

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Aug 02 2023**

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Heath P. Taylor, Circuit Court Judge

Case No. 2021-CP-18-1217


Treveen Gethers, Petitioner,

v.

State of South Carolina, Respondent.

**NOTICE OF APPEAL**

Petitioner Treveen Gethers appeals the Honorable Heath P. Taylor's Order Denying his Application for Post-Conviction Relief filed on **July 6, 2023**, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **August 1, 2023**.

  
\_\_\_\_\_  
Dayne C. Phillips, Esq.  
1614 Taylor Street, Suite D.  
Columbia, SC 29201

**ATTORNEY FOR PETITIONER**

**August 2, 2023**

**Other Counsel of Record:**

Danielle Dixon, Assistant Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211

cc: Cheryl Graham, Dorchester County Clerk of Court

STATE OF SOUTH CAROLINA )  
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COUNTY OF DORCHESTER )  
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Trevee Gethers, #343706, )  
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Applicant, )  
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v. )  
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State of South Carolina, )  
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Respondent. )  
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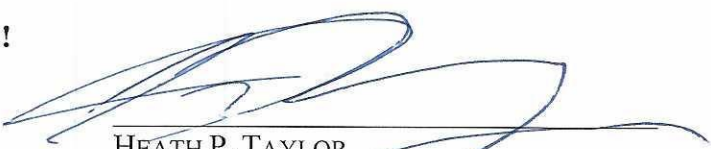
IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2021-CP-18-1217

**ORDER**

This matter is before the Court on Applicant’s Motion to Alter or Amend Pursuant to Rule 59 (e), SCRCP. Applicant urges this Court to apply the doctrine of equitable tolling and find that his application is not time barred based upon his pursuit of a Writ of Habeas Corpus in U.S. District Court. Applicant’s motion is denied. *See, Green v. State*, 353 S.C. 29, 576 S.E.2d 182 (2003)(Statute of limitation for filing application held not to be tolled by applicant’s action seeking federal habeas corpus relief).

**AND IT IS SO ORDERED!**

  
HEATH P. TAYLOR  
Presiding Judge  
First Judicial Circuit

August 1, 2023  
Orangeburg, South Carolina.

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER  
IN THE COURT OF COMMON PLEAS** IDENTIFIED COPY

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2021CP1801217**

Trevée Gethers	2023 JUL -6 AM 9:41	South Carolina State Of	
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<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
<b>Submitted by:</b>	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

**This order**  ends  does not end the case.  
Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

**Note:** Title abstractors and researchers should refer to the official court order for judgment details.

**E-Filing Note:** In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ _____ Health Taylor, Circuit Court Judge	2775 _____ Judge Code	7/6/2023 _____ Date
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**For Clerk of Court Office Use Only**

This judgment was entered on 7/6/2023, and a copy mailed first class or placed in the appropriate attorney's box on 7/6/2023, to attorneys of record or to parties (when appearing pro se) as follows:

**Treveen Gethers** Ridgeland Corr. Inst., Scdc#343706  
5 Correctional Road  
Ridgeland, SC 29936

**Danielle Dixon**  
PO Box 11549  
Columbia, SC 29211

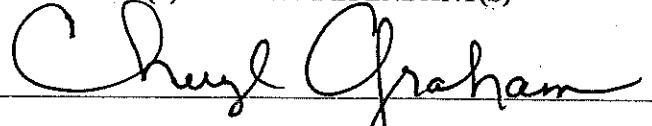
**Dayne C Phillips**  
Price Benowitz LLP  
1614 Taylor Street, Ste. D  
Columbia, SC 29201

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**



**Court Reporter**

**Cheryl Graham - Clerk of Court**

**Court Reporter:**

**E-Filing Note:** In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA )  
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COUNTY OF DORCHESTER )  
 )  
Trevee Gethers, #343706, )  
 )  
Applicant, )  
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v. )  
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State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No.: 2021-CP-18-1217

**ORDER OF DISMISSAL**

2023 JUL -6 AM 9:14  
CERTIFIED COPY  
DORCHESTER COUNTY

This matter is before this Court on Applicant’s post-conviction relief application filed July 6, 2021. The State’s return and motion to summarily dismiss the application was filed on October 14, 2021. By order dated June 29, 2022, the Honorable Edgar W. Dickson ordered a full evidentiary hearing be held in this matter. An evidentiary hearing was held on January 24, 2023 at the Orangeburg County Courthouse. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent. After reviewing all records and evidence, this Court finds Applicant is entitled to post-conviction relief but denies and dismisses this application with prejudice as barred by the statute of limitations. The Court’s findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2007 term, the Dorchester County Grand Jury indicted the Applicant for murder (2007-GS-18-01755). On November 15-16, 2010, Applicant exercised his right to a jury trial before the Honorable Diane S. Goodstein. Sara Jayne Rogers, Esquire, represented Applicant. Russell D. Hilton, Esquire and Harrison Bell, Jr., Esquire of the First Circuit Solicitor’s Office

prosecuted the case. Applicant was found guilty as indicted and Judge Goodstein sentenced him to forty-five years in prison.

Applicant filed a timely notice of appeal. Appellate Defender Susan Hackett, Esquire perfected Applicant's appeal. Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence. *State v. Gethers*, 2012-UP-576 (S.C. Ct. App. Filed October 25<sup>th</sup>, 2012). The case was remitted back to the circuit court on May 7, 2014.

Applicant filed his first application for post-conviction relief on July 3, 2014, alleging ineffective assistance of trial counsel (1) in failing to object to Judge Goodstein's opening instruction; (2) in failing to object the solicitor's comments regarding robbery as a motive despite the fact that Applicant was not indicted for robbery; (3) in failing to object to the admission of Applicant's booking photo; and (4) in failing to request a voluntary manslaughter charge. The State filed its Return on February 26, 2015. Applicant was represented by Rodney D. Davis, Esquire. An evidentiary hearing was held on October 28, 2015 before the Honorable Frank R. Addy at the Dorchester County Courthouse. On January 8, 2016, Judge Addy issued an order denying and dismissing Applicant's application with prejudice.

Subsequently, Applicant appealed the denial of post-conviction relief and was represented on appeal by Appellate Defender Lara M. Caudy, Esquire who filed a petition for writ of certiorari. Respondent filed its Return to the Petition on September 7, 2016. On March 2, 2017, the post-conviction relief appeal was transferred to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied Applicant's petition by Order filed April 24, 2018. The Remittitur was issued on May 15, 2018.

Applicant subsequently filed a Petition for Habeas Corpus under 28 U.S.C. § 2254 on April 15, 2019. Applicant was represented by Elizabeth A. Franklin – Best, Esquire. In the Petition,

Applicant set forth several grounds for relief alleging (1) the South Carolina Court of Appeals erred when it found the trial court did not err in denying Applicants' motion for a directed verdict; (2) trial counsel rendered ineffective assistance of counsel when she did not secure the attendance of a witness who gave a statement to the Dorchester County Sheriff's Office shortly after the murder informing them that he witnessed someone else shoot the decedent; (3) the post-conviction relief court erred in finding that Applicant was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the admission of Applicant's mugshot from his prior arrest; and (4) the post-conviction relief court erred in finding that Applicant was not denied his rights under the Sixth and Fourteenth Amendments to the effective assistance of counsel when counsel failed to object to the trial court's opening statement to the jury.

Respondent filed its Return and Motion for Summary Judgment and Motion to Strike Exhibits Attached to Petition for Writ of Habeas Corpus on July 1, 2019. Applicant moved for an evidentiary hearing on July 11, 2019. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation on October 17, 2019 recommending that (1) the Respondent's motion for summary judgement be granted; (2) the Respondent's motion to strike be denied; (3) Applicant's motion for an evidentiary hearing be denied; and (4) the Petition be dismissed with prejudice. Applicant timely objected on October 29, 2019 and the Respondent replied. The Honorable Sherri A. Lydon, United States District Judge, denied Applicant's Petition on June 5, 2020 and accepted the Report and Recommendation for summary judgment. Applicant filed a notice of appeal with the Fourth Circuit Court of Appeals on June 7, 2020 and filed an informal opening brief on July 15, 2020. The Fourth Circuit Court of Appeals dismissed Applicant's appeal by unpublished *per curiam* opinion on March 22, 2021. *Treveen Gethers v. Bryan*

*Stirling*, No. 20-6850 (4th Cir. March 22, 2021). The formal mandate of the Fourth Circuit Court of Appeals was issued on April 13, 2021.

In his current post-conviction relief application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel based upon newly-discovered evidence related to the existence of a witness, Dante Hubbard, and a statement given to law enforcement by Mr. Hubbard indicating Applicant did not shoot the victim. Additionally, the application alleges the State wrongfully withheld and failed to produce the exculpatory statement during discovery. At the hearing, Applicant proceeded on the allegations listed above. All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

#### **Factual Background**

On September 17, 2007, the victim was found fatally shot in the chest while sitting in the driver's seat of a vehicle outside of an apartment complex. Neighbors in the apartment complex heard arguing in the parking lot just prior to the gunshots but none of the witnesses identified Applicant as the shooter. Based on the testimony presented at the trial, the apartment complex was known as a very high crime area and gunshots were "fairly common." An officer with the Dorchester County Sheriff's Office confirmed this was a violent area with "a lot of fights, a lot of drug-related calls."

During their investigation, the police seized cigarette butts, a .40 caliber shell casing and a Bluetooth telephone headset. The cigarette butts that were in the immediate vicinity of the victim's vehicle and were never analyzed for DNA. The .40 caliber shell casing was determined not to be relevant to the crime scene. Three individuals were identified based on the 34 latent fingerprints

that were extracted from the victim's car but were never pursued by police during their investigation. Applicant's prints were also on the vehicle.

The State subsequently obtained a DNA profile from Applicant and his DNA was found on the Bluetooth headset. The headset was not found in close proximity to victim's body. Specifically, a detective testified at trial: "That was just inside the first crime scene tape that was stretched across the road. It was actually in front of Apartment [redacted]. It was not located anywhere around the vehicle. It was between Apartment [redacted] and [redacted], the apartment complex to the right. It was in that area on the road as you came in."

During the trial, Brandee Kieffer, Applicant's former girlfriend, recalled that around the time of this incident, she and Applicant switched cars. Veronica M., who was 14 years old at the time, testified that on the date of the incident she was supposed to meet with the victim because he allegedly wanted to bring her money in exchange for sex. Veronica M. stated that she was using her friend's telephone that evening. At some point after the incident, Veronica M. and Applicant went to Virginia and eventually to New York.

During their investigation, law enforcement obtained the telephone that belonged to the victim and noticed numerous telephone calls to his son and to a telephone that was registered to Maggie Reid. The police were able to identify Applicant's telephone number and obtained search warrants based on those telephone calls. Notably, those records did not uncover anything of evidentiary value to the investigation.

In addition to the unidentified fingerprints located in the car, the police were never able to locate the murder weapon in this case. Veronica M. ultimately provided a statement to the police suggesting that Applicant met with the victim to get money from him for her. She also testified that she did not want to have sex with the victim so she sent Applicant in her place to obtain the

money. In exchange for her cooperation, Veronica M.'s charge of murder remained in the jurisdiction of Family Court.

### **Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Before this Court are the Dorchester County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; records from Applicant's direct appeal, including the trial transcript; the final order from Applicant's previous post-conviction relief action and subsequent appeal; records from Applicant's federal habeas action; and the records of the current post-conviction relief action. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2014) based upon the evidence presented to the Court.

At the evidentiary hearing, Elizabeth Franklin – Best, Esquire testified about her extensive background and experience in the following practice areas: criminal defense; appeals; post-conviction relief; and federal habeas corpus. Ms. Franklin - Best represented Applicant on his federal habeas corpus action. Applicant moved to admit his Petition for Writ of Habeas Corpus into evidence and the petition was admitted as Applicant's Exhibit 1 without objection. During her representation of Applicant in the federal habeas matter, Ms. Franklin - Best obtained a statement that Dante Hubbart provided law enforcement in connection with the murder investigation in this case from Don Sorenson, Esquire of the First Circuit Solicitor's Office.<sup>1</sup> It

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<sup>1</sup> Assistant Solicitor Sorenson was not involved in the prosecution of Applicant's case.

appears that this statement and the detective's notes were found in the State's file. Applicant moved to admit this statement and the detective's notes into evidence and the documents were admitted as the Applicant's Exhibits 2 and 3 without objection. The statement and notes indicated Applicant did not shoot and kill the victim and positively identified another individual as the shooter.

Ms. Franklin - Best obtained an affidavit from Dante Hubbard affirming his prior statement that Donsurvi Chisolm shot and killed the victim in this case. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 4 without objection. Donsurvi Chisolm is serving two life sentences for murder.<sup>2</sup> Ms. Franklin - Best also obtained an affidavit from Applicant's original post-conviction relief counsel, Rodney Davis, Esquire who admitted he did not request a copy of the State's file and had no strategic reason for failing to do so. Further, he did not contact trial counsel prior to the evidentiary hearing. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 6 without objection. According to Ms. Franklin - Best, a State's witness at trial, Veronica M., provided an affidavit recanting her testimony and declaring that she was coerced by law enforcement to write a statement and testify at Applicant's trial. Applicant moved to admit this affidavit into evidence and the affidavit was admitted as Applicant's Exhibit 5 without objection.

As to the murder investigation, Ms. Franklin - Best testified that that Applicant was not identified as the shooter and that the three people identified based on the presence of fingerprints in the decedent's car were never pursued by law enforcement. The murder weapon was not found. Applicant's DNA was found on a Bluetooth telephone headset that was not close to the victim's

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<sup>2</sup> See <https://public.doc.state.sc.us/scdc-public/inmateDetails.do?id=%2000347831>

body and a search warrant for the Applicant's phone records did not contain any inculpatory evidence.

Applicant's brother, Jamal Gethers, happened to see Dante Hubbard in public and Hubbard asked about his brother. During their discussion, Hubbard told him about making the statement to law enforcement about Donsurvi Chisolm being the shooter. Gethers informed Applicant of this information. It is unclear from the record when this conversation with Mr. Hubbard occurred.

Applicant's trial counsel, Sara Rogers, was appointed to represent Applicant after he had numerous prior lawyers. Ms. Rogers acknowledged that she was disbarred from the practice of law in 2015.<sup>3</sup> At the time of Applicant's trial, Ms. Rogers was a new attorney and did not have a lot of time between her initial appointment to represent Applicant and the scheduled trial date to prepare. She thought prior counsel would assist her with the case but he did not. Ms. Rogers believed the Applicant was not guilty of the charges and looked closely through the discovery for exculpatory evidence. She did not see Exhibits 2 and 3 before the trial of the case

Ms. Rogers reviewed Dante Hubbard's statement to law enforcement and the detective's notes. She had not seen the documents prior to Applicant's trial and believed the trial would have been different had she been in possession of these documents. Ms. Rogers acknowledged on cross-examination that she met with Assistant Solicitor Russell Hilton and reviewed the State's file prior to trial. However, Ms. Rogers maintained that she did not see the statement or notes in the State's file during that review.

Former assistant solicitor, Russell Hilton, was the lead prosecutor in Applicant's case. Hilton maintained that his typical practice was to have an open-file policy and that Sara Rogers reviewed the State's file with him prior to trial. Hilton maintained that the statement and

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<sup>3</sup> See *In re Sara Jayne Rogers*, Op. No. 27550 (Sup. Ct. filed July 23, 2015).

detective's notes had always been in the file. Hilton admitted that he could not recall whether he specifically discussed or reviewed Hubbard's statement with Rogers or that the statement was provided directly to Rogers due to Applicant having numerous prior lawyers. Over Applicant's objection, Hilton testified that the other prosecutor on the case had sent a letter to one of Applicant's former lawyers about this evidence. The State failed to call that prosecutor as a witness and Hilton conceded that he did not know whether the former lawyer had shared the evidence with Applicant or Rogers.

Applicant had never seen Dante Hubbard's statement prior to trial but acknowledged that he knew Hubbard was a witness. The Applicant had five prior lawyers and had provided a previous lawyer a list of potential witnesses. He did not hear anything else about Dante Hubbard or any other investigation done prior to trial from his lawyers

From a substantive perspective, Applicant is entitled to the relief he seeks. However, the application currently before the Court is procedurally barred and for the reasons set forth below, must be denied. Nonetheless, the Court is compelled to address merits of the application. The State and Applicant ground their arguments in the doctrine of newly discovered evidence. The two documents at issue in the matter are the statement of Dante Hubbard (Exhibit 2) and the investigative notes from the interview with Dante Hubbard (Exhibit 3). Both are dated November 28, 2007. These documents were not newly discovered. The State was aware of the evidence all along. Either the State wrongfully withheld the documents from Applicant's trial counsel or trial counsel and Applicant's initial post-conviction relief counsel simply missed the documents and their paramount importance of having positively identified a person other than Applicant as committing the murder in this case. There is nothing in the record before this Court to suggest the State engaged in any wrongful conduct. Consequently, the analysis of this case does not revolve

around newly discovered evidence but ineffective assistance of counsel.

This action is Applicant's second post-conviction relief application. S.C. Code Ann. § 17-27-90 (2014) generally prohibits successive applications "... unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." Our Supreme Court has permitted a successive application upon a showing of a "... 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). This Court finds that Applicant has shown a sufficient reason why the current grounds for relief were not raised. Applicant was not afforded effective assistance of counsel at the trial level or during his initial post-conviction relief application. "In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The same standard applies to post-conviction relief counsel.

Applicant's trial counsel failed to locate the exculpatory statement of Dante Hubbart. Not only did the statement indicate Applicant did not shoot the victim but the statement also positively identified another individual as the shooter. Failure to locate and present exculpatory evidence of this magnitude is unquestionably deficient under the *Strickland* standard. Additionally, this Court finds and concludes that there is a reasonable probability that but for Ms. Rogers' error, the result of Applicant's trial would have been different.

In addition to receiving ineffective assistance of counsel at the trial level, Applicant also was not provided effective assistance of counsel during his initial post-conviction relief

application. Applicant's counsel during his initial post-conviction relief proceeding provided an affidavit indicating he did not request a copy of the State's file during the course of his representation of Applicant. *See* Exhibit 6. He stated that he had no strategic reason for failing to request or review the file. Further, he did not interview trial counsel or otherwise discuss the case with her prior to Applicant's evidentiary hearing. Failure to complete these rudimentary steps necessary to investigate Applicant's claims amounts to deficient performance under *Strickland*. Had Applicant's post-conviction relief counsel reviewed the State's file, he likely would have discovered Mr. Hubbart's statement in similar manner as Applicant's federal habeas counsel. This Court finds and concludes that there is a reasonable probability that but for Mr. Davis' failure to minimally investigate Applicant's case, the result of Applicant's initial post-conviction relief proceeding would have been different.

The State contends Applicant could have easily obtained this statement through the exercise of due diligence and that the information is not material because the statement only matters in so far as it established that the witness was on the scene and had a different perspective than that of the State's witnesses. This Court finds and concludes that Applicant could not have obtained the statement of Mr. Hubbart on his own but instead was at the mercy of his attorneys to properly investigate and prepare his case at the trial level and post-conviction relief proceeding. Further, Mr. Hubbart's statement was unquestionably material. While Mr. Hubbart's statement was not entirely consistent with the physical evidence present at trial, the exculpatory value is obvious and material.

The Uniform Post-Conviction Procedure Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims: . . . [t]hat there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in

the interest of justice” is authorized to file a post-conviction relief action. S.C. Code § 17-27-20 (A)(4) (2014). The Act also provides that “[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” S.C. Code § 17-27-45 (C) (2014).

Despite the woefully ineffective assistance of counsel, this Court finds Applicant’s current application must be dismissed with prejudice. If Applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the application must be filed within one year after the date of actual discovery of the facts by Applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45 (C) (2014). Applicant’s federal habeas petition was filed on or about April 15, 2019. While Applicant likely knew of the existence of Mr. Hubbart’s exculpatory statement and his counsel’s ineffective assistance prior to the filing of the habeas petition, he certainly knew or should have known in April of 2019. The current application was filed July 6, 2021. In the memorandum of law accompanying his application, Applicant contends he did not discover the existence of Mr. Hubbart’s exculpatory statement until his habeas counsel filed a brief in that matter on July 9, 2020. This Court does not find Applicant’s assertion that he did not discover the information with regard to Mr. Hubbart until July 9, 2020 to be credible. Therefore, this PCR application must be denied and dismissed with prejudice.

### **Conclusion**

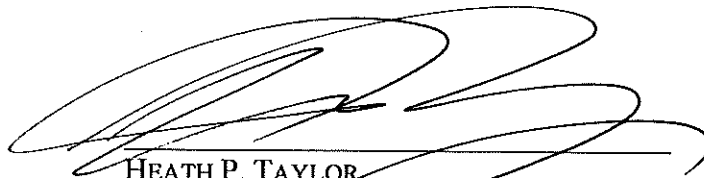
This Court is of the opinion that the interests of justice suggest Applicant should receive a new trial. However, this Court has neither the constitutional nor statutory authority to ignore the

one-year statute of limitations set forth in S.C. Code § 17-27-45 (C) (2014). Jurists in lower courts generally loathe a reversal by a higher court. In this instance, however, this Court invites a reversal that provides Applicant the fair trial with competent counsel afforded to him by the United States and South Carolina Constitutions.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of this order in order to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP provides that if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Counsel's attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the post-conviction relief application is hereby denied and dismissed with prejudice and Applicant is hereby remanded to the custody of Respondent.

**AND IT IS SO ORDERED!**



HEATH P. TAYLOR  
Presiding Judge  
First Judicial Circuit

July 3, 2023

Orangeburg, South Carolina.