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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable H. Steven DeBerry IV, Circuit Court Judge

HENRY DUKES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000522

APPENDIX

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photograph from a series of photographs that inadvertently fell out of a file onto the table. Dukes thus pointed out the discrepancy between the report and the testimony of the eyewitness, Ford.

Although Dukes did not introduce Det. Addison's report as an exhibit, the trial judge clearly considered this relevant discrepancy between the report and Ford's testimony before he ruled on the admissibility of the eyewitness identification under *Biggers*. Nor did Dukes demonstrate what additional information he could have elicited on cross-examination of Det. Addison that was not already before the trial judge in the form of Det. Addison's report, other than to speculate what he might conceivably hope to prove as to how the photographs were presented to Ford, and whether or not Ford was told that the suspect might not be in these photographs. The State submits that his speculation does not show any abuse of discretion by the trial judge in rejecting Dukes' motion. *State v. Smith*, 307 S.C. 376, 381, 415 S.E.2d 409, 412 (Ct.App. 1992) ("At any rate, we are unable to determine whether Smith was actually prejudiced by the witness' unavailability because Smith made no proffer as to what this witness would have testified"); *State v. Chapman*, 289 S.C. 42, 45, 344 S.E.2d 611, 613 (1986) (the bare assertion of a witness' unavailability is insufficient to warrant the conclusion that the defendant suffered actual prejudice thereby).

Moreover, due process does not require that every possible witness testify at a suppression hearing where the accused contests an identification procedure under *Biggers*. To the contrary, the appellate courts in the State of New York and the federal courts in the Second Circuit have consistently and quite correctly recognized that a victim need not testify at a *Biggers* or *Wade* hearing, and that the defendant is not entitled to compulsory process at such a hearing. In *People v. Chipp*, 75 N.Y.2d 327, 553 N.Y.S.2d 72, 552 N.E.2d 608 (N.Y. 1990), the New York Court of Appeals limited a defendant's Sixth Amendment right to compulsory process

at his *Wade* hearing. Specifically, the Court limited the right of the defendant to call the complaining witness. The Court reasoned that while a *Wade* hearing is "properly characterized as a criminal proceeding," it does not involve a determination of the accused's guilt or innocence. Instead, it is functions to determine whether a police-arranged pretrial identification procedure was unduly suggestive. *Id.* at 337, 553 N.Y.S.2d 72, 552 N.E.2d 608 (citing *Stovall v. Denno*, 388 U.S. 293 (1967)). Because Chip had not offered any persuasive authority in support of his argument that an absolute right to compulsory process attaches to a *Wade* hearing, the Court found that "any right of compulsory process at a *Wade* hearing may be outweighed by countervailing policy concerns, properly within the discretion and control of the hearing Judge." *Id.*

As a result, the Court rejected Chip's claim that he had an absolute right to call the complainant to testify at the *Wade* hearing and it held that, because there was no *indicia* of suggestiveness in the identification procedure, the trial judge did not abuse its discretion in declining to permit the defendant to call the complaining witness at the *Wade* hearing. *Id.* at 339, 553 N.Y.S.2d 72, 552 N.E.2d 608.

In light of the New York Court of Appeals' holding in *Chipp*, the federal habeas courts in the Second Circuit

have held that a state court's denial of a petitioner's request to call witnesses at a *Wade* hearing does not deprive a petitioner of a federal constitutional right or address a matter of clearly established federal law as required for habeas review. *See Duran v. Miller*, 322 F.Supp.2d 251, 257 (E.D.N.Y.2004) (noting that petitioner did not have absolute right, under New York or federal law, to compulsory process at pretrial suppression hearing; holding that state trial court's discretionary exclusion of identifying witness at pre-trial hearing, under New York law, did not rise to level of constitutional error cognizable on petition for federal habeas relief) (citing *Mitchell v. Fischer*, No. 02-CV-6336 (JBW), 2003 WL 22952851, at *6 (E.D.N.Y. Oct.20, 2003) (holding that a defendant does not have an absolute right to have a complainant produced at a *Wade* hearing); *Heron v. People of the State of New York*, No. 98 Civ. 7941(SAS), 1999 WL 1125059, at

*10 (S.D.N.Y. Dec.8, 1999) (rejecting habeas claim that petitioner was denied right to call witness at *Wade* hearing; under New York law, there exists no absolute rule requiring the identifying witness to appear at a *Wade* hearing when the suggestiveness of the identification procedure is called into question)); *Rivalta v. Artuz*, No. 96 CIV. 8043(SAS), 1997 WL 401819, at *3 (S.D.N.Y. July 16, 1997) (rejecting claim of habeas petitioner contends that because the trial judge prevented him from calling the complainants at the *Wade* hearing, he was denied his constitutional right to a fair trial where petitioner's objection was "predicated on the purely speculative assertion that the complainants' testimony at the *Wade* hearing might have revealed that something improper was said to them at the pretrial identification procedure"). Whether or not to exclude an identifying witness is generally a discretionary matter for the judge at a pre-trial hearing and therefore does not rise to the level of constitutional error. *Duran v. Miller*, 322 F.Supp.2d 251, 257 (E.D.N.Y.2004) (citing *Sorenson v. Superintendent*, No. 97 Civ. 3498(NG), 1998 WL 474149, at *4 (E.D.N.Y. Aug.7, 1998) ("Generally, the discretionary exclusion of an identifying witness by a trial judge at a pre-trial hearing does not rise to the level of constitutional error.")).

Mitchell v. Herbert, 01-CV-681, 2008 WL 342975, 8 (W.D.N.Y., Feb. 6, 2008). *See also Smith v. Smith*, 2003 WL 22290984, 6-9 (S.D.N.Y., Sept. 29, 2003) (rejecting argument that the trial court deprived defendant of his right to present a defense, as guaranteed by the Sixth and Fourteenth Amendments, by refusing to allow defendant to call witnesses to testify at the *Wade* hearing). To the extent that there is no right to compulsory process at a *Wade* hearing, *Dukes* cannot show an abuse of discretion by the trial's denial of his motion.

Further, and as the trial judge found, neither Ford's recollection of the identification procedure nor that reflected in Detective Addison's report showed any suggestiveness in the procedure employed, regardless of which account is accepted.⁷ Again, *Biggers* explained that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification and that it is this likelihood which violates due process. *Biggers*, 409 U.S. at 198. The hearing held in this case was sufficient, both as a matter of due process and state law, for the trial judge to determine whether the identification process was unduly suggestive and whether the out-of-court

⁷ Mr. Ford's version of the identification procedure showed no police action, whatsoever, that would even require a hearing under *Biggers* and *Wade*. *See Perry, supra*.

identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Id. Accord Liverman*, 398 S.C. at 138-41, 727 S.E.2d at 426-27. Moreover, at worst, the identification procedure employed was harmless beyond a reasonable doubt under *Liverman* for the reasons set forth in **Argument II**. Therefore, the trial judge's ruling must be affirmed.

II. The Court of Appeals correctly found that the trial judge did not err by denying Dukes' motion to suppress Cornelius Ford's pretrial identification of him because the record supports the findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, despite any possible suggestiveness.

The State submits that the Court of Appeals correctly found that the trial judge did not err by denying Dukes' motion to suppress Cornelius Ford's pretrial identification of him because the record supports the trial judge's findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances - despite any possible suggestiveness - that no substantial likelihood of misidentification existed.

As discussed, the trial judge must first determine whether the identification process was unduly suggestive. *Biggers* 409 U.S. at 198. Even assuming an identification procedure was suggestive, suppression is not automatically required. *Id.* Rather, the court must then determine whether the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed. *Id.*

Here, the trial judge found that there was no unduly suggestive identification process. In making this determination, he blended the two-pronged test in *Biggers*. He found that Ford was present at the time the crime was committed; that Ford had seen Dukes on prior occasions before the crime was committed; that Ford was certain of who the shooter was; and that he subsequently

identified Dukes and gave a description of Dukes to the police. The trial judge further found that Ford testified that he was paying close attention at the time of the offense, and the trial judge took into consideration the fact that Ford would be paying close attention since a gun was pointed at him during the commission of the offense. **R. pp. 53-54.**

The trial judge also considered other factors to be weighed against the corrupting effect of any suggestive identification procedure: the accuracy of Ford's prior description of the defendant; Ford's level of certainty demonstrated by at the time of the confrontation; and the amount of time between the crime and the confrontation. The trial judge found that Ford had testified that he was 100% certain about who the shooter was; and that for a given an initial description the same day. **R. p. 54.**

Applying these factors, the trial judge found that:

[i]t it does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, if there was any deliberate act, there was any act by the police of the suggestive nature. The witness had already identified the defendant prior to the – looking at the photographs." The trial judge further found that Ford's viewing of "the photographs was either done quote accidentally through the looking at a file or in a process that the Court finds was not suggestive... in any manner, and therefore, based on all of that, the motion to suppress is denied."

R. pp. 54 – 55.

The Court of Appeals rejected this argument as well. *See Dukes*, 404 S.C. at 561-63, 745 S.E.2d at 141-42. After rejecting Dukes' argument that the State bore the burden of proof on his motion to suppress, *id.* at 561, 745 S.E.2d at 141, the Court of Appeals found that the record supported the trial judge's ruling. *Id.* at 561-63, 745 S.E.2d at 141-42. There was no error.

On direct appeal, this Court may only review errors of law. "Whether an eyewitness to the identification is sufficiently reliable is a mixed question of law and fact... generally, the decision to admit an eyewitness of the notification is that the trial judge's discretion and will not

be disturbed on appeal absent an abuse of discretion." *Liverman*, 298 S.C. at 137-38, 727 S.E.2d at 425 (citations omitted). Applying this standard to the present case, it is clear that the trial judge's ruling must be affirmed because the record, particularly Ford's testimony, supports the trial judge's findings and conclusions of law.

Specifically, the out-of-court identification was so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, even assuming suggestiveness in the identification procedure.⁸ *Biggers*, 409 U.S. at 198. Ford clearly testified that he had previously seen Dukes on two separate occasions prior to the morning of the shooting. On the first occasion, the men had passed within close proximity to each other. On the second occasion, at the residence where the shooting occurred, Ford had the opportunity to observe Dukes for a longer period of time.

While this Court in *Liverman* overruled *McLeod*, it is clear that the trial judge properly relied upon Ford's opportunity to view Dukes on the occasions before the shooting because this was a "significant factor in determining the reliability." *Liverman*, 398 S.C. at 142, 727 S.E. 2d at 427-28. Also, Ford had an ample opportunity to view Dukes at the time of the shooting within the relatively small confines of his residence, and he had a heightened sense of awareness since Dukes also attempted to shoot him as well. Further, Ford gave a police description of Dukes later

⁸ Again, the relevant factors to be considered under the totality of circumstances include: (1) the opportunity of the witness to view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id* at 199-200. See also *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426.

The State does not concede that there was suggestiveness in the procedure because Ford's testimony supports the conclusion that there was no suggestiveness involved in the indemnification procedure, whatsoever, that would require a hearing, even as a matter of state law. See *Perry*, 132 S.Ct. at 736-38. Likewise, there is nothing in Det. Addison's report to support the conclusion that the photographs were displayed to Ford in a manner suggesting the identification of Dukes as the shooter, or that Ford was otherwise prompted to select Dukes as the person whom he had seen murder his friend and roommate. See *Dukes*, 404 S.C. at 563, 745 S.E.2d at 142 ("It does not appear, even taking into consideration the report of the investigator, that there was any corrupting effect, that there was any intentional act, that there was any deliberate act, there was any act by the police of a suggestive manner").

that day; he accurately described Dukes, as his subsequent testimony before the jury makes clear; he then selected Dukes' photograph from those he viewed – whether the photographs fell out of the folder onto the desk inadvertently or they were shown to him, individually, by Det. Addison; he did not hesitate in making the identification; and he was 100% certain in his identification of Dukes as the shooter. Moreover, Ford's father, Mr. Muhammad, corroborated Ford's testimony concerning the identification of Dukes as the shooter. Likewise, Mr. Muhammad had previously met with Dukes several times at the mosque, where Mr. Muhammad was Iman.

Also and as in *Liverman*, many of the procedural safeguards discussed by the Supreme Court and present in *Perry* were at work in Dukes' trial. The reliability of the Ford's testimony was fully "vetted. . . at the pretrial hearing, "as well as before the jury. *Liverman*, 398 S.C. at 142-43, 727 S.E.2d at 428. Although counsel's attack on the credibility of Ford's identification in this case was not as direct as that in *Liverman, id*, it was every bit as thorough and scathing. In his opening statement, Dukes' counsel cautioned the jury about the importance of Ford's testimony to the State's case; Ford's lack of credibility; and that Ford had, himself, fled the scene after the shooting. **R. pp. 65-66.**

On cross-examination of Ford **R. pp. 149-74**), defense counsel repeatedly pointed out perceived weaknesses of Ford's identification and his credibility, generally, including: his fleeing the scene and failure to discuss the shooting with police until six or eight hours after the shooting; that he did not check the victim's pulse before leaving the scene and that the victim's cousin informed him of the victim's death; that Dukes fired two gunshots; that he had gone home once his father arrived on the scene; that he only went to see the police because his father told him that his father was taking him there; that he told police he had been at the residence for fifteen minutes, whereas he testified that he had awakened, in the residence, fifteen minutes

before the murder; that he failed to tell police that he had previously seen Dukes on two occasions because the second time that he saw Dukes was during a drug deal; he had a prior drug conviction and he did not want to face enhanced penalties for another drug conviction; that he failed to tell Det. Addison about this other encounter with Dukes, even though Det. Addison told him that police were not interested in "what was going on in the house;" and that Ford supposedly did not know where the victim's money and drugs were kept, despite the fact both men were dealing drugs out of the residence. Defense counsel also established that Ford did not tell police, in his statement, that he had lifted the mattress after the shooting, to make Dukes think that he had a gun; and that he told police he had retreated to a closet when the shooting began. Finally, counsel fully reviewed Ford's version of how he supposedly identified Dukes from the photographs that fell out onto the table.

Additionally, defense counsel devoted over one half of his closing argument to pointing out every perceived deficiency in the testimony of Cornelius Ford and Ford's supposed lack of credibility. **R. pp. 330-39.**³ Defense counsel then launched a brief but scathing attack on Mr. Muhammad's credibility. **R. pp. 339-41.** Counsel's attack on Ford concluded as follows:

³ Specifically, counsel argued that:

The Judge will tell you [that] you can believe everything a witness tells you from the witness stand; you can reject every single thing they tell you, or you can believe some and not others. This case is all about the witnesses, because there is not one shred of physical evidence that connects the death of Andy Gowans to Henry Jermaine Dukes, not the first thing. The only piece of physical evidence ... that you've heard talked about ... is a shell casing that was found ... where Andy Gowans was. Officer Mishoe testified yesterday. He said he was one of the first ones on the scene, he walked in, saw the body, and he found a shell casing, and he seemed to be able to identify it here yesterday; this looks like the same one. So, one shell casing, that is it.

Now, might as well stay with that. One shell casing. Just any physical evidence in this case support the eyewitnesses were the witnesses in this case? Now, the judge will tell you, if you believe everything a witness, ... and we are talking about Cornelius Ford, right, this whole case is Cornelius Ford. If you choose to believe Cornelius Ford, his version of events, that is your providence. You're the jury. You are the finders of fact. You can do that. I [will] go through with you many, many, many reasons why C 4 should not be believed, other than maybe saying that this was Conway, South Carolina. Other than that I am not sure I would trust him to tell me the sum was coming up in the morning. But, is there anything, independent of C 4, the admitted drug

dealer, that can verify what he's been telling you? Well, you sure haven't been given anything. The only thing you have been given is one shell casing, and that itself contradicts what C 4 told to do. C 4 was adamant, said it over and over again, two gunshots. He told the police, and he testified here yesterday, two gunshots. The officer testified he found one shell casing. Nobody else told to any different. Dr. Proctor, just a little while ago, told you I found one wound on Mr. Gowan's and in checking that wound I found one bullet, right off the bat. And that's the only physical evidence you got. No weapon was ever recovered....

We've heard this guy talk a little bit about the jacket, the white jacket. No one brought shall white jacket. There is not one piece of physical evidence to Henry Jermaine Dukes to the death of [the victim].

Now, Cornelius Ford. In deciding whether someone is telling you the truth, I think the place to start first is, how consistent -- now, perfect consistency -- if you are trying to recall in that three and a half years before, and him come and explain it, I would agree, perfect consistency over every little thing is not to be expected, but you also don't expect fact after fact after fact to be different, to be wrong, to be contradicted directly by other people or other evidence.

We talked about the shell casing. As to Ford wants you to believe that one reason he can identify the shooter is that he had seen Mr. Dukes to times before, once briefly coming out of the Food Lion, but that got his attention because he was with this Ronnie Atkinson, this Stank, that had been involved in this whole viewed that doesn't seem to have anything to do with Henry Dukes or Cornelius Ford, but having you Stank and when he saw Jermaine Dukes with Stank that got his attention.

Now, when he talked to the police eventually, on November 2nd, 2007, he did not mention that he saw Henry Dukes with Stank. He simply said, one time before I saw Henry Dukes at the Food Lion, just while I was going in he was coming out, or may be vice versa, but just in passing. He was asked three different times by that the Detective, so you've only seen him once before; you saw him one time before; have you ever seen him before, three different opportunities, and seven different times is to ford answered, when he talked to the police, I've only seen him once; only saw him once; I only seen him once before; I never saw him but the wants. Seven times he said that.

He wasn't afraid of the officers. They gave him [every] chance. The Officer told him, you are not in trouble; you've got nothing to worry about. I'm sure he didn't enjoy being in their talking to the police, but it's not like he was being interrogated, it's not like he was a suspect. Thought about that also. It's not like he was threatened, coerced, pressured in any way; he was given a free opportunity to tell what he knew. Once he decided to drag his sorry butt down there, and after he talked to the police, after he left his friend, supposedly his best friend, lying dead on the ground, that he had different chances -- he had the whole time he was talking to the police, but specifically three times, have you ever seen Henry Dukes before; one time, and he said that seven different times, and not once did he mention that [other] time he had seen Henry Dukes he saw him with Stank, that yesterday seemed to be so important and got [him] on his "P" s" and "Q" s." He never mentioned that.

Yesterday he testified, I actually saw Henry Dukes two times. I saw him at Food Lion with Stank that's New and I Saw him over at [the victim's residence] before; he came with some other guy; I didn't know him, and they stayed around for a while. He made no mention of that when he talked to the Detective at Conway Police Department back on November 2nd, 2007. [Not] one word about that, and the explanation, apparently, is, well, he was protective of everybody. He didn't want to implicate them, so he said that himself, I don't want to implicate myself. There was stuff going on at bracket [the victim's residence]; and I didn't [want] to connect that with the police.

Now, self-preservation is a mighty strong instinct in every body, and I certainly understand if you've been busted for selling drugs before and been to prison for selling drugs before, that you did not want to go back for an even longer period of time for selling drugs; however, when the police looking at you and say, we know what is going on at [your residence], and frankly we don't care cause now there's a dead body, and they tell you that face to face, and they don't ask you thing one about your drug dealing activities; they don't bring it up; they don't mention it; they don't say a thing, and you still don't tell them everything you know, I think that justification, that rationale goes right out the window. I don't think it is at all plausible that he's withholding information from the police -- well, it is plausible, he probably is afraid to deal with the police; however, he's been basically told, we ain't worried about your drug activity there.

There's been testimony ... about Mr. Dukes leaving Conway, and leaving South Carolina, about his flight, so to speak. Well, there's another person that absolutely took flight, and that's Cornelius Ford. He hung up on 911, he called his daddy, and he left. He didn't check on Andy Gowans, his best friend, he didn't talk to the police, he didn't talk to EMS and let them know how this happened; he took off in his car and went home, and he didn't call the police at any time and let them know what was going on. His best friend has been shot, for all he knows, is dead, and he can't be bothered to take the time to pick up the phone and call the police and say, I saw who did it. He took off. And amazingly, no one ever bothered to check his car or to check his residence to see if maybe there's a reason he took off, but we've got no testimony about that, but ... no question that by ten o'clock in the morning the police and EMS are on the scene, and that by Mr. Ford's own testimony it is -- and he can't tell you if it's three, four or five o'clock before he talked to the police. His daddy said it was 7:30. At the minimum it was five hours, and it might have been as much as - what is that, eight, nine and a half hours, depending on who you want to believe, between Cornelius Ford and his daddy. That's not much of a choice right there.

Now, so for many, many hours he is gone. It's lots of these little things that don't add up. All right. Mr. Ford - how did Mr. Ford tell you he learned that Andy was actually dead, no question he's dead? Now he could have found out if he had stuck around, talked to the police, but he didn't. How did he find out? He testified that his former girlfriend, Andy's cousin, told him. He's calling everybody cause he's so concerned. He's talking to family. Not talking to the police, but he's talking to family. And he tells you, I heard it from my ex-girlfriend, all right, from Andy's cousin. What does Rasheed Muhammad tell you? Rasheed Muhammad said, I told him. All right. He testified and said, I didn't want to; he didn't seem to know yet; he had asked me about him and finally I had to tell him. Remember that. Both those things ain't true Both those things, I think, should make you say, I wonder what else they are not giving me completely right, may be inaccurate, maybe they are outright lies, but at least inaccurate. C-4's credibility, his ability to remember and be truthful about some of these little things directly impacts if he's telling you the truth about the big things, how many times he saw Henry Dukes, where he saw Henry Dukes, who he saw Henry Dukes with, where he went, why he went, who told him what happened to Andy Gowans. All these things by themselves may not be significant, but together they are very significant.

What else from Mr. Ford? He says the person came in, and Mr. Ford says, I'm sitting back a little ways from the it up, two shots, right, two shots, one bullet, and the person couldn't quite hear what was said, at one point he heard give front door, actually he said he couldn't see Andy at this point; he saw the fellow that fired the gun, but actually Andy and this fellow, but anyway, in court Cornelius Ford didn't see Andy, so he doesn't know what was going on between said, I went in this other room and I grabbed the mattress and pulled it up like I had a gun or something, like I was hiding that, and he was very specific, and he went through his a gun, but I got a mattress and I pulled it up on me. All right. Well, when he talked to the Detective six, seven, eight, nine hours after the shooting he made no mention of statement on the stand. He was very specific with the Detective, I went in, I got in the closet; if you check the room you will see the closet door; I was in the closet. He said that over and over and over again. It's important because the closet ain't the mattress, right; it's another little thing. Well, did you go in the closet or did you get the mattress.

Cornelius Ford, I submit to you, is not to be believed because of all those things that he either lied, or wanted to add to his testimony or change about his testimony, and there were many, and again, there is no physical evidence, not one iota of physical evidence that corroborates support what Cornelius Ford told you happened.

R. p. 341.

The trial judge gave a standard jury instruction on the credibility of witnesses, **R. pp.**

370-71, and he charged jurors on eyewitness identification, as follows:

An issue in this case is identification of the Defendant as the person who committed the crime charged. The State, as with everything, has the burden of proving to you the identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant of the crime charged. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the Defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available, how far or close the witness was, the lighting condition, whether the witness had the chance to see or know the person in the past. You may also look at the strength of the identification and the circumstances under which the identification was made. The burden of proof extends to the State on every element of a crime charged, and this specifically

Was the mattress in the closet? No, the mattress was in the middle of the room. Well, which was it? It ain't both of those things. Another little detail. C-4 is misleading, or doesn't remember, or is lying to you about.

There's a photograph that he claims to have identified Mr. Dukes with when he finally did go see the police, right. Mr. Ford said, I spontaneously saw this person right here. The Detective stood up as he went to into the other -- going to go in the other room to look at, I guess mug [shots] folks, whatever; we got up the leave, the photograph fell out, there it was. Well, okay, you all can choose whether or not that was critical; however, the police officer that interviewed him said, I showed him four photographs, one at a time, and that's in the stipulation. That little small snippet, little video we showed yesterday afternoon, clearly that was the end of the interview. In fact, they do stand up and everyone leaves, and you can watch them leave. You can see the Detective, his arm, step out of the door, and you can see very well Mr. Ford and his father get up and walk right out the door, and nobody stops to pick anything up, no one says anything; that's the end of the tape. There wasn't anything dropped; he didn't see anything.

Six and a half hours, at least, is a long time to think about what you are going to tell the police when you are gone. That is a long time to think about what you want to tell the police or not to tell the police, and that's how long, at least by his own admission, Mr. Ford stayed gone.

R. pp. 330 39.

includes the burden of proving, beyond a reasonable doubt, the identity of the Defendant as the person who committed the crime.

R. pp. 375-76. *Accord Liverman*, 398 S.C. at 144 & n. 7, 727 S.E.2d at 429 & n. 7.

Based upon this record, the trial judge did not err in denying Dukes' motion. Alternatively, the error, if any, in admitting Ford's identification testimony must be viewed, at worst, as harmless beyond a reasonable doubt because it "did not contribute to the verdict obtained." *Id* at 144, 727 S.E.2d at 429. Therefore, the trial judge's ruling must be affirmed.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

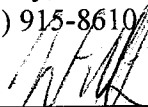
DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

JIMMY A. RICHARDSON, III
Solicitor, Fifteenth Judicial Circuit

P.O. Drawer 1276
Conway, SC 29528-1276
(843) 915-8610

By: 

WILLIAM EDGAR SALTER, III

December 23, 2013.

ATTORNEYS FOR RESPONDENT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2013-001798

THE STATE,

Respondent,

vs.

HENRY JERMAINE DUKES,

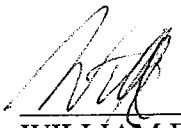
Petitioner.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served the within Return to Petition for Writ of Certiorari and Certificate of Compliance on Petitioner by depositing two (2) copies of same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Kathrine H. Hudgins, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of December, 2013.



WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
Office of Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT.

The Supreme Court of South Carolina

RECEIVED

JUL 25 2014

SC Court of Appeals

The State, Respondent,

v.

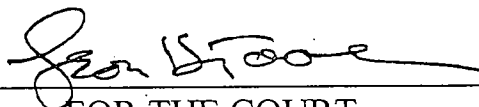
Henry Jermaine Dukes, Petitioner.

Appellate Case No. 2013-001798

Lower Court Case No. 2008-GS-26-02911

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). The petition is denied.



FOR THE COURT C.J.

Columbia, South Carolina

July 25, 2014

cc:

The Honorable Jenny Abbot Kitchings
The Honorable Melanie Huggins-Ward
Kathrine Haggard Hudgins, Esquire
W. Edgar Salter, III, Esquire
John Gregory Hembree, Esquire
Henry Jermaine Dukes, #347234



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 02, 2014

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Dukes, Henry Jermaine
Lower Court Case No. 2008GS2602911
Appellate Case No. 2011-196667

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

Enclosure

cc: Donald J. Zelenka, Esquire
Kathrine Haggard Hudgins, Esquire
W. Edgar Salter, III, Esquire
John W. McIntosh, Esquire
Alan McCrory Wilson, Esquire
Jimmy A. Richardson, II, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Henry Jermaine Duke 347234)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

20 11 CP26 7994

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kirkland Correctional Institution
2. Name and location of Court which imposed sentence General Sessions Horry county
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008 GS 26 2911
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 21, 2011 47 years
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Identification by witness should have never made it to jury; there was no

- (a) Identification by witness never should have made it to trial
- (b) Arrest Warrant in case was invalid
- (c) Lead Detective Addison wasn't at trial
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Ford gave three different accounts on how picture was procured
- (b) Only a Conclusive Statement in Arrest Warrant
- (c) Det. Addison was out of Country during trial and ruled by Incompetent Counsel; Change of venue solicitor being a witness
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Direct appeal never heard anything from the
- ii. Must: a Federal Habeas Corpus from
- iii. 2009 Federal Habeas Corpus Dismissed w/o prejudice
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. United States District Court
- ii. Court of General Sessions
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. Must go through State Courts Dismissed w/o prejudice
- ii. Never got heard in General sessions court
- iii. _____

10.(D) Indictment is not valid Article 4.511 SC Constitution

"Practice of using Solicitor or other officers of State as sole witness for grand jury to provide only summary of evidence should be abandoned unless no alternative is available. State v Capps (SC 1981) 276 S.C. 592 57 322 Det. Addison was sole witness to indictment

10(F) incompetent Counsel. There were things that attorney refused to do in trial that would have acquitted me

10(F) Prosecution Misconduct, Solicitor withheld information from the Defendant regarding a witness and Solicitor made himself a witness, Defense counsel never brought that to the Court's attention.

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. The Out of Court Identification

ii. Change of venue; habeas corpus lack of probable

iii. cause? incompetent Counsel

(b) the proceedings in which each ground was raised:

i. Suppression hearing denied

ii. was ignored by Court of General Sessions

iii. Incompetent counsel; was denied by Court

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Motions were unheard in General Sessions Court

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of: Pre-trial

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. J. Eric Fox 210 Elm St. Conway, SC

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Arraignment, Trial, Sentencing

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

Conviction Overturned and grant new trial

20. Are you now under sentence from any other court that you have not challenged?

Yes (Probation) Florida's Eleventh Circuit Court

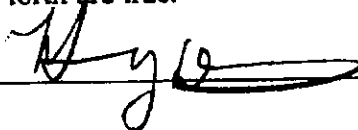
STATE OF SOUTH CAROLINA

County of Harry

20 1/ VERIFICATION

7994

I, Hing J. Dukes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 9th
day of September, 2011.

 (L.S.)
Notary Public

My Commission Expires
October 8, 2014

My Commission Expires:

11 SEP 23 PM 12:17
CLERK OF COURT

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

2011 CP26 7994

I, Henry J. Dukes, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

HJD
Applicant

SWORN or affirmed to and subscribed before me this
9th day of September, 2011.

[Signature]
Notary Public
My Commission Expires
My Commission Expires: October 8, 2014

11 SEP 23 PM 12:17
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Henry Jermaine Dukes, # 347234,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-7994

**RETURN AND MOTION TO DISMISS
WITHOUT PREJUDICE**

FILED
11 NOV 21
CLERK OF COURT
PH 1:43

Respondent, making its Return to the Application for post-conviction relief filed September 23, 2011, by Henry Jermaine Dukes, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in August 2008 for murder (2008-GS-26-02911). He was represented by J. Eric Fox, Esquire. The Applicant was tried before the Honorable Steven H. John, and the jury found him guilty on August 2, 2011. Judge John sentenced the Applicant to 47 years. A timely notice of appeal was served on August 3, 2011, and the appeal is currently pending in the South Carolina Court of Appeals.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction and the Applicant's pending direct appeal records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – MOTION TO DISMISS WITHOUT PREJUDICE DUE TO PENDING APPEAL

Respondent submits that the PCR Application must be summarily dismissed because the Applicant's direct appeal is pending in the South Carolina Court of Appeals. Under S.C. Code Ann. § 17-27-20(b) & § 17-27-45(A), PCR is not available to the Applicant at this time. See Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending."); see also Rule 71.1(b), SCRCP. Therefore, the Application for post-conviction

relief must be summarily dismissed without prejudice such that it may be re-filed under a new case number after the direct appeal is resolved.

III.

All allegations, statements, and claims contained within the Application which are not expressly admitted, qualified, or explained are hereby DENIED.

IV.

WHEREFORE, Respondent requests that the Application be summarily dismissed without prejudice.

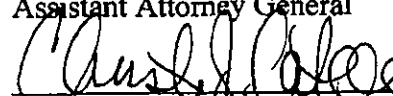
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3737

November 18, 2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Henry Jermaine Dukes, # 347234,

Applicant,

v.

State of South Carolina,

Respondent.

COPIES
MAILED

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-7994

ORDER OF DISMISSAL WITHOUT PREJUDICE
DUE TO PENDING DIRECT APPEAL

HORRY COUNTY
11 NOV 30 PM 1:44
MELANIE
CLERK
COURT
WARD

This matter comes before the Court by way of an Application for post-conviction relief filed September 23, 2011, by Henry Jermaine Dukes. Respondent made a Return and Motion to Dismiss Without Prejudice on November 18, 2011, requesting that the Application be summarily dismissed without prejudice because the Applicant's direct appeal is still pending. Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the underlying conviction and Applicant's direct appeal records.

PROCEDURAL HISTORY

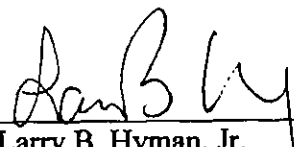
The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in August 2008 for murder (2008-GS-26-02911). He was represented by J. Eric Fox, Esquire. The Applicant was tried before the Honorable Steven H. John, and the jury found him guilty on August 2, 2011. Judge John sentenced the Applicant to 47 years. A timely notice of appeal was served on August 3, 2011, and the appeal is currently pending in the South Carolina Court of Appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

This Court finds that because the Applicant currently has a pending appeal in the South Carolina Court of Appeals, the Application for post-conviction relief is premature and must be summarily dismissed without prejudice. See S.C. Code Ann. § 17-27-20(b) & § 17-27-45(A); Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending."); see also Rule 71.1(b), SCRCP. Therefore, the Application for post-conviction relief is dismissed **WITHOUT PREJUDICE** and may be re-filed with a new case number when the direct appeal is resolved and the case is remitted to the circuit court.

AND, IT IS SO ORDERED this 22 day of Nov, 2011.



Larry B. Hyman, Jr.
Chief Administrative Judge
Fifteenth Judicial Circuit

Conway, South Carolina

FORM 5

STATE OF SOUTH CAROLINA)

County of Horry)Henry Jermaine Dukes 347234)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

13

4699

APPLICATION FOR
POST-CONVICTION RELIEFFILED
CLERK OF COURT
2013 JUL -9 AM 10:01
HARRIS COUNTYINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence General Sessions
Horry County
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-26-02911 Murder
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 2, 2011; 47 Years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 26, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) In effective assistance of Counsel.
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel failed to investigate numerous aspects of the States
- (b) case. Counsel failed to put forth a proper defense including
- (c) but not limited to one of alibi. Counsel failed to inquire about the
defendants state of mind.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. J. Eric Fox 206 Laurel Street. Conway

ii. Katherine Hudgins 1330 Lady Street
Columbia, SC

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Jeric Fox, Arraignment, Trial, Sentencing

ii. Katherine Hudgins Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Reverse Conviction for a new Trial

20. Are you now under sentence from any other court that you have not challenged?

STATE OF SOUTH CAROLINA)

County of Horry)

13
VERIFICATION

4699

I, Henry Jermaine Dukes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

SWORN to and subscribed before me this 1st day of July, 2013.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

FILED
Horry County
2013 JUL -9 AM 10:01
MELANIE HUGGINS-WARD
CLERK OF COURT

13

4699

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

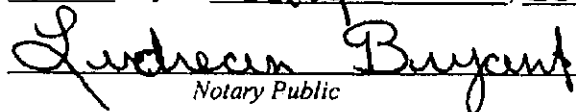
I, Henry Jermaine Dukes, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this

1st day of July, 2013.


Notary Public

My Commission Expires: May 26, 2020

FILED
JURY COUNTY
2013 JUL -9 AM 10:01
KELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Henry J. Dukes, #347234,

) Case No. 2013-CP-26-4699

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

FILED
Horry County
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KELARIE HUGGINS-WARD
CLERK OF COURT

Respondent, making its Return to the Application for Post-Conviction Relief filed July 9, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In August 2008, the Horry County Grand Jury indicted Applicant for murder (2008-GS-26-2911). J. Eric Fox, Esquire, represented Applicant. On July 20, 2011, Applicant appeared before the Honorable Steven H. John for pre-trial motions. On August 1, 2011 Applicant proceeded to trial before Judge John and a jury. On August 2, 2011, the jury found Applicant guilty as indicted. Judge John sentenced Applicant to forty-seven (47) years imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). The Court of appeals denied Applicant's motion for rehearing on July 24, 2013. Applicant filed a

petition for writ of certiorari to the South Carolina Supreme Court, which is pending as of the date of this pleading.

II.

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
 - a. "Counsel failed to investigate numerous aspects of the States case. Counsel failed to put forth a proper defense including but not limited to one of alibi. Counsel failed to inquire about the defendants state of mind."

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

Attached to this return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of trial counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance

of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

V.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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By: 
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June 2, 2014

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

2 COUNTY OF HORRY) NO: 2013-CP-26-4699

3 PCR HEARING

4 -----
5 **B E F O R E:** The Honorable Craig Brown
6 February 11, 2016
7 -----

8 HENRY JERMAINE DUKES,

9 Petitioner,

10 vs.

11 STATE OF SOUTH CAROLINA,

12 Respondent.
13 -----

14 APPEARANCES:

15 Tristan Shaffer, Esq.
16 For the Petitioner.

17 Jessica Kinard, Esq.
18 For the Respondent.

19
20
21 Court Reporter:
22 Natalie Dahl, RPR
23
24
25

I-N-D-E-X

WITNESS

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E-X-H-I-B-I-T-S

PLAINTIFF'S EXHIBITS

MARKED

ADMITTED

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P-R-O-C-E-E-D-I-N-G-S

MS. KINARD: This is Henry Dukes versus State of South Carolina, 2013-CP-26-4699. This is before the Court on an application post-conviction relief filed July 9th, 2013. Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court.

In August 2008, the Horry County indicted the Applicant for murder. Mr. J. Eric Fox represented the Applicant. On July 20, 2011, Applicant appeared before the Honorable Steven John for pretrial motions. On August 1, Applicant proceeded to trial before Judge John and the jury. On August 2, 2011 the jury found Applicant guilty as indicted, and Judge John sentenced him to 47 years imprisonment. Applicant filed his Notice of Appeal that was perfected by Kathryn H. Hudgins of the Office of Appellant Defense. The South Carolina Court of Appeals affirmed his conviction on June 26, 2013. Court of Appeals denied his motion for rehearing on July 24, 2013. He also filed a petition for Writ of Certiorari to the South Carolina Supreme Court which was denied July 25, 2014. A remittitur was sent to Circuit Court on August 2, 2014.

State is present and ready to proceed. The

ERIC FOX - DIRECT EXAMINATION

1 Applicant is present and represented by Tristan
2 Shaffer.

3 THE COURT: Ready to proceed?

4 MR. SHAFFER: Yes, we are.

5 THE COURT: Call your first witness.

6 MR. SHAFFER: I'll call Eric Fox.

7 (ERIC FOX, having been duly sworn, testified
8 as follows:)

9 DIRECT-EXAMINATION

10 BY MR. SHAFFER:

11 Q Mr. Fox, did you represent Henry Dukes?

12 A Yes, I did. I inherited this case from James
13 Galmore of the Public Defender's Office, but I did
14 starting in October of 2008.

15 Q How did you come to represent him?

16 A There was -- I got a call from Ms. Orrie West,
17 she's was a public defender. At that time I was
18 contract public defender in Georgetown and would take
19 conflict cases from the office here in Conway. I don't
20 know exactly what the conflict was, but she indicated
21 that Mr. Galmore had been relieved and asked if I would
22 represent Mr. Dukes.

23 Q Tell us about the allegations against him.

24 A He was accused of murder, of a shooting, and I
25 apologize, I'll forget names, but shooting someone over

ERIC FOX - DIRECT EXAMINATION

1 here in Conway across from Whitmore Park Middle School
2 just a mile or so from here. There was a witness,
3 Mr. Cornelius Ford, that name I remember, who was in
4 the house who allegedly claimed to have seen the
5 shooting and was able to identify Mr. Dukes.

6 Q Now, Mr. Ford, had he seen the witness
7 previously, or was this the only incident?

8 A I think very briefly. He did not, in his
9 original statement to the police, was not able to give
10 a name. I think he may have had a nickname, but he
11 said he had seen this person, the shooter, one time
12 briefly before, you know, through mutual friends.

13 Q Okay. What happened after the shooting? How did
14 they actually end up arresting --

15 A It was kind of convoluted. Mr. Ford, rather than
16 call the police, called his daddy who came and got him
17 and, again, rather than calling the police, they
18 disappeared for about an hour or so, but at some point
19 they contacted the police. There was information about
20 the victim and another person, Mr. Atkinson, I believe.
21 There was prior bad blood. So after learning who the
22 identity was of the victim, they began talking to
23 friends and acquaintances, and this led them to the
24 residence where Mr. Duke was staying, which was
25 actually with Mr. Atkinson. I mean, there is a whole

ERIC FOX - DIRECT EXAMINATION

1 long process of things, but that is the initial part
2 where Mr. Dukes was on the radar, and other information
3 came in.

4 Q When the investigators initially went there to
5 speak with Mr. Atkinson?

6 A That is correct, yes, sir.

7 Q And they also spoke with Mr. Dukes, who was
8 there, correct?

9 A They did. About, I would say, within an hour or
10 two, they had information and went basically across
11 town to the south side of town going towards
12 Georgetown, and when they arrived there, Mr. Atkinson
13 and another gentleman -- they had information it was a
14 black male who did the shooting. Mr. Atkinson, who is
15 a black male, another gentleman that was there and Mr.
16 Dukes was there, and they spoke with all of them; in
17 fact, did gunshot residue on all three of them.

18 Q Do you recall the results of the gunshot residue?

19 A It was negative on Mr. Dukes. I believe it was
20 negative on the third gentleman, and Mr. Atkinson,
21 there was a presumptive positive on him.

22 Q And the -- you received that in discovery,
23 correct?

24 A Yes.

25 Q Would you mind pulling that document? I

ERIC FOX - DIRECT EXAMINATION

1 apologize, I had planned on running it off for you and
2 the printer's battery died, and apparently I don't have
3 a power cord.

4 A All right. There is the ballistics information.
5 There is the gunshot residue.

6 Q They ended up doing a search warrant of Mr.
7 Atkinson's home, correct.

8 A I think so, I don't recall but that's probably
9 correct.

10 Q Was part of the basis of the search warrant the
11 gunshot residue presumptive test?

12 A Yes.

13 Q So even though it came back negative from SLED,
14 they used that part of the probable cause to do the
15 search warrant, correct?

16 A Yes.

17 MR. SHAFFER: If I may have this marked.

18 THE COURT: Any objection? For ID or evidence?

19 MR. SHAFFER: I'll move it into evidence if I can
20 lay a foundation, Your Honor.

21 THE COURT: She may not object to it.

22 MS. KINARD: I don't object.

23 (Plaintiff's Exhibit 1 marked and admitted.)

24 THE COURT: Very well. Move forward.

25 Q (MR. SHAFFER) Thank you, Your Honor. At any

ERIC FOX - DIRECT EXAMINATION

1 point, did the jury hear about the positive gunshot
2 residue test of Mr. Atkinson?

3 A I don't believe so.

4 Q They did hear that there was a negative on the
5 client, correct?

6 A The way it played out, State did not call SLED.
7 They are on the witness list, potential witness list.
8 The State did not end up calling anyone from SLED in
9 regards to those results. They were not in evidence,
10 and I had not subpoenaed anyone from SLED. I was able
11 to get out through another witness the fact that
12 Mr. Dukes had been tested along with others and,
13 therefore, was able to argue in closing that because no
14 evidence was introduced that there was any positive
15 results from Mr. Dukes, obviously the State would have
16 brought that to the jury if there had been. So I was
17 able to argue the inference that it must have been
18 negative because there wasn't shown any evidence of
19 that, but there wasn't anything about Mr. Atkinson's
20 positive test.

21 Q And Mr. Atkinson's positive test was done by the
22 officers?

23 A That is correct. They did it right there at the
24 house.

25 Q Any particular reason why you did not ask them

ERIC FOX - DIRECT EXAMINATION

1 about that?

2 A I don't recall. I believe I was expecting --
3 anticipating the SLED -- the agent from SLED to be
4 there with the final record that I could cross-examine
5 them about.

6 Q Now, going back to the actual allegation, was
7 there any physical evidence linking Mr. Dukes to the
8 offense?

9 A No.

10 Q Is it fair to characterize the evidence against
11 him was the eyewitness and evidence of flight?

12 A Yes.

13 Q The eyewitness, you actually challenged the
14 identification, correct?

15 A Yes.

16 Q Can you tell us about the basis of that
17 challenge?

18 A Well, to start with, the actions of the witness
19 immediately after. I mentioned that before, that
20 rather than contacting police, he immediately contacted
21 his father, kind of disappeared for awhile, I argued to
22 get his story straight. He didn't claim to know
23 Mr. Dukes by name. There was one very brief prior time
24 when he said he had seen him. He then claimed -- this
25 is Mr. Ford -- he claimed that -- he was interviewed by

ERIC FOX - DIRECT EXAMINATION

1 police, I'm not sure at the jail or police station, but
2 he was interviewed by police -- we had the video
3 recording of that -- where he denied any involvement,
4 told him what he knew. At the end, the officer, he
5 claimed that he just by chance happened to see a
6 photograph and said, That's the guy. It was a
7 photograph because police, when they went to Mr.
8 Atkinson's house, Mr. Dukes photograph, Mr. Atkinson's
9 and other folks who were people of interest at that
10 time, Mr. Ford claimed to have just happened to have
11 seen this photograph fall out of the officer's binder;
12 but, in fact, what you could see was the officer got up
13 to leave for a moment, and Mr. Ford leaned up, grabbed
14 the binder, rifled through it, selected it. It didn't
15 look to be a recognition, it was just here are the
16 photographs, I'll say it is this guy. We had that, and
17 if I recall, we played that for the jury.

18 Q Was that consistent with his testimony at the
19 Neil versus Biggers hearing?

20 A No.

21 Q What was his testimony at the Neil versus Biggers
22 hearing?

23 A I think that is where, if I recall, where he
24 said -- he claimed, oh, it was just, you know,
25 happenstance that I saw this photograph.

ERIC FOX - DIRECT EXAMINATION

1 Q At the Neil v. Biggers hearing, did you attempt
2 to impeach him with the prior statement?

3 A I don't recall if I did or not.

4 Q Do you know if you impeached him or what his
5 testimony was at trial compared to the Neil v. Biggers
6 hearing?

7 A I don't recall specifically. I know that it was
8 like night and day between his certainty and his
9 demeanor. He had been to witness school in a major way
10 in the week between, but I don't recall the specific
11 differences.

12 Q Do you know if you impeached him, do you recall,
13 of the previous statement?

14 A I'm sure I did.

15 Q And he had a previous written statement as well?

16 A He did.

17 Q Do you know if you brought that up either in the
18 Neil v. Biggers hearing or in the trial?

19 A I don't specifically recall. It would be in the
20 record.

21 Q But you would trust the record?

22 A Oh, yes, obviously.

23 Q What was your theory in your defense?

24 A Innocence. I felt like Mr. Ford, the witness,
25 his actions were very suspicious. I believe I focused

ERIC FOX - DIRECT EXAMINATION

1 more on his actions after, what I thought was
2 questionable identification of Mr. Duke. Even though
3 the judge admitted it and allowed it, it was still an
4 argument for the jury. It was Mr. Duke's actual
5 innocence. Because there was no physical evidence, the
6 risk of flight, he had family in Florida, he had an
7 explanation for being in Florida. A lot of the
8 evidence that showed that he was supposedly fleeing was
9 circumstantial, innuendo and wasn't solid, in my point
10 of view.

11 Q Do you recall his explanation for fleeing?

12 A Well, again, he wouldn't describe it as flight.
13 His mother lived here, but he spent a good point of his
14 life and years prior in south Florida, Miami.

15 Q Do you recall him mentioning he had gone to a
16 funeral down there?

17 A He did.

18 Q Do you know if the jury ever heard that?

19 A He did not testify. I don't believe they did.

20 Q Did you ever consider presenting a third-party
21 guilt defense?

22 A In preparing a case like this, all things would
23 be on the table, so I know I did, but ultimately chose
24 not to because that is a very small window, or needle
25 to thread. Although there was certainly suspicion,

ERIC FOX - DIRECT EXAMINATION

1 there was someone else involved. My theory was Henry
2 didn't do it, they can't prove he did it.

3 Q The other person involved, that would be the
4 Atkinson fellow?

5 A Yes.

6 Q That they previously thought was a suspect?

7 A Yes.

8 Q And he had given an alibi to the State, correct?

9 A I believe so, yes. You are talking Mr. Atkinson?

10 Q Yeah. He had provided that alibi to
11 investigators from the Solicitor's Office, correct?

12 A I believe so.

13 Q Do you recall receiving any information about
14 that?

15 A It involved a girlfriend, and she reported a car
16 stolen and I -- I did. I do recall some information
17 about that.

18 Q Do you think you could have possibly have
19 challenged that alibi in court, or at least cast
20 suspicion on it?

21 A If third-party guilt was my theory of the case,
22 yes.

23 Q Do you remember anything about them collecting
24 shoe print evidence?

25 A I don't.

ERIC FOX - CROSS-EXAMINATION

1 Q Do you have any SLED results there?

2 A Sure do. I did receive in May of 2011 report
3 from SLED. They had taken footwear cast and --
4 actually two -- and compared that to a pair of red and
5 white Niki Air Force One's, and they did not match.

6 Q Those were from Mr. Dukes, correct?

7 A Yes.

8 Q Did you ever consider trying to present any
9 evidence like that?

10 A I don't recall. I know they took a pair of shoes
11 from Mr. Dukes; it was sometime after. I don't believe
12 they are even the shoes he had on -- because he wasn't
13 arrested right away, so I know I didn't. I don't
14 recall whether that was considered, but I didn't.

15 MR. SHAFFER: No further questions.

16 CROSS-EXAMINATION

17 BY MS. KINARD:

18 Q Just a few basics, Mr. Fox. How long have you
19 been practicing law?

20 A November of 1990.

21 THE COURT: Hold on a minute. Hold on a minute.
22 The SLED information that you obtained from Mr. Fox,
23 Mr. Shaffer, pertaining to footprint, was that moved
24 into evidence?

25 MR. SHAFFER: No, it is not. I am happy to move

ERIC FOX - CROSS-EXAMINATION

1 it into evidence if the State would consent to it.

2 THE COURT: I want to be sure the record is
3 clear.

4 MS. KINARD: No objection.

5 THE COURT: All right.

6 (Plaintiff's Exhibit 2 marked and admitted.)

7 THE COURT: Go ahead, I'm sorry.

8 Q (MS. KINARD) Is the bulk of your practice in
9 criminal law?

10 A Yes.

11 Q And you are a public defender?

12 A Yes.

13 Q Therefore, you were appointed to this case, I
14 believe you testified?

15 A That's correct.

16 Q Did you file a Rule 5 or Brady motion?

17 A I'm not sure that I did, because I inherited this
18 case, so a Rule 5 would have already been filed by Mr.
19 Galmore. There were supplement motions filed for
20 specific requests during my representation.

21 Q Did you have any issues obtaining discovery?

22 A Not in the end. I mean, everything I requested,
23 I was provided.

24 Q Did you share all of this discovery with
25 Mr. Dukes?

ERIC FOX - CROSS-EXAMINATION

1 A Yes.

2 Q And you reviewed it all with him?

3 A Yes, I met with Mr. Dukes. He wasn't tried -- it
4 was almost three years I represented him before he was
5 tried. We met seven, eight times either in jail, at
6 least in my office and then countless phone calls,
7 because part of that time he was in Florida. Mr. Dukes
8 was very good about checking in with me monthly, so we
9 spoke pretty much on a monthly basis for the better
10 part of three years.

11 Q During that time you represented him, did he have
12 any problems with your representation?

13 A Other than the frustration about the case hanging
14 around and not understanding why he would have to go to
15 trial.

16 Q So more general frustration with the legal
17 process, not your representation?

18 A That is what I recall.

19 Q In preparing for this case, you said your
20 strategy was to prove his innocence -- or, excuse me,
21 that the State couldn't prove his guilt?

22 A Yeah. More than just they can't prove it, but
23 this is an innocent man. Of course, the burden is not
24 on us to prove that, but that was the theory of the
25 case.

ERIC FOX - CROSS-EXAMINATION

1 Q You testified there was no physical evidence
2 linking Mr. Dukes?

3 A No. They had Mr. Ford, who was an eyewitness,
4 who claimed saw him -- literally saw him shoot the
5 victim, and then there were things like Mr. Dukes -- I
6 want to say about the next day -- he went to someone's
7 house and asked that person to call a taxi for him in
8 the evening, spoke to that taxi driver and he told the
9 taxi driver when he dropped him off at his mother's in
10 Marion, oh, remember, you didn't see me. So it was
11 things like that. Then when he got to Miami, there was
12 another witness that claimed that he -- not confessed
13 really, but said, oh, I can't go to back to South
14 Carolina, there is bad stuff there, that kind of thing.
15 So there was all kinds of innuendos, and the fact he
16 left the state at all was seen as suspicious.

17 Q Speaking of that, did you file any pretrial
18 motions?

19 A Yes. There was the motion about witness
20 identification. Motions trying to preclude any
21 evidence of risk of flight as evidence of guilt, there
22 were several others. I don't recall, but those were
23 the main ones.

24 Q Would the number "8" sound familiar?

25 A That sounds right.

ERIC FOX - CROSS-EXAMINATION

1 Q That is how many I counted in the transcript. Do
2 you believe you argued all of those to the best of your
3 ability?

4 A I hope I did.

5 Q What was the result of the Biggers hearing?

6 A It was allowed -- Mr. Ford was allowed to testify
7 that he could identify Mr. Dukes from seeing him before
8 the shooting, at the shooting and from the photograph
9 when he was at the police station.

10 MS. KINARD: Beg the Court's indulgence.

11 Q Was there anything else remarkable as the trial
12 progressed?

13 A No. I don't recall. It was five years,
14 four-and-a-half years ago. I don't recall any
15 surprises during the trial.

16 Q In essence, you believe you investigated this
17 case as fully as it needed to be?

18 A I think so. Mr. Dukes was very involved. I
19 didn't wait for the Solicitor, I was able to track down
20 the cab driver and speak to him myself and, in fact,
21 had him testify that he had a number of clients that he
22 would drop off that had been doing things maybe they
23 weren't supposed to do or didn't want others to know
24 about running behind their wives and would say things
25 like, You ain't seen me. He didn't find anything

HENRY DUKES - DIRECT EXAMINATION

1 remarkable about Mr. Dukes' demeanor, that he was
2 nervous or scared.

3 I spoke with the lady that he had gone to her
4 house about getting a cab. I spoke with his family in
5 Florida that he had been staying with. So, yeah, I
6 feel like I was able to review the State's evidence
7 and got everything I requested in discovery. I felt I
8 thoroughly investigated the case.

9 Q Is there anything else you would like the Court
10 to know about your representation of Mr. Dukes in this
11 matter?

12 A No.

13 MS. KINARD: That is all I have, Your Honor.

14 MR. SHAFFER: Nothing further.

15 THE COURT: You may step down. Thank you.

16 MR. SHAFFER: We call Henry Dukes.

17 (HENRY DUKES, having been duly sworn,
18 testified as follows:)

19 DIRECT-EXAMINATION

20 BY MR. SHAFFER:

21 Q Where are you from originally?

22 A From Brooklyn, New York.

23 Q Prior to being incarcerated for this offense, how
24 much time have you spent in South Carolina throughout
25 your life?

HENRY DUKES - DIRECT EXAMINATION

1 A I have family here, but as far as living here,
2 not even a year.

3 Q When you came down -- were you living here at the
4 time you were arrested?

5 A No. I was just like visiting family, and a lot
6 of things were going on where I couldn't -- I didn't
7 want to stay in the house, so I stayed in a truck on
8 the side of the house because there was too much going
9 on for me.

10 Q That would be Mr. Atkinson's house?

11 A Yes.

12 Q When police initially came to speak with you, did
13 you believe that you were a suspect, or what was your
14 feeling of that conversation?

15 A They checked me for gunshot residue and swabbed
16 my hand and let me go. I thought that was the end of
17 that, and they took Atkinson in the police car. I
18 didn't know what was going on. So I go and talk to
19 people, and they say this is what is going on, someone
20 just got shot and they got him. He's been shot before
21 by these people, and all the shootings back and forth.
22 I say, okay, I'm staying here living in a truck, I'm
23 going to be -- I'm an easy target to get shot.

24 Q Did you leave South Carolina at that point?

25 A Probably the next day when I went to my mother's

HENRY DUKES - DIRECT EXAMINATION

1 house and heard that a friend of mine got killed in
2 Miami.

3 Q And you went to Miami?

4 A Yes.

5 Q How long after you went to Miami were you
6 arrested?

7 A About two weeks, something like that.

8 Q When was the first time after your arrest that
9 you saw any lawyer?

10 A I was arrested -- I think Galmore came to see me,
11 and they just appointed him to me in March, so he came
12 to see me like in April, or something like that, let me
13 know that we was going to come for a bond hearing.

14 Q How long after that did you see Mr. Fox, or how
15 long did Mr. Fox represent you, I guess, before trial?

16 A Mr. Fox was appointed to me, let's see,
17 October 7, 2008. I believe Mr. Fox saw me probably
18 December '08 to go over the case or whatever, and he
19 said he was going to push to get me a bond.

20 Q Did Mr. Fox go over your discovery with you?

21 A Yes. Only thing he really came to show me is
22 about -- basically about Ford, that's it, he's saying
23 that Ford -- he is not sure, that he wished that we had
24 a fingerprint or something, some kind of evidence
25 because Ford is shaky.

HENRY DUKES - DIRECT EXAMINATION

1 Q Did you all ever discuss the possibility of
2 presenting a third-party guilt, that Mr. Atkinson could
3 have been involved?

4 A No.

5 Q Did you -- you never discussed that at all?

6 A I discussed it about this thing about the gunshot
7 residue. If you put it altogether, this meant -- they
8 said this man tested positive for gunshot residue, he
9 was shot by these people, you put it together, why are
10 these people hounding me for?

11 Q Okay. Now, when -- did Mr. Fox tell you what his
12 theory of the case would be, or his theory to argue to
13 the jury?

14 A No, just that Ford -- that he's just going to
15 catch Ford in so many lies.

16 Q And Ford was the only witness against you?

17 A Yes.

18 Q Is there any other evidence against you, physical
19 evidence?

20 A No, just what Ford says.

21 Q And did you agree with Mr. Fox, that that would
22 be a good strategy going to trial, or did you comment
23 on that?

24 A I was hoping he was going to present all the
25 stuff about the GSR and everything, that was my whole

HENRY DUKES - DIRECT EXAMINATION

1 purpose of going to trial. The stuff was pointing to
2 someone else, not me. It is just what Ford is saying,
3 but he never presented it.

4 Q Did he tell you that they are and were going to
5 use evidence of, you know, traveling to Florida against
6 you as evidence of flight?

7 A Yes. He said they are going to bring it up,
8 because he said he was going to try to suppress it.

9 Q Why were you going to Florida?

10 A I had a friend of mine that passed away. He was
11 killed in Miami. The detective, Franky Sanchez,
12 testified at my trial, and Mr. Fox didn't cross-examine
13 him, he could have gotten that out of him.

14 Q Franky Sanchez was a detective from Miami that
15 testified at your trial?

16 A Right. Right.

17 Q Franky, did he know something about the death of
18 your friend?

19 A Yes, because his office, department, was
20 investigating that.

21 Q Was he investigating it, to your knowledge?

22 A Not that I know of, but....

23 Q Were you present for the Neil v. Biggers hearing?

24 A Yes.

25 Q And present during trial?

HENRY DUKES - DIRECT EXAMINATION

1 A Yes.

2 Q Do you think that -- is there something that -- I
3 know that Mr. Fox testified that he brought out the
4 previous statement of Cornelius Ford, about how he saw
5 the picture, correct?

6 A Right.

7 Q You made an allegation about -- specifically
8 about him not crossing Mr. Cornelius Ford on this
9 issue?

10 A Right. He didn't impeach Ford with his written
11 statement, because at the Biggers hearing, he gave out
12 two different accounts how he made the identification,
13 and both were different from what his written statement
14 says, and also different from what the officer says.

15 Q In the written statement you saw, you received in
16 discovery?

17 A Yes.

18 Q It said he was shown pictures, correct?

19 A Right.

20 Q Do you think that should have been brought out in
21 front of the jury?

22 A Yes, it should have been brought out at the
23 Biggers hearing, too, to show the judge this man keep
24 switching his story. How can you make a determination
25 of identification when we couldn't figure out what the

HENRY DUKES - CROSS-EXAMINATION

1 procedure was because of this man giving four, five
2 different accounts, and the detective is not here at
3 the trial to explain it? Mr. Fox should have let them
4 know that he is saying this, now he's saying that,
5 which one is it.

6 MR. SHAFFER: No further questions.

7 MS. KINARD: Beg the Court's indulgence.

8 THE COURT: Yes, ma'am.

9 (A brief pause in the proceedings.)

10 CROSS-EXAMINATION

11 BY MS. KINARD:

12 Q As Mr. Shaffer pointed out, you were in court
13 during all of these proceedings?

14 A Yes.

15 Q And you heard all the pretrial motions?

16 A Just about, yes.

17 Q And the main one, motion for suppression of the
18 ID that Cornelius made --

19 A Yes, ma'am.

20 Q Do you recall Mr. Fox arguing vehemently in your
21 favor about how this should not be allowed?

22 A No. Only thing he was saying about that is we
23 needed the testimony of the detective.

24 Q Do you remember him stating that multiple times
25 and arguing that it shouldn't --

HENRY DUKES - CROSS-EXAMINATION

1 A If you look at the trial transcript, Page 4, when
2 the judge made his ruling, Mr. Fox was asking like,
3 okay, we have this witness saying this, but the officer
4 report says this, that is an issue there, but the judge
5 saw otherwise.

6 Q Agreed, the judge thought otherwise. But
7 regardless of that, did Mr. Fox make the argument in
8 your favor?

9 A Just about what the officer said in his report
10 and what the witness said on the stand, not what the
11 witnesses said in the statement. He never presented
12 the statement to show that he said something else
13 originally. Mr. Fox claims he knows nothing about the
14 statement. I have the right for disciplinary council
15 to make Mr. Fox come up off of my case file, and then
16 the statement is in the case file. Mr. Fox acted like
17 he knew nothing about the statement, but the
18 disciplinary council made him send me my case file, and
19 the statement is in the case file. What he said at the
20 Neil v. Biggers hearing is different from what he said
21 in his statement.

22 Q Thank you, sir. Regardless of that, do you
23 remember the other motions that went forward that day,
24 the pretrial motions?

25 A Yes. Motions to get everybody's criminal record

HENRY DUKES - CROSS-EXAMINATION

1 and things of that nature to help speed things up
2 during the trial so we wouldn't have to stop and admit
3 things in evidence and things.

4 Q Do you remember a lengthy motion about excluding
5 your flight as evidence of guilt?

6 A Yes.

7 Q And the judge did not agree with your position on
8 that as well.

9 A Right. Because the State, they went with what
10 they assume the witnesses would testify about
11 Ms. Dixon, but when she come to testify, she testified
12 totally different than what the State assumed she was
13 going to testify about.

14 Q Regardless, that was all presented to the Court
15 by your attorney?

16 A Yes.

17 Q As well as a motion to disclose the State's
18 witness list?

19 A Yes.

20 Q And motion to allow counsel to inspect evidence?

21 A Yes.

22 Q And motion to suppress the statement made to the
23 Miami police when he wasn't present?

24 A Right. The Jackson Denno statement, but the
25 police never came to testify, so we never had to deal

HENRY DUKES - CROSS-EXAMINATION

1 with that.

2 Q Thank you.

3 MS. KINARD: Mr. Dukes, that is all I have.

4 MR. SHAFFER: No further questions, Your Honor.

5 THE COURT: You may step down. Thank you.

6 MR. SHAFFER: Applicant rests, Your Honor.

7 MS. KINARD: No witnesses for the State.

8 THE COURT: Anything by way of argument.

9 MR. SHAFFER: Briefly, Your Honor. We are
10 arguing that there should have been third-party
11 guilty, they should have impeached the one eyewitness
12 as well based off of the previous statement. Relating
13 to the third-party guilt, I believe they could have
14 presented that, which would have been consistent with
15 their theory which was that he was not guilty.
16 Obviously, if it is third-party guilt, essentially
17 that is part of that, is that your client didn't do
18 it, someone else did it. In this situation, I think
19 there would have been at least a reasonable doubt
20 raised as to his guilt had Mr. Fox attempted to
21 present this evidence that, you know, another person
22 had gunshot residue, he was a suspect, a shaky alibi,
23 footprint didn't match, that evidence might have been
24 able to present some doubt in the jury's mind as to
25 whether or not he was guilty.

HENRY DUKES - CROSS-EXAMINATION

1 THE COURT: Ms. Kinard.

2 MS. KINARD: Thank you, Your Honor. In this
3 case, I don't think it is really necessary to even
4 consider whether the third-party guilt factor was
5 raised because Mr. Fox clearly testified to a valid
6 and articular trial strategy, which is the one he
7 presented. Everything he presented was in line with
8 this strategy. It was one that is very simple, yet
9 very effective, and he believed that it was the right
10 one to take.

11 He also testified that he considered the
12 third-party guilt defense, but he said he had not much
13 luck with it and, as he said, there was not much room
14 to thread the needle. When he made the professional
15 decision, there was no need for him to discuss that
16 with the defendant. It is apparent that he tried to
17 keep out the testimony of the eyewitness, and he made
18 eight pretrial motions in order to help the trial be
19 as fair as possible and run as smoothly as possible,
20 whether they were granted or not does not speak to Mr.
21 Fox' abilities or representation of Mr. Dukes.

22 As Mr. Fox testified, there was no physical
23 evidence, but an abundance of circumstantial evidence.
24 He went above and beyond, I believe, what is a
25 reasonable level of investigation to find people --

HENRY DUKES - CROSS-EXAMINATION

1 such as the cab driver and a woman whose house he just
2 happened to stop by -- in order to present their
3 testimony and evidence, and in abundance of effort,
4 presented all of this to the jury. Just because an
5 unfavorable outcome occurred doesn't mean that Mr. Fox
6 in any way failed in his representation. It does not
7 mean he was ineffective, and I do not believe that the
8 Applicant has shown that there is a reasonable
9 probability that if any of these items or factors had
10 changed, that the outcome would have been different;
11 therefore, I don't believe that there is any prejudice
12 towards this defendant in the trying of this
13 underlying matter, and because of that, I do not think
14 it can be shown Mr. Fox was deficient in any way in
15 his representation of Mr. Dukes, therefore, I request
16 that you deny any relief that Mr. Dukes is seeking.

17 (A long pause in the proceedings.)

18 THE COURT: All right. I'll let you all know on
19 that one, okay?

20 (Whereupon, the proceedings concluded.)
21
22
23
24
25

HENRY DUKES - CROSS-EXAMINATION

CERTIFICATE OF REPORTER

State of South Carolina)

County of Horry)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the matter of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 11TH day of February, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 11, 2023

Natalie Dahl, RPR

Court Reporter

570

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

NIKKI R. HALEY
Governor



REGINALD I. LLOYD
Director

Rick Morgan
Conway Police Department
P.O. Drawer 1075
Conway, SC 29528-1075

TRACE EVIDENCE
January 25, 2011
SLED LAB: L08-00431
Your Case No: 2007007460
Incident Date: 11/02/2007
[V-Deceased] Andrico Gowans
[S] Henry Dukes
[S] Jeremy Rush
[S] Ronnie Wilson
[S] Ronnie Atkinson

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Reginald I. Lloyd, Director
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 4 One GSR kit from Henry Dukes

Item: 4.1 Right palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 4.2 Right back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.



SLED LAB No. 108-00431
January 25, 2011

Page 2 of 4

Item: 4.3 Left palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 4.4 Left back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 5 One GSR kit from Jeremy Rush

Item: 5.1 Right palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 5.2 Right back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 5.3 Left palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 5.4 Left back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.



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SLED LAB No. L08-00431
January 25, 2011

Page 3 of 4

Item: 6 One GSR kit from Ronnie Wilson

Item: 6.1 Right palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 6.2 Right back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 6.3 Left palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 6.4 Left back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 7 One GSR kit from Ronnie Atkinson

Item: 7.1 Right palm

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 7.2 Right back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.



SLED LAB No. L08-00431
January 25, 2011

Page 4 of 4

Item: 7.3 Left palm

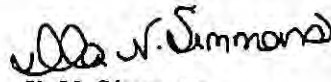
RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.

Item: 7.4 Left back

RESULTS:

The quantities of metals found did not indicate the presence of gunshot residue.


Ila N. Simmons
Forensic Scientist



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Henry J. Dukes, #347234,

Applicant,

v.

State of South Carolina,

Respondent.

copies mailed

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

) Case No. 2013-CP-26-4699
)
)
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ORDER OF DISMISSAL
(Ends action)

HORRY COUNTY
2016 MAR 10 PM 2:22
MELANIE HUGGINS-WARD
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 9, 2013. Respondent made a timely Return on or about June 2, 2014. The Court convened an evidentiary hearing on February 11, 2016, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Jessica E. Kinard, Esquire of the South Carolina Attorney General's Office, represented Respondent.

Applicant and his trial counsel, Jonathan Eric Fox, Esquire testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In August 2008, the Horry County Grand Jury indicted Applicant for murder (2008-GS-26-2911). J. Eric Fox, Esquire, represented Applicant. On July 20, 2011, Applicant appeared before the Honorable Steven H. John for pre-trial motions. On August 1, 2011 Applicant proceeded to trial before Judge John and a jury. On August 2, 2011,

the jury found Applicant guilty as indicted. Judge John sentenced Applicant to forty-seven (47) years imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on June 26, 2013. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). The Court of appeals denied Applicant's motion for rehearing on July 24, 2013. Applicant filed a petition for writ of certiorari to the South Carolina Supreme Court, which is pending as of the date of this pleading.

II. ALLEGATIONS

In his Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel"
 - a. "Counsel failed to investigate numerous aspects of the States case. Counsel failed to put forth a proper defense including but not limited to one of alibi. Counsel failed to inquire about the defendants state of mind."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Trial counsel was called first by Applicant, and began by testifying to his memory of the case, particularly the relevant evidence. First, trial counsel testified to the results of gunshot

residue testing, which were that all three (3) black men that were at the scene and matched the description were tested, and Applicant's test was negative. He went on to testify that there was no direct evidence linking Applicant to the crime scene, and that the biggest factors working against him were an eyewitness and evidence of flight. Trial counsel testified that he made a pre-trial motion to prevent evidence of Applicant's out-of-state travel as being considered evidence of guilt, as Applicant was actually visiting family, but this motion was denied. Applicant's counsel questioned trial counsel about the possibility of using a third party guilt defense rather than the defense of pure innocence. Trial counsel testified that he considered this possibility, but had found that it was rarely effective, especially when combined with the fact that the most likely third party culprit had an alibi. Lastly, much discussion was had regarding the eyewitness testimony of Cornelius Ford and whether the identification he made at the police station was proper and admissible. This was the subject of a Biggers¹ hearing before trial, and was ultimately admitted over trial counsel's very competent argument. Trial counsel also testified that he conducted further personal investigation, including finding a taxi driver that had spoken with Applicant and a woman whose telephone he used.

Applicant also testified at the hearing, with most of his testimony centering around his actions shortly after the shooting. In particular, Applicant testified that he was staying in the area with some family who had "bad blood" with the deceased. This made him feel like an easy target, especially since he was sleeping in a truck near the house due to the tensions inside the home. So, he went to Miami when he heard that a close friend had passed away. He testified that he was incarcerated for quite a while before he was visited by trial counsel, who took over for another member of the Public Defender's office. He also stated that trial counsel reviewed the discovery

¹ Neil v. Biggers, 409 U.S. 188 (1972).

with him. This was contrary to trial counsel's testimony that they met seven (7) or eight (8) times, had countless phone calls, and that Applicant was good about checking in regularly with trial counsel. Applicant testified that he thought the reason for going to trial was to get in some evidentiary elements that were not admitted or emphasized, such as his negative gunshot residue test and shoeprint evidence that did not link him to the crime scene.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial counsel's "conduct so undermined the proper functioning of the adversarial process" that the trial "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688).

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

The Court finds Applicant failed to meet his burden of proof to demonstrate trial counsel was ineffective in any manner. Specifically, the Court finds Applicant failed to demonstrate that trial counsel was deficient in any way. The Court finds very credible trial counsel's testimony regarding his trial strategy and how he presented or attempted to present different items of evidence. The Court also finds persuasive and credible trial counsel's testimony that he met with Applicant multiple times, had many phone calls, discussed the case with him at length, and prepared this case to the best of his ability. Trial counsel had a valid and clearly articulable trial strategy that was in line with the prevailing norms of professional conduct. The Court does not find Applicant's testimony credible when he stated that he felt trial counsel failed to investigate this case, as the record and trial counsel's very credible testimony show otherwise.

Because Applicant failed to prove that trial counsel as deficient, he does not reach the second prong of the Strickland test regarding prejudice. However, assuming *arguendo* that deficiency had been proven, Applicant failed to prove that he was in any way prejudiced by trial counsel's representation. Applicant presented no evidence of trial counsel representing him in a manner that was anything but professional and beneficial. Therefore, Applicant has not demonstrated that a different attorney would have changed the result of his proceedings.

C. All Other Allegations

This Court notes that Applicant alleged other allegations, namely other aspects of ineffective assistance of counsel. However, this Court finds Applicant either failed to meet his burden of

proving Counsel was ineffective or failed to show how Counsel's actions prejudiced Applicant's case thereby. Accordingly, these allegations are denied.

IV. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. There is nothing in this record to show that trial counsel was anything but prepared. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a 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, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 7 day of March, 2016.

Florence

, South Carolina

D. Craig

The Honorable D. Craig Brown
Presiding Judge

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Horry)347234 Henry Jerome Dels)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

Fifteenth Judicial Circuit
14 5308

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention South Carolina Department of Corrections Lee CI
2. Name and location of Court which imposed sentence General Sessions, Horry County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008 GS-26-02911 / 47 ~~years~~ Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 47 Years August 2, 2011
 - (b) _____

 CLERK OF COURT
 AUG 14 8 AM '08
 HARRIS WARD
 Horry County
 Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC @ Court of Appeals _____
- ii. SC Supreme Court _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed trial Court's Ruling _____
- ii. Cert. denied _____
- iii. _____
- (c) the date of each such result:
- i. June 26, 2013 _____
- ii. July 25, 2014 _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Duke, 404 SC 553, 745 SE2d 137 (1st App 2013) _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Ineffective Assistance of Trial Counsel

- (a) Ineffective Assistance of Counsel
 (b) Prosecutorial misconduct A
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Not asking for Alibi instruction
 (b) Failure to Present evidence of Third Party Guilt
 (c) Failure to do an independent investigation of State's case

12. Prior to this application have you filed with respect to this conviction: (D) Failure to inform Applicant Sentencing Guidelines for murder

- (a) any petition in a State Court under South Carolina Law? N/A
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
 (d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

15. If you answered "yes" to (14) identify:

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

- (b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) It was not preserved for appellate review

- (b) _____

- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. J. Eric Fox, Esquire 203 Laurel Street, Conway, SC
- ii. Katherine H. Hudgens, Esquire 330 Lady Street Columbia, SC
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Fox: Arraignment, Trial, and Sentencing
- ii. Hudgens: Appeal, Writ of Cert
- iii. _____

19. State clearly the relief you seek in filing this application:

Reverse and remand for new trial

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

14

5308

^{H.J. Dukes}
 I, H.J. Dukes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

H.J. Dukes

SWORN to and subscribed before me this 6
 day of Aug, 2014.

Debra Suse

Notary Public

(L.S.)

My Commission Expires: 11-4-2015

CLERK OF COURT
 DEBRA SUSE
 14 AUG - 8 AM 10:09
 Horry County

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

5308

14

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

6 day of Aug., 2014.



Notary Public

My Commission Expires: 11-4-2015

CLERK OF COURT
14 AUG - 8 AM 10:09
JULIA J. JONES-WARD

- 11(E) Failure to investigate grand jury proceedings
- 11(F) Failure to call favorable witness
- 11(G) Failure to impeach state's witness with statement
- 11(H) Failure to impeach state's witness with NCIC
- 11(I) Brady Violation Failure to disclose NCIC of witness
- 11(J) Failure to get expert analysis

CLERK OF COURT**MELANIE HUGGINS-WARD**

CLERK OF COURT
1301 2ND AVENUE
CONWAY, SC 29526
(843) 915-5080 • Fax: (843) 915-6081

FILED
HORRY COUNTY
2014 AUG 12 AM 9:38
MELANIE HUGGINS-WARD
CLERK OF COURT

AUGUST 12, 2014

HENRY JERMAINE DUKES # 347234
LEE CORRECTIONAL INSTITUTION
990 WISACKY HWY
BISHOPVILLE, SC 29010

RE: POST-CONVICTION RELIEF
CIVIL ACTION #2014-CP-26-05308

DEAR MR. DUKES,

THE POST-CONVICTION RELIEF APPLICATION HAS BEEN FILED AND ASSIGNED THE ABOVE CIVIL ACTION NUMBER FOR THE DOCKET. YOUR COPY IS ENCLOSED WITH THE ABOVE INFORMATION SHOWN. COPIES HAVE BEEN FORWARDED TO THE OFFICE OF THE ATTORNEY GENERAL. THAT OFFICE WILL BE PROCESSING YOUR CASE FOR COURT PROCEEDINGS.

SINCERELY,

Melanie Huggins-Ward

MELANIE HUGGINS-WARD
CLERK OF COURT

MHW/fhn
ENCLOSURES

CLERK OF COURT**MELANIE HUGGINS-WARD**

CLERK OF COURT
1301 2ND AVENUE
CONWAY, SC 29526
(843) 915-5080 • Fax: (843) 915-6081

FILED
HORRY COUNT
2014 AUG 12 AM 9:38
MELANIE HUGGINS-WARD
CLERK OF COURT

AUGUST 12, 2014

ATTORNEY JOSHUA L. THOMAS
OFFICE OF ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211

RE: HENRY JERMAINE DUKES # 347234
CASE #: 2014-CP-26-05308

PLEASE BE ADVISED THAT THE ABOVE REFERENCED INDIVIDUAL HAS
MADE APPLICATION FOR POST-CONVICTION RELIEF IN OUR COUNTY.

ENCLOSED YOU WILL FIND A COPY OF THE POST-CONVICTION RELIEF
APPLICATION, ALONG WITH TRUE COPIES OF THE WARRANT, VERDICT
FORM (IF TRIAL BY JURY), SENTENCE SHEET, AND THE INDICTMENT
ON THE ABOVE REFERENCED INDIVIDUAL.

IF WE MAY BE OF FURTHER ASSISTANCE, PLEASE ADVISE.

SINCERELY,

Melanie Huggins-Ward

MELANIE HUGGINS-WARD
CLERK OF COURT

MHW/fhn
ENCLOSURES

Supreme Court denied Applicant's petition for writ of certiorari on July 25, 2014, and the remittitur was returned to the circuit court on August 2, 2014.

II.

Respondent submits Applicant's application should be dismissed because he already has a pending post-conviction relief action. Applicant filed a prior application on July 9, 2013 (2013-CP-26-4699). Respondent filed its return on or about June 2, 2014. Tristan M. Shaffer, Esquire, currently represents Applicant in the pending action.

An applicant is not generally allowed to have two post-conviction relief proceedings in regard to the same conviction. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. § 17-27-90). Accordingly, Respondent hereby moves to dismiss this action because Applicant currently has a pending post-conviction relief action.

Because such a dismissal is based on a pending action, this dismissal should not be subject to the provisions of S.C. Code Ann. § 17-27-70(b). Furthermore, such dismissal should not prohibit Applicant from raising in his pending action any grounds for relief alleged in the dismissed application.

IV.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

V.

WHEREFORE, having made its return and motion to dismiss, Respondent requests the Court summarily dismiss this application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS
Assistant Attorney General
S.C. Bar No. 100777

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

August 14, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HENRY J. DUKES, #347234)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2014-CP-26-5308

AFFIDAVIT OF SERVICE BY MAIL

14 AUG 18 AM 8:19
CLERK OF COURT
WARD

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tristan Michael Shaffer, Esquire
4701 Oleander Drive
Myrtle Beach, SC 29577

DATED this 14TH day of August, 2014

Norma Bigbee
 Norma Bigbee, Legal Assistant

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Henry J. Dukes, #347234,

) Case No. 2014-CP-26-5308
)

Applicant,

)

v.

)

State of South Carolina,

)

Respondent.

)
)

ORDER OF DISMISSAL

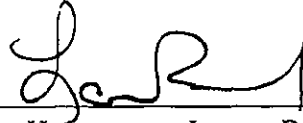
FILED
HORRY COUNTY
14 SEP -3 AM 11:43
CLERK OF COURT

This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed August 8, 2014. Respondent made a timely Return and Motion to Dismiss on or about August 14, 2014, requesting the Application be summarily dismissed because Applicant has a pending post-conviction relief application regarding his 2007 murder conviction (2008-GS-26-2911).

Applicant filed a prior application on July 9, 2013 (2013-CP-26-4699). Respondent filed its return on or about June 2, 2014. Tristan M. Shaffer, Esquire, currently represents Applicant in the pending action. The Court finds Respondent's motion well taken in light of the prohibition on multiple post-conviction relief proceedings in regard to the same conviction. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); S.C. Code Ann. § 17-27-90). Accordingly, the Court finds this action should be summarily dismissed. The dismissal of this action is purely administrative, and in no way prohibits Applicant from raising in his remaining post-conviction action any grounds for relief included in this application.

IT IS THEREFORE ORDERED that this Application for Post-Conviction Relief is hereby dismissed.

IT IS SO ORDERED THIS 27 DAY OF Aug, 2014.



THE HONORABLE LARRY B. HYMAN, JR.
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

Cowan, South Carolina

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Henry Jermaine Duke's #347231
 Full name and prison number (if any) of Applicant.

20 17 CP26 1473

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence General Sessions Horry Court
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) don't remember
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 2, 2011
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC Court of Appeals _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 26, 2013 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 745 SE 2d 737 _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Ineffective Assistance of trial Counsel

- (a) Prosecutorial Misconduct
 (b) Court never had ~~jurisdiction~~ Jurisdiction to hear
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Trial Counsel failed to request a mistrial when testimony was offered to impeach the passion of jury
 (b) Trial Counsel allowed solicitor
 (c) (See back)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? _____
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Post Conviction Relief
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. Common Pleas Harry County
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. Judge denied Application (appointed attorney new appeared)
 ii. _____
 iii. _____

- B) Trial Counsel failed to have Solicitor ~~resused~~ after he made himself a witness.
- C) Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)
- D) Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one
- E) Trial Counsel never explained guidelines ^{of} ~~to~~ Sentencing ~~or~~ in mandatory

F

- iv. _____
- (d) the date of each such disposition:
- i. March 2016
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- yes
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. all
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. PCR
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. J. Eric Fox 210 Elm Street Conway SC 29526
 - ii. Katherine H. Hudgins indigent defense
 - iii. Trishon Shaffer
- (b) the proceedings at which each such attorney represented you:
- i. Fox, Arraignment, trial, and sentencing
 - ii. Hudgins, Direct appeal
 - iii. Shaffer PCR

19. State clearly the relief you seek in filing this application:

a new PCR Hearing & appointed counsel new appeal

20. Are you now under sentence from any other court that you have not challenged?

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

20 17 CP26 1473

I, Henry J. Davis hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Henry J. Davis
Applicant

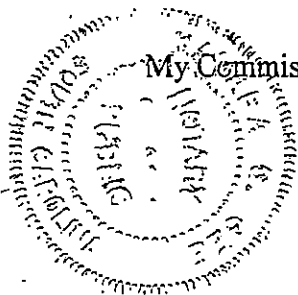
SWORN or affirmed to and subscribed before me this

24 day of February, 2017.

Kavara G. Gee
Notary Public

My Commission Expires: _____

KAVARA G. GEE
Notary Public, State of South Carolina
Commission Expires 7/24/2023



Horry County
2017 MAR -7 PM 2:59
CLERK
HORRY COUNTY, SC

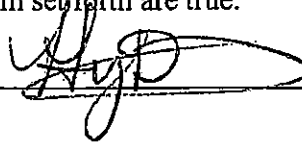
STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

20 17 CP26 1473

I, Henry J. Dukes Being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 24
day of February, 2017.

Kavarag G. Gee (L.S.)
Notary Public

My Commission Expires: _____

KAVARAG. GEE
Notary Public, State of South Carolina
My Commission Expires 7/24/2023



HORRY COUNTY
2017 MAR -7 PM 2:59
RENEE N. ELLIOTT
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Henry Jermaine Dukes,	)	Case No.: 2017-CP-26-01473
S.C.D.C. No. 347234,	)	
	)	
Applicant,	)	
	)	RETURN AND
v.	)	PARTIAL MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

FILED
 2017 JUN 30 PM 4:45
 Horry County, SC
 CLERK OF COURT

In response to the application for post-conviction relief filed by Henry Jermaine Dukes (Applicant) on March 7, 2017, Respondent would show this Court:

1.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2008-GS-26-02911). Jonathan Eric Fox, Esquire represented Applicant. Jimmy A. Richardson, II, and Robert Paul Taylor, both of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on August 2, 2011. Judge John sentenced Applicant to imprisonment for a term of 47 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esquire. By opinion filed June 26, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 25, 2014. The Remittitur was issued on August 2, 2014.

First PCR Application: 2013-CP-26-04699

Applicant filed his first application for post-conviction relief on July 9, 2013 (2013-CP-26-04699). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
 - a. "Counsel failed to investigate numerous aspects of the States case
 - b. "Counsel failed to put forth a proper defense including but not limited to one of alibi."
 - c. "Counsel failed to inquire about the defendants state of mind."

Respondent made its return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 11, 2016, before the Honorable D. Craig Brown. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Jessica E. Kinard, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and J. Eric Fox, Esquire, also testified. By written order dated March 7, 2016, and filed March 10, 2016, Judge Brown denied and dismissed the application. Applicant did not appeal the order denying relief.

Second PCR Application: 2014-CP-26-05308

During the pendency of the above application, Applicant filed a second application for post-conviction relief on August 8, 2014. Respondent made its return and motion to dismiss on or about August 14, 2014, requesting the application be summarily dismissed because the first application was still pending. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter by order dated August 27, 2014, and filed September 3, 2014.

II.

In his third and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Prosecutorial Misconduct"
2. Court lacked jurisdiction

3. Ineffective assistance of counsel, in that:

- a. "Trial Counsel failed to request a mistrial when testimony was offered to incite the passion of the jury."
- b. "Trial Counsel failed to have Solicitor recused after he made himself a witness"
- c. "Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)"
- d. "Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one."
- e. "Trial Counsel never explained guidelines to sentencing in mandatory"

Inconsistent with the above allegations, Applicant requests relief as follows:

- "a new PCR Hearing (appointed counsel never appealed)"

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, the records of Applicant's prior PCR action, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant alleges through his request for relief that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent lacks sufficient information to admit or deny this allegation. Accordingly, Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.; Austin, 305 S.C. 453, 409 S.E.2d 395.

IV.

With the exception of Applicant's prayer for relief pursuant to Austin v. State, the application should be summarily dismissed for failure to comply with the filing procedures of the

Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted on August 2, 2011, and the remittitur from his direct appeal issued on August 2, 2014. The current application was not filed until March 7, 2017—well after the one-year statutory filing period expired. Therefore, with the exception of the Austin claim, the application should be summarily dismissed as barred by the statute of limitations.

V.

With the exception of Applicant’s prayer for relief pursuant to Austin v. State, the application should be summarily dismissed because it is successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981);

Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina

Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and with the exception of Applicant's prayer for relief pursuant to Austin v. State, the application should be dismissed as successive to Applicant's previous PCR application.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII.

Respondent denies each allegation not expressly admitted, qualified, or explained.

VIII.

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on Applicant's prayer for relief pursuant to Austin v. State. As to all other allegations,

Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

Respectfully submitted,

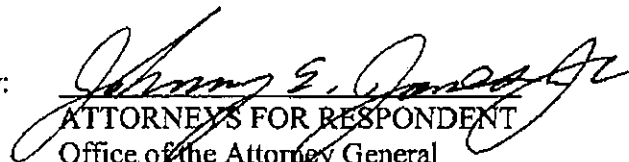
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY E. JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

29 June 2017

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

HENRY JERMAINE DUKES, #347231,)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2017-CP-26-1473

AFFIDAVIT OF SERVICE BY MAIL

FILED
2017 JUN 30 PM 4:45
RECEIVED
CLERK OF COURT
HORRY COUNTY, SC

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by e-mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Partial Motion to Dismiss** on the above-captioned matter on the following person by e-mail:

Mr. Steven W. Fowler, Esquire
1018 Highway 17 South
North Myrtle Beach, SC 29582

DATED this 29th day of June, 2017.

Jennifer Fennison

 Jennifer Fennison, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Henry Jermaine Dukes,	)	Case No.: 2017-CP-26-01473
S.C.D.C. No. 347234,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER GRANTING RELIEF PURSUANT TO
	)	<u>AUSTIN V. STATE, GRANTING</u>
State of South Carolina,	)	RESPONDENT'S PARTIAL MOTION TO
	)	DISMISS
Respondent.	)	
	)	

2018 JUN 28 PM 1:46
 Horry County
 Clerk of Court
 Horry, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Henry Jermaine Dukes ("Applicant") on March 7, 2017. Respondent made its return on or about June 29, 2017. The Court convened an evidentiary hearing into the matter on Monday, May 21, 2018, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Steven W. Fowler, Esq. Johnny E. James Jr., of the South Carolina Attorney General's Office, represented Respondent. No testimony was taken at the hearing. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2017-CP-26-01473). J. Eric Fox, Esq. represented Applicant. Jimmy A. Richardson, II, Esq. and Robert Paul Taylor, Esq., of the

Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on August 2, 2011. Judge John sentenced Applicant to imprisonment for a term of 47 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., two raised two issues on appeal:

1. Did the judge err in refusing to find that the pre-trial hearing in regard to identification failed to comport with due process requirements when the detective who conducted the identification procedure was not available to testify?
2. Did the judge err in refusing to suppress the in court identification testimony when the out of court identification procedure used was unduly suggestive and created a substantial likelihood of irreparable misidentification?

By opinion decided June 26, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Dukes, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 25, 2014. The Remittitur was issued on August 2, 2014.

First PCR Application: 2013-CP-26-04699

Applicant filed his first application for post-conviction relief on July 9, 2013 (2013-CP-26-04699). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
 - a. "Counsel failed to investigate numerous aspects of the States case"
 - b. "Counsel failed to put forth a proper defense including but not limited to one of alibi."
 - c. "Counsel failed to inquire about the defendants state of mind."

Respondent made its return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 11, 2016, before the Honorable D. Craig Brown. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own

behalf, and J. Eric Fox, Esq., also testified. By written order dated March 7, 2016, and filed March 10, 2016, Judge Brown denied and dismissed the application. Applicant did not appeal the order denying relief.

Second PCR Application: 2014-CP-26-05308

During the pendency of the above application, Applicant filed a second application for post-conviction relief on August 8, 2014. Respondent made its return and motion to dismiss on or about August 14, 2014, requesting the application be summarily dismissed because the first application was still pending. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter by order dated August 27, 2014, and filed September 3, 2014.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Prosecutorial Misconduct"
2. Court lacked jurisdiction
3. Ineffective assistance of counsel, in that:
 - a. "Trial Counsel failed to request a mistrial when testimony was offered to incite the passion of the jury."
 - b. "Trial Counsel failed to have Solicitor recused after he made himself a witness"
 - c. "Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)"
 - d. "Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one."
 - e. "Trial Counsel never explained guidelines to sentencing in mandatory"

Applicant requests relief as follows:

- "A new PCR Hearing (appointed counsel never appealed)"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has considered the arguments presented at the evidentiary hearing and reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Austin Relief

At the hearing, Respondent informed the Court that, upon consultation with opposing counsel, it understood the request for relief to be a demand for relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent indicated that communications with prior PCR counsel Tristan M. Shaffer, Esq.¹ led Respondent to believe that Applicant was not timely informed of the entry of the order denying relief in the prior PCR action, and thus was not afforded an opportunity to either request an appeal or knowingly, intelligently, and voluntarily waive his right to an appeal. Respondent then conceded Applicant was entitled to Austin relief. Accordingly, because Respondent concedes the issue, this Court grants Applicant relief pursuant to Austin v. State for appellate review of the order denying relief filed March 10, 2016 (2013-CP-26-04699).

B. Partial Motion to Dismiss

Respondent reasserted its pending motion to dismiss all other allegations as untimely and successive. Applicant, in response, alleged prior PCR counsel failed to raise all of his allegations in the prior hearing.

The Court finds the remaining allegations must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

¹ Mr. Shaffer did not appear for the hearing.

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

Applicant was convicted on August 2, 2011, and the remittitur from his direct appeal issued on August 2, 2014. The current application was not filed until March 7, 2017—well after the one-year statutory filing period expired. Therefore, with the exception of the Austin claim, the partial motion to dismiss is **GRANTED** and the application is **DISMISSED** as barred by the statute of limitations.

Furthermore, the Court finds the remaining allegations must be summarily dismissed as successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If the applicant

could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant asserts the contrary based on the alleged ineffectiveness of PCR counsel. Ineffective assistance of PCR counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 395. Aice further held that "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Id. at 452, 409 S.E.2d at 394. Applicant's contention that prior PCR counsel was ineffective is not a sufficient reason to warrant a

successive PCR application. Thus, Applicant has failed to show that a successive application is appropriate.

Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and with the exception of Applicant's prayer for relief pursuant to Austin v. State, the partial motion to dismiss is **GRANTED** and the application is **DISMISSED** as successive to Applicant's previous PCR application.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant did not knowingly and intelligently waive his right to appeal from the denial of his prior application for post-conviction relief and, as such, he may petition the Supreme Court of South Carolina pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). As to the remaining allegations, this Court finds Respondent's partial motion to dismiss well founded and the remaining allegations are dismissed as untimely and successive. Therefore, excepting the demand for relief pursuant to Austin, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your

attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Applicant petition for appellate review of 2013-CP-26-04699 pursuant to Austin v. State;
2. Respondent's partial motion to dismiss is granted and all other allegations are denied and dismissed with prejudice; and
3. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 12 day of June, 2018.



LARRY B. HYMAN, JR.
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

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**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

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United States District Court		District:
Name (under which you were convicted): <i>Henry Jermaine Dukes</i>		Docket or Case No.:
Place of Confinement: <i>Lee Correctional Institution</i>		Prisoner No.: <i>347234</i>
Petitioner (include the name under which you were convicted)		Respondent (authorized person having custody of petitioner)
v.		
The Attorney General of the State of:		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Henry County Court of General Sessions
- (b) Criminal docket or case number (if you know): *2008 GS 26 2911*
2. (a) Date of the judgment of conviction (if you know): *August 2, 2011*
(b) Date of sentencing: *August 2, 2011*
3. Length of sentence: *47 years*
4. In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No
5. Identify all crimes of which you were convicted and sentenced in this case: *Murder*
6. (a) What was your plea? (Check one)

☒ (1) Not guilty	☐ (3) Nolo contendere (no contest)
☐ (2) Guilty	☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: South Carolina Court of Appeals

(b) Docket or case number (if you know): 745 SE 2d 137

(c) Result: Affirmed

(d) Date of result (if you know): June 26, 2013

(e) Citation to the case (if you know):

(f) Grounds raised: Pretrial hearing on identification was unduly suggestive violating Confrontation Clause. Pretrial hearing did not comport with due process requirements when officer who conducted procedure was unavailable to testify

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: South Carolina Supreme Court

(2) Docket or case number (if you know):

(3) Result: Denied

(4) Date of result (if you know): June 25th, 2014

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes

☒ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Harry County Court of Common Pleas

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: Post Conviction Relief

(5) Grounds raised: Ineffective Assistance of Counsel

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes

☐ No

(7) Result: Denied

(8) Date of result (if you know): 3/7/16

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(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: Horry County Court of Common Pleas
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): _____
- (4) Nature of the proceeding: Post Conviction Relief
- (5) Grounds raised: Post Conviction Relief was abandoned by Counsel and Appeal never filed.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☐ No

- (7) Result: Applicant was allowed a belated appeal.
- (8) Date of result (if you know): Attorney refuses to file appeal.

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court: Horry County Court of General Sessions
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): 6-29-18
- (4) Nature of the proceeding: Motion for New Trial. After Discovered Evidence.
- (5) Grounds raised: _____

State's witness testified under a false identity whom had prior drug convictions under his real name.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result:

Motion Denied

(8) Date of result (if you know):

11-30-18

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☒ Yes ☐ No

(2) Second petition: ☐ Yes ☒ No

(3) Third petition: ☐ Yes ☒ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

State appointed Counsel failed to file appeal.

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

Pretrial hearing regarding Identification was unduly suggestive. Violating Confrontation Clause.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Detective Addison who conducted out of court identification did not appear for the hearing. Witness for the state gave three (3) different accounts on how the photo line up procedure was done, none of which corroborated with Detective Addison's report.

(b) If you did not exhaust your state remedies on Ground One, explain why:

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(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

☐ Yes☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____

GROUND TWO:Ineffective Assistance of Trial Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The state admitted shoe prints from the scene of the crime that didn't match Applicant's shoe but trial Counsel did present to jury

(b) If you did not exhaust your state remedies on Ground Two, explain why:

Counsel on Post Conviction Relief failed to file appeal

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Post Conviction Relief issue only.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Post Conviction Relief

Name and location of the court where the motion or petition was filed:

Horry County Court of Common Pleas

Docket or case number (if you know): _____

Date of the court's decision:

March 7th 2016

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Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Post Conviction lawyer failed to Appeal.

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two :

GROUND THREE:4th Amendment Illegal search and seizure. ID was fruit of poisonous tree

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

~~P~~ Applicant was given a Terry frisk and all was found was his wallet containing his ID. That was going beyond Terry. For the picture to be in the desk available 7 hours later to be picked by Cornelius Ford

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(b) If you did not exhaust your state remedies on Ground Three, explain why:

Post Conviction
Relief Counsel failed to raise the issue at the PCR
hearing after asked to do so.

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Claim not an
appeal issue on Direct

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Counsel failed to raise the issue and Petitioner is barred from filing Pro se pleadings.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: Newly Discovered Evidence. Witness testified under false identity who had prior convictions.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Carolyn Heester testified for the state and the state failed to disclose Mrs. Heester's Multiple convictions for writing fraudulent checks which could have been used to impeach her.

(b) If you did not exhaust your state remedies on Ground Four, explain why: Counsel on PCR failed to raise the issue once discovered.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Not a direct appeal issue.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes

☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

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Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

☐ Yes☒ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Was not Discovered till after the Hearing and
Counsel on PCR failed to file Motion for New
Hearing.

Empeachment evidence was not disclosed
in discovery

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

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13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

All of the ineffective assistance of counsel claims. Also the After Discovered Evidence claim.

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Illegal search and seizure. Third party guilt claim. After Discovered Evidence claim.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

NA

(b) At arraignment and plea:

J. Eric Fox 210 Elm Street Conway,
South Carolina

(c) At trial:

J. Eric Fox

(d) At sentencing:

J Eric Fox

(e) On appeal:

Katherine H. Hudgins

(f) In any post-conviction proceeding:

Trishan Shatter and Steve
Fowler

(g) On appeal from any ruling against you in a post-conviction proceeding:

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Petitioner must first bring all issues before the state court. Counsel on Appeal to PCR has failed to file belated appeal twice. Petitioner is barred from filing Pro Se pleading and motions when represented by state appoint counsel.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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(Rev. 01/15)

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

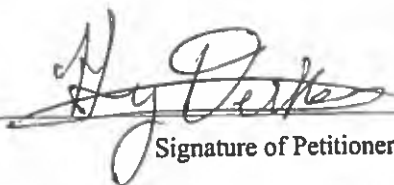
Therefore, petitioner asks that the Court grant the following relief: Remand back to lower
Court to properly exhaust and or vacation of
Sentence.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).



Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Henry J. Dukes, #347324,	)	C/A No. 4:19-cv-1211-TMC-TER
aka Henry Jermaine Dukes,	)	
	)	
Petitioner,	)	
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	
	)	
Warden, Lee Correctional Institution,	)	
	)	
Respondent.	)	
_____	)	

The Respondent, above-named, by and through the undersigned attorneys, would respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for judgment on the pleadings, or in the alternative, for summary judgment based on the pleadings.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
ID No. 07979

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
ID No. 3710

By: s/William Edgar Salter, III
ATTORNEYS FOR RESPONDENTS

July 19, 2019.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Henry J. Dukes, #347324,	)	C/A No. 4:19-cv-1211-TMC-TER
aka Henry Jermaine Dukes,	)	
	)	
Petitioner,	)	
	)	
vs.	)	RETURN AND MEMORANDUM
	)	OF LAW IN SUPPORT OF MOTION
Warden, Lee Correctional Institution,	)	FOR SUMMARY JUDGMENT
	)	
Respondent.	)	
	)	

Respondent hereby makes Return to the Rules to Show Cause filed by the Honorable Thomas E. Rogers, III, United States Magistrate Judge, and responds to the allegations in the *pro se* Petition for Writ of Habeas Corpus, as amended. Respondent is entitled to summary judgment because the Petition is barred by the statute of limitations in 28 U.S.C. 2244(d)(1). Alternatively, Respondent submits that the Court may wish to stay and abey this somewhat unusual case under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528 (2005), because Petitioner has an available state court remedy that would permit him to exhaust the cognizable ineffective assistance claims that he raised in state PCR, unless he made a knowing and intelligent waiver of his right to appeal the state PCR judge's adverse ruling. *See Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). Should he prove successful in his appeal, the question of whether he is entitled to federal habeas corpus relief will be moot.

Respondent would show the following in support of this motion:

I. PROCEDURAL HISTORY

Henry J. Dukes, #347324, aka Henry Jermaine Dukes (Petitioner), is currently confined in the Lee Correctional Institution, of the South Carolina Department of Corrections (SCDC), as

the result of his Horry County, South Carolina, murder conviction and life sentence. The Horry County Grand Jury indicted Petitioner at the August 2008 term of court for murder, in connection with the shooting death of Andrico Gowans. (2008-GS-26-2911, **R. pp. 387-89**).¹ Horry County Assistant Public Defender Jonathan Eric Fox, Esquire, represented him on this charge. Then-Assistant Solicitors Jimmy A. Richardson and Robert Paul Taylor, of the Fifteenth Circuit Solicitor's Office, prosecuted him.

The Honorable Steven H. John held a motions hearing on July 20, 2011, at which Petitioner was present and represented by counsel. **Tr. pp. 8-55**. He then received a jury trial on August 1-2, 2011, before Judge John. The jury convicted him of murder, and Judge John sentenced him to forty-seven years imprisonment. **Tr. pp. 55-398**.

Petitioner timely served and filed a notice of appeal. Assistant Appellate Defender Kathrine H. Hudgins represented him on direct appeal. On January 3 2013, Petitioner filed a Final Brief of Appellant, which presented the following issues to the South Carolina Court of Appeals:

1. Did the judge err in refusing to find that the pre-trial hearing in regard to identification failed to comport with due process requirements when the detective who conducted the identification procedure was not available to testify?

The court abused its discretion by refusing to direct a verdict on the charge of murder where it was undisputed appellant shot the decedent after the decedent attacked and hit him with a beer bottle since appellant was either guilty of voluntary manslaughter or not guilty by reason of self-defense under the circumstances.

¹ As will be discussed, *infra*, Petitioner has not yet had an appeal from the denial of PCR relief. Accordingly, there is no PCR Appendix. All citations abbreviated "**R. p.**" are to the Record on Appeal filed in the state court direct appeal. See Rule 210, SCACR. The citations abbreviated "**App. p.**" are to the Appendix to the Record on Appeal that was filed with the Petition for Writ of Certiorari in the South Carolina Supreme Court. Respondent has also attached a copy of the two volume trial transcript. Citations to it are abbreviated as "**Tr.**"

The State filed the Final Brief of Respondent on January 2, 2013. The State's Counterstatement of the issues on appeal was as follows:

- I. Whether the trial judge properly refused to suppress the pretrial identification of Dukes by State's witness Cornelius Ford, based upon the unavailability of the detective who conducted the identification procedure, because the *United States v. Wade*, 388 U.S. 218, 235-36 (1967) hearing held in this case comported with both due process and the state law requirements for hearings where pretrial identification is at issue, despite the witness' absence?
- II. Whether the trial judge properly denied Dukes' motion to suppress Cornelius Ford's pretrial identification of him because the record supports his findings that identification process was not unduly suggestive, and that the out-of-court identification was nevertheless so reliable under the totality of the circumstances that no substantial likelihood of misidentification existed, despite any possible suggestiveness?

Following oral argument, the South Carolina Court of Appeals filed a written Opinion affirming Petitioner's conviction and sentence on June 26, 2013. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct.App. 2013). **App. 1-9**. Petitioner filed a Petition for Rehearing on July 11, 2013. **App. pp. 10-19**. The Court of Appeals denied rehearing on July 24, 2013. **App. p. 20**.

On October 23, 2013, Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals in the South Carolina Supreme Court. He presented the following questions for review:

1. Did the Court of Appeals err in refusing to find that the trial judge erred in finding that the pre-trial hearing in regard to identification met the requirements of due process when the detective who conducted the identification procedure was not available to testify at trial?
2. Did the Court of Appeals err in failing to address the issue in regard to the reliability of the in court identification testimony when the out of court identification procedure used created a substantial likelihood of irreparable misidentification?

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The State filed a Return to Petition for Writ of Certiorari on December 23, 2013. The South Carolina Supreme Court denied certiorari on July 25, 2014, and the Court of Appeals sent the Remittitur to the Horry County Clerk of Court on August 02, 2014.

First PCR Application: 2011-CP-26-7994

While Petitioner's direct appeal was pending, he filed two PCR Applications. He filed his first Application (2011-CP-26-7994) on September 23, 2011. He raised the following claims in the 2011 Application:

- (a) Identification by witness should have never made it to jury;
- (b) Arrest warrant in case was invalid;
- (c) Lead Detective wasn't at trial.

The State filed a Return and Motion to Dismiss on November 18, 2011, in which it argued that his Application should be summarily dismissed without prejudice because his direct appeal was pending in the South Carolina Court of Appeals. Thus, PCR relief was not available to him at that time. *See Al-Shahazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending"); *see also* Rule 71.1(b), SCRCRCP. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter in an Order filed on November 30, 2011. Petitioner did not appeal from this Order.

Second PCR Application: 2013-CP-26-04699

While Petitioner's case was still pending on direct appeal, he filed a second *pro se* Post-Conviction Relief (PCR) Application (2013-CP-26-04699) on July 9, 2013. He alleged the following grounds for relief in his Application:

1. Ineffective assistance of counsel.

- a. "Counsel failed to investigate numerous aspects of the [State's] case;"
- b. "Counsel failed to put forth a proper defense including but not limited to one of alibi;"
- c. "Counsel failed to inquire about the [defendant's] state of mind."

The State filed its Return on June 2, 2014, and did not seek summary dismissal pursuant to *Al-Shahazz*.

The Honorable D. Craig Brown held an evidentiary hearing into the matter on February 11, 2016, at the Horry County Courthouse. Petitioner was present at the hearing and Tristan M. Shaffer, Esquire, represented him. Assistant Attorney General Jessica E. Kinard represented the State. Petitioner testified on his own behalf at the hearing. Trial counsel, J. Eric Fox, Esquire, also testified.

Judge Brown denied relief and dismissed the Application with prejudice in an Order of Dismissal that was filed on March 10, 2016. The Order addressed Petitioner's claim that counsel was ineffective because he did not "investigate numerous aspects of the State's case[;] Counsel failed to put forth a proper defense including but not limited to one of alibi[;] [and] Counsel failed to inquire about the [defendant's] state of mind." Petitioner did not perfect an appeal from this Order. Because a timely notice of appeal was not served and filed, there is no transcript of these proceedings at present, although the South Carolina Attorney General's Office will request it. *See pp. 26-27, infra.*

Third PCR Application: 2014-CP-26-05308

During the pendency of the 2013 Application, Petitioner filed a third PCR Application (2014-CP-26-05308) on August 8, 2014. Respondent made its Return and Motion to Dismiss on

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or about August 14, 2014, arguing that the 2014 Application should be summarily dismissed because his 2013 Application was still pending. The Honorable Larry B. Hyman, Jr., granted Respondent's motion and dismissed the matter by an Order filed on September 3, 2014. Petitioner did not appeal from this Order.

Fourth PCR Application: 2017-CP-26-01473

Petitioner filed a fourth PCR Application (2017-CP-26-01473) on March 7, 2017. He raised the following claims in his 2017 Application:

1. Prosecutorial Misconduct. "Solicitor pushed to have unrepresented Defendant's Preliminary hearing waived when one was requested (see special rules of Prosecutor);"
2. "Court lacked jurisdiction." "Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one."
3. Ineffective assistance of counsel:
 - a. "Trial Counsel failed to request a mistrial when testimony was offered to incite the passion of the jury."
 - b. "Trial Counsel failed to have Solicitor recused after he made himself a witness;"
 - c. "Trial Counsel never explained guidelines to sentencing is mandatory."

In his prayer for relief, he asked for "a new PCR Hearing (appointed counsel never appealed)."

The State made a Return and Partial Motion to Dismiss on June 29, 2017, in which it asserted that with the exception of Petitioner's prayer for relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), the 2017 Application should be summarily dismissed because it was barred by the PCR statute of limitations in and because it was successive to Petitioner's previous PCR Application. The Honorable Larry B. Hyman, Jr., held a hearing into the matter on

May 21, 2018, at the Horry County Courthouse in Conway, South Carolina. Petitioner was present at the hearing and Steven W. Fowler, Esquire, represented him. Assistant Attorney General Johnny E. James Jr., represented the State.

No testimony was taken at the hearing. Judge Hyman thereafter filed an “Order Granting Relief Pursuant to *Austin v. State*, Granting Respondent’s Partial Motion to Dismiss” on June 18, 2018. Judge Hyman granted *Austin* review of Judge Brown’s Order denying relief in 2013-CP-26-04699, but summarily dismissed the remaining claims as barred by the PCR statute of limitations and as impermissibly successive.

II. STATEMENT OF FACTS

The South Carolina Court of Appeals found the following facts:

A jury found Henry Dukes guilty of murder for the shooting death of Andrico Gowans. On the morning of November 2, 2007, Cornelius Ford witnessed Gowans' murder. That afternoon, Ford met with Detective Sean Addison at the Conway Police Department and identified Dukes as the shooter.

Dukes, 404 S.C. at 555, 745 S.E.2d at 138.

Respondent attaches the following documents to this Return and incorporates these documents by reference:

1. The two volume trial transcript (including the transcripts of the motions hearing on July 20, 2011, and Petitioner’s August 1-2, 2011, jury trial);
2. The Record on Appeal filed in the state court direct appeal (including both those portions of the trial transcript designated by the parties, the indictment, and the sentencing sheet;
3. The Appendix to the Record on Appeal that was filed with the Petition for Writ of Certiorari in the South Carolina Supreme Court (including the South Carolina Court of Appeals’ Opinion affirming Petitioner’s conviction and sentence in *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct.App. 2013), the Petition for Rehearing, and the Order denying rehearing);
4. The Petition for Writ of Certiorari to the Court of Appeals;
5. The Return to Petition for Writ of Certiorari;

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6. The South Carolina Supreme Court's Order denying certiorari;
7. The Remittitur;
8. The copy of the Remittitur filed in the Horry County Clerk of Court's Office;
9. PCR Application 2011-CP-26-7994, which was filed on September 23, 2011;
10. The State's Return and Motion to Dismiss filed on November 18, 2011;
11. The Order filed on November 30, 2011 dismissing the matter;
12. The second *pro se* Post-Conviction Relief (PCR) Application (2013-CP-26-04699);
13. The State's Return filed on June 2, 2014;
14. The Order of Dismissal in 2013-CP-26-04699 that was filed on March 10, 2016;
15. The third PCR Application (2014-CP-26-05308);
16. The Return and Motion to Dismiss filed on or about August 14, 2014;
17. The Order dismissing the third Application filed on September 3, 2014;
18. The fourth PCR Application (2017-CP-26-01473);
19. The State's Return and Partial Motion to Dismiss filed on June 29, 2017; and
20. The "Order Granting Relief Pursuant to *Austin v. State*, Granting Respondent's Partial Motion to Dismiss."

III. ALLEGATIONS

Petitioner raises the following allegations in his original *pro se* Petition for Writ of Habeas Corpus [*ECF #17-1*]:

GROUND ONE: Pretrial hearing regarding identification was unduly suggestive[,] violating Confrontation Clause.

SUPPORTING FACTS: Detective Addison who conducted out of court identification did not appear for the hearing. Witness for the State gave three (3) different accounts on how the photo [lineup] procedure was done, none of which corroborated with Detective Addison's report.

GROUND TWO: Ineffective Assistance of Trial Counsel.

- SUPPORTING FACTS:** The State admitted shoeprints from the scene of the crime that didn't match [Petitioner's] shoe but counsel did present to the jury.
- GROUND THREE:** 4th Amendment illegal search and seizure. ID was fruit of [the] poisonous tree.
- SUPPORTING FACTS:** [Petitioner] was given a Terry frisk and all [that] was found was his wallet containing his ID. That was going beyond Terry for the picture to be on the desk available 7 hours later to be picked by Cornelius Ford.
- GROUND FOUR:** Newly discovered evidence. Witness testified under false identity who had prior convictions.
- SUPPORTING FACTS:** Carolyn Heester testified for the state and the state failed to disclose Mrs. Heester's multiple convictions for writing fraudulent checks which could have been use[d] to impeach her.

Petitioner states reasons why he is entitled to equitable tolling of the statute of limitations, 28 U.S.C. 2244(d), in his Amended Petition [*ECF #20-1*].

III. DISCUSSION

SUMMARY JUDGMENT STANDARD

“Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting Fed. R. Civ. P. 56). “[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat a summary judgment motion, the non-moving party

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must “do more than simply show that there is some metaphysical doubt as to the material fact.” *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Here, the records before the Court by way of this Return and Memorandum show that Petitioner is not entitled to any relief for the reasons discussed below.

STANDARD OF REVIEW FOR FEDERAL HABEAS RELIEF

The present habeas corpus petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Accordingly, the provisions of the AEDPA apply to this case. *Lindh v. Murphy*, 521 U.S. 320 (1997).

THE PETITION IS BARRED BY THE STATUTE OF LIMITATIONS, 28 U.S.C. § 2244(d).

Respondent initially submits that the Petition must be dismissed because Petitioner did not file it within the one year federal habeas corpus statute of limitations period in 28 U.S.C. § 2244(d)(1). In Respondent’s July 8, 2019, Response [*ECF #26*] to Petitioner’s Motion to Amend his Petition for Writ of Habeas Corpus, Respondent erroneously calculated the statute of limitations and erroneously asserted that Petitioner would “have thirty-five days after the state appellate court rules on his appeal within which to timely file a Petition in this Court.” As demonstrated below, however, the limitations period had run long before he filed his Petition, the 2017 Application was not a “properly filed” PCR Application, and he is not entitled to equitable tolling.

Section 2244(d) provides that:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

State collateral review tolls the one-year statute of limitations under § 2244(d)(1)(A) for “properly filed” PCR pleadings. *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000). However, it does not establish a right to file within one year after completion of collateral review. *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir 2000). Also, the tolling period for state collateral review does not include the time for filing a petition for certiorari in the United States Supreme Court following the denial of post-conviction relief by the state courts. § 2244(d)(2); *Lawrence v. Florida*, 549 U.S. 327, 331-35 (2007).

In *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012), the United States Supreme Court ruled that:

We now make clear ... [that] [t]he text of § 2244(d)(1)(A), which marks finality as of “the conclusion of direct review or the expiration of the time for seeking such review,” consists of two prongs.... For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the ‘conclusion of direct review’—when this Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the ‘expiration of the time for seeking direct review in this Court, or in state court, expires.

(Emphasis added).

1. *The Petition is untimely under § 2244(d)(1).*

Applying the above criteria to the present case, it is clear that Petitioner did not timely file his Petition within the one-year limitations period in § 2244(d)(1)(A). Under *Gonzalez*, his state court convictions became final ninety days after July 25, 2014, which was the date on which the state supreme court denied certiorari, since that was the last date on which he could seek review in the United States Supreme Court, by way of a Petition for Writ of Certiorari. See U.S. SUP. CT. R. 13; *Gonzalez*, 565 U.S. at 150. Accordingly his convictions became final on Thursday, October 23, 2014. By that time, however, Petitioner had filed his 2013 PCR Application (2013-CP-26-04699), which he filed on July 9, 2013.

Respondent has construed the 2013 Application as being “properly filed” under *Artuz* and tolled the statute of limitations for the period during which that Application was pending. § 2244(d)(2). This is because Respondent did not assert that Petitioner’s 2013 PCR Application was improperly filed under *Al-Shahazz*, 338 S.C. at 363, 527 S.E.2d at 747 (“The applicant may not bring a PCR action while a direct appeal is pending”) and Rule 71.1(b), SCRCR, but allowed it to proceed to a hearing. The proceedings in the 2013 action concluded thirty-two days after March 10, 2016, the day that Judge Brown’s Order of Dismissal was filed, or on Monday, April 9, 2016, since this was the last day on which Petitioner could timely serve his notice of appeal from that Order. See Rule 203(b)(1), SCACR (providing that notice of appeal must be served on Respondent “within thirty days after receipt of notice of entry of the order or judgment”); Rule 263(a), SCACR (“In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is to be

included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday”).

The *pro se* Petition for a Writ of Habeas Corpus [**ECF #1**] was delivered to this Court on May 18, 2019 (pursuant to *Houston v. Lack*, 487 U.S. 266 (1988), and the mailroom stamp from the corrections facility on the envelope transmitting the Petition).² [**ECF #1, p. 1**]. This was one thousand, one hundred thirty-four (1134) days after his convictions became final. Therefore, the Petition is untimely.

2. Petitioner is not entitled to tolling based upon the grant of *Austin* review in the 2017 PCR action.

Respondent submits that Petitioner is not entitled to tolling of the three hundred thirty-three (333) days of elapsed time between the conclusion of the 2013 proceedings and the filing of the 2017 Application³ based upon the state courts’ granting *Austin* review of the 2017 action, which likewise concluded without an appeal. Respondent further submits that the United States Supreme Court’s decision in *Jimenez v. Quarterman*, 555 U.S. 113 (2009), does not affect the analysis here. In *Jimenez*, the Court held that “where a state court has in fact reopened *direct review* ... [by] grant[ing] a criminal defendant the right to file an out-of-time direct appeal during state collateral review, ... [the] judgment is not yet ‘final’ for purposes of § 2244(d)(1)(A).” *Id.* at 120 n. 4 (emphasis added). The Court in *Jimenez* specifically relied upon the fact that under prevailing state law “the ‘order granting an out-of-time appeal restored the pendency of the

² The copy of the materials attached to the Petition served on Respondent carry a date of May 28, 2019. See [**ECF # 17-1, p. 25**].

³ Again, the proceedings in the 2013 action concluded on Monday, April 9, 2016, and he filed the 2017 Application (2017-CP-26-01473) on March 7, 2017.

direct appeal.” *Id.* at 120 & n 4 (quoting *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex.Crim.App.1997)) (emphasis added).

Importantly, the Court specifically emphasized that:

Our decision today is a narrow one. We hold that, where a state court grants a criminal defendant the right to file an out-of-time *direct appeal* during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of § 2244(d)(1)(A).

555 U.S. at 121 (emphasis added).

Section 2244(d)(2) provides that “[t]he *time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending* shall not be counted toward any period of limitation under this subsection.” (Emphasis added). Courts construing this provision have relied upon the plain wording of the statute, *i.e.*, periods of time when no collateral matter is pending do not toll the statute of limitations. In other words, the filing of multiple applications for post-conviction relief does not result in a new starting of the statute of limitations, nor does it render the entire time from the first filing to final resolution a tolling period. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (a motion seeking a belated appeal in Florida state court did not revive an expired AEDPA); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (after the appeal period has lapsed, an application for further appellate review ceases to be "pending" for purposes of calculating federal habeas corpus tolling provision); *Gibson v. Klinger*, 232 F.3d 799, 804-808 (10th Cir. 2000) (concluding that a "state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state court); *Fernandez v. Sternes*, 227 F.3d 977, 981 (7th Cir. 2000) (while a state process may be reviewed after the time to seek further review has expired, "the prospect of revival does not make a case ‘pending’ in the interim"); *Small v. Norris*, No. 08-

273, 2009 WL 1529463 at *2 (E.D.Ark., filed June 1, 2009) (the time period between the expiration of time to file an appeal and the filing of a motion for a belated appeal is not tolled under § 2244). *See also Streu v. Dormire*, 557 F.3d 960, 967 n. 2 (8th Cir. 2009) (“When a conviction becomes ‘final’ for purposes of § 2244(d)(1)(A) is distinct from when an application for post-conviction review is ‘pending’ for purposes of § 2244(d)(2)”); *Clemons v. Kansas*, 384 Fed.Appx. 734, 736-37, 2010 WL 2543148, 2 (10th Cir. 2010); *Drew v. Superintendent, MCI-Shirley*, 607 F.Supp.2d 277, 282 n.3 (D.Mass. 2009); *Siniscalchi v. MacEachern*, 2010 WL 1930567, 1 (D.Mass. May 12, 2010) (“*Jimenez* is not applicable, as there is no indication that the state courts ever reopened petitioner's direct appeal process”).

While the Fourth Circuit Court of Appeals does not appear to have addressed the issue, a number of courts in this District have adopted this rationale where the South Carolina courts have ordered an *Austin* review. *See, e.g., McHoney v. South Carolina*, 518 F.Supp.2d 700, 705 (D.S.C. 2007); *Coleman v. Hagan*, 2009 WL 2900698, *4 (D.S.C., Sept. 9, 2009); *Smith v. Warden*, 2010 WL 5672090, *2-3 (D.S.C., Aug. 25, 2010); *Golden v. McCall*, No. 9:08-3469-TLW-BM, 2010 WL 146164, 5 n. 16 (D.S.C., Jan. 8, 2010); *Gambrell v. Warden, MCCI*, 2010 WL 883008, 13-14 n. 8 (D.S.C., Mar. 8, 2010) (Report and Recommendation) (unpublished); *Anderson v. Bodison*, 2010 WL 5777551, 4 & n. 16 (D.S.C., Nov. 16, 2010) (Report and Recommendation) (unpublished); *Jones v. Warden of Broad River Correctional Inst.*, 2010 WL 1791369, 7 & n. 4 (D.S.C., April 16, 2010) (Report and Recommendation) (unpublished).

As a result, a belated appeal under *Austin* does not retroactively toll the statute back to the filing date of the original PCR Application, and Petitioner is not entitled to tolling of the limitations period for the time period in which he had no Application pending after the dismissal of his 2013 PCR Application. *Id.*

3. Petitioner is not entitled to equitable tolling.

Section 2244(d) is not a jurisdictional limitation on the power of the district court but a statute of limitations. As a result, it is subject to the doctrine of equitable tolling. *Holland v. Florida*, 560 U.S. 631 (2010); *Harris*, 209 F.3d at 330. Nevertheless, both the Supreme Court and the Fourth Circuit Court of Appeals have underscored the **very limited circumstances** where equitable tolling will be permitted. *See Lawrence, supra*; *Rouse v Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc). The limits on equitable tolling stem from the fact that "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases ... and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (internal citations and quotation marks omitted).

Petitioner may only avoid the statute of limitations bar if he can show that he is "actually innocent," *see McQuiggin v. Perkins*, 569 U.S. 363, 392 (2013), which is not asserted, or that he has diligently pursued a judicial remedy but extraordinary circumstances beyond his control prevented him from meeting the deadline. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). *See also Lawrence*, 549 U.S. at 336; *Holland*, 560 U.S. at 649. Further, equitable tolling is "the exception rather than the rule ... [and] resort to its prophylaxis is deemed justified only in extraordinary circumstances." *Trapp v. Spencer*, 479 F.3d 53, 59 (1st Cir. 2007) (internal citation omitted). The respondent bears the burden of asserting the AEDPA's statute of limitations. *Hill v. Braxton*, 277 F.3d 701, 705-06 (4th Cir. 2002). The petitioner then bears the burden of establishing that his petition is timely or that he is entitled to the benefit of the equitable-tolling doctrine. *Rouse*, 339 F.3d at 246.⁴

⁴ An argument for tolling must be made in the district court or it is waived; it may not be raised for the first time on appeal. *United States v. Monreal*, 301 F.3d 1127, 1131 (9th Cir. 2002).

Whether equitable tolling is warranted is a fact-intensive inquiry best left to the district courts. *See, e.g., Holland*, 560 U.S. at 653-54 (recognizing the prudence of allowing lower courts to first undertake the “equitable, often fact-intensive” inquiry of equitable tolling).

As the Fourth Circuit Court of Appeals explained in *Harris*, 209 F.3d at 330:

[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would lose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that **any resort to equity must be reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result.**

Harris, 209 F.3d at 330 (emphasis added).

The requirement that Petitioner prove that he was prevented from timely filing by extraordinary circumstances that were beyond his control or external to his own conduct does not include the failure of his attorney to advise him of the statute of limitations or misadvice from counsel, as opposed to grossly outrageous and incompetent conduct by counsel discussed in *Holland*. *See Lawrence*, 549 U.S. at 336-37 (“Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel”); *Harris*, 209 F.3d at 330-31 (no equitable tolling when counsel erroneously advised petitioner as to the statute of limitations). *Compare Holland*, 560 U.S. at 651-52 (recognizing that although “‘a garden variety claim of excusable neglect’ ... does not warrant equitable tolling[,] ... serious instances of attorney misconduct” may rise to the level of an extraordinary circumstance necessary to justify equitable tolling).

In his Amended Petition [*ECF #20-1, p. 18-21*], Petitioner asserts that he is entitled to equitable tolling because of the failure of Mr. Shaffer to perfect an appeal from the Order

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denying relief in his 2013 case and the failure of Mr. Fowler to perfect an appeal from the Order granting *Austin* review, despite Petitioner's repeated efforts to have an appeal. He also correctly asserts his inability to perfect the appeal *pro se*, since he was represented by counsel. *See State v. Rivera*, 402 S.C. 225, 239, 741 S.E.2d 694, 701 (2013) (“There is no constitutional right to hybrid representation either at trial or on appeal”) (citation omitted); *Foster v. State*, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (holding that there is no right to hybrid representation at trial); *Miller v. State*, 388 S.C. 347, 347, 697 S.E.2d 527 (2010) (“Since there is no right to ‘hybrid representation’ that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel”); *State v. Devore*, 416 S.C. 115, 120–21, 784 S.E.2d 690, 693 (Ct. App. 2016) (observing there is no right to hybrid representation under either the United States or South Carolina constitution and explaining substantive documents submitted *pro se* by litigants who are represented by counsel should not be accepted by the clerk of court for filing); *State v. Stuckey*, 333 S.C. 56, 58, 508 S.E.2d 564, 564 (1998) (“[Because] there is no right to hybrid representation, substantive documents filed [*pro se*] by a person represented by counsel are not accepted unless submitted by counsel”); *Koon v. Clare*, 338 S.C. 423, 424, 527 S.E.2d 357, 357 (2000) (where petitioner was represented by counsel in the lower court, Supreme Court of South Carolina declined to take action on *pro se* petition submitted in the Court's original jurisdiction based upon cases barring hybrid representation on appeal: The rationale behind those decisions applies equally to situations where a litigant who is represented by counsel before the Court of Appeals seeks review of action taken by the Court of Appeals pending a final decision on the matter by that court. Should similar petitions be filed in the

future, the Clerk of this Court is instructed to inform the petitioner that no action will be taken on the petition”).

In spite of his complaints regarding his PCR attorneys’ failure to perfect the two appeals, Respondent notes that Petitioner waited three hundred thirty-three (333) days after the conclusion of the 2013 proceedings before he filed the 2017 Application on which he was granted *Austin* review. Also, he did not file his habeas Petition until May 18, 2019 (pursuant to *Houston v. Lack*), and he has not sought further relief in state court following the June 18, 2018 Order granting *Austin* review. Thus, he waited another three hundred thirty-four (334) days to file the Petition. This is true even though the attachments to his Amended Petition reflect that the South Carolina Commission on Indigent Defense’s Division of Appellate Defense responded to his inquiry on September 25, 2018, and informed him that there was no record of an appeal having been filed. *See [ECF #20-1, p. 23]*.

These two periods, for which he was responsible, are beyond the one year period in § 2244(d). As a result, he slept on his rights and is not entitled to equitable tolling, under these facts.

B. ALTERNATIVELY, THE COURT SHOULD STAY AND ABEY THIS CASE BECAUSE PETITIONER HAS A POTENTIAL STATE COURT REMEDY AVAILABLE OF APPELLATE REVIEW OF THE DENIAL OF PCR RELIEF PURSUANT TO AUSTIN V. STATE.

Should the Court reject Respondent’s argument that the Petition is barred by the statute of limitations, Petitioner’s case involves a relatively unusual situation. He still has a state court remedy available to pursue his unexhausted claims of ineffective assistance of trial counsel, to the extent that the same claims were presented in the 2013 action and encompassed within the issues addressed in Judge Brown’s Order of Dismissal: *i.e.*, appellate review of the PCR court’s

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adverse ruling pursuant to *Austin*, which is based upon the ineffective assistance of his PCR counsel in failing to perfect an appeal of the Order of Dismissal. Also, if successful in state court, he could perhaps receive a new trial. Therefore, Respondent alternatively submits that the Court should stay and abey the case.

“[A] state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. §2254(b)(1)(A). The exhaustion requirement is designed to avoid the ‘unseemly’ result of a federal court ‘upset[ting] a state court conviction without’ first according the state courts an ‘opportunity to ... correct a constitutional violation.’” *Davila v. Davis*, 137 S.Ct. 2058, 2064 (2017) (citing *Rose v. Lundy*, 455 U. S. 509, 518 (1982) (internal quotation marks omitted by Court)). *See also O’Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 1731 (1999).

South Carolina provides two basic remedies after conviction -- direct appeal and post-conviction relief (PCR). *See e.g.*, S.C. Code Ann. § 14-3-330 (providing for appellate jurisdiction for correction of errors of law); S.C. Code Ann. § 17-27-20 (setting out cognizable claims in PCR and providing, for collateral actions, that PCR “comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them”); Rule 201(a), SCACR (recognizing right to appeal from final judgment); *see also Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010) (“To exhaust a claim in state court, a person in custody has two primary means of attacking his conviction: filing a direct appeal and/or filing an application for relief under the South Carolina Post Conviction Procedure Act.”). Petitioner has neither of these remedies available to him.

Petitioner timely pursued his direct appeal remedies from his conviction and sentence and sentence. In the course of exhausting his direct appeal remedy, he exhausted his claim in Ground One on appeal. As a result, he has no direct appeal remedies available. *See State v. Lawrence*, 266 S.C. 423, 427, 223 S.E.2d 856, 858 (1976) (“[W]e have no jurisdiction over ... an appeal in the absence of notice of appeal having been given and timely served”); *White v. State*, 263 S.C. 110, 119, 208 S.E.2d 35, 39 (1974) (“[I]t is well settled that in the absence of a notice of appeal having been given and timely served this Court has no jurisdiction over such an appeal”).

Petitioner timely filed his one PCR action as a matter of right, but he failed to exhaust this remedy because he has never presented his claim to the South Carolina Supreme Court on certiorari. *See Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) (“An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal”); *Gibson v. State*, 329 S.C. 37,42, 495 S.E.2d 426, 428 (1998) (exhaustion of state PCR remedies requires “filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review.”); *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (“... [W]e hold that *Martinez* does not afford Petitioner a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel”). *But see Terry v. Byars*, 2012 WL 6102938, *6 (D.S.C. 2012) (“The State of South Carolina allows a second or subsequent application in limited circumstances. [A]lthough successive PCR cases are disfavored by courts of the State of South Carolina, they are not absolutely precluded”); *Williams v. Ozmint*, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (“Although successive PCR applications are disfavored, they are not prohibited”).

Here, he has a potential state court remedy for his claims raised in PCR that: counsel was ineffective for failing to “investigate numerous aspects of the State’s case[;] Counsel failed to put

forth a proper defense including but not limited to one of alibi[;] [and] Counsel failed to inquire about the [defendant's] state of mind.” To the extent his Ground Two is encompassed within his testimony at the PCR hearing, he has a state court remedy.⁵

In *Austin*, the South Carolina Supreme Court reversed the summary dismissal of a second PCR application and remanded for an evidentiary hearing, where the petitioner alleged in his second application that his first PCR counsel was ineffective for failing to seek appellate review. The Court found that the petitioner’s “allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance [of PCR counsel].” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Therefore, the Court remanded the case “for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” *Id.*

Accordingly, “[u]nder *Austin*, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an

⁵ His Grounds Three and Four were not pursued in PCR and cannot be exhausted. Further, Ground Three fails to state a claim that is cognizable in federal habeas corpus. See *Stone v. Powell*, 428 U.S. 465, 494 (1976) (“where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial”) (footnote omitted); *Williams v. Taylor*, 529 U.S. 362, 375 (2000) (referring to the limitation as “well settled”). See also *Simpson v. Stevenson*, 2013 WL 3229685, * 1 (D.C.S.C. 2013) (affirming continued applicability of Stone Doctrine after AEDPA); *Sanna v. Dipaolo*, 265 F.3d 1, 8 (1st Cir. 2001) (finding *Stone* survives post-AEDPA); *Hampton v. Wyant*, 296 F.3d 560, 563 (7th Cir. 2002) (“...the Antiterrorism and Effective Death Penalty Act does not affect *Stone*”); *Herrera v. Lemaster*, 225 F.3d 1176, 1178 (10th Cir. 2000) (rejecting petitioner’s claim “that *Stone v. Powell* is no longer applicable after AEDPA,” finding, “We are not persuaded ... that by enacting AEDPA Congress intended to expand in any way a habeas petitioner’s right to overturn a state court decision”); *Loza v. Mitchell*, 705 F.Supp.2d 773, 860 (S.D. Ohio 2010) (applying *Stone v. Powell* over petitioner’s objection that it was no longer applicable); *Bronson v. Kelchner*, 2008 WL 5397759, * 10 n. 6 (W.D. Pa. 2008) (“The rule of *Stone v. Powell* remains good law even after the enactment of AEDPA.”); *Jacobs v. Cockrell*, 2002 WL 31688875, * 11 (5th Cir. 2002) (“... *Stone v. Powell* is still good law” in post-AEDPA case).

opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal.” *Odom v. State*, 337 S.C. 256, 260, 263, 523 S.E.2d 753, 755, 756 (1999) (“The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to *Austin v. State*”); *see also Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (“We have held that the PCR statute of limitations found in S.C. Code Ann. § 17-27-45(A) (Supp.2001) does not apply to *Austin* claims”). In *Aice*, which was submitted in conjunction with *Austin*, the Court further explained that “[t]his Court is not empowered to expand its jurisdiction and grant *Austin* additional time to petition for review. Hence, merely as a method of enforcing Rule 50(6), and of enforcing *Austin*’s entitlement to a PCR proceeding, complete with a petition for *certiorari* to this Court, we held that *Austin* could attack his PCR counsel as ineffective.” *Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (emphasis in original).

Respondent submits that this Court does not need to address the questions of whether the Petition is barred by the statute of limitations or whether he is entitled to equitable tolling. Rather, the Court could stay and abey the case because he has a state court remedy available that may allow him to perfect a claim upon which he may or may not ultimately prevail.

In *Rose v. Lundy*, 455 U.S. 509, 510 (1982), the Supreme Court held that “a district court must dismiss such ‘mixed petitions,’” and that the petitioner is left “with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.” The Court explained that:

A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. *See Braden v. 30th Judicial Circuit Court of Kentucky, supra*, 410 U.S. at 490, 93 S.Ct. at 1127. Equally as important, federal claims that have been fully exhausted in state courts

will more often be accompanied by a complete factual record to aid the federal courts in their review. Cf. 28 U.S.C. § 2254(d) (requiring a federal court reviewing a habeas petition to presume as correct factual findings made by a state court).

Rose v. Lundy, 455 U.S. at 518-19, 102 S.Ct. at 1203-04.

The Court subsequently altered this hard and fast rule in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528 (2005). In *Rhines*, the Court began by observing that “[w]hen we decided *Lundy*, there was no statute of limitations on the filing of federal habeas corpus petitions. As a result, petitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitions with relative ease.” *Rhines*, 544 U.S. at 274. However, the Court found that the 1996 enactment of AEDPA, complete with both a total exhaustion requirement and a one-year statute of limitations, “dramatically altered the landscape for federal habeas corpus petitions.” *Id.*

The Court explained that:

As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with “mixed” petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. For example, if the District Court in this case had dismissed the petition because it contained unexhausted claims, AEDPA's 1-year statute of limitations would have barred *Rhines* from returning to federal court after exhausting the previously unexhausted claims in state court. Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refiling his petition in federal court before the limitations period runs are slim. The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

Rhines, 544 U.S. at 275.

The Court “recognize[d] the gravity of this problem and the difficulty it has posed for petitioners and federal district courts alike.” *Id.* at 275. To solve the problem, it altered the rule that it had established in *Lundy*. Because too frequent use of stay and abeyance has the potential to undermine AEDPA’s purposes of “of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings” and “of streamlining federal habeas proceedings” since it would decreas[e] a petitioner’s incentive to exhaust all his claims in state court prior to filing his federal petition,” the Court emphasized that “stay and abeyance should be available only in limited circumstances.” *Rhines*, *Id.* 269, 277.

The Court then that to obtain a stay, a petitioner must show (1) good cause for his failure to exhaust his state court claim[s], (2) that his unexhausted claim[s] is [are] potentially meritorious, and (3) that there is no indication that he “engaged in intentionally dilatory litigation tactics.” *Rhines*, 544 U.S. at 277-78.

Even where stay and abeyance is appropriate, the district court’s discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Though, generally, a prisoner’s “principal interest ... is in obtaining speedy federal relief on his claims,” *Lundy*, *supra*, at 520, 102 S.Ct. 1198 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA’s goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner’s trip to state court and back. See, e.g., *Zarvela*, 254 F.3d, at 381 (“[District courts] should explicitly condition the stay on the prisoner’s pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed”).

Rhines, 544 U.S. at 277-78.

The procedural posture of this case is very different from most cases where habeas petitioners seek a stay under *Rhines*, for the previously explained reasons. However, Respondent

concedes that he can satisfy the “good cause” and “potentially meritorious” requirements of *Rhines*, since the state courts will provide an avenue for him to obtain appellate review of the Order of Dismissal. Therefore, the Court may find that a stay under *Rhines* is appropriate.

The undersigned counsel for Respondent has discussed the unusual posture of this case and the necessity of *Austin* review with both Senior Assistant Deputy Attorney General Megan Harrigan Jameson, who is the supervisor of the PCR unit of the South Carolina Attorney General’s Office, and Assistant Attorney General Johnny E. James Jr., who will be handling the response to any future PCR Application that may be filed by Petitioner. Also, Mr. James has agreed to request copies of the relevant PCR transcripts, so that the tapes of those transcripts are not destroyed in accordance with Rule 607(i), SCACR, before an appeal can be had.

Finally, Respondent notes that the Honorable David C. Norton, United States District Judge, entered a stay in a habeas case involving an inmate with analogous problem of securing *Austin* review of the denial of PCR relief. See *Jason Sinatra Edwards v. Warden Dennis Bush*, C/A No. 6:17-1570-DCN-KFM, Order [*ECF #30*] filed May 14, 2018. See also *Jason Sinatra Edwards v. Warden Dennis Bush*, C/A No. 6:17-1570-DCN-KFM, Report of Magistrate Judge [*ECF #27*] filed April 16, 2018.

IV.

Each and every allegation contained within the Petition not previously admitted, qualified or explained is hereby denied.

CONCLUSION

WHEREFORE, having made Return, Respondent requests that the Court either (1) dismiss the case because it is barred by the limitations period in § 2244(d)(1) or because it fails

to state a claim that is cognizable in federal habeas corpus; or, in the alternative, (2) stay and
abey the case under *Rhines*.

Respectfully submitted,

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Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
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I.D. No. 7979

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ID No. 3710

ATTORNEYS FOR RESPONDENT

By: s/William Edgar Salter, III
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Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

July 19, 2019.

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United States District Court
District of South Carolina

Henry Jermaine Dukes,
Petitioner,

C/A NO: 4:19-1211-TMC-TER

v

Reply to Respondent's Motion for
Summary Judgement

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2019 AUG - 1 AM 10:44

Warden Lee Correctional,
Respondent,

The Petitioner hereby replies to Respondent's Motion
For Summary Judgement

The Petitioner Submits that the Respondent's argument is
without merit. The Court Ordered the Petitioner to file a factual
explanation on why the Petition should not be dismissed based on
the one year Statute of limitation period established by 28 USC 2244(d)

The Petitioner responded to that order on May 31, 2019, Where
the Petitioner showed the Court that both Counsel who were
appointed from the Attorney General's Office; The Same office
who is representing the Respondent in this matter, failed to file
a notice of intent to appeal. In fact, this is the first time that
the Petitioner saw the Order of Dismissal of the PCR and the Order
granting relief for an Austin Review. The PCR Counsel, Tristan
Shaffer never alerted the Petitioner of the Dismissal of the
PCR until 343 days after the dismissal, in which he had to
check the Public index to find out. He advised the Petitioner
to file another PCR pursuant to Austin v State 305 S.C. 453, 454

(1)

409 S.E. 2d 395, 396 (1991), to get a belated appeal. An evidentiary was held before the Honorable Larry Hyman where he granted a belated appeal to the Petitioner. The Petitioner was represented by Steve Fowler, Esquire, who was appointed by the Court ~~who~~ ^{through} the Attorney General's office who represents the Respondent. Mr. Fowler never filed a notice of intent to appeal therefore leaving the Petitioner without an appeal.

Once again, there is no hybrid representation in South Carolina. It is up to Counsel to file the Proper motions to the Court any Prose Pleadings will be ignored by the Clerk of Court. See State v Stuckey 333 S.C. 56, 508 S.E. 2d 564 (1998) Therefore this was out of the Petitioner's Control.

AEDPA USC § 2244(d)(1)(B) States equitable tolling must be reserved those rare instances where due to circumstances external to the Party's own conduct it would be unconscionable to enforce the limitation period against the party and gross injustice would result, Spencer v Sutton 239 F3d 626, 630 (4th Cir 2001).

The Respondent is basically trying to confuse the Court by mentioning a jury charge and directed verdict that has nothing to do with the case at hand. The Court should reject The Respondent's argument on the timeliness of the Petition because of the delay. It was beyond the Petitioner's Control.

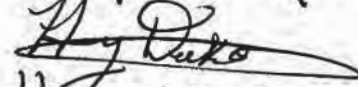
The Petitioner Concedes that he has a State Court Remedy available in which he can exhaust his ineffective assistance claim. The Petitioner never got an appeal to the order denying PCR. The Petitioner asks this Court to intervene and make sure that the Petitioner gets appellate review on

The ⁶⁶⁶PCR or the Court to take the case and hear the claims because it will be the same situation where court appointed attorneys would not file a notice of intent to appeal. Once again these lawyers are appointed through the Attorney General's office, the same office who represents the Respondent

Dated July 29, 2019

Bishopville, South Carolina

Respectfully Submitted



Henry J. Dukes

Petitioner Prose

United States District Court
District of South Carolina

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Henry Jermaine Dukes,
Petitioner,

v

Warden, Lee Correctional,
Respondent,C/A NO. 4:19-CV-1211-TMC-TER
Certificate of ServiceRECEIVED
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I, Henry Jermaine Dukes do hereby certify that I have this date served the Petitioner's Reply to Respondent's Motion for Summary Judgment in the foregoing action on the Respondent by giving the Correctional officer at Lee Correctional FIA unit to deposit in the prison mailing system, postage prepaid and addressed as follows:

Office of the Attorney General
c/o William Edgar Salter, III
PO Box 11549
Columbia, South Carolina 29211

This 29th day of July 2019


Henry J. Dukes

From: SCDEfilingstat@scd.uscourts.gov
To: scd_ecf_nef@scd.uscourts.gov
Subject: Activity in Case 4:19-cv-01211-TMC-TER Dukes v. Lee Correctional Institution Order
Date: Wednesday, October 9, 2019 10:36:25 AM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 10/9/2019 at 10:35 AM EDT and filed on 10/9/2019

Case Name: Dukes v. Lee Correctional Institution

Case Number: 4:19-cv-01211-TMC-TER

Filer:

Document Number: 39(No document attached)

Docket Text:

TEXT ORDER: In the petition, Petitioner requested that the case be remanded back to the lower court so that he can properly exhaust his remedies. In his response to summary judgment, Petitioner concedes that he still has a state court remedy available in which he can exhaust his ineffective assistance of counsel claims because he never received an appeal to the order denying his PCR application. The court will construe his response to summary judgment as a motion to stay the case while he returns to state court to exhaust his state court remedies. If Petitioner is not requesting that his case be stayed to exhaust his state court remedies, Petitioner shall so inform the court within ten days from the date of this Order. Otherwise, this case will be stayed and held in abeyance while the Petitioner pursues his state court remedy, and the motion for summary judgment shall be deemed moot with right to re-file. The Respondent is directed to file a status report with the Court every six (6) months, commencing on the date of this Order, advising the Court of the status of the pending state case. Counsel for Respondent shall file a motion to lift the stay within thirty (30) days after the final decision of the state court. See *Rhines v. Weber*, 544 U.S. 269(2005). Once the stay is lifted, Respondent shall have thirty days to re-file the motion for summary judgment, and the Petitioner shall have thirty-one days to file a response. As the parties have conceded, an Order was entered by Judge Hyman on June 18, 2018, granting review pursuant to *Austin v. State*, 409 S.E.2d 395 (S.C. 1991) of Judge Brown's order denying

relief in 2013-CP-26-04699. Respondent asserts that the "Court should stay and abey this case because Petitioner has a potential State court remedy available of appellate review of the denial of PCR relief pursuant to Austin v. State"... "He still has a state court remedy available to pursue his unexhausted claims of ineffective assistance of trial counsel, to the extent that the same claims were presented in the 2013 action and encompassed within the issues addressed in Judge Brown's Order of Dismissal: i.e., appellate review of the PCR court's adverse ruling pursuant to Austin, which is based upon the ineffective assistance of his PCR counsel in failing to perfect an appeal of the Order of Dismissal. Also, if successful in state court, he could perhaps receive a new trial." (ECF No.[33] at 19-20 of 27). If Petitioner does not return to state court with filings to exhaust his state court remedies pursuant to Austin v. State within sixty days of the date of this Order, Respondent is to file a motion with the court to lift the stay. Ten day response is due October 22, 2019. Signed by Magistrate Judge Thomas E Rogers, III on 10/09/2019. (dsto,)

4:19-cv-01211-TMC-TER Notice has been electronically mailed to:

William Edgar Salter, III ESalter@scag.gov

Melody Jane Brown mbrown@scag.gov, abennett@scag.gov

4:19-cv-01211-TMC-TER Notice will not be electronically mailed to:

Henry J. Dukes
#347324
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Horry20 19 CP26 6842Henry Jermaine Dukes 347234
Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEFFILED
HORRY COUNTY
2019 OCT 28 P 12:55
RECEIVED ELVIS
CLERK COURT
HORRY COUNTY, SCINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Horry County General Session
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008 GS 26 2911

- (b) _____
 (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) August 2, 2011
 (b) _____
 (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
 (b) after a plea of not guilty ☒ _____
 (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 i. South Carolina Court of Appeals
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Affirmed
 ii. _____
 iii. _____

(c) the date of each such result:

- i. June 26, 2013
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. 745 SE2d 137 (2013)
 ii. _____
 iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Brady Violation and noncompliance with Court order
- (b) Belated appeal
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial Judge ordered the state to turn over NCIC of its witnesses
Carolyn Heester had multiple ~~no~~ check Fraud convictions which
was not disclosed to the Defense which prejudiced the Defendant
- (b) Never got to properly appeal PCR
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. PCR 2013 ~~2013~~ CP 24 - 4699
- ii. Federal Habeas Corpus
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Common Pleas Horry County
- ii. United States District Court South Carolina
- iii. _____

iv.

(c) the disposition thereof:

i.

Relief Denied

ii.

Petitioner to return to state court and exhaust

iii.

state court remedy (order attached)

iv.

(d) the date of each such disposition:

i.

3-7-16

ii.

10-12-19

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Heester's Convictions was just discovered
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? J. Eric Fox Yes
 (b) your trial, if any? J. Eric Fox Yes
 (c) your sentencing? J. Eric Fox Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. J. Eric Fox, 201 Laurel Street Conway, SC
Arraignment, Trial, and Sentencing
 ii. Katherine Hudgins 336 Lady Street, Columbia, SC
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. J. Eric Fox, Arraignment, Trial and Sentencing
 ii. Katherine Hudgins Direct Appeal
 iii. _____

19. State clearly the relief you seek in filing this application:

Remand for New Trial
Belated PCR Appeal

20. Are you now under sentence from any other court that you have not challenged?

no

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

2019 CP26

6842

I, Henry J. Dukes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Hy Dukes

SWORN to and subscribed before me this

day of

Oct, 2019.

James M. Jike (L.S.)
 Notary Public

My Commission Expires:

09/04/2021

FILED
 HORRY COUNTY
 2019 OCT 24 P. 12:55
 RENEE N. ELYS
 CLERK OF COURT
 HORRY COUNTY, SC

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

20 19 CP26 6842

I, Henry J. Dukes, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Henry J. Dukes
Applicant

SWORN or affirmed to and subscribed before me this

21st day of Oct 2019.

James McTeke
Notary Public

My Commission Expires: 09/04/2029

FILED
HORRY COUNTY
2019 OCT 24 P 12:55
RENEE H. ELYS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Henry J. Dukes, SCDC No. 347234)

Applicant,)

v.)

State of South Carolina)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL
CIRCUIT

Case No. 2019-CP-26-6842

RETURN AND PARTIAL
MOTION TO DISMISS
CONCESSION TO REQUEST
FOR AUSTIN RELIEF; MOTION
TO FILE RETURN OUT OF TIME

FILED
HORRY COUNTY
CLERK OF COURT
RENEE H. HUDGINS
2019 OCT 14 PM 4:15
US

NOW COMES Respondent, the State of South Carolina, in response to Applicant Henry J. Dukes's October 24, 2019 Application for post-conviction relief. Respondent would respectfully show this Court:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2017-CP-26-01473). J. Eric Fox, Esq., represented Applicant. Jimmy A. Richardson, II., Esq., and Robert Paul Taylor, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to a jury trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted on August 2, 2011. Judge John sentenced Applicant to imprisonment for a term of 47 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions on June 26, 2013. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 25, 2014. The Remittitur was issued on August 2, 2014.

First PCR Application: 2011-CP-26-7994

Applicant filed his first application for post-conviction relief on September 23, 2011 (2011-CP-26-7994) while his direct appeal was still pending. He alleged the following grounds for relief:

1. Identification by witness should have never made it to jury
2. Arrest warrant in case was invalid
3. Lead Detective wasn't at trial

Respondent filed a return and motion to dismiss on November 18, 2011, arguing that the Application should be dismissed without prejudice while the direct appeal was pending in the South Carolina Court of Appeals. Thus, PCR relief was not available to him at that time. *See Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending"); *see also* Rule 71.1(b), SCRPC. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter in an Order filed on November 30, 2011. Petitioner did not appeal from this Order.

Second PCR Application: 2013-CP-26-04699

Applicant filed his second application for post-conviction relief on July 9, 2013 (2013-CP-26-04699), while his direct appeal was still pending. He alleged the following grounds for relief:

1. Ineffective assistance of counsel
 - a. Counsel failed to investigate numerous aspects of the States case
 - b. Counsel failed to put forth a proper defense included but not limited to one of alibi.
 - c. Counsel failed to inquire about the defendants state of mind.

Respondent made its Return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 11, 2016, before the Honorable D. Craig Brown. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own

behalf, and J. Eric Fox., Esq., also testified. By written order dated March 7, 2016, and filed March 10, 2016, Judge Brown denied and dismissed the application. Applicant did not appeal the order denying relief.

Third PCR Application: 2014-CP-26-05308

During the pendency of the above application, Applicant filed a third application for post-conviction relief on August 8, 2014. Respondent made its Return and Motion to Dismiss on or about August 14, 2014, requesting the application be summarily dismissed because the second application was still pending. The Honorable Larry B. Hyman, Jr., granted Respondent's motion and dismissed the matter by order dated August 27, 2014, and filed September 3, 2014.

Fourth PCR Application: 2017-CP-26-01473

Applicant filed his fourth application for post-conviction relief on March 7, 2017 (2017-CP-26-01473). He alleged the following grounds for relief:

1. Prosecutorial Misconduct
2. Court lacked jurisdiction
3. Ineffective assistance of counsel, in that:
 - a. Trial Counsel failed to request a mistrial when testimony was offered to incite the passion of the jury;
 - b. Trial Counsel failed to have Solicitor recused after he made himself a witness
 - c. Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)
 - d. Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one.
 - e. Trial Counsel never explained guidelines to sentencing in mandatory

In Applicant's request for relief, Applicant alleged that his appointed counsel never appealed the dismissal of his previous post-conviction relief application. Respondent made its Return and Partial Motion to Dismiss on June 29, 2017. Respondent requested an evidentiary hearing on Applicant's claims that he was denied his right to appeal the dismissal of his previous

PCR claims, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent moved to dismiss all other allegations contained in the Application.

Applicant was present at the hearing and was represented by Steven W. Fowler, Esq. Respondent was represented by Assistant Attorney General Johnny E. James, Jr. No testimony was taken at the hearing, but Respondent conceded Applicant was entitled to *Austin* relief based upon communications with Applicant's prior PCR counsel, Tristan M. Shaffer, Esq., that indicated that Applicant had not been informed of the entry of the order denying relief in the prior PCR action in a timely manner, and therefore had not been afforded an opportunity to either request or properly waive his right to an appeal. The Court granted Applicant's request for *Austin* relief while also finding that his remaining allegations were untimely and successive, and accordingly denied relief and dismissed those claims with prejudice. No notice of appeal was filed pursuant to the Court's grant of *Austin* relief.

Federal Habeas Corpus Action: 4:19-cv-1211-TMC-TER

Applicant filed a *pro se* habeas corpus petition in federal court on April 26, 2019. In his petition, Applicant alleged several issues with the proceedings giving rise to his conviction, most notably that the "post conviction relief was abandoned by counsel and appeal never filed." Applicant elaborated that he "was allowed a belated appeal" but that his "attorney refuses to file appeal."

On July 19, 2019, Respondent moved to summarily dismiss Applicant's claims, arguing that they were barred by the statute of limitations. Alternatively, Respondent requested that the federal court stay its proceedings and hold the case in abeyance to allow Applicant to exhaust his state court remedy of pursuing appellate review of the denial of his PCR relief pursuant to the *Austin* relief he had been previously granted. Applicant made his response to the motion for

summary judgment on July 29, 2019, acknowledging that he had a state remedy available and reasserting his position that his appointed PCR attorney did not file a notice of appeal on his behalf. On October 9, 2019, the federal district court denied Respondent's motion to dismiss, but granted its motion to stay and hold the case in abeyance while Applicant exhausts his state remedies available under the previous grant of *Austin* relief, based upon his. The current application for post-conviction relief followed.

II. FACTUAL HISTORY

The South Carolina Court of Appeals found the following facts:

A jury found Henry Dukes guilty of murder for the shooting death of Andrico Gowans. . . . On the morning of November 2, 2007, Cornelius Ford witnessed Gowans' murder. That afternoon, Ford met with Detective Sean Addison at the Conway Police Department and identified Dukes as the shooter.

Dukes, 404 S.C. at 555, 745 S.E.2d at 138.

III. CURRENT APPLICATION

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons (verbatim):

1. Brady violation and noncompliance with court order
 - a. Trial judge ordered the state to turn over NCIC of its witnesses Carolyn Heester had multiple check fraud convictions which was not disclosed to the Defense which prejudiced the Defendant.
2. Belated appeal
 - a. Never got to properly appeal PCR

Applicant requests the following relief (verbatim):

1. Remand for New Trial
2. Belated PCR Appeal

Attached herewith and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, transcripts from Applicant's trial and prior PCR hearings, records from the prior

PCR proceedings, records from the ongoing federal habeas corpus proceedings, and the current application for post-conviction relief. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

IV. RESPONSE TO REQUEST FOR BELATED APPEAL

Applicant asserts that he was never able to properly appeal the judgment of his 2013 PCR action, pursuant to the *Austin* relief he was granted by order dated June 18, 2018. Respondent consented to the grant of that relief, and is unable to identify any evidence that Applicant's prior PCR counsel ever filed a notice of appeal to give the ruling any effect. Furthermore, Respondent can identify no evidence in the record suggesting that Applicant made a knowing and intelligent waiver of his right to appeal the denial of his prior application for post-conviction relief, or the belated appeal previously granted under *Austin*.

Therefore, Respondent concedes that Applicant is entitled to a belated appeal of the 2013 PCR action (2013-CP-26-04699), pursuant to the *Austin* relief granted in his 2017 PCR action (2017-CP-26-01473). Respondent asks that this Court grant Applicant's request to pursue a belated appeal, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), and allow Applicant thirty (30) days from the receipt of written notice of entry of judgment to file and serve a notice of appeal and secure the appropriate appellate review. See Rule 203, SCACR.

V. PARTIAL MOTION TO DISMISS

Respondent asserts that Applicant's current allegation of a *Brady* violation should be summarily dismissed because it is successive to Applicant's previous PCR applications and is untimely.

Successiveness

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Sec. 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore he has failed to meet the burden imposed upon him, and the application should be dismissed as successive to Applicant's previous PCR application.

Statute of Limitations

Applicant's current application should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant was convicted on August 2, 2011, and the remittitur from his direct appeal was issued on August 2, 2014. The current application was not filed until October 24, 2019—well after the one-year statutory filing period expired. Therefore, the application should be summarily dismissed as barred by the statute of limitations.

VI. MOTION TO FILE OUT OF TIME

Respondent respectfully requests that this Court to accept this return for filing out of time, in light of no evidence or allegation of prejudice to Applicant resulting from Respondent's delay in filing this return. *See* S.C. Code Ann. §17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *see also*

Rule 55(e), SCRCF ("No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof unless the claimant establishes his claim to relief by evidence satisfactory to the Court"); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (Holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

VII. OTHER ALLEGATIONS DENIED

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explained in this Return is hereby denied by the Respondent.

VIII. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court grant Applicant's request to pursue a belated appeal, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), and allow Applicant thirty (30) days from the receipt of written notice of entry of judgment to file and serve a notice of appeal and secure the appropriate appellate review. See Rule 203, SCACR. Respondent also moves for summary dismissal of Applicant's allegations of *Brady* violations pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

[Signature page follows]

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

WILLIAM H. RAY
Assistant Attorney General

By: /s/ William H. Ray
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

October 13, 2020

State of South Carolina
County of Horry
Henry Jermaine Dukes
Applicant,

- V -

State of South Carolina,
Respondent,

687 Files
Fifteenth Judicial Circuit

2019-LP-26-6842

Response to Respondent's
Return

2020 DEC 18 PM 4:43
RECEIVED
CLERK OF COURT
HORRY COUNTY, SC

FILED

To the Court of Common Pleas of The Fifteenth Judicial
Circuit.

The Applicant respectfully wishes to respond to Respondent's
return.

The Applicant asks that a hearing be held in order for the
Applicant can meet his burden of showing that he is
entitled to relief on the Brady issue.

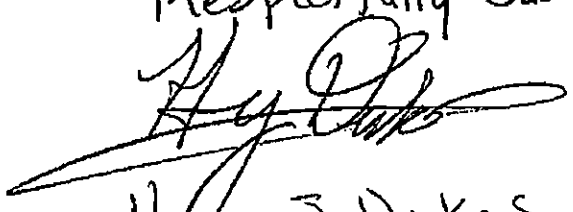
On July 20, 2011, pretrial motions ~~was~~ was heard by
The Honorable Steven H. John. The Applicant was present and
was represented by Jonathan Eric Fox and the state was
represented by Robert Paul Taylor.

Successive Applications are disfavored and the applicant has the burden to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. *Arnold v State* 309 S.E.2d 834 (1992) Cert denied, 507 U.S. 927, 115 S.Ct. 1302, 122 L.Ed.2d 691 (1993), *Nice v State* 305 S.E.2d 442, 409 S.E.2d 392 (1991).

This evidence was just recently discovered by the Applicant. The State violated the Court's order and all of the Counsel for the Applicant believed the State acted in good faith in giving the Defense the Brady material since the Court ordered the State to do so.

The Applicant asks the Court to hold a hearing on the Brady issue.

November 12, 2020
Bishopville, SC

Respectfully Submitted

Henry J. Dukes
Applicant Prose

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Henry J. Dukes, SCDC No. 347234

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-6842

**ORDER GRANTING RELIEF
PURSUANT TO AUSTIN
V. STATE AND CONDITIONALLY
DISMISSING APPLICANT'S PCR
APPLICATION**

FILED
HORRY COUNTY
2021 APR 19 12:11
RENEE L. EAVIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Henry J. Dukes, on October 24, 2019. Respondent's made its return and partial motion to dismiss and conceded to Applicant's request for relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2017-CP-26-01473). J. Eric Fox, Esq., represented Applicant. Jimmy A. Richardson, II., Esq., and Robert Paul Taylor, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to a jury trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted on August 2, 2011. Judge John sentenced Applicant to imprisonment for a term of 47 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions on June 26, 2013. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). Applicant petitioned the

Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 25, 2014. The Remittitur was issued on August 2, 2014.

First PCR Application: 2011-CP-26-7994

Applicant filed his first application for post-conviction relief on September 23, 2011 (2011-CP-26-7994) while his direct appeal was still pending. He alleged the following grounds for relief:

1. Identification by witness should have never made it to jury
2. Arrest warrant in case was invalid
3. Lead Detective wasn't at trial

Respondent filed a return and motion to dismiss on November 18, 2011, arguing that the Application should be dismissed without prejudice while the direct appeal was pending in the South Carolina Court of Appeals. Thus, PCR relief was not available to him at that time. *See Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending"); *see also* Rule 71.1(b), SCRCP. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter in an Order filed on November 30, 2011. Petitioner did not appeal from this Order.

Second PCR Application: 2013-CP-26-04699

Applicant filed his second application for post-conviction relief on July 9, 2013 (2013-CP-26-04699), while his direct appeal was still pending. He alleged the following grounds for relief:

1. Ineffective assistance of counsel
 - a. Counsel failed to investigate numerous aspects of the States case
 - b. Counsel failed to put forth a proper defense included but not limited to one of alibi.
 - c. Counsel failed to inquire about the defendants state of mind.

Respondent made its Return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 11, 2016, before the Honorable D. Craig Brown. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq., of the South

Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and J. Eric Fox., Esq., also testified. By written order dated March 7, 2016, and filed March 10, 2016, Judge Brown denied and dismissed the application. Applicant did not appeal the order denying relief.

Third PCR Application: 2014-CP-26-05308

During the pendency of the above application, Applicant filed a third application for post-conviction relief on August 8, 2014. Respondent made its Return and Motion to Dismiss on or about August 14, 2014, requesting the application be summarily dismissed because the second application was still pending. The Honorable Larry B. Hyman, Jr., granted Respondent's motion and dismissed the matter by order dated August 27, 2014, and filed September 3, 2014.

Fourth PCR Application: 2017-CP-26-01473

Applicant filed his fourth application for post-conviction relief on March 7, 2017 (2017-CP-26-01473). He alleged the following grounds for relief:

1. Prosecutorial Misconduct
2. Court lacked jurisdiction
3. Ineffective assistance of counsel, in that:
 - a. Trial Counsel failed to request a mistrial when testimony was offered to incite the passion of the jury.
 - b. Trial Counsel failed to have Solicitor recused after he made himself a witness
 - c. Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)
 - d. Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one.
 - e. Trial Counsel never explained guidelines to sentencing in mandatory

In Applicant's request for relief, Applicant alleged that his appointed counsel never appealed the dismissal of his previous post-conviction relief application. Respondent made its Return and Partial Motion to Dismiss on June 29, 2017. Respondent requested an evidentiary

hearing on Applicant's claims that he was denied his right to appeal the dismissal of his previous PCR claims, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent moved to dismiss all other allegations contained in the Application.

Applicant was present at the hearing and was represented by Steven W. Fowler, Esq. Respondent was represented by Assistant Attorney General Johnny E. James, Jr. No testimony was taken at the hearing, but Respondent conceded Applicant was entitled to *Austin* relief based upon communications with Applicant's prior PCR counsel, Tristan M. Shaffer, Esq., that indicated that Applicant had not been informed of the entry of the order denying relief in the prior PCR action in a timely manner, and therefore had not been afforded an opportunity to either request or properly waive his right to an appeal. The Court granted Applicant's request for *Austin* relief while also finding that his remaining allegations were untimely and successive, and accordingly denied relief and dismissed those claims with prejudice. No notice of appeal was filed pursuant to the Court's grant of *Austin* relief.

Federal Habeas Corpus Action: 4:19-cv-1211-TMC-TER

Applicant filed a *pro se* habeas corpus petition in federal court on April 26, 2019. In his petition, Applicant alleged several issues with the proceedings giving rise to his conviction, most notably that the "post conviction relief was abandoned by counsel and appeal never filed." Applicant elaborated that he "was allowed a belated appeal" but that his "attorney refuses to file appeal."

On July 19, 2019, Respondent moved to summarily dismiss Applicant's claims, arguing that they were barred by the statute of limitations. Alternatively, Respondent requested that the federal court stay its proceedings and hold the case in abeyance to allow Applicant to exhaust his state court remedy of pursuing appellate review of the denial of his PCR relief pursuant to the

Austin relief he had been previously granted. Applicant made his response to the motion for summary judgment on July 29, 2019, acknowledging that he had a state remedy available and reasserting his position that his appointed PCR attorney did not file a notice of appeal on his behalf. On October 9, 2019, the federal district court denied Respondent's motion to dismiss, but granted its motion to stay and hold the case in abeyance while Applicant exhausts his state remedies available under the previous grant of *Austin* relief, based upon his. The current application for post-conviction relief followed.

Present Application

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons (verbatim):

1. Brady violation and noncompliance with court order
 - a. Trial judge ordered the state to turn over NCIC of its witnesses Carolyn Heester had multiple check fraud convictions which was not disclosed to the Defense which prejudiced the Defendant.
2. Belated appeal
 - a. Never got to properly appeal PCR

Applicant requests the following relief (verbatim):

1. Remand for New Trial
2. Belated PCR Appeal

II. FACTUAL HISTORY

The South Carolina Court of Appeals found the following facts:

A jury found Henry Dukes guilty of murder for the shooting death of Andrico Gowans. . . . On the morning of November 2, 2007, Cornelius Ford witnessed Gowans' murder. That afternoon, Ford met with Detective Sean Addison at the Conway Police Department and identified Dukes as the shooter.

Dukes, 404 S.C. at 555, 745 S.E.2d at 138.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has considered the arguments presented at the prior hearings, reviewed the records submitted to it, and considered the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. §17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. *Austin* Relief

Applicant alleges that he never received an opportunity to appeal the ruling of a prior PCR court. Respondent has informed the Court that, upon investigation of the record of the prior proceedings and the pending action for habeas relief in federal court, it understands the request for relief to be a demand for relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent has conceded to this request for relief because Applicant was previously granted such relief by a PCR court, and Applicant's counsel failed to file a notice of appeal to effectuate said relief. Accordingly, because Respondent concedes the issue, this Court grants Applicant relief pursuant to *Austin v. State* for appellate review of the order denying relief filed March 10, 2016 (2013-CP-26-04699).

B. Partial Motion to Dismiss

Respondent moved to dismiss all other allegations as untimely and successive. The Court finds the remaining allegations must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-70 to -160. Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. §17-27-45(A).

Applicant was convicted on August 2, 2011, and the remittitur from his direct appeal was issued on August 2, 2014. The current application was not filed until October 24, 2019—well after the one-year statutory filing period expired. Therefore, with the exception of the *Austin* claim, the partial motion to dismiss is **GRANTED** and the application is **DISMISSED** as barred by the statute of limitations.

Furthermore, the Court finds the remaining allegations must be summarily dismissed as successive to Applicant's previous PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). South Carolina Code Ann. §17-27-90 states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. §17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised these allegations of *Brady* violations at an earlier proceeding. In his response to the State's motion to dismiss he states that the evidence is newly discovered, but does not state with specificity when it was discovered. Applicant also does not explain why the evidence in question, the criminal background of a witness, is material to his innocence or guilt. Therefore, he has failed to meet the burden imposed upon him, and with the exception of Applicant's prayer for relief pursuant to *Austin v. State*, the partial motion to dismiss is **GRANTED** and the application is **DISMISSED** as successive to Applicant's previous PCR applications.

IV. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant did not knowingly and intelligently waive his right to appeal from the denial of his prior application for post-conviction relief and, as such, he may petition the Supreme Court of South Carolina pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). As to the remaining allegations, this Court finds Respondent's partial motion to dismiss well founded and the remaining allegations are dismissed as untimely and successive. Therefore, excepting the demand for relief pursuant to *Austin*, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial

of PCR. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss the remaining allegations in the PCR application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – Fifteenth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court and opposing counsel within twenty days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

IT IS THEREFORE ORDERED

1. Applicant's request petition for appellate review of 2013-CP-26-04699 pursuant to *Austin v. State* is granted;
2. Respondent's partial motion to dismiss is granted and all other allegations are denied and dismissed with prejudice

AND IT IS SO ORDERED this 12th day of April, 2021.



Hon. Benjamin H. Culbertson
Chief Administrative Judge
Fifteenth Judicial Circuit

Georgetown, South Carolina

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Joanna Gonzales (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)

COUNTY OF Lee)

AFFIDAVIT OF PERSONAL SERVICE

On this 4th day of May 2021, I served the Conditional Order of Dismissal, on Inmate Henry J. Dukes SCDC Inmate #347234, by delivering personally and leaving a copy of the same at Lee Correctional Institution. Deponent is not a party to this action.

s/ Joanna Gonzales
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 4th day of May, 2021

Donna P. Ponder (L.S.)
Notary Public for South Carolina

My Commission Expires: 9/27/2023

FILED
Horry County
2021 MAY 21 A 9:44
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal** is admitted at the South Carolina Department of Corrections (Lee Correctional Institution), Bishopville, County, SC this 4th day of MAY, 2021.

s/ Henry J. Dukes
Inmate
SCDC Inmate #: 347234

2019-CP-26-6842

State of South Carolina
County of Horry

Henry Jermaine Dukes
Applicant,

- v -

State of South Carolina
Respondent,

In the Court of Common Pleas
For the Fifteenth Judicial Circuit

2019-CP-26-6842

Response to Court Order
of Respondent, Signed by
Judge

FILED
HORRY COUNTY
2021 MAY 21 A 9:44
RENEE M. ELMIS
CLERK OF COURT
HORRY COUNTY, SC

On May 4, 2021 Applicant was Served with the Order Granting Relief pursuant to Austin v State and Conditionally Dismissing Applicant's PCR Application by SCDC Staff.

There was never a 59(e) motion filed by Tristan Shaffer to Amend the order denying relief in the 2013 PCR. Counsel abandoned his responsibilities to the Applicant.

On Page 8 of the Order the Court Said that the Applicant could have brought up the issue of Carolyn Heester's fraudulent check convictions. This was not known to the Applicant until on or about March 28, 2019 by a family member who has access to the Horry County Public Index, which the Applicant doesn't have due to his current confinement

The Applicant was never afforded the opportunity to show the Court he is entitled to relief. This Court has become a mere rubber stamp for the Respondent and never heard the Applicant's argument. The Court also said that the Applicant failed to "meet the burden imposed upon him" the Court never gave the Applicant the opportunity to meet his burden.

On 2/20/07 Ms Heester was convicted of Fraudulent Check under 500 1st offense Case # J475726, On 11/12/07 five days after ~~on~~ Ms Heester writes her statement Ms. Heester was convicted of the same offense Case # J478924 and Case # J478925 same offense first offense. On 3/3/08 Ms Heester was convicted of the same offense Case # J610061, first offense. The very next day on 3/4/08 Ms Heester was convicted of the same offense Case # J610060, Once again first offense.

Had this information been disclosed at trial the Applicant could have raised a Giglio issue. Ms Heester being convicted of the same offense all being first offense in exchange for her testimony. Also to question her credibility.

In the State's closing argument at trial. Ms Heester's testimony was referred to on eight different occasions.

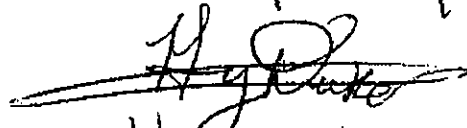
to Vouch for Cornelius Ford's Credibility. Without Heester's Testimony the State would not been able to Secure a Conviction. That's why the State withheld this information from the defense.

Had this information been disclosed more questions would have been asked of Mrs Heester to Show that she could have not been believed. That was a matter for the jury to decide but without this information the Applicant was denied a fair trial. This information was admissable under the rules of evidence because it was a crime of dishonesty and was within 10 years of her testimony. The State withheld this information after being ordered to disclose it to the defense by the trial court. The State failed to do so and the Applicant was denied of a fair trial. This Court must grant relief on the issue at hand

March 7, 2021

Bishopville, South Carolina

Respectfully Submitted



Henry J. Dukes
Applicant Pro Se

On March 08 2019 I
checked the Horry County
Public Index and seen
multiple check fraud
convictions for Carolyn
Heester and I informed
Henry Dukes of this
because I know due to
his incarceration that
he doesn't have access
to such information.

Thank you

Niya Lemon
11615 Echo Dr
Titusville, FL
32780

Niya Lemon

Subscribed and sworn before me, this 05
day of MAY, 2021 a Notary Public
In and for BREVARD County,
State of FLORIDA

Tarun Gupta
(Signature)

NOTARY PUBLIC

My Commission expires 09 JUNE, 2021



TARUN GUPTA

MY COMMISSION # GG 079242

EXPIRES: June 9, 2021

Bonded Thru Budget Notary Services



Horry County Fifteenth Judicial Circuit Public Index



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Switch View

The State of South Carolina VS Carolyn E Heester

Case Number:	J475726	Court Agency:	Conway Magistrate Court	Filed Date:	11/27/2006
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	GUILTY Bench Trial				
Disposition Date:	02/20/2007	Date Received:		Arrest Date:	
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Heester, Carolyn E	29526 CONWAY, SC 29526				Defendant		02/20/2007
NICHOLS, JOANNE					Affiant		

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn E	0670-FRAUDULENT CHECK, UNDER \$500 - 1ST OFFEN	0670-	02/20/2007

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	Fine Suspended			02/20/2007			

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn E	Criminal/Traffic Court	Event		01/30/2007-09:00	02/20/2007-09:00	

Financials

Summary					
Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00
Costs					
Description	Cost Code	Amount	Charge Action	Disbursed Amount	
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00	
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00	
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00	
Payments					
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount	
02/20/2007	250006	C26DELLIOT	PY	\$91.00	



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Switch View

The State of South Carolina VS Carolyn Heester

Case Number:	J478924	Court Agency:	Conway Magistrate Court	Filed Date:	10/16/2007
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	Guilty Bench Trial				
Disposition Date:	11/12/2007	Date Received:		Arrest Date:	10/16/2007
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the  icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Cooper, Lisa	1201 Third Ave-Sol. Office Conway SC 29526-				Affiant		10/16/2007
Heester, Carolyn	Myrtle Beach SC 29577	White	F		Defendant		01/16/2008

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	11/12/2007

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
Or	Fine or Jail Time	20	Days				Consecutive

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn	Bench Warrant / Arrest Warrant Recalled	Filing		01/16/2008-00:00		
Heester, Carolyn	Failure to Comply	Filing		12/04/2007-12:29	11/12/2007-12:29	
Heester, Carolyn	Failure to Comply	Filing		12/04/2007-00:00		
Heester, Carolyn	Criminal/Traffic Court	Event		11/12/2007-09:00	11/12/2007-09:00	

Financials

Summary

Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00
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Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Fine to General Fund	AFNEGF	\$0.00		\$0.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	\$0.00		\$0.00
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00

5/8/2021

Public Index Search

State Assessment		STAASM	\$0.00				\$0.00	
Payments								
Payment Date	Receipt Number	Entered By		Transaction Type Code		Payment Amount		
01/16/2008	253198	C26JGRAHAM		PY		\$91.00		
Bonds								
Bond Information								
Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2007BD2610700537	10/16/2007		Mayers	Personal Recognizance	\$200.00		\$0.00	
Post Information								
None								

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The State of South Carolina VS Carolyn Heester

Case Number:	1478925	Court Agency:	Conway Magistrate Court	Filed Date:	10/16/2007
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	GUILTY BENCH TRIAL				
Disposition Date:	11/12/2007	Date Received:		Arrest Date:	10/16/2007
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Cooper, Lisa	1201 Third Ave-Sol. Office Conway SC 29526-				Affiant		10/16/2007
Heester, Carolyn	Myrtle Beach SC 29577	White	F		Defendant		01/16/2008

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	11/12/2007

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
Or	Fine or Jail Time	10	Days				Consecutive

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn	Failure to Comply	Filing		12/04/2007-12:32	11/12/2007-12:32	
Heester, Carolyn	Failure to Comply	Filing		12/04/2007-00:00		
Heester, Carolyn	Criminal/Traffic Court	Event		11/12/2007-09:00	11/12/2007-09:00	

Financials

Summary

Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00
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Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
State Assessment	STAASM	\$0.00		\$0.00
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	\$0.00		\$0.00
Fine to General Fund	AFNEGF	\$0.00		\$0.00

5/8/2021

Public Index Search

Payments				
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
01/16/2008	253198	C26JGRAHAM	PY	\$89.00
01/16/2008	253198	C26JGRAHAM	PY	\$2.00

Bonds								
Bond Information								
Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2007BD2610700537	10/16/2007		Mayers	Personal Recognizance	\$200.00		\$0.00	

Post Information	
None	

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The State of South Carolina VS Carolyn Heester

Case Number:	J479915	Court Agency:	Conway Magistrate Court	Filed Date:	01/16/2008
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	Gulity Bench Trial				
Disposition Date:	03/03/2008	Date Received:		Arrest Date:	01/16/2008
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Heester, Carolyn	Myrtle Beach SC 29577	White	F		Defendant		03/04/2008
Lee, Esther	Po Box 96 Piedmont SC 29673-				Affiant		01/15/2008

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	03/03/2008

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn	Criminal/Traffic Court	Event		02/05/2008-10:00	03/03/2008-10:00	

Financials

Summary

Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00
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Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
State Assessment	STAASM	\$0.00		\$0.00
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	\$0.00		\$0.00
Fine to General Fund	AFNEGF	\$0.00		\$0.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
03/03/2008	253641	C26JGRAHAM	PY	\$91.00

Bonds

Bond Information

Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2008BD2610700024	01/16/2008		Mayers	Personal Recognizance	\$200.00		\$0.00	

5/8/2021

Public Index Search

Post Information
None

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The State of South Carolina VS Carolyn Heester

Case Number:	J610061	Court Agency:	Conway Magistrate Court	Filed Date:	01/16/2008
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	Gulity Bench Trial				
Disposition Date:	03/03/2008	Date Received:		Arrest Date:	01/16/2008
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the  icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Cooper, Lisa	1201 Third Ave-Sol. Office Conway SC 29526-				Affiant		01/16/2008
Heester, Carolyn	Myrtle Beach SC 29577	White	F		Defendant		04/03/2008

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	03/03/2008

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn	Criminal/Traffic Court	Event		02/05/2008-10:00	03/03/2008-10:00	

Financials

Summary

Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00
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Costs

Description	Cost Code	Amount	Charge Action	Disbursed Amount
Fine to General Fund	AFNEGF	\$0.00		\$0.00
Victim Services Asm 38.0013% / 5.7831%	ASMVIC	\$0.00		\$0.00
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00
State Assessment	STAASH	\$0.00		\$0.00

Payments

Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
03/03/2008	253641	C26JGRAHAM	PY	\$91.00

Bonds

Bond Information

Bond Id	Set Date	Amend Date	Set By	Type	Amount	Type	Amount	Condition
2008BD2610700024	01/16/2008		Mayers	Personal	\$200.00		\$0.00	

5/8/2021

Public Index Search

				Recognizance			
Post Information							
None							

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Horry County Fifteenth Judicial Circuit Public Index



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Switch View

The State of South Carolina VS Carolyn Heester

Case Number:	J610060	Court Agency:	Conway Magistrate Court	Filed Date:	01/16/2008
Case Type:	Criminal	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Mayers, Bradley Dwyer	Disposition Judge:	Mayers, Bradley Dwyer
Disposition:	Guilty Bench Trial				
Disposition Date:	03/04/2008	Date Received:		Arrest Date:	01/16/2008
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
Cooper, Lisa	1201 Third Ave-Sol. Office Conway SC 29526-				Affiant		01/16/2008
Heester, Carolyn	Myrtle Beach SC 29577	White	F		Defendant		03/04/2008

Charges

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Heester, Carolyn	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	0670-Checks / Fraudulent check, or stop payment, \$500 or less - 1st offense	03/04/2008

Sentencing

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	Fine Suspended			03/04/2008			

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Heester, Carolyn	Criminal/Traffic Court	Event		02/05/2008-10:00	03/04/2008-10:00	

Financials

Summary					
Fine/Costs:	\$91.00	Total Paid for fine/costs:	\$91.00	Balance Due:	\$0.00

Costs				
Description	Cost Code	Amount	Charge Action	Disbursed Amount
Administrative Court Cost \$41	CTCOST	\$41.00		\$41.00
Victim Conviction Surcharge \$100 / \$25	CVSRCH	\$25.00		\$25.00
Law Enforcement Funding Surcharge \$25	LEFSUR	\$25.00		\$25.00

Payments				
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
03/03/2008	253641	C26JGRAHAM	PY	\$91.00

Bonds

Bond Information								
Bond Id	Set Date	Amend	Set By	Type	Amount	Type	Amount	Condition

5/8/2021

Public Index Search

		Date					
2008MD2610700024	01/16/2008		Mayers	Personal Recognizance	\$200.00		\$0.00
Post Information							
None							

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State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
 Resident Circuit Judge

P. O. Box 479 (zip code 29442)
 401 Cleland St. (zip code 29440)
 Georgetown, South Carolina
 Telephone: (843) 545-3030
 Facsimile: (843) 545-3282
 Email: bculbertsonj@sccourts.org

June 10, 2021

William H. Ray, Assistant Attorney General
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211-1549

RE: *Dukes*, #347234 v. *State* (2019CP2606842)
Ware, #366707 v. *State* (2020CP2601016)

Dear Mr. Ray:

I return to you, unsigned, the proposed Final Order of Dismissal in each of the above referenced cases.

Based upon the applicant's Response to the Conditional Order of Dismissal in *Dukes*, I ask that you schedule this case for an evidentiary hearing. By copy of this letter to the Clerk of Court, I'm asking that the Applicant be appointed counsel in this case.

As to *Ware*, I cannot find a Conditional Order of Dismissal or proof of service of the order in the clerk of court file. If you have clocked copies of these, please re-submit your proposed Final Order of Dismissal with the clocked copies and I will review your proposed order. Again, under copy of this letter to the Clerk of Court, I'm asking that office to check its file to make sure it is complete.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

Enclosures (a/s)

pc: Renee Elvis, Clerk of Court (letter only)

FILED
 HORRY COUNTY
 2021 JUN 14 P 1:20
 RENEE N. ELVIS
 CLERK OF COURT
 HORRY COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2019-CP-26-06842
Henry J. Dukes,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	
	)	June 2, 2022
State of South Carolina,	)	
	)	
Defendant.	)	
	)	

B E F O R E:

Honorable H. Steven DeBerry, IV
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

James K. Falk, Esquire
Attorney for Plaintiff

Chelsea F. Marto, Esquire
Attorney for State

Sallie Beth Todd
Official Court Reporter

1

I N D E X

2

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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3

HENRY J. DUKES

4

By Mr. Falk 10

5

By Ms. Marto 19

6

7

ERIC FOX

8

By Mr. Falk 24

9

By Ms. Marto 26

10

11

JIMMY A. RICHARDSON, II

12

By Ms. Marto 28

13

By Mr. Falk 33

14

15

16

Certificate of Court Reporter..... 43

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E X H I B I T S

19

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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20

(There were no exhibits marked during this hearing.)

21

22

23

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25

1 **THE COURT:** All right. Ms. Marto.

2 **MS. MARTO:** Yes, Your Honor. May it please the Court?

3 We are here today in the case of Henry Dukes, docket
4 number 2019-CP-26-6842. He's presently confined in the South
5 Carolina Department of Corrections. He was indicted August
6 2008 for murder. J. Eric Fox represented applicant and Jimmy
7 Richardson prosecuted the case. He proceeded to a jury trial
8 before the Honorable Steven H. John and the jury found
9 applicant guilty as indicted August 2nd, 2011. Judge John
10 sentenced him to imprisonment for a term of 47 years. He
11 filed a notice of appeal and that was perfected and the
12 convictions were affirmed.

13 June 26th, 2013 he petitioned the Supreme Court of South
14 Carolina for a writ of cert and this was denied on July 25th,
15 2014 in a remittitur issued August 2nd, 2014.

16 Applicant has since pursued four different PCR
17 applications and a habeas action. And from my understanding,
18 was granted Austin relief in one of the prior PCR actions and
19 that was never -- that never caused his other PCR counsel to
20 file a notice of appeal. So he still hasn't been given his
21 belated PCR appeal, if that makes sense. So it was granted in
22 either the second or third action, and then it was never
23 filed, so he is still entitled to one but one has still not
24 been granted.

25 So what we're here for today is the state filed a return

1 and partial motion to dismiss, conceding Austin relief but
2 stating that the rest of the application was successive and
3 untimely. And then from my understanding, an order hasn't --
4 a summary dismissal order was provided and then it was
5 requested from there that a hearing be set on this matter for
6 the motion to dismiss, and I believe the Austin concession.
7 So that's why we're here.

8 **THE COURT:** All right.

9 **MS. MARTO:** Thank you, Your Honor.

10 **THE COURT:** Mr. Falk.

11 **MR. FALK:** Your Honor, there's sort of a discrepancy in
12 the record. And what I can show the Court, this is in the
13 record, so the order from Judge Culbertson is dated April 12th,
14 2021. But then there is this letter in the file to the
15 Attorney General's Office which would seem to indicate -- but
16 I can't reconcile the fact that that letter is dated six weeks
17 after this order is dated. But it seems to me that Judge
18 Culbertson is suggesting that he be appointed counsel and then
19 have an evidentiary hearing on these issues that he raised up
20 to that point.

21 **THE COURT:** All right.

22 **MR. FALK:** And the issue that we want to raise is we
23 think there's potentially a -- it doesn't really qualify as
24 after discovered evidence, but we do believe that it's a Brady
25 violation in that there was one of the witnesses who testified

1 at the trial, and it was a substantial witness because she
2 corroborated the testimony of another witness. And although
3 Mr. Dukes believes that there was -- that the Court instructed
4 the solicitor to provide the NCICs of the criminal records for
5 all of the defendants, either this one was withheld, or
6 counsel never paid attention to it. But her prior convictions
7 for several check writing -- several check fraud cases were
8 never introduced at the trial and never tried to use to
9 impeach her credibility. And so it's our understanding that
10 it's a -- that it was never provided to Mr. Fox, and that it's
11 a Brady violation, and that's what we wanted to have the
12 hearing on.

13 **THE COURT:** Ms. Marto.

14 **MS. MARTO:** Your Honor, I do understand that the letter
15 says it's set for an evidentiary hearing. My understanding is
16 that no ruling has ever been made on the motion to dismiss,
17 and so I think that we do have that opportunity to renew our
18 motions for untimeliness and successiveness being that this is
19 his fifth PCR application and that this application was due
20 roughly four years prior to when he actually filed is my
21 understanding. The remittitur from his direct appeal was
22 issued August 2nd, 2014 and this application was filed October
23 24th, 2019 rendering it untimely. So we would move to
24 summarily dismiss on those grounds.

25 **THE COURT:** All right. Tell me the status again of the

1 appeal he's due.

2 **MS. MARTO:** So essentially what's going on is he was
3 granted Austin relief, which is basically a White issue but
4 for PCR. So it was granted in, I think, his second PCR
5 application, but then PCR counsel never filed that notice of
6 appeal from that action and so he still hasn't had an appeal
7 on his original PCR action. And so we are conceding that
8 because he has been granted that in a prior action.

9 **THE COURT:** Does that cover these issues as well?

10 **MR. FALK:** That issue was never addressed in any of the
11 prior PCRs, this issue with ---

12 **THE COURT:** The current issue.

13 **MR. FALK:** The current issue.

14 **THE COURT:** Is the current issue a PCR issue?

15 **MR. FALK:** Well if it's a Brady violation it is.

16 **MS. MARTO:** Prosecutorial misconduct is a claim for PCR
17 relief, but it's still -- because it's not after discovered
18 evidence it is still procedurally barred.

19 **THE COURT:** And you disagree with that, Mr. Falk?

20 **MR. FALK:** I disagree with that.

21 **THE COURT:** All right.

22 **MR. FALK:** Your Honor, I mean certainly in a case like
23 the one that we had here, I mean this evidence that would --
24 you know you've already had one sort of questionable witness,
25 and then Ms. Heester is called and she kind of corroborates

1 that, but she has serious challenges with crimes of moral
2 turpitude, the check writing and the fraudulent checks. So I
3 think that is something that Mr. Fox certainly could have made
4 some hay with had he known about it.

5 **THE COURT:** And I'm trying to -- I'm struggling to see
6 how prosecutorial misconduct is a PCR issue. I mean is it
7 claiming ineffective assistance of somebody else's counsel?

8 **MS. MARTO:** From my understanding, the law has shifted
9 over the course of the past maybe five years to encompassing
10 claims beyond ineffective assistance of counsel. This would
11 be prosecutorial misconduct, Brady violation would be, I
12 believe, a valid claim. The issue is whether it's
13 procedurally barred.

14 **MR. FALK:** It's kind of in the PCR manual, I haven't
15 brought it down to find out the case law to support it.

16 **THE COURT:** All right. So you want to have an
17 evidentiary hearing today based on this possible prosecutorial
18 misconduct?

19 **MR. FALK:** Yes.

20 **THE COURT:** And you want this case dismissed because it's
21 five years too late?

22 **MS. MARTO:** Yes, Your Honor. And because it's his fifth
23 application.

24 **THE COURT:** All right. Is there any other way that he
25 can file for relief based on these issues -- on this issue?

1 **MR. FALK:** Well he could always file for newly discovered
2 evidence.

3 **THE COURT:** Right.

4 **MR. FALK:** And so whether or not this is newly discovered
5 evidence or a Brady violation, you know, I would treat any
6 time that you've got newly discovered evidence, provided you
7 can get through the hurdles of the requirements for that, that
8 you can file a successive PCR.

9 **THE COURT:** All right.

10 **MR. FALK:** And I think the primary hurdle we would have
11 to accomplish here is the knew or should have known hurdle,
12 and my client will testify as to why he didn't, you know, when
13 he found out about this, the charges.

14 **THE COURT:** Now this letter that Judge Culbertson writes
15 in June of 2021, what is he -- what is he talking about when
16 he says based upon the applicant's response to the conditional
17 order of dismissal?

18 **MS. MARTO:** Your Honor, I believe it would be enclosed in
19 the packets. From my understanding, Mr. Dukes has a tendency
20 to write quite a bit.

21 **THE COURT:** Okay. Well what I'm trying to understand is
22 it seems like an order granting the dismissal was what he was
23 intending to sign and then he sent it back for an evidentiary
24 hearing. Is he asking for an evidentiary hearing on the
25 dismissal or on the underlying issue?

1 **MS. MARTO:** It would be an evidentiary hearing on the
2 underlying issue. I believe only a conditional order took
3 effect, if I'm not mistaken.

4 **THE COURT:** All right. I mean, I guess my question is
5 was Judge Culbertson prepared -- did everybody intend for him
6 to sign an order dismissing this case last year?

7 **MR. DUKES:** Excuse me, Your Honor. Can I address the
8 Court, please?

9 **THE COURT:** Yeah, hang on one second.
10 Or do y'all know?

11 **MR. FALK:** Your Honor, I can show you -- I pulled this
12 off the record. I think this is -- Your Honor, so if you look
13 at the court record, this is dated 6/4/2021 and I think I've
14 got a copy of that and this might be in your file. This
15 letter right here is the letter he wrote in response to the
16 proposed order of dismissal.

17 **THE COURT:** Okay. If you don't mind, let me take a look
18 at that.

19 **MR. FALK:** I think I have -- I think it's in there.

20 **THE COURT:** All right. In the interest of time, we'll
21 have the evidentiary hearing, but I'm going to also keep the
22 motion to dismiss under advisement.

23 **MS. MARTO:** Thank you, Your Honor.

24 Your Honor, I've been informed that Mr. Jimmy Richardson
25 is about a half hour away, so we start with Mr. Dukes and Mr.

1 Fox and that should be about enough time for him to make it
2 here.

3 MR. FALK: Yeah, is Mr. Fox here? I'd say maybe put him
4 on first.

5 MS. MARTO: Okay. Whatever way.

6 MR. FALK: I'll put Mr. Dukes up first.

7 THE COURT: All right, sir.

8 HENRY J. DUKES, HAVING BEEN DULY SWORN TESTIFIES

9 AS FOLLOWS:

10 DIRECT EXAMINATION OF MR. DUKES BY MR. FALK:

11 Q: Could you state your name for the record?

12 A: Henry J. Dukes, D-U-K-E-S.

13 Q: All right. Mr. Dukes, let's sort of really confine our
14 conversation just to the issue regarding Ms. --- is it Nester
15 or Heester?

16 A: Heester, H-E-E-S-T-E-R.

17 Q: H-E-S-T-E-R?

18 A: H-E-E-S-T-E-R.

19 Q: H-E-E-S-T-E-R. Okay. Thank you.

20 Can you tell me, I mean, the Court has got a copy of the
21 trial transcript, but can you just basically tell me what was
22 her testimony?

23 A: Her testimony was ---

24 Q: Let me back up. You said that there's another witness
25 who testified against you.

1 A: Right.

2 Q: Who -- what was his name?

3 A: Cornelius Ford.

4 Q: Okay. And Cornelius Ford, that was the state's witness,
5 right?

6 A: Yes, that was the main witness, yes.

7 Q: And so his testimony was prejudicial towards you; is that
8 right?

9 A: Yes.

10 Q: Okay. And ---

11 **THE COURT:** Mr. Dukes, if you could speak into the
12 microphone.

13 **MR. DUKES:** I'm sorry.

14 **THE COURT:** Thank you.

15 **BY MR. FALK:**

16 Q: Okay. So then the state called Ms. Heester to the stand?

17 A: Yes.

18 Q: Okay. And now what was her testimony?

19 A: Her testimony was that she seen a black male with a white
20 coat on like running through the yard where the crime scene
21 was; and then Cornelius Ford testified that he seen me shoot
22 his friend and I had on a white coat. So her testimony --
23 Cornelius Ford's testimony already looked suspect because he
24 fled the scene and everything. I'm still surprised why he was
25 never -- why him and his father was never charged with

1 anything. But her testimony was used to corroborate his
2 testimony because his testimony already looked -- he already
3 looked suspect from the beginning.

4 Q: Because he testified that you were there and you were
5 wearing the white coat?

6 A: Yes.

7 Q: She testified that it was black man -- she saw a black
8 man wearing a ---

9 A: She said she was two yards away, she was two yard away,
10 she looked over waiting to go meet her friend and then she
11 seen a black guy wearing a white coat run through the yard.
12 So that -- Richardson threw that in the jury's face all day.
13 Now, Mr. Fox he stayed away from her testimony because that
14 was a thorn in the side to the defense, you know. But by the
15 time -- Richardson, he had the last closing argument so he
16 referred to it like eight different times in his closing
17 argument.

18 Q: Okay. And just so that we're all clear, when you said
19 she was two yards away, she means like her back yard or her
20 front yard, right?

21 A: Her front yard. She was going to visit her friend.

22 Q: Not -- she's not saying she was six feet away?

23 A: No. She was two houses away.

24 Q: Two houses away. Okay. And as you've highlighted, the
25 solicitor pointed to that testimony several times ---

1 A: Right.

2 Q: --- in his closing argument.

3 A: Saying things like he has to be telling the truth if
4 she's saying this, and she's an uninterested third party, so
5 he has to be telling the truth. If -- if they're making this
6 up, he has to be a great mind reader basically (inaudible) his
7 credibility.

8 Q: Okay. And so those are issues that could have been
9 raised at one of your prior PCRs before.

10 A: Yes.

11 Q: But what we're talking about today is this information
12 that you got about Ms. Heester.

13 A: Yes.

14 Q: When did you find that out?

15 A: About 2019.

16 Q: Why did it take so long?

17 A: Because I'm in prison. I don't have access to the
18 internet or nothing like that to find this information, and
19 even if I write like -- even it's on the record now I'm trying
20 to ask for information that Richardson should have turned over
21 in discovery, they keep on calling the statute about me being
22 incarcerated. They -- they don't have to give me anything, so
23 ---

24 Q: So did you go over the discovery in this case?

25 A: Yes. Fox came over to me, came to the county jail a

1 couple of times and went over what we had.

2 Q: And ---

3 A: There was never no mention of Ms. Heester's criminal
4 background.

5 Q: Criminal record -- were there any wrap sheets on anybody,
6 any of the witnesses in that discovery that you saw?

7 A: Oh, no. There was none. I guess they kept it away from
8 me because of personal information and things like that.

9 Q: All right. So you said it was 2019 or so that you found
10 out; is that right?

11 A: Yes.

12 Q: How did you find out?

13 A: A friend of mine she was -- we was on the phone, she was
14 messing around on Google and everything and we was mentioning
15 all of the witnesses in my case and everything. She was like
16 what about this lady who got all of these fraudulent check

17 charges? I'm like what lady. She said Carolyn Heester. I'm
18 like, okay, I never knew nothing about this. And I believe
19 she wrote an affidavit, in the like what Ms. Marto was
20 speaking about with the -- trying to get what's going on with
21 that letter from Judge Culbertson. Before you was appointed,
22 I was pro se, right?

23 Q: Right.

24 A: And the Judge -- Mr. Ray was representing the state. He
25 came with a proposed order to dismiss the case, right? But

1 then Culbertson he signed it and told me I had 20 days to
2 respond to it, which I responded to it, that when he came with
3 that letter, based on my response, that an evidentiary hearing
4 needed to be set up.

5 Q: And ---

6 A: And also for me to be appointed counsel.

7 Q: Okay. Was it somebody inside that told you about Ms.
8 Heester's record?

9 A: No. It was a friend on the outside. She wrote an
10 affidavit, and I sent it -- everything is on the record.

11 Q: Okay. Okay. And that's the first time you found out
12 about this?

13 A: Yes.

14 Q: And what's your understanding? What are her charges?
15 She has several ---

16 A: All of these fraudulent check writing charges. She pled
17 guilty to one five days after she wrote her statement.

18 Q: Okay.

19 A: And it's like multiple different cases and it's different
20 checks like she's a habitual fraudulent check writer.

21 Q: Now tell me this, had you ever met her before?

22 A: No.

23 Q: Do y'all have any friends in common?

24 A: No.

25 Q: Did you ever know her prior to her testifying against you

1 at the trial?

2 A: No.

3 Q: So is it safe to say you had no idea she existed until
4 she testified against you at trial?

5 A: No. We had a statement.

6 Q: Right, right, right.

7 A: A written statement.

8 Q: Right. So prior to reading that statement, you didn't
9 know anything about her?

10 A: Right. I never knew she was a white lady until she got
11 on the stand. And not to sound like a racist guy or nothing,
12 but the question to me is, okay, what's this white lady doing
13 two houses from the crack house if she's saying she was there,
14 right? And now the question for the jury would have been
15 what's this bad check writing white lady doing two houses from
16 the crack house? And then five days after you write your
17 statement you go plead out to fraudulent check writing
18 charges, first offense, which was like a third or fourth
19 offense. That makes me want to think, okay, was she a
20 fabricated witness or what, you know?

21 And she also testified that there was this SUV driving
22 real slow. So the state, they put up Ashley Hardee from the
23 Horry County Police Department, he said that that was him
24 doing intel on that house because they had a couple of
25 controlled buys and they was going to execute a search

1 warrant. So now the question is, okay, if she's saying she
2 seen this and this officer who is supposed to be -- who's
3 trained to be watching this house, how come he didn't see
4 nothing? That goes to say, was this witness fabricated, you
5 know.

6 Q: So you believe that if you had -- if your lawyer had this
7 evidence about the check writing charges, he could have tried
8 to impeach her testimony, not only ---

9 A: He would have because like ---

10 Q: Let me just get through ---

11 A: Okay, I'm sorry.

12 Q: So he could have impeached the testimony about the SUV,
13 which was damaging to you, in addition to the identification?

14 A: Right. Well the SUV really wasn't -- it really wasn't
15 damaging, but her testimony -- it goes hand in hand with her
16 testimony because she said she seen this and Richardson gets
17 up and says yeah we have the detective that says, yeah, that
18 was me. I was trying to do intel on this house.

19 Q: Okay.

20 A: Well obviously if he seen this -- if she's saying she
21 seen this, why didn't he see this? And I've been asking
22 trying to get this information that -- Mr. Fox he comes to the
23 county jail two days before trial telling me about this
24 Detective Ashley Hardee. They never gave us no paperwork or
25 anything, so even to this day I'm still trying to ask for this

1 paperwork, but they keep on hitting me with this Freedom of
2 Information statute. Being that I'm an inmate and I'm
3 incarcerated, they don't have to give me nothing. Was this
4 detective fabricated now? I don't know because there's no
5 paperwork saying that -- they never gave us this in the
6 discovery.

7 Q: Okay. Okay.

8 MR. FALK: One moment, Your Honor.

9 BY MR. FALK:

10 Q: And so again, your testimony is you didn't find out that
11 she had any type of criminal record until 2019?

12 A: Yes.

13 Q: Okay. So you wrote a letter to Judge Culbertson; is that
14 correct?

15 A: No.

16 Q: A response to the ---

17 A: Right. I filed a pro se response to the ---

18 Q: Proposed order.

19 A: To the proposed order.

20 Q: Okay.

21 A: He told me I had 20 days to respond to it before it
22 becomes final.

23 Q: And what was your concern with the proposed order?

24 A: I was basically saying that I could not have brought this
25 up on my first PCR because I knew nothing about it. The

1 defense counsel never knew nothing about this information
2 because had he knew about it, he would have brought it up at
3 trial. So the law says that successive applications are
4 disfavored, but if I meet the burden of showing why I couldn't
5 have brought it up on my first PCR a hearing is supposed to be
6 granted despite the successiveness.

7 Q: Okay.

8 A: I believe that's Carter vs State, I believe.

9 Q: And then the Judge -- then you got a copy of this letter
10 from Judge Culbertson that he sent to Mr. Ray saying to
11 appoint you counsel to have an evidentiary hearing?

12 A: About the issue, yes, sir.

13 Q: Yeah. And the issue that you were raising about the
14 prior order was the fact that it shouldn't be dismissed for
15 being successive because you never had an opportunity to learn
16 about it?

17 A: Right.

18 Q: Up until that time.

19 A: Yes.

20 **MR. FALK:** No further questions.

21 **THE COURT:** All right. Ms. Marto.

22 **MS. MARTO:** Yes, Your Honor.

23 **CROSS EXAMINATION OF MR. DUKES BY MS. MARTO:**

24 Q: Sir, you were present for your trial, correct?

25 A: Yes.

1 Q: What evidence did the state present at trial?

2 A: No physical evidence, just people testifying.

3 Q: Now this was a murder, correct?

4 A: Yes.

5 Q: And how many people were present in the room at the time
6 of the murder?

7 A: I don't know, I wasn't there.

8 Q: Okay. Did they have one individual come testify that
9 said they witnessed it?

10 A: Yes.

11 Q: And that they were in the same room?

12 A: Yes.

13 Q: And that they said that the perpetrator was you?

14 A: Yes.

15 Q: And then his father arrived on scene shortly thereafter
16 and spoke to the police, correct?

17 A: Yes. He left the scene and his father called the police
18 or whatever and lied in his statement saying that the victim
19 called him there. And then come to find out hours later, the
20 officer found out that the son was there and wanted to speak
21 back to the father and things like that and catch him in a
22 lie, but they didn't do nothing. And this is the same officer
23 that's not at my trial, so I don't know.

24 Q: Did you know the father and son by chance?

25 A: No.

1 Q: And you're saying you didn't do the murder, right?

2 A: I pled not guilty, didn't I?

3 Q: So why do you think that they blamed you if you didn't do
4 it?

5 A: To take the heat off of themselves, of course. If you're
6 standing here next to a dead body lying to the police and you
7 get caught in a lie and the father is the Chaplin at the
8 county jail. It's the good ole boy system here going on.

9 Q: Were you at the scene at the time or around ---

10 A: No. The police came to me on the other side of town and
11 checked me for gunshot residue, didn't find nothing, and let
12 me go. That was that.

13 Q: And you're saying that they singled you out in particular
14 because of a good ole boy system?

15 A: I don't know but I just know seven hours later this guy
16 come and they say he picks my picture.

17 Q: Do you recall if a taxi driver testified that you got in
18 his car?

19 A: Yes.

20 Q: He stated that you looked nervous, correct?

21 A: No, he didn't say that.

22 Q: Okay. Did you have individuals from Miami testify at
23 your trial?

24 A: Yes.

25 Q: Stating that you went down there unexpectedly shortly

1 after the incident occurred?

2 A: (Inaudible) was in Miami, I spent half my life in Miami.

3 Q: Okay.

4 A: Had Mr. Fox even dug into that he would have realized
5 that they was trying to get a reward and realized there was no
6 reward. Remember they had to force them to go to court down
7 there in order to testify. There was no reward so they was
8 trying to run from it.

9 Q: And it's your testimony today that you would have won at
10 trial had you known about the fraudulent check convictions on
11 Carolyn Heester, right?

12 A: Yes. It would have been -- the law states that I don't
13 have to prove that I would have been acquitted. It would have
14 undermined the outcome. It would have undermined the
15 credibility of the outcome of the trial.

16 Q: So are you saying that it doesn't matter how strong the
17 evidence is even if it's like a scintilla of a difference that
18 would be sufficient enough for you to ---

19 A: I'm not saying that. The law stated that if this
20 impeaching evidence would have been brought up -- a new trial
21 should be granted if this impeachment evidence was withheld
22 and it would have been brought up. It's denied me due process
23 of law.

24 Q: Okay. Do you think that you would have won at trial if
25 that had been presented?

1 A: Yes, because it would have broke the whole state's case
2 through. Heester was used as he's got to be telling the
3 truth, that's what Richardson say if she's saying this and she
4 has nothing to do with anything. This would have broke down
5 the whole state's theory of things.

6 Q: So impeaching one witness who testified for a few minutes
7 at trial would have brought the whole case crashing?

8 A: Yes, because this one witness was the witness that
9 corroborated with the main witness that placed a black man
10 with a white coat near the crime scene.

11 Q: Okay. But they also had other witnesses beyond the
12 father and son that testified, correct?

13 A: Yes.

14 MS. MARTO: No further questions, Your Honor.

15 THE COURT: Mr. Falk.

16 MR. FALK: No redirect.

17 THE COURT: All right. Mr. Dukes, thank you, sir. You
18 can step down.

19 MR. DUKES: Okay, Your Honor.

20 MR. FALK: We call Mr. Fox.

21 THE COURT: All right.

22 ERIC FOX, HAVING BEEN DULY SWORN TESTIFIES
23 AS FOLLOWS:

24 THE CLERK: State your name, please.

25 MR. FOX: Eric Fox.

1 DIRECT EXAMINATION OF MR. FOX BY MR. FALK:

2 Q: Mr. Fox, did you get the criminal background checks, the
3 NCICs for the state's witnesses?

4 A: Yes. Typically I would say most of the time we get those
5 in advance of trial in this circuit. It's not required. The
6 rule says after the witness testifies, so it's -- at times I
7 might get it -- I almost always get it before the witness
8 testifies here. But, yes, we get them.

9 Q: Did you show those to Mr. Dukes?

10 A: Yes. Mr. Dukes and I had a chance to review everything I
11 had in my possession.

12 Q: Did you review Carolyn Heester's criminal record?

13 A: I don't recall having that, and from the transcript I
14 certainly didn't ask her about any record so ---

15 Q: Okay. Because when I'd asked you before about criminal
16 records, specifically you don't recall ever getting that for
17 Ms. Heester?

18 A: I don't. I don't.

19 Q: Okay. How would you have used that testimony that she
20 had several fraudulent check charges? Is that something that
21 you might have used?

22 A: Absolutely. Those would definitely be qualifying
23 impeachment convictions being crimes of dishonesty, or what we
24 used to call crimes of moral turpitude.

25 Q: Right.

1 A: And her credibility would have been a big issue. So
2 sure, anything I could have used to attack that. Because Mr.
3 Dukes is correct, she corroborated a key part of what
4 Cornelius Ford testified to.

5 Q: So it's your testimony that her testimony was important
6 to the state's case?

7 A: Ultimately, yes. Again, I think the solicitor made it a
8 big part of his closing. Going through the trial I'm not sure
9 that I saw it as quite as big a piece of evidence, but it
10 certainly became at the end.

11 Q: And certainly that's the last stuff that the jury hears?

12 A: Yes.

13 Q: Is we all need to believe Ms. Heester?

14 A: Yes. And ultimately we need to believe ---

15 Q: Mr. Ford.

16 A: That's right. We should believe -- Cornelius Ford, to
17 me, was the most important witness. He was the eyewitness, he
18 claimed to be. His testimony was very, in my opinion,
19 suspicious. His actions were incredibly suspicious. He left
20 right after by his own account and his father's. He said he
21 saw this shooting, rather than call the police or seek help in
22 any way, seek help for this man who's been shot, he fled,
23 called his daddy and they stayed out of sight for several
24 hours before they finally contacted the police. I thought he
25 had real credibility issues and if I had had another witness

1 that could have undermined Ms. Heester who supported him, at
2 least a little bit, I certainly would have done that.

3 Q: I don't believe I have any other questions.

4 **THE COURT:** All right. Ms. Marto.

5 **MS. MARTO:** Yes, Your Honor.

6 **CROSS EXAMINATION OF MR. FOX BY MS. MARTO:**

7 Q: Good afternoon, sir.

8 A: Afternoon.

9 Q: So is it fair to say that the bulk of the state's case
10 rested upon the father and son's testimony?

11 A: Yes. There was -- as Mr. Dukes said, there was no
12 physical evidence. There was a lot of kind of surrounding,
13 you referenced the taxi driver, some of the people in Miami.
14 They had no direct knowledge of anything and so they kind of
15 painted a picture that looked -- the state wanted to make it
16 look suspicious. But when it boiled down to it, you either
17 believed Mr. Ford or you didn't. So, yes.

18 Q: And that's effectively what Ms. Heester was called for,
19 much of the same thing as the taxi driver, correct?

20 A: Yes.

21 Q: And do you think that having her criminal record would
22 have led to an acquittal?

23 A: It would have knocked -- I can't say, but I think it
24 certainly would have called into question her credibility on a
25 very important issue.

1 Q: And again, her testimony was essentially she saw a man
2 that looked like Mr. Dukes in the general area at the time,
3 correct?

4 A: It really was just black man white coat, and I think
5 that's part of the reason I don't say I ignored it, but to me
6 it was very non-specific. And I think at the time -- my
7 recollection was the timeframe wasn't exact as well. But,
8 yes.

9 Q: And that's certainly not something that a case is built
10 on itself, right?

11 A: You'd have to ask Mr. Richardson about that.

12 Q: And you stated that you received NCIC records before
13 trial, right?

14 A: Yeah, as far as I know. That's just not a thing that's
15 been an issue during my career in this circuit.

16 **MS. MARTO:** No further questions, Your Honor.

17 **THE COURT:** All right. Mr. Falk.

18 **MR. FALK:** No redirect.

19 **THE COURT:** All right. Thank you, Mr. Fox.

20 **MS. MARTO:** Your Honor, may I take a moment to go figure
21 out where Mr. Richardson is?

22 **THE COURT:** Sure.

23 **MS. MARTO:** Thank you.

24 **THE COURT:** All right. We're going to take about a five
25 minute recess.

1 (HEARING IN RECESS)

2 THE COURT: All right.

3 MS. MARTO: Your Honor, it's my understanding we're still
4 waiting on Mr. Richardson. What I recommend that we do, is we
5 move on to Mr. James' case and then move back.

6 THE COURT: Okay. Let's do it.

7 Mr. Dukes, we'll have you back out as soon as we have the
8 next witness.

9 MR. DUKES: Yes, Your Honor.

10 THE COURT: Thank you.

11 (HEARING IN RECESS)

12 THE COURT: All right. So we're back on the record on
13 Henry Dukes' PCR versus State of South Carolina. The state
14 has called Solicitor Jimmy Richardson.

15 MS. MARTO: Thank you, Your Honor.

16 DIRECT EXAMINATION OF SOLICITOR RICHARDSON BY MS. MARTO:

17 Q: Good afternoon, sir.

18 A: Good afternoon.

19 Q: So you prosecuted Mr. Henry Dukes' case, correct?

20 A: Yes, ma'am.

21 Q: And now the issue that's before this Court today is
22 whether or not the NCIC records of Carolyn Heester were turned
23 over to counsel. How long have you been a solicitor for?

24 A: I started in '98.

25 Q: What has your general practice been when it comes to NCIC

1 records, pulling them and handing them over to the defense?

2 A: Yes, ma'am. Whether it's my witness or the defense
3 witness, I always have somebody to run the NCIC on each
4 witness. In this case, Ms. Heester would have been my witness
5 so I would have run it and gave it over to the defense counsel
6 beforehand. If it were to be -- this isn't the case here, but
7 if it were one of Mr. Dukes' witnesses I would have tried to
8 stop him on the way, you know, before they called the witness,
9 get the social security number, birth date, and run an NCIC on
10 those guys too.

11 Q: And did you run an NCIC record on this case?

12 A: I did or someone did for me. We ran it on it looks like
13 August the 1st, 2011 at 9:38.

14 Q: And briefly what did the NCIC records reveal to you?

15 A: Nothing. I've got it here, there was nothing on it.
16 Now, so after seeing this, and of course it's been ten or so
17 years, but I have seen what Mr. Dukes is talking about. And
18 apparently the witness, Ms. Carolyn Heester, had several bad
19 checks and those bad checks were in city court, and what I was
20 referred to was stuff that was on public index. Now,
21 honestly, I don't run public index. I run the NCIC. On this
22 one I ran her driving record, and I would have given both of
23 those, or showed those to Mr. Fox. And I ran -- well it's a
24 clear report, but that clear report is just to basically find
25 out where the witness lives. So those are the documents that

1 were in her file from ten or 11 years ago. An NCIC, a clear
2 report, which none of them showed up anything, and a driving
3 record.

4 Q: So the only indication of bad checks you found was on the
5 public index, correct?

6 A: Yes, ma'am.

7 Q: And the public is accessible to the public at large,
8 correct?

9 A: Yes, ma'am.

10 Q: What contribution to the case did Ms. Heester provide?

11 A: Ms. Heester didn't know Henry Dukes; she didn't know the
12 victim; she didn't know anyone. She was visiting a friend of
13 hers that was a street over, maybe two streets over from where
14 the victim was killed, and she was on the side porch knocking
15 on the door at her friend's house. And she basically -- she
16 didn't even report it to the police, but when the police came
17 back around she said, well I was on the porch and you're
18 asking if anybody saw anything strange, I did see a young
19 black male running away from that house wearing a white coat
20 with a hood over it. I think she described the jeans and that
21 sort of stuff, but she didn't know who it was. Then she went
22 on to talk about a vehicle that was riding through, but that
23 vehicle didn't have anything to do with Mr. Dukes. It was a
24 vehicle with an emblem on the door. She was giving -- she --
25 long story short, she was a fact witness around time and she

1 said she saw a young black male, I think she described him
2 maybe as 29, late 20s, running away from where the victim's
3 house was.

4 Q: And what other evidence in this case existed, just in
5 broad strokes?

6 A: Okay. So the police had originally talked with Mr. Dukes
7 at a location in Conway, but it was a very brief conversation.
8 Then they went and talked with a nephew of Mr. Dukes, and
9 while we were at the police station for that, a young man who
10 I still don't know came by and said you've got the wrong guy,
11 it's Henry Dukes. So I asked the officer about it. He said
12 that he had spoken briefly with Henry Dukes and he would go
13 back over there, that was early in the investigation. When
14 the officer went back to talk with Mr. Dukes, Mr. Dukes had
15 left. If my memory serves me correct, he had left that house,
16 packed up everything. He had stayed at like a crack house for
17 a small amount of time. That lady came in and said that he
18 was there.

19 Then he had called cab from her house, or her apartment,
20 back to Darlington. The cab driver was a witness against Mr.
21 Dukes. I think Mr. Dukes gave him, or Mr. Dukes' mama gave
22 him a piece of money and said, I wasn't here or you wasn't
23 here or something like that.

24 Then the biggest part was Mr. Dukes ended up back in
25 Miami, or somewhere in South Florida and we got a call from a

1 CI in Miami that said Mr. Dukes -- if you're looking for Henry
2 Dukes, he is at the train station or the bus station,
3 something like that. They reached out to Miami-Dade Police
4 who went to arrest Mr. Dukes. Mr. Dukes said -- put his hands
5 up, walked off the platform. The big break was those girls,
6 the Miami detectives said your confidential informant really
7 ain't confidential, her name is -- I don't remember it. We
8 were able to find that witness. There were several witnesses
9 there.

10 Mr. Dukes was kin to or somehow related to a guy in
11 Miami. The people in that house said that Henry Dukes came
12 down there and said I killed a -- I'm having to lay low, I
13 killed a guy in Conway, or I killed a guy in South Carolina,
14 so that was the important witness. Carolyn Heester wasn't
15 very important at all, but we did run her NCIC as we do all of
16 them.

17 Q: Do you think that the prior convictions for bad checks
18 could have been brought out at trial?

19 A: Probably. You know I would have to dig deeper into them.
20 It could be, it was certainly a 30-day offense, it was small
21 stuff and that's why it didn't show up. Depending on, I would
22 say and I may be wrong on this, but I would say if she was out
23 writing a bunch of bad checks somebody could make an argument
24 that that was relative at trial. If she was -- I think there
25 were five, if she was stopping checks, probably not, but the

1 public index doesn't say, it just says that there was a bench
2 trial, so it's possible. It wouldn't have really made a
3 difference; everybody has written a bad check at some point.
4 Q: And again, counsel for the defense had this information
5 available to him as easily as you did, correct, since it was
6 on the public index?

7 A: On the public index, yes. On the NCIC, that's why we run
8 theirs too, but there wasn't anything on the NCIC. But, yes,
9 public index is just that, anybody can look up anything.

10 **MS. MARTO:** No further questions, Your Honor.

11 **THE COURT:** All right. Mr. Falk.

12 **CROSS EXAMINATION OF SOLICITOR RICHARDSON BY MR. FALK:**

13 Q: Mr. Richardson, you would agree that evidence that's
14 potential impeachment evidence would be something that'd be
15 necessary for defense counsel to have to prepare for trial,
16 would you not?

17 A: Yes, sir.

18 Q: Okay. And you'd also agree that you mentioned Carolyn
19 Heester several times in your closing argument; is that
20 correct?

21 A: Now I don't remember that, Mr. Falk. I haven't looked at
22 all -- if you say I did, I may have, I don't know.

23 Q: Okay.

24 **MR. FALK:** Is the transcript in the record for this?

25 **MS. MARTO:** Yes.

1 **MR. FALK:** Okay.

2 **BY MR. FALK:**

3 A: I don't disagree with you, I just ---

4 Q: And I know that. I just -- whatever it is is in the
5 record.

6 A: Yes, sir.

7 Q: So, but if you did mention it in your closing argument
8 was the purpose of doing that in order to draw attention to
9 the testimony?

10 A: It would be to draw attention to the time and the manner.
11 She really -- she wouldn't have know Henry Dukes from Adam's
12 house cat. She did not know him. She didn't know the
13 victims. She did know the other witnesses. But she would
14 have been important enough to say I was on the porch, I looked
15 out and I saw a guy with a white coat running away from the
16 house.

17 Q: And you would agree that her testimony corroborated
18 Cornelius Ford's testimony, right?

19 A: Yes, sir. The outside -- most of Ford's stuff was -- I
20 think Ford was inside of the house, but ---

21 Q: Well there was testimony earlier that Ford testified that
22 it was Mr. Dukes and he was wearing a white coat, and then
23 Carolyn Heester said black man white coat.

24 A: Yes, sir.

25 Q: Okay. And you would agree that the reason that you would

1 mention testimony like that during your closing argument is
2 you want the jury to sort of have that on their mind when
3 they're going back to render their verdict?

4 A: Yes, sir.

5 Q: And you wanted to emphasize it to the jury?

6 A: To the extent that this was an unbiased witness. She
7 didn't know anybody from anything. She wasn't a witness that
8 would -- I think it would have been better for us, obviously,
9 if she would have said, yes, I know Henry Dukes, I would have
10 known Henry Dukes everywhere, that was Henry Dukes. She said
11 I don't know who that was. I know it was a black male running
12 in a white coat away. And I don't even think that she called
13 the police, I don't think that there was anything towards Mr.
14 Dukes, but I could be wrong on that. I don't remember her
15 calling the police.

16 Q: So at the Fifteenth Circuit Solicitor's Office y'all
17 practice is, as far as criminal records, is just to rely on
18 whatever the NCIC says; is that correct?

19 A: Yes, sir.

20 Q: And the reason why you did not turn over these charges
21 for Ms. Heester were because they weren't on the NCIC?

22 A: That's true.

23 **MR. FALK:** I have no further questions.

24 **MS. MARTO:** No questions, Your Honor.

25 **THE COURT:** All right.

1 **MS. MARTO:** No further witness, Your Honor.

2 **THE COURT:** All right. Thank you, Mr. Richardson. I
3 appreciate you being here.

4 **MR. RICHARDSON:** Thank you, Your Honor.

5 **THE COURT:** So that's -- Mr. Falk, I'll be happy to hear
6 from you in closing.

7 **MR. FALK:** Your Honor, we heard the testimony from Mr.
8 Fox and he said that he certainly would emphasize that because
9 it is a crime or moral turpitude. And I think we did have
10 some testimony that suddenly Ms. Heester's testimony
11 corroborated Cornelius Ford's testimony. And obviously I
12 don't have a copy of the trial transcript, and I would rely on
13 whatever it said, but I believe that he mentioned her
14 testimony several times in his closing argument. We heard Mr.
15 Richardson testify that the reason why he does that is because
16 he's trying to highlight it. So I don't think it's fair to
17 cast her testimony as being insignificant towards this case
18 and then the solicitor mentioned it in his closing argument.

19 Whether or not you can say that he should have found this
20 information from like accessing the public record, I don't
21 know if that's a fair burden to put on somebody. I mean I
22 think from his point of view, he's entitled to the criminal
23 records of the people who are going to testify against him.
24 And whether or not the solicitor's office is exercising due
25 care by exercising a method that apparently he must know does

1 not pick up magistrate level charges, or not all magistrate
2 level charges, I mean my client's entitled to have that
3 information of potential impeachment evidence. We certainly
4 know that it would have been relevant in this case, and he
5 wasn't given that.

6 **THE COURT:** All right, sir.

7 **MR. FALK:** And so I think there's an obligation, as to
8 whether it's under Giglio or Brady or what, I mean he
9 certainly was entitled to that information. I don't think you
10 can put it on him to know how to find it. I mean you can't
11 just -- I mean the only way for him to -- he would have to
12 know to go onto Sccourts and try to find it that way. I just
13 am not sure that that's a fair obligation that you'd have to
14 put on him. I think he testified that he found out about it
15 in 2019 because somebody that he knew, knew her, and knew that
16 she had a bunch of bad checks. So I think as far as showing
17 that he -- the reason why he didn't raise it prior to it is he
18 didn't have access to the information or he didn't know about
19 the information. Whether or not -- I think we heard from Mr.
20 Fox that he thought the evidence would have been relevant.

21 So, Your Honor, I think as far as granting relief in this
22 case, in addition to granting the Austin relief, we should be
23 granted relief based on the fact that there was significant
24 evidence about a significant witness in the case that was not
25 provided to them, impeachment evidence that wasn't provided to

1 them.

2 **THE COURT:** All right. Ms. Marto.

3 **MS. MARTO:** Yes, Your Honor, just briefly.

4 I believe when we started this hearing this was being
5 hedged as a prosecutorial misconduct claim, and now it's being
6 hedged as a newly discovered evidence claim given the timing.
7 It's the state's contention that under either of those relief
8 should be denied because the evidence here -- it was
9 accessible to not just the applicant, but to his counsel who
10 is aware, presumably, what the public index is and have just
11 as easy of access to the public index as Mr. Richardson. Mr.
12 Richardson said that the NCIC record revealed nothing about
13 Ms. Heester's past. The only thing that was revealed was in
14 the public domain.

15 For after discovered evidence to be met an individual has
16 to meet five prongs, one of which is showing that through
17 reasonable diligence this could not have been discovered until
18 after the trial and that it is material to the case. And it's
19 the state's contention that they cannot met either of those
20 prongs because it was readily accessible to the public at
21 large.

22 And it's, as Mr. Richardson testified, Ms. Heester didn't
23 know Mr. Dukes, was in the general vicinity and saw a black
24 man running with a coat, but beyond that it was not the crux
25 of the case. The crux of the case was testimony from the son

1 that was in the building when the murder occurred, the father
2 that responded to the scene immediately after, the family
3 members from Miami, the comment made about him killing a dude,
4 the cabs that he took thereafter. And it would be the state's
5 position that this would not lead to a different outcome, or
6 that there is a reasonable likelihood of prejudice being
7 established because that is not material and likely would not
8 have shifted the outcome at trial. And so for that, we would
9 request that you deny relief in this case.

10 **MR. FALK:** Your Honor, if I could?

11 Obviously, this has been somewhat in flux, I did not know
12 that there was an NCIC that was clear on that. When I went
13 into this I thought there was just an NCIC that wasn't turned
14 over. So we would ask the Court's permission to amend him
15 claim to say that it's ineffective assistance of counsel for
16 not going to the public index, finding this information about
17 Carolyn Heester. We still are at this same position that
18 whether or not my client should have known how to go on the
19 public index to find this information. He never had the
20 information until somebody told him. So saying that Mr. Fox
21 could have looked it up, that's fine if we want to put that
22 there. He's already admitted that he thought it would be
23 valuable information to use and that he didn't use it. I
24 would assume that that would support the claim for ineffective
25 assistance of counsel.

1 **THE COURT:** I understand. So noted.

2 Given the -- given the facts that have brought out in
3 testimony during this hearing, I don't know that the evidence
4 that wasn't known by both sides at the time is what's apparent
5 to me, that this witness may have had convictions in Municipal
6 Court, and it's still not known to me that that was apparent
7 and posted on Sccourts during the trial. There's been no
8 testimony to that. It's just that at some point later, much
9 later after the conviction, that was found out. So I think
10 the solicitor -- certainly it's well known that you have to
11 have certain credentials to be able to access NCIC and that
12 they have to provide criminal histories because of that, and
13 that defense attorneys generally cannot access NCIC and so
14 they're wholly relying on the prosecution to provide those
15 things. And in this matter it seems clear that whatever these
16 convictions are, if they are convictions, were not on the
17 NCIC, at least they were not on the NCIC at the time of trial.

18 But I also have to find that there's overwhelming
19 evidence including evidence of a confession after Mr. Dukes
20 traveled to Miami, plus eyewitness testimony. So I'm not sure
21 if -- I can't make a finding that had this impeachment
22 evidence been present at trial that anything would be
23 different.

24 And for those reasons -- and I can't find that there's
25 any ineffective assistance of counsel. Certainly, Mr. Fox

1 testified that had the NCICs shown any convictions that he
2 would have used those. I'm just not at all clear when the
3 public index would have shown that.

4 **MR. FALK:** Your Honor, if I may, just to complete the
5 record. And I'm not sure if these have been put in from some
6 of his other pleadings in some of the prior PCRs, but just if
7 the Court would take judicial notice of the warrant numbers
8 for these bad check charges.

9 **THE COURT:** All right.

10 **MR. FALK:** And I can list them off. It's an Horry County
11 case, I mean it's under the Horry County Sccourts. It's
12 J478924, and that's a conviction date of 11/12/2007. And
13 Sccourts also listed J478925 on the same conviction date.
14 Then it lists J479915 under a 3/3/2008 conviction date. And
15 then J610060 and 61, again additional charges for fraudulent
16 check under \$500.

17 **THE COURT:** Okay. All right. I'm going to stand on my
18 conclusions and rulings and deny the relief based on PCR
19 application for ineffective assistance of counsel or for
20 prosecutorial misconduct. And as a result, that makes the
21 motion to dismiss moot. But he's still entitled to his relief
22 that's already been granted. All right.

23 **MS. MARTO:** Thank you, Your Honor.

24 **MR. FALK:** He's still entitled to the Austin plea?

25 **THE COURT:** Sure.

1 **MR. FALK:** Do we need a new order for that?

2 **THE COURT:** Well that wasn't really before me. I'm just
3 saying I don't know of any reason why it would be affected by
4 this.

5 **MR. FALK:** Thank you.

6 **THE COURT:** All right. Yes, sir.

7 **MS. MARTO:** Judge, do you mind if I put in the order of
8 dismissal that he's entitled to Austin relief and that that
9 should be bumped up, or are you looking for two separate
10 orders?

11 **THE COURT:** No, that's fine.

12 **MS. MARTO:** Okay.

13 **(HEARING IS ADJOURNED)**

14

Dukes vs State

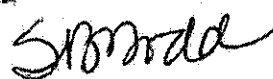
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2019-CP-26-06842

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Henry J. Dukes versus State of South Carolina in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on June 2, 2022.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Sallie Beth Todd, CVR

Official Reporter

June 13, 2023.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Henry Dukes, #347234,)
Applicant,)

Case No.: 2019-CP-26-06842

v.)

**ORDER GRANTING RELIEF PURSUANT
TO *AUSTIN V. STATE* AND DISMISSING
APPLICANT'S PCR APPLICATION**

State of South Carolina,)
Respondent.)

This matter comes before this Court by way of Applicant's post-conviction relief application filed October 25, 2019. Respondent made its return on October 13, 2020, requesting an evidentiary hearing be convened. An evidentiary hearing was held on June 2, 2022, at Horry County Courthouse. James K. Falk, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel J. Eric Fox and Solicitor Jimmy A. Richardson, II, Esquires, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant is entitled to *Austin* relief and that he cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief on the remaining claims. Accordingly, this Court affords Applicant a belated PCR appeal and denies and dismisses the remainder of the application with prejudice. Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2017-CP-26-01473). J. Eric Fox, Esq., represented Applicant. Jimmy A. Richardson, II, Esq., and Robert Paul Taylor, Esq., of the

Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to a jury trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted on August 2, 2011. Judge John sentenced Applicant to imprisonment for a term of 47 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions on June 26, 2013. *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013). Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 25, 2014. The Remittitur was issued on August 2, 2014.

First PCR Application: 2011-CP-26-7994

Applicant filed his first application for post-conviction relief on September 23, 2011 (2011-CP-26-7994) while his direct appeal was still pending. He alleged the following grounds for relief:

1. Identification by witness should have never made it to jury.
2. Arrest warrant in case was invalid.
3. Lead Detective wasn't at trial.

Respondent filed a return and motion to dismiss on November 18, 2011, arguing that the Application should be dismissed without prejudice while the direct appeal was pending in the South Carolina Court of Appeals. Thus, PCR relief was not available to him at that time. *See Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000) ("The applicant may not bring a PCR action while a direct appeal is pending"); *see also* Rule 71.1(b), SCRCP. The Honorable Larry B. Hyman, Jr. granted Respondent's motion and dismissed the matter in an Order filed on November 30, 2011. Petitioner did not appeal from this Order.

Second PCR Application: 2013-CP-26-04699

Applicant filed his second application for post-conviction relief on July 9, 2013 (2013-

CP-26-04699), while his direct appeal was still pending. He alleged the following grounds for relief:

1. Ineffective assistance of counsel
 - a. Counsel failed to investigate numerous aspects of the States case
 - b. Counsel failed to put forth a proper defense included but not limited to one of alibi.
 - c. Counsel failed to inquire about the defendants state of mind.

Respondent made its Return on June 2, 2014, and an evidentiary hearing into the matter was convened on February 11, 2016, before the Honorable D. Craig Brown. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq. of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and J. Eric Fox., Esq., also testified. By written order dated March 7, 2016, and filed March 10, 2016, Judge Brown denied and dismissed the application. Applicant did not appeal the order denying relief.

Third PCR Application: 2014-CP-26-05308

During the pendency of the above application, Applicant filed a third application for post-conviction relief on August 8, 2014. Respondent made its Return and Motion to Dismiss on or about August 14, 2014, requesting the application be summarily dismissed because the second application was still pending. The Honorable Larry B. Hyman, Jr., granted Respondent's motion and dismissed the matter by order dated August 27, 2014, and filed September 3, 2014.

Fourth PCR Application: 2017-CP-26-01473

Applicant filed his fourth application for post-conviction relief on March 7, 2017 (2017-CP-26-01473). He alleged the following grounds for relief:

1. Prosecutorial Misconduct
2. Court lacked jurisdiction
3. Ineffective assistance of counsel, in that:
 - a. Trial Counsel failed to request a mistrial when testimony was offered to

- incite the passion of the jury.
- b. Trial Counsel failed to have Solicitor recused after he made himself a witness
- c. Solicitor pushed to have unrepresented Defendant Preliminary hearing waived when one was requested (see special rules of Prosecutor)
- d. Court of General Sessions never had jurisdiction of case when Defendant requested a Preliminary hearing and never had one.
- e. Trial Counsel never explained guidelines to sentencing in mandatory

In Applicant's request for relief, Applicant alleged that his appointed counsel never appealed the dismissal of his previous post-conviction relief application. Respondent made its Return and Partial Motion to Dismiss on June 29, 2017. Respondent requested an evidentiary hearing on Applicant's claims that he was denied his right to appeal the dismissal of his previous PCR claims, pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Respondent moved to dismiss all other allegations contained in the Application.

Applicant was present at the hearing and was represented by Steven W. Fowler, Esq. Respondent was represented by Assistant Attorney General Johnny E. James, Jr. No testimony was taken at the hearing, but Respondent conceded Applicant was entitled to *Austin* relief based upon communications with Applicant's prior PCR counsel, Tristan M. Shaffer, Esq., that indicated that Applicant had not been informed of the entry of the order denying relief in the prior PCR action in a timely manner, and therefore had not been afforded an opportunity to either request or properly waive his right to an appeal. The Court granted Applicant's request for *Austin* relief while also finding that his remaining allegations were untimely and successive, and accordingly denied relief and dismissed those claims with prejudice. No notice of appeal was filed pursuant to the Court's grant of *Austin* relief.

Federal Habeas Corpus Action: 4:19-cv-1211-TMC-TER

Applicant filed a *pro se* habeas corpus petition in federal court on April 26, 2019. In his petition, Applicant alleged several issues with the proceedings giving rise to his conviction, most

[Handwritten signature]

notably that the “post conviction relief was abandoned by counsel and appeal never filed.”

Applicant elaborated that he “was allowed a belated appeal” but that his “attorney refuses to file appeal.”

On July 19, 2019, Respondent moved to summarily dismiss Applicant’s claims, arguing that they were barred by the statute of limitations. Alternatively, Respondent requested that the federal court stay its proceedings and hold the case in abeyance to allow Applicant to exhaust his state court remedy of pursuing appellate review of the denial of his PCR relief pursuant to the *Austin* relief he had been previously granted. Applicant made his response to the motion for summary judgment on July 29, 2019, acknowledging that he had a state remedy available and reasserting his position that his appointed PCR attorney did not file a notice of appeal on his behalf. On October 9, 2019, the federal district court denied Respondent’s motion to dismiss but granted its motion to stay and hold the case in abeyance while Applicant exhausts his state remedies available under the previous grant of *Austin* relief, based upon his. The current application for post-conviction relief followed.

Summary of Relevant Facts

The South Carolina Court of Appeals found the following facts:

A jury found Henry Dukes guilty of murder for the shooting death of Andrico Gowans. . . . On the morning of November 2, 2007, Cornelius Ford witnessed Gowans’ murder. That afternoon, Ford met with Detective Sean Addison at the Conway Police Department and identified Dukes as the shooter.

Dukes, 404 S.C. at 555, 745 S.E.2d at 138.

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Brady violation and noncompliance with court order.

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- a. Trial judge ordered the state to turn over NCIC of its witnesses Carolyn Heester had multiple check fraud convictions which was not disclosed to the Defense which prejudiced the Defendant.
2. Belated appeal.
 - a. Never got to properly appeal PCR.

At the PCR hearing, Applicant proceeded forward on the allegations listed above, as well as ineffective assistance of counsel for failure to search Heester's name on the public index for a prior record and newly discovered evidence of these records. All other allegations available to Applicant are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated that Heester testified at trial that she saw a black man with a white coat running around the crime scene. He stated that she was used to corroborate the testimony of the man and son who testified. He stated he found out about her criminal history in 2019. He stated that he found out through a fellow prisoner that Heester pled to fraudulent check charges. He stated he did not know her, and they did not have any mutual friends. He stated that this evidence could have been used to impeach her.

Counsel Testimony

Counsel testified that the State handed over all the NCIC records associated with the case. He stated that he showed Applicant everything he had associated with the case. He stated he did not recall being given Ms. Heester's records. He stated that her fraudulent check charges were qualifying impeachment convictions and would have impacted her credibility. He stated that her testimony corroborated Ford's testimony. He stated that this testimony was important for the State. He stated that Ford's testimony and actions were suspicious because he did not call the

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police, just his father, and remained hidden for several hours after the killing.

On cross-examination, he testified that the State's case was primarily based on the son's and father's testimonies and Heester was used to corroborate those testimonies. He stated that he was unsure whether the criminal record would have led to an acquittal but stated it would have impacted her credibility. He stated that another witness stated he saw a black man in a white coat nearby, but that the timeframe he produced was not exact. He stated he usually gets NCIC records before trial.

Prosecutor Testimony

Prosecutor testified that his general practice is to turn over all NCIC records on all witnesses before they are called to the stand. He stated he ran a NCIC search on for this witness on August 4, 2011, and nothing came up as part of her record. He stated that the public index showed that Heester was charged because of several bad checks. He stated these charges did not appear on her NCIC record. He testified that the public index is accessible by the public.

Prosecutor stated that Heester was not familiar with the victim or Applicant. He stated her testimony consisted of her visiting a friend of hers from where the victim was killed on the side porch. He stated she did not inform the police of this. He stated that she saw a young black male, roughly twenty-nine years of age, run away from the house with a white hood over his head. He testified that other evidence in the case consisted of the police initially speaking with Applicant, followed by Applicant's nephew, while at the police station. He stated that a young man came by and he stated that they got the wrong guy and the man responsible was Applicant. He stated that an officer went back to talk to Applicant, but discovered he packet everything up and left. He stated he stayed at a crack house for a short period of time and that he called a cab back to Darlington. He stated that the cab driver testified at trial. He stated that Applicant's

mother gave him money. He stated that Applicant went to Miami. He stated a confidential informant called and stated that if they were looking for Applicant, he was at the police station. He stated that Applicant told the confidential informant that he was laying low after killing someone. He stated that Heester was not an important witness. He stated that the checks charges were admissible.

On cross-examination, Prosecutor testified that Heester's prior record was impeachment evidence. He stated he did not recall mentioning this witness in closing argument but stated that it was only helpful testimony concerning time and manner because he did not know Applicant or the victims.

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 PCR hearing. Before this Court are the Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, prior PCR and habeas records, and this PCR action's records. 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 conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Austin Relief

Applicant contends that PCR Counsel was ineffective for failure to timely file a notice of appeal. "An indigent defendant has the right to be informed of an appeal and the manner and method for taking the appeal." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989); *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395, 396 (1991). In *Austin*, the South Carolina Supreme

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Court framed the inquiry as whether the PCR applicant “requested and was denied an opportunity to seek appellate review.” *Austin* at 454, 409 S.E.2d at 396. Under *Austin*, an Applicant is entitled to appeal the denial of a PCR application when they have not voluntarily waived the right to appeal. An applicant may waive the right to appeal by making a “knowing and intelligent decision not to pursue the appeal.” *Simuel v. State*, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010).

“The right to seek appellate review of the denial of PCR is expressly authorized by state law.” *Austin*, 305 S.C. at 454, 409 S.E.2d at 396; S.C. Code Ann. § 17-27-100 (2014). Pursuant to *Austin*, a post-conviction relief applicant may petition the South Carolina Supreme Court for belated discretionary review of the dismissal of his or her application in some circumstances. A PCR applicant is entitled to an *Austin* appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999).

This Court finds Applicant wanted an appeal from his prior PCR action and did not waive this right. The State consented to his request. Accordingly, Applicant is entitled to a belated appeal of his prior PCR matter.

Prosecutorial Misconduct

Applicant claims the prosecutor engaged in misconduct by withholding NCIC records on Ms. Heester, which he claims constitutes a *Brady*¹ violation. *Brady* violations occur if four conditions are met: “the evidence was favorable to the accused”, “it was in the possession of or known to the prosecution”, “it was suppressed by the prosecution”, and “it was material to guilt

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

or punishment.” *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Further, whether a mistrial is warranted remains contingent on “(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant’s guilt; and (3) the curative actions taken by the court.” *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (quoting *United States v. Anwar*, 428 F.3d 1102, 1112 (8th Cir. 2005)).

This Court finds Prosecutor credible in his assertion that he handed over Heester’s NCIC records to Counsel. This Court also finds Prosecutor’s statement that no charges appeared on her NCIC record credible. Thus, even if they were not handed over, the error was harmless and not material. Accordingly, relief is denied on this ground.

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. See *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v.*

Washington, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); see *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "strong presumption" of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Applicant alleges ineffective assistance of counsel for "failure to investigate" Heester's prior record on the public index. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* However, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)),

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including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to "investigate lines of defense that he has chosen not to employ at trial." *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1255 (5th Cir. 1982)). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Counsel acted reasonably in concluding that Heester's criminal history would be documented on the NCIC report and reasonably relied on that when building his understanding of her prior record. However, even if this Court were to find Counsel deficient, no prejudice was suffered. This Court finds there was overwhelming evidence of guilt in this case, so that additional impeachment on a minor State witness would not change the outcome of the proceedings. Accordingly, because deficiency nor prejudice was established, relief is denied on this ground.

Newly Discovered Evidence

This Court finds Applicant's claim of newly discovered evidence of Heester's prior criminal history must be dismissed. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed 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 Ann. §17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999).

This Court finds that this evidence could have been discovered prior to trial through exercising due diligence. Additionally, this evidence not material, is merely cumulative and impeaching, and most likely would not change the outcome at trial. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant is entitled to a belated appeal of his prior PCR action but has not established any constitutional violations or deprivations that would require this Court to grant his application as it pertains to the remaining allegations. Therefore, this PCR application allegations, with exception of the belated PCR appeal issue, must be denied and dismissed with prejudice.²

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991),

² This Court elected to proceed forward to a full evidentiary hearing, rule on the merits, and dismiss the State's motion to dismiss as moot.

an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCF provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. Applicant be afforded a belated PCR appeal;
2. The remainder of the PCR application be denied and dismissed with prejudice; and
3. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 22nd day of February, 2023.

H. Steven DeBerry, IV

H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina.

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CLERK OF COURT
HORRY COUNTY, SC

WITNESSES

Det S Addison Conway Police Department

DOCKET NO. 2008-GS-26-022911

The State of South Carolina

County of Horry

Jimmy Richardson, II
86507-1

COURT OF GENERAL SESSIONS

August, 2008 TERM

ARREST WARRANT NUMBER

1215612

CDR: 0116 16-03-0010, 0020

DOA: 12/13/2007

THE STATE

VS.

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury
Date: AUG 21 2008

Henry Jermaine Dukes
/ M
LAMAR, SC 290699144
DOB: [REDACTED]
SSN: [REDACTED]

ATTORNEY: *Eric Fox* Gethers, James Gethers

Indictment for

Murder

J. Gregory Hembree, Solicitor

For person of Petit Jury
Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on August 21, 2008, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Henry Jermaine Dukes did in Horry County, on or about November 2, 2007, willfully, feloniously, and intentionally kill the victim, Andrico Gowans, with malice aforethought, either express or implied, by means of gunshot, and the victim did die as a proximate result thereof on or about November 2, 2007 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Henry Jernaine Dukes

AKA:

Race: BLACK Sex: M Age: 28

Address:

City, State, Zip: LAMAR, SC 290699144

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder (30 - Life)in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Ac) ☐ §17-25-45The charge is: ☒ As Indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY:

SCB13632

Richardson, Jr. Jimmy A.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 4 1/2 years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ca	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL		\$ <u>133.90 + 40.00 = 173.90</u>

Clerk of Court/ Deputy Clerk

Melanie Huggins-Ward

Court Reporter:

Dixie Eubank

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS2602911A/W#: 1215612Date of Offense: 11/2/2007S.C. Code § : 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☒ PLEADS

PTUP

 day/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 09/02/2008\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date: 8/2/11