STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Carmen L. Rice, #308637, Applicant,	)	CASE NO. 2017–CP–40–06361
v.	)	**ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Timothy L. Griffith, Esq.
Respondent's Attorney:	D. Russell Barlow II, Esq.
Trial Counsel:	Christopher Hart, Esq. John T. Mobley, Esq.
Date of Hearing:	July 17, 2023
Court Reporter:	Karen Ambroziak

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Carmen Latrice Rice (Applicant) on October 18, 2017, alleging she is entitled to post-conviction relief based on newly or after-discovered evidence. An evidentiary hearing into the matter was convened on July 17, 2023 at the Richland County Courthouse. The Applicant was present and represented by Timothy L. Griffith, Esquire. D. Russell Barlow II, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on her own behalf, and additional testimony was provided by Holly Jo Thompson[1] (Thompson) and Abdullah S. Mustafa (Mustafa). The Court had before it the trial transcript, the Richland County Clerk of Court records, the records from the direct appeal, the records from Applicant's first PCR hearing, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return thereto.

[1] SCDC Inmate #299956.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to the Richland County Clerk of Court orders of commitment. In October 2004, the Richland County Grand Jury indicted Applicant for Armed Robbery[2] (2004-GS-40-8755) and Murder[3] (2004-GS-40-8754). John T. Mobley, Esquire and Christopher R. Hart, Esquire represented Applicant at trial. Deputy Solicitor John P. Meadors and Assistant Solicitor Theodore N. Lupton prosecuted the case. On April 4, 2005, Applicant proceeded to a jury trial before the Honorable Reginald I. Lloyd. Applicant was found guilty as indicted. Judge Lloyd sentenced Applicant to imprisonment for concurrent terms of thirty (30) years for Armed Robbery and life without parole for Murder.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, perfected the appeal. In Applicant's appeal Appellate Counsel Dudek raised the following issues:

1. Whether the Court erred by refusing to allow defense witnesses Alana Quattlebaum to testify that co-defendant Iris Bryant told her in jail that Nikki was with her when the decedent was killed, and that Nikki shot the decedent, since Bryant on a prior occasion told the police Nikki was present, and Bryant later testified that admission was a lie, and she denied at trial making this statement to Quattlebaum, since this was an admissible prior inconsistent statement, and the judge's reason for excluding it as evidence of third-party guilt was also erroneous.
2. Whether the Court erred by allowing Investigator Smith to testify he was told by another law enforcement official that appellant did not want to submit to her fingerprints being taken, since this testimony was hearsay and was very prejudicial.

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[2] A person who is convicted of or pleads guilty to Armed Robbery must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years. See S.C. CODE ANN. § 16–11–330 (2015). The offense of Armed Robbery is a violent, most serious felony. See S.C. CODE ANN. § 16–1–60 (2015); S.C. CODE ANN. § 17–25–45 (2014).

[3] A person who is convicted of or pleads guilty to Murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty (30) years. See S.C. CODE ANN. § 16–3–20 (2015). The offense of Murder is a violent, most serious felony. See S.C. CODE ANN. § 16–1–60 (2015); S.C. CODE ANN. § 17–25–45 (2014).

2019

3 Whether the Court erred by allowing waitress Heidi Feagin to make and [sic] in-court identification of appellant, where she previously was not only unable to identify appellant, but she also misidentified two other women in the photo array, since the judge erroneously ruled appellant opened the door to this unreliable in-court identification by cross-examining Feagin.

4. Whether the Court erred by admitting records and the attendant testimony from the security company where appellant was employed under the business records exception, since the records were not "trustworthy" within the meaning of Rule 803(6), SCRE, where the company went bankrupt and the custodian of the records and other evidence indicated that the poor bookkeeping made it possible for thirty-three guns not to be accounted for, including one the state strongly insinuated belonged to appellant, and the probative value of this "bad employment acts" and gun evidence was also outweighed by its unduly prejudicial effect under Rule 403, SCRE.

5. Whether the Court erred by refusing to give a curative instruction where the solicitor argued that the jury should convict appellant to give decedent's wife and the decedent justice, since this was an improper appeal to the sympathy and passion of the jury.

The South Carolina Court of Appeals affirmed Applicant's conviction in a published opinion on October 5, 2007. State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007).

Applicant filed a Petition for Rehearing on November 26, 2007. On January 2, 2008, the Court of Appeals denied Applicant's Petition for Rehearing. On April 4, 2008, Applicant filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. On December 4, 2008, the South Carolina Supreme Court denied Certiorari. The Remittitur was returned to the lower court on December 8, 2008.

First PCR Action and Subsequent Appeal: 2009-CP-40-0234

Applicant subsequently filed an application for PCR on January 14, 2009, in which she alleged the following grounds for relief:

1. "Ineffectiveness of counsel"
2. "Judicial violation"
3. "Search, seizure, and investigator's violation of procedure"

 3/4/19

4. "Miranda improperly done"
5. "Incomplete discovery/Brady prior to trial"
6. "Sentence [sic] on basically hearsay; no tangible evidence"

Attached to Applicant's PCR application was an "Attachment to Post Conviction Relief Form Number Nine (9)," in which Applicant expounded on her allegations to include (verbatim):

1. The attorney did not provide the Defendant a complete Motion of Discovery and Brady with all favorable material in accordance to Maryland v. Brady . . . with sufficient time to prepare rebuttal.
2. The attorney did not insist on the suppression of incredible witnesses [sic] statement or testimony.
3. The Defendant was charged and convicted on hearsay of witnesses in a case of four (4) years old whereas witnesses in her behalf nor she could recall evidence or whereabouts.
4. No tangible evidence was presented at the trial.
5. Witness for the prosecution did not pick the Defendant out of any lineup, however pick out the prosecution chief witness.
6. The Defendant Miranda Rights was not given to her during the time of the investigator's questioning. The Defendant was given false information as to why she was being questioned at the beginning of interrogation by investigators who came to the Defendant's home.
7. All witnesses for the prosecution was in jail/detention/and or prison and was coerced into testifying.
8. The Rule of Evidence 708 was violated . . . at the trial.

Respondent filed its Return on July 7, 2009, and an Amended Return on March 11, 2010.

An evidentiary hearing was convened at the Richland County Courthouse on June 6, 2011, before the Honorable James R. Barber, III. Applicant was present at the hearing and represented by Mark Schnee, Esquire. Brian T. Petrano, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the evidentiary hearing, Applicant, John T. Mobley, Esquire, Arletta Frierson, and LaShawn Roberts testified. Judge Barber had before him the records of the Richland County Clerk of Court, Applicant's trial transcript, the complete records from the direct appeal, and Applicant's records from SCDC. On August 22, 2011, Judge Barber issued the Order of Dismissal denying Applicant's application for post-conviction relief.

 4 of 19

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court on behalf of Applicant and raised the following issues:

1. Did the PCR judge erroneously find that the statement of Arletta Frierson that Iris Bryant the co-defendant and the State's main witness at trial, told her that the petitioner had nothing to do with the murder of Bernard Brennan was inadmissible hearsay when the statement of Frierson was admissible as impeachment testimony not hearsay pursuant to Rule 801(d)(1)?
2. In finding that the statement of Arletta Frierson was inadmissible, did the PCR judge err in failing to make findings of fact and conclusion of law as to allegation that trial counsel was ineffective for failing to call Arletta Frierson as a witness at trial to testify that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with murder of Bernard Brennan?
3. Did the PCR judge err in refusing to make findings of fact and conclusions of law as to the allegations that the testimony of LaShawn Roberts that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan constituted newly discovered evidence?

Respondent, through Assistant Attorney General Robert Corney, made a Return to the Petition on January 4, 2012. The South Carolina Supreme Court thereafter entered an order transferring the case to the South Carolina Court of Appeals. On May 21, 2014, the South Carolina Court of Appeals entered an order granting the Petition for Writ of Certiorari and ordering further briefing.

Applicant, through Appellate Counsel, filed a Brief of Petitioner on June 24, 2014. The Respondent, through Assistant Attorney General J. Clayton Mitchell, filed the Brief of Respondent on November 24, 2014. On April 5, 2015, the South Carolina Court of Appeals affirmed the denial of post-conviction relief in unpublished order State v. Rice, Unpub. Op. 2015-UP-191 (Filed April 8, 2015). Applicant filed a timely Petition for Rehearing on April 16, 2015. On May 19, 2015, the

Court of Appeals denied the petition for rehearing.

On June 15, 2015, Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. Respondent filed its Return to the Petition on July 30, 2015. On November 4, 2015, the South Carolina Supreme Court entered its order denying the Petition for Writ of Certiorari. The Remittitur was returned to the lower court on November 9, 2016.

Petition for Writ of Habeas Corpus: 2:16 –2610-RBH-MGB

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on July 13, 2016. Applicant set forth the following grounds for relief:

1. Ineffective Assistance of Counsel
   a. The Court of Appeals erred in finding that if trial counsel was deficient for failing to call (Arletta) Frierson as a witness, petitioner failed to show prejudice because the testimony was merely cumulative when the PCR judge did not rule on the merits of the ineffective assistance of counsel claim and did not find the testimony merely cumulative. (Petitioner's Question Three on PCR Certiorari in S.C. Supreme Court).
2. No physical evidence was pointing to me as the person that committed the crime.
   a. They had DNA and fingerprints, but none matched mine.
   b. Petitioner asserts this issue was raised in the direct appeal and cert petition in the post-conviction relief appeal.
3. The trial court erred by ruling a prior inconsistent statement concerning third party guilt admissible.
   a. Because this was a murder trial where someone was deceased and another incarcerated for life due to false statements by the state's key witness.
4. Feagin was given a photo line-up of all individuals including the subject (me Carmen) and I wasn't picked out until placed in court on trial between two attorneys charged with murder and armed robbery.

Respondent filed its Return and Motion for Summary Judgment on November 28, 2016. On January 5, 2017, Applicant filed her objection to the Return and Motion for Summary Judgment. On March 27, 2017, Applicant filed a notarized letter written by SCDC inmate

 6 of 19

#299956, Holly Jo Thompson. On July 31, 2017, the Honorable Mary Gordon Baker issued the Report and Recommendation that Respondent's Motion for Summary Judgment be granted, and Applicant's petition be denied. Applicant filed her objection to the Report and Recommendation on August 17, 2017. On August 31, 2017, Respondent filed its Reply to Objections to Report and Recommendation of the Magistrate Judge. On September 26, 2017, the Honorable R. Bryan Harwell, United States District Judge, adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgement and dismissed Applicant's petition.

ALLEGATIONS

In Applicant's current PCR application, Applicant alleges she is being held in custody unlawfully for the following reasons:

1. "Appeal Counsel's ineffective representation"
   a. "Counsel failed to properly insist and/or present evidence that Rice had no physical or direct evidence linking her to crime and appeal counsel further failed to raise such an issue on appeal which resulted in a procedural default in Applicant's habeas corpus"
2. "Judge's failure to insure [sic] Carmen Rice received fair trial"
3. "Violation of Carmen Rice's constitutional rights-other and further violations discovered in this case including newly found issues"

Respondent filed its Return and Motion to Dismiss on February 19, 2019, requesting that the PCR Application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive applications. On March 6, 2019, Applicant filed her response to Respondent's Return and Motion to Dismiss and/or Proposed Conditional Order of Dismissal. The Honorable Jocelyn Newman issued a Conditional Order of Dismissal on May 22, 2019, provisionally denying and dismissing the PCR Application while giving Applicant twenty (20) days from the *date* of service of said Order to show why the dismissal should not become final. The Conditional Order of Dismissal was properly served on Applicant, and, in

response, she filed her Opposition to Conditional Order of Dismissal on June 18, 2019. In Applicant's Opposition to Conditional Order of Dismissal, she included a letter purportedly written by SCDC inmate #299956, Holly Jo Thompson, with no date and another letter from Stacie Earle (Earle) dated November 22, 2016.

On July 1, 2019, the Honorable Jocelyn Newman, Chief Administrative Judge for the Fifth Judicial Circuit, issued an Order of Partial Dismissal (Judge Newman's Order) finding

> Applicant's allegations of general ineffective representation (numbered 1 above), the judge's failure to ensure fairness (numbered 2 above), and the violation of her constitutional rights (a portion of number 3 above) . . . has failed to show sufficient reason why the Conditional Order of Dismissal should not become final.

However, after reviewing Applicant's supplement to the application for PCR, Judge Newman granted an evidentiary hearing as to the allegation of newly discovered evidence *only*. On June 23, 2021, Respondent filed an Amended Return addressing the newly discovered evidence claim.

APPLICANT'S FIRST AMENDED PCR APPLICATION

On March 21, 2023, Applicant, through Counsel, filed a First Amended PCR Application to allege the following:

1. Brady Violation
   a. "The State violated Rice's rights under the US and South Carolina Constitutions by failing to turn over to the defense the attached statements of witnesses, and the failure to turn over those statements prejudiced Rice's defense."

Attached to the First Amended PCR Application were statements from Nathaniel Hallman dated July 13, 2003, July 14, 2003, October 27, 2003, and Lamont Bostick (Isaac) dated August 1, 2003.

APPLICANT'S SECOND AMENDED PCR APPLICATION

8/7/19

On July 10, 2023, Applicant filed her Second Amended PCR Application with the following allegations:

1. Ineffective Assistance of Counsel and Prosecutorial Misconduct By Suppression of Exculpatory Evidence in Violation of Applicant's Due Process Rights
   a. "November 2003-2005 Rice defense trial attorney John Mobley and Chis Hart failed to raise the exculpatory material; ineffective assistance of counsel"
   b. "In 2007 rice is represented by attorney Robert Dudek, appointed by appeals court; he failed to raise the exculpatory statement; ineffective assistance of counsel,"
   c. "2009-2011 Rice first PCR she was represented by attorney Mark Schnee, appointed by indigent commission; he failed to raise the exculpatory statement, ineffective assistance of counsel,"
   d. "2015 Rice is represented by attorney Katerine [sic] Hudgins, indigent commission, writ of certiorari; she failed to raise the exculpatory statement; ineffective assistance of counsel,"
   e. "2017 Rice is represented by Katerine [sic] Hudgins attorney appointed by indigent commission, habeas corpus; she failed to raise the exculpatory material; ineffective assistance of counsel,"
   f. "2019 Rice is represented by Gregory Collins, appointed by indigent commission, PCR; he failed to raise the exculpatory statement; ineffective assistance of counsel,"
   g. "2021 Rice is represented by Art Aiken, appointed by indigent commissions, PCR; attorney Aiken amended Rice's PCR application to include exculpatory materials but he failed to raise in the PCR application INEFFECTIVE ASSISTANCE OF COUNSEL outlining the above chronological order of ineffective assistance of counsel starting with Rice defense-trial attorneys. Rice denied of her constitutional Sixth Amendment right to effective assistance of counsel has been deny to this very day."
2. Newly Discovered Evidence
   a. "Rice defense trail attorneys failed to disclosed exculpatory material to her. The exculpatory statements are new

discovered evidence to Rice. She were made aware of them in October 2022."

3. Trial Counsel Failed to Call Witnesses
   a. "Rice defense trail attorneys failed to called the witnesses in the exculpatory material; they should have called Nathaniel Hallman, Lamont Bostics, Renee Bostics, Rita Bostics, Alexander Sharpe and Troy Stevenson"
4. Trial Counsel Failed to Request DNA Samples of Other People
   a. "Rice defense trial attorney should have requested that Iris Bryant and her cousin Tika Bethel(aka Nikki, Tina) be tested DNA/Forensic since there were DNA in the front and back sit as the court trial transcript stated."
5. Trial Counsel Failed to Properly Cross-Examine Alton Page
   a. "Rice defense trial attorney should have question more in depth of Alton Page the witness in the pool hall that was shooting pool with the victim. The defense attorney asked Mr. Page how tall was the two females. The trial court record will reflect that Mr. Page stated that the two females were a few inches shorter than him. He stated that he was 5'9. That would bring the two females in the ranges of 5'7 or 5'6. Rice is 4'11."

SUMMARY OF TESTIMONY FROM PCR EVIDENTIARY HEARING

Holly Jo Thompson's Testimony

On direct examination, Thompson testified that she wrote the letter shown to her and that it was not the first letter she had ever written.[4] Thompson testified that the statements she wrote in the letter were true.[5, 6]

On cross-examination, Thompson testified that she wrote the letter approximately seven

[4] The letter was admitted into evidence as Applicant's Exhibit Number one (1) without objection.
[5] Unlike the letter Applicant used in her federal *habeas*, Thompson's letter submitted to the Court was undated and not notarized.
[6] Respondent objected to Thompson testifying to the contents of the letter based on hearsay. The Court sustained Respondent's objection. The substance of the letters were statements purportedly made by Felisha Hallman and Iris Bryant. Hallman and Bryant were not present or available to testify and be subject to cross examination. However, the letter was admitted into record for review purposes. While the Court sustained the objection, the witness was not precluded from testifying to the substance of any matter within her personal knowledge that may have been contained within her letters.

 10/7/19

and a half years ago while incarcerated. Thompson testified that the first letter she ever wrote was before Applicant's trial, and she had turned it into Richland County Sheriff's Department. Thompson testified that she was not employed prior to her conviction, and she was convicted of murder in 2017.

Applicant's Testimony

On direct examination, Applicant testified that Thompson gave her the letter when she wrote it about seven years ago. Applicant was shown Stacie Earle's letter, and she testified that Earle gave her the letter in 2016.[7, 8]

On cross-examination, Applicant testified Thompson gave her the letter about seven years ago. Applicant testified that she could not recall if she used a similar letter in her federal *habeas* action. Applicant further testified that it was possible Thompson had written two letters for her.

Abdullah S. Mustafa's Testimony

On direct examination, Mustafa testified that he was the chairman of Prison Voices of South Carolina, which advocates for people who have been wrongfully convicted. Mustafa testified that he had been involved in Applicant's case since September 2022, and decided to help Applicant after reading the letters. Mustafa further testified he did not receive the letters from Applicant, but discovered them in her discovery packet. Mustafa testified that upon discovering the letters, he provided them to Applicant's prior attorney and Respondent. Mustafa testified that he had no knowledge of whether the letters were in Applicant's discovery at trial.

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[7] A copy of Stacie Earle's letter is dated November 22, 2016, but is not notarized. The Court was not provided with the original letter.

[8] Respondent objected to Ms. Earle's letter being admitted into evidence on the legal basis of authentication and hearsay. The Court agreed with Respondent and sustained the objection. The letter was marked as Applicant's two (2) for ID purposes only. Ms. Earle was not present to testify and be subject to cross examination regarding the authenticity of the letter and the substance of its purported content.

Ms. Earle (5906 Weston Avenue, Columbia, SC 29203) but likewise had no previous success in contacting her at that address.

Additionally, Respondent noted in closing that the contents of Ms. Earle's letter alleged Earle signed a statement against Applicant before trial; however, the record is void of such statement. Even assuming *arguendo* that Earle was present to authenticate the letter, the letter is hearsay, and Applicant did not provide this Court with the original letter or a copy of the affidavit Earle allegedly signed against Applicant. Our Supreme Court has "repeatedly held a PCR applicant *must produce the testimony* of a favorable witness or *otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing" in order to prevail on this type of claim. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (holding that "pure conjecture" as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

Accordingly, this Court finds Applicant has failed to meet her burden, and the evidence presented does not constitute newly discovered evidence. Importantly, even if the evidence constituted newly discovered evidence, it was immaterial to Applicant's guilt or innocence, and would not change the result if Applicant was granted a new trial. Therefore, Applicant's application for PCR is **DENIED** and **DISMISSED**.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony

18 Jul 19

and a half years ago while incarcerated. Thompson testified that the first letter she ever wrote was before Applicant's trial, and she had turned it into Richland County Sheriff's Department. Thompson testified that she was not employed prior to her conviction, and she was convicted of murder in 2017.

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STANDARD OF REVIEW

The PCR Act provides that a person who has been convicted of a crime may seek post-conviction relief based on the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. That the court was without jurisdiction to impose sentence;
> 3. That the sentence exceeds the maximum authorized by law;
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A) (2014). In a post-conviction relief action, "[t]he applicant has the burden of establishing [her] entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP; see Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

To obtain a new trial based on after discovered evidence under S.C. Code Ann. § 17-27-20(A)(4) (2014), a PCR applicant must show the evidence:

> 1. would probably change the result if a new trial is had;
> 2. has been discovered since the trial;
> 3. could not have been discovered before trial;
> 4. is material to the issue of guilt or innocence; and
> 5. is not merely cumulative or impeaching.

Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when

 12 of 19

considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)); see also, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.").

However, the granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .").

Additionally, the "credibility of newly-discovered evidence . . . is a matter for determination by the circuit judge to whom it is offered." State v. Mayfield, 235 S.C. 11, 34, 109 S.E.2d 716, 729 (1959); Harris, 391 S.C. at 544–45, 706 S.E.2d at 529 ("The credibility of newly-discovered evidence is for the trial court to determine."); see e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.").

FINDINGS OF FACT & 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 post-conviction relief hearing. This Court further had the opportunity to observe each witness who testified at the evidentiary hearing, and closely evaluate their credibility, and the Court has weighed their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law pursuant to S.C. Code Ann. § 17-27-80 (2014).

At the outset of the evidentiary hearing, Respondent requested to be heard on the two (2)

 13 of 19

Motions to Strike Applicant's two (2) Amended PCR applications. Respondent maintained that Judge Newman's Order was very limited in scope and that Applicant's amended PCR applications exceeded the scope of Judge Newman's Order. As an initial matter, the Court finds that Judge Newman's Order is very clear and is the law of the case because Applicant did not appeal Judge Newman's Order. Accordingly, the Court finds that Respondent's Motions to Strike are moot because Judge Newman's Order is the law of this case, and the amended PCR applications exceed the scope of that Order. The Court proceeds on the merits of the sole issue of whether the Thompson and Earle letters are after-discovered evidence and timely presented to the Court pursuant to the PCR Act.

Allegation of After-Discovered Evidence

Upon conducting and completing its analysis, the Court finds Applicant has failed to meet the requisite burden of proof regarding after-discovered evidence under S.C. Code Ann. § 17-27-20(A)(4) (2014) and further failed to establish any constitutional violations or deprivations that would entitle Applicant to relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief.); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

As aforementioned, it is a "fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered." State v. Parker, 249 S.C. 139, 141, 153 S.E.2d 183, 184 (1967); c.f. Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the

 1/4/19

smoke of the battle is by [her] very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

As an initial matter, the Court does not find Applicant's and Thompson's testimony **credible**. The determination of whether new evidence is credible for the purposes of a new trial rests with the trial court. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing Porter, 269 S.C. at 621, 239 S.E.2d at 643). "When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence." State v. Deese, 266 S.C. 534, 538 225 S.E.2d 175, 176 (1976) (citing State v. Fowler, 264 S.C. 149, 155, 213 S.E.2d 447, 450 (1975)).

Applicant contends that Thompson's letter was given to her approximately seven (7) years ago, Thompson testifying to the same.[9] Additionally, Thompson testified she had written a letter to the same effect before trial and provided it to Richland County Sheriff's Department. Applicant testified she knew who Thompson was as her name was included in the discovery around the time of trial. The record provides that Thompson was referred to multiple times while lead investigator Stan Smith was on the stand at Applicant's trial. See Trial Tr. p. 829, ll. 5 – 19; pp. 864, l. 19 – 865, l. 5; pp. 865, l. 24 – 866, l. 18; pp. 886, l. 14 – 887, l. 5. As well, Applicant used a letter written by Thompson in her federal *habeas* action.[10]

Notably, at Applicant's first PCR evidentiary hearing on June 6, 2011, Applicant called two (2) witnesses to testify regarding allegations that Applicant's co-defendant, Iris Bryant, told them Applicant had nothing to do with the murder for which Applicant is convicted. The PCR

[9] Thompson testified that she had written the second letter within the last seven and one-half years.
[10] See Entry Number 21, filed 3/27/2017, Case No. 2:16-cv-02610-RBH-MGB.

court ruled their testimony was inadmissible hearsay but allowed Counsel to proffer testimony from Arletta Frierson and Lashawn Roberts. (2011 PCR Tr. p. 15; p. 21). Applicant appealed her 2011 PCR order of dismissal, arguing the PCR court erred in (1) ruling that Arletta Frierson's statement constituted inadmissible hearsay, (2) not making findings of fact and conclusions of law as to the allegation that LaShawn Roberts' testimony constituted newly discovered evidence, and (3) not making findings of fact and conclusions of law regarding whether Trial Counsel was ineffective for failing to call Frierson as a witness. The Court of Appeals affirmed Applicant's convictions finding issues one and two unpreserved and finding Trial Counsel was not ineffective for not calling Frierson to testify. The Court of Appeals reasoned that the testimony Frierson would have provided was merely cumulative to what Alana Quattlebaum testified to at the trial. See State v. Rice, Unpub. Op. 2015-UP-191 (S.C. Ct. App. Filed April 8, 2015).

Here, Applicant is seemingly doing exactly what she did in her first PCR hearing with the exception that she now has two (2) new witnesses. As to Thompson's letter, the Court finds that even if the letters were not available to Applicant before or at the time of trial—or at her first PCR action—and this PCR action was timely filed with Thompson's letter—the letter is immaterial, conclusory in nature lacking substantiation, merely purporting to impeach a State's witness, and would not change the result if Applicant was granted a new trial. In a new trial, Thompson may testify to the fact she wrote the letter, but the knowledge she purports to have that would allegedly exculpate Applicant is inadmissible hearsay. See Rule 801, SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE; Sams v. McCaskill, 282 S.C. 481, 319 S.E.2d 344 (Ct. App. 1984) (A statement offered to prove the truth of the statement is inadmissible hearsay).

 1/6/19

Moreover, even assuming *arguendo* that Thompson's letter is newly discovered evidence, Applicant failed to demonstrate that this purported evidence satisfies the five-factor test in Clark. Specifically, the Court finds Thompson's letter fails factors one, four, and five. See United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion."). The Court finds Thompson's testimony would not have changed the result of the trial, is not material to guilt or innocence, and at best would have merely been used for impeachment purposes. Thompson's letter is tangentially associated with Applicant's guilt or innocence. Evidence that merely impeaches a witness's credibility does not constitute material evidence of a defendant's guilt or innocence. See State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979).

As well, at the evidentiary hearing, this Court found that Ms. Earle's letter was not admissible because its contents are hearsay and Ms. Earle was not present to authenticate the letter or be subject to cross examination concerning its content. See Rule 901, SCRE; see also State v. Brown, 424 S.C. 479, 818 S.E.2d 735 (2018); State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019), cert. granted, (Jan. 16, 2020) and aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020) (all evidence must be authenticated to be admissible). During the evidentiary hearing, Respondent indicated to the Court that his office had attempted to locate Ms. Earle without success. After a review of Ms. Earle's criminal record, it was discovered that Ms. Earle had been on probation. The Court, *sua sponte*, requested that the Bailiff summon a probation officer for questioning regarding potential contact information for Ms. Earle. The probation officer informed the Court that the last known record of Ms. Earle indicated she was on probation in Sumter, but she absconded from probation, and there is no updated record showing an address or any other way to communicate with Ms. Earle. The probation department also had a Columbia address for

 17 of 19

Ms. Earle (5906 Weston Avenue, Columbia, SC 29203) but likewise had no previous success in contacting her at that address.

Additionally, Respondent noted in closing that the contents of Ms. Earle's letter alleged Earle signed a statement against Applicant before trial; however, the record is void of such statement. Even assuming *arguendo* that Earle was present to authenticate the letter, the letter is hearsay, and Applicant did not provide this Court with the original letter or a copy of the affidavit Earle allegedly signed against Applicant. Our Supreme Court has "repeatedly held a PCR applicant *must produce the testimony* of a favorable witness or *otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing" in order to prevail on this type of claim. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (holding that "pure conjecture" as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different); Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (mere speculation as to un-presented witness' testimony does not satisfy PCR applicant's burden).

Accordingly, this Court finds Applicant has failed to meet her burden, and the evidence presented does not constitute newly discovered evidence. Importantly, even if the evidence constituted newly discovered evidence, it was immaterial to Applicant's guilt or innocence, and would not change the result if Applicant was granted a new trial. Therefore, Applicant's application for PCR is **DENIED** and **DISMISSED**.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence or testimony

18 of 19

in support of the claims. Accordingly, this Court deems these allegations abandoned by the Applicant. Therefore, they are hereby denied and dismissed.

CONCLUSION

For all the foregoing reasons, this Court finds and concludes Applicant has failed to meet Ither burden of proof as to any of the allegations advanced in this post-conviction relief action and has not established any constitutional violations or deprivations entitling her to post-conviction relief. Therefore, Applicant's application for post-conviction relief is **DENIED** on all grounds and **DISMISSED WITH PREJUDICE**.

This Court advises the Applicant that she must file and serve a notice of intent to appeal within thirty (30) days from PCR Counsel's receipt of written notice of entry of this Order to secure the appropriate appellate review. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. 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's attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3rd day of November, 2023.

Deadra L. Jefferson
Presiding Judge
5th Judicial Circuit

Charleston, South Carolina
At Chambers

19 of 19