

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BERKELEY )  
 )  
 )  
 )  
JERMAINE HARTWELL, #323738 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
STATE OF SOUTH CAROLINA )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 NINTH JUDICIAL CIRCUIT

CASE NO: 2018-CP-08-2120

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

Plaintiff's Attorney: James P. Craig, Esquire Address: Craig Law Firm, PC 2001 Assembly Street, Suite 201 Columbia, SC 29201 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Benjamin H. Limbaugh., Esquire. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<u>Benjamin Limbaugh</u> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	March 8, 2019 Date submitted
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

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 CLERK OF COURT  
 BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF BERKELEY )  
) )  
) )  
Jermaine Hartwell, #323738 )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS,  
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-2120

**CONDITIONAL ORDER OF  
DISMISSAL**

FILED  
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CLERK OF COURT  
BERKELEY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Jermaine Hartwell (Applicant) on October 23, 2018. Respondent made its Return, requesting the application be summarily dismissed.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. In February 2007, the Berkeley County Grand Jury indicted Applicant for four counts of kidnapping (2007-GS-08-0308-0311), murder (2007-GS-08-0312), armed robbery (2007-GS-08-0313) and two counts of first degree burglary (2007-GS-08-342;-345). N. Elliot Burnwell, Esquire represented Applicant. Assistant Solicitor Blair Jennings, Esquire prosecuted the case. On August 30, 2007, Applicant proceeded to trial before the Honorable Deadra Jefferson. The jury found Applicant guilty as indicted. Judge Jefferson sentenced Applicant to imprisonment for concurrent terms of 30 years for each charge.

Applicant filed a timely notice of appeal. Joseph L. Savitz, III, Esquire, of the Office of Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Hartwell, Op. No. 2010-UP-036 (S.C. Ct. App. filed January 26, 2010). The Remittitur was sent on February 11, 2010.

**2010-CP-08-2341**

The Applicant subsequently filed an application for PCR on July 6, 2010, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel

Respondent filed its return on October 29, 2010. An evidentiary hearing into the matter was convened on September 20, 2011, at the Berkeley County Courthouse. Applicant was present at the hearing and was represented by Grover Seaton, Esquire. Matthew Friedman, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On August 15, 2011, the Honorable J. Mark Hayes, II, issued the order of dismissal denying Applicant's application for post-conviction relief.

**CURRENT APPLICATION**

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly Discovered evidence: recantation of testimony of State's witness, Kerry Hollins"
2. "New, after discovered evidence of State's cooperative witness, Kareem King."

Before this Court are the Berkeley County Clerk of Court records, Applicant's prior post-conviction relief action records, Applicant's appellate records, and the records for this post-conviction relief action.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Statute of Limitations**

The Court finds that this application 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:



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 and sentenced on August 30, 2007. Remittitur from the direct appeal was issued on February 11, 2010. The application was therefore due on February 12, 2011. This application was filed on October 23, 2018, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

#### **Successive Applications**

The Court further finds the application must 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. 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's current application is practically identical to his prior application with the addition of a new allegation of newly discovered evidence. Applicant has failed to establish any sufficient reason why he could not have raised his current allegation of newly discovered evidence in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.



### Newly Discovered Evidence

Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief 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 material fact not previously presented, the post-conviction relief 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).

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not, by the exercise of due diligence, have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In support of his claim of newly discovered evidence, Applicant provided an affidavit from his co-defendant Kerry Hollins, in which Hollins recanted his testimony at Applicant's trial. "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (quoting State v. Whitener, 228 S.C. 244, 264, 89 S.E.2d 701 (1955)). The granting of a new trial based on after-discovered evidence is not favored, and the Court of Appeals will affirm the trial

court's denial of such a motion unless the trial court abused its discretion. State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed with prejudice.



**CONCLUSION**

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this 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 (20) 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 Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Benjamin Limbaugh, Esquire  
PCR Division – 9th Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this \_\_\_\_\_ day of 7/14, 2019.

  
\_\_\_\_\_  
Chief Administrative Judge  
Ninth Judicial Circuit

  
\_\_\_\_\_, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

March 8, 2019

The Honorable Roger M. Young, Sr.  
Chief Administrative Judge  
100 Broad Street, Suite 368  
Charleston, SC 29401

Re: Jermaine Hartwell, #323738 v. State of South Carolina  
2018-CP-08-2120

Dear Judge Young:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. If this order meets your approval, please sign and forward to the Clerk's office in the enclosed envelope, and have her serve the order on all parties. If you have any questions, please feel free to contact me.

Sincerely,

Benjamin H. Limbaugh  
Assistant Attorney General

BHL/jaj  
Enclosure(s)

cc: James P. Craig, Esquire