November 19, 2015

To:

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED
NOV 23 2015
S.C. SUPREME COURT

From:

John Hayward #291763
BRCI Mount 253
4460 Broad River Rd
Cola, SC 29210

2015-002278

Dear Clerk's Office, SC Supreme Court

I am writing for the letter I received on Nov. 12 2015 telling me to include the final order, and any Conditional order, which I am doing now. The letter also tells me to provide proof of service showing the notice of appeal has been properly served on opposing counsel, the Attorney General's Office, which I cannot do at this time. I am writing this Court because I mailed you my one and only copy of my notice of appeal and would ask this court to send me a copy or forward a copy to the Atty. Gen. Office for me. If this Court chooses not to do neither, I would ask this Court to give me an extention of time to allow me to re-write my notice of appeal until December 11, 2015. I have

included a copy of the official affidavit of personal service of the Final Order of Dismissal that was properly served to me on November 4, 2015 If this court would please assist me with either a copy of my notice of appeal or forward a copy to the Atty Gen Office, and if not that, would you grant me an extention of time until December 11, 2015 to allow me to re-write my notice of appeal and propedy serve the Atty. Gen. Office myself. Thank you for your time.

Sincerely,

John Hayward

John Hayward #291763
BRCI Mont #253
4460 Broad River Rd
Cola, SC 29210

Nov. 19, 2015

The Supreme Court of South Carolina
DANIEL E. SHEAROUSE, CLERK OF COURT
POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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John Wallace Hayward #291763
Broad River Correctional Institution
4460 Broad River Road
Columbia SC 29210

RECEIVED
NOV 12 2015
BRCI
MAILROOM

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Code Section 15-9-500, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated Atonia Jacks (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA) **AFFIDAVIT OF PERSONAL SERVICE**
COUNTY OF Richland)

On this 4 day of November, **2015**, I served the signed **Final Order of Dismissal** on ***Inmate John Wallace Hayward, SCDC Inmate No. 291763*** by delivering personally and leaving a copy of the same at ***Broad River Correctional Institution,*** Columbia, South Carolina. Deponent is not a party to this action.

s/ Atonia Jacks

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

This 4 day of November, **2015**

Tenyth L Montgomery (L.S.)
Notary Public for South Carolina

My Commission Expires: 6/10/2018

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Broadriver ***Correctional Institution,*** Columbia, Richland County, South Carolina, this _____ day of November, 2015.

s/
Inmate Signature
SCDC No. 291763

2012-CP-40-2863

Broad River

RECEIVED

OCT 15 2015

GENERAL COUNSEL

ALAN WILSON
ATTORNEY GENERAL

October 7, 2015

Tina Kellett
South Carolina Department of Corrections
4444 Broad River Road
Columbia, South Carolina 29221-1787

Re: **John Wallace Hayward, #291763 v. State of South Carolina**
2012-CP-40-2863

Dear Ms. Kellett:

Enclosed please find the **Final Order of Dismissal** dismissing the above-captioned inmate's post-conviction relief application. Please serve the inmate, **John Wallace Hayward, #291763** with the order and provide me with an affidavit of service (enclosed).

If you have any questions, please feel free to call: (803) 734-3737.

Sincerely,

for P C Scott

J. Clayton Mitchell
Assistant Attorney General

JCM/jcb
Enclosures

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMEI IN A CIVIL CASE

CASE NUMBER: 2012CP4002863

John Wallace #271763 Hayward
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 September 2015 to attorneys of record or to parties (when appearing pro se) as follows:

John Wallace #271763 Hayward

James Clayton Mitchell III

John Wallace #271763 Hayward
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

FILED
2015 SEP 29 PM 3:07
RICHLAND COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

John Wallace Hayward, #291763,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: **2012-CP-40-02863**

FINAL ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 23, 2012. Respondent made its Return and Motion to Dismiss September 19, 2014, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 28, 2014, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated June 5, 2015, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Reply and Objection to the Conditional Order of Dismissal," mailed on November 20, 2014, Applicant asserted he is entitled to an evidentiary hearing to address his allegations of newly-discovered evidence, ineffective assistance of trial counsel, and ineffective assistance of prior collateral counsel. Applicant alleges that the Supreme Court improperly ruled on his prior PCR action (2006-CP-40-07301) because it considered issues that were not preserved or raised. He further alleges that a closing letter from the attorney general's office to the solicitor is newly-discovered evidence because it shows that his trial counsel

provided poor advice. Applicant believes that these matters could not have been raised during a previous PCR application. This Court finds these allegations meritless and dismisses them with prejudice.

To the extent that Applicant finds fault with the Supreme Court's decision, this Court is not in a position to question that Court's wisdom. Furthermore, because the Supreme Court took up these issues (specifically that of ineffective assistance of trial counsel) and they have been thoroughly adjudicated, the doctrine of *res judicata* governs. Regarding other allegations, Applicant fails to make a showing that would surmount the threshold required to allow a hearing on a successive application, for newly-discovered evidence, or to allow a filing outside of the statute of limitations to be considered. The letter to which Applicant refers is merely the opinion of one attorney, just as his trial attorney's alleged recommendation to plea was the opinion of another attorney. Applicant similarly misconstrues that importance of the remittitur in his direct appeal. He argues that, because the Richland County charges were not remitted, they are still in the jurisdiction of the Court of Appeals; in reality, the Supreme Court has ruled on the status of all charges through the prior PCR action, so this argument is moot.

Accordingly, this Court finds the current application fails to state a claim which creates any genuine issue of material fact for this Court to consider.

This Court has reviewed Applicant's responses to the Court's Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court further finds that Applicant's current application is successive to Applicant's previously applications; that Applicant's current application was filed outside the statute of

limitations; and that Applicant's current application fails to make a *prima facie* showing to substantiate a case based on newly-discovered evidence.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 28th **day of** September, **2015**

THE HONORABLE ALISON RENEE LEE
Chief Administrative Judge for Common Pleas
Fifth Judicial Circuit

Columbia, South Carolina

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Code Section 15-9-500, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated Atonia Jacobs (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA) **AFFIDAVIT OF PERSONAL SERVICE**
COUNTY OF Calhoun)

On this 5 day of June, **2015**, I served the signed **Conditional Order of Dismissal** on ***Inmate John Wallace Hayward SCDC Inmate No. 291763*** by delivering personally and leaving a copy of the same at ***Broad River Institution,*** Columbia, South Carolina. Deponent is not a party to this action.

s/ Atonia Jacobs

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

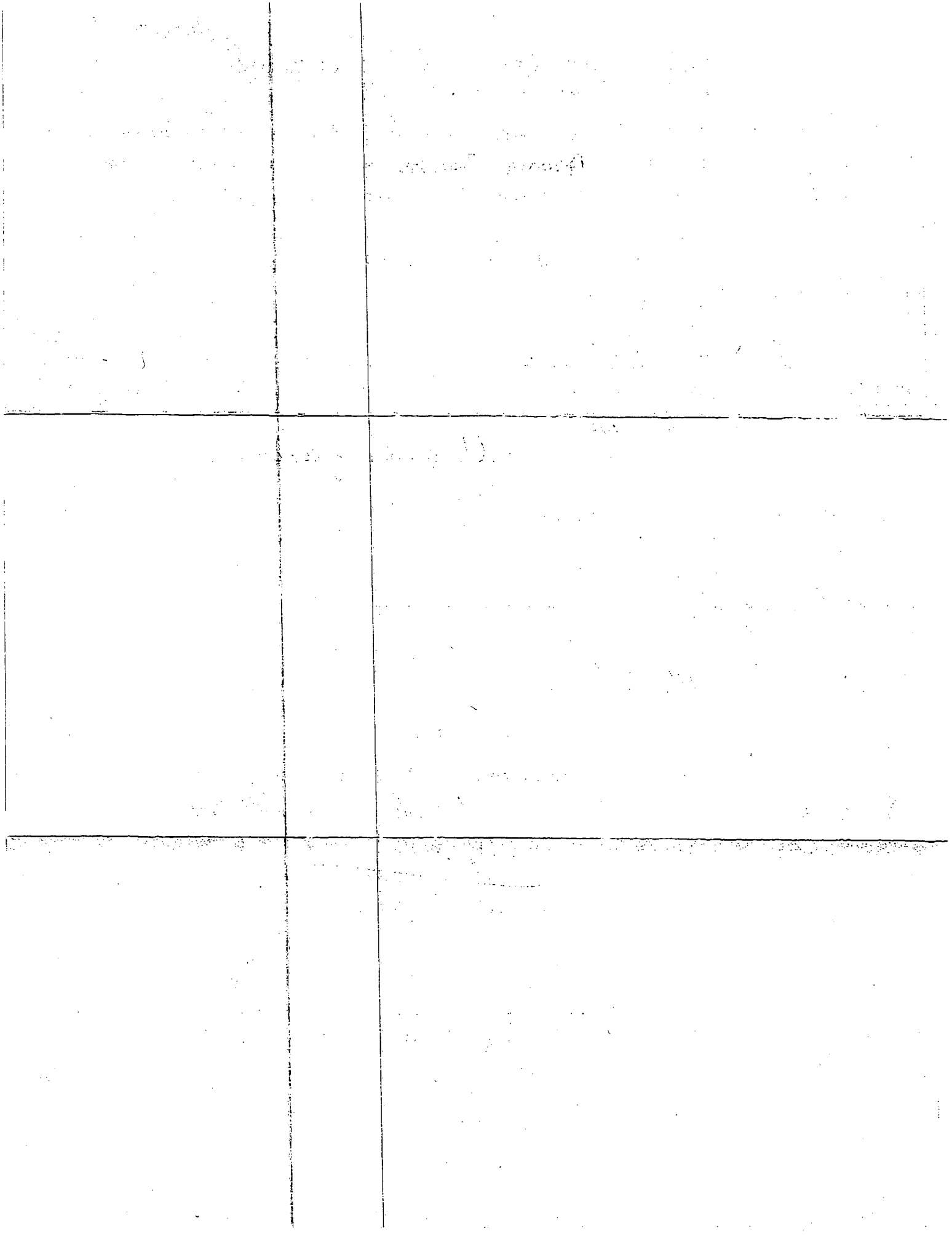
This 5 day of June, **2015**
Jennifer L Montgomery, (L.S.)
Notary Public for South Carolina

My Commission Expires: 6/10/2018

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Broadriver ***Correctional Institution,*** Columbia, Richland County, South Carolina, this 5 day of June, 2015.

s/ John Wallace Hayward
Inmate Signature
SCDC No. 291763



STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
John Wallace Hayward, #291763, Applicant, v. State of South Carolina, Respondent.	2012-CP-40-02863 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed April 23, 2012.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted during the April and November terms of the Richland County Grand Jury for Armed Robbery (2003-GS-40-00870; and -00905). Applicant additionally signed a waiver of his rights to have his Lexington County charges heard in Richland County and agreed to have the plea handled in Richland County. Applicant also waived the right to have the Clerk of Court for Lexington County sign the documents. At the guilty plea proceeding on December 1, 2003, in Richland County, Applicant waived venue and presentment of Lexington County charges to the Lexington County grand jury for Assault and Battery with Intent to Kill (2003-GS-32-4182), Burglary – First Degree (2003-GS-32-4185), Criminal Conspiracy (2003-GS-32-4191), two counts of Armed Robbery (2003-GS-32-4183; -4186) and five counts of Kidnapping (2003-GS-32-4184; -4187; -4188; -4189; -4190). Applicant was represented by Samuel Mokeba, Esquire. Applicant pleaded guilty as indicted on December 1, 2003, and was sentenced by the Honorable Reginald I. Lloyd to confinement for a period of thirty (30) years for each Armed Robbery charge, thirty

(30) years for each Kidnapping charge, thirty (30) years for Burglary – First Degree, twenty (20) years for Assault and Battery with Intent to Kill, and to five (5) years for Criminal Conspiracy. All sentences were to run consecutively for an aggregate sentence of three hundred twenty-five (325) years.

Applicant filed a timely Notice of Appeal where he was represented by Eleanor Duffy Cleary of the South Carolina Office of Appellate Defense. On July 5, 2005, Counsel Cleary filed a Final Anders Brief of Appellant and petitioned to be relieved as counsel and asserted as the sole arguable basis for relief:

1. Whether appellant's guilty plea failed to comply with the mandates set forth in Boykin v. Alabama?"

The South Carolina Court of Appeals dismissed the appeal. State v. Hayward, 05-UP-609 (S.C. Ct. App. Dec. 8, 2005). The Remittitur was issued on January 3, 2006.

2006-CP-40-07301

Applicant subsequently filed an application for post-conviction relief on December 8, 2006, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that
   a. counsel failed properly move/object to squash invalid indictments; and
   b. counsel failed to properly move/object to squash indictments for improper change of venue.

The State filed its Return on or about May 5, 2007. An evidentiary hearing was held on March 21, 2008, before the Honorable James R. Barber, III. Applicant was represented in this PCR action by Bryan S. Jeffries, Esquire. Brian T. Petrano, Esquire represented the State. By written order, dated April 8, 2008, Judge Barber granted PCR relief on the Lexington and Richland County charges because counsel had not been appointed by the Clerk of Court for Lexington County on the Lexington charges. The PCR court concluded that counsel was ineffective by not

investigating the Lexington County charges and therefore found that Applicant did not knowingly and intelligently plead guilty to the Lexington and Richland County charges.

The State appealed the PCR court's decision and filed a timely notice of appeal. The State filed a Petition for Writ of Certiorari on October 6, 2008, where the State raised the following question:

> 1. Whether sufficient evidence of probative value exists to support the PCR court's findings that Respondent's guilty plea was not knowingly and intelligently entered because appointed counsel, from Richland County, was either not appointed to handle Respondent's Lexington County charges, and/or appointed counsel's representation was ineffective regarding the Lexington County charges.

Applicant filed its Return to the Petition for Writ of Certiorari on April 29, 2009, where he was represented by Elizabeth Franklin-Best. The Supreme Court of South Carolina granted certiorari on March 5, 2010, and set a briefing schedule. The Brief of Petitioner was filed on May 4, 2010, and the Brief of Respondent was filed July 27, 2010.

On March 7, 2011, the South Carolina Supreme Court entered its opinion affirming in part and reversing in part. Hayward v. State, Memo. Op. No. 2011-MO-008 (SC. S. Ct. March 7, 2011) (unpublished). The supreme court reinstated the Richland County charges since Counsel was only ineffective with regards to the Lexington County charges.

2011-cv-00644-RBH

Applicant then filed a petition for writ of habeas corpus on March 18, 2011, in federal district court. Petitioner raised the following issues verbatim:

> 1. Ineffective Assistance of Counsel
>   a. Counsel failed to properly move/object to squash invalid indictments for Richland County. My indictments clearly show that the grand jury convened when the Court of General Sessions were in session. Counsel failed to squash both indictments because the grand jury cannot convene when the

Court of General Sessions is in session. I am denied U.S.C.A. Const. Amend. 5 because validity of indictment was not met.

2. Proportionality
    a. After pleading, I was given 12 consecutive sentences for charges in two counties (2 - Richland, 10 - Lexington). The consecutive sentences were purely based on the Lexington County issue. Currently Lexington charges and sentence have been vacated. Richland was not effected, so I am serving 60 years for the two Richland charges that I was offered 20 years for both charges by Lesley M. Coggiola before Lexington came into the fold. Lexington aggravated the Richland County charges. Sentence is not excessive if it is within the statutory limitations and there are no facts supporting allegation of prejudice against defendant. Lexington County and Richland County charges and sentence were vacated and Richland County charges and sentence were reinstated. The State made a decision that was based upon an unreasonable determination of facts in light of the evidence presented. 2254(d)(2).

On August 17, 2011, Respondent filed its return and motion for summary judgment. The federal district court granted Respondent's motion for summary judgment by Order dated January 4, 2012, finding that Petitioner's claims were without merit.

CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel/Inadequate and/or erroneous advice from counsel.
    a. Counsel's inadequate and/or erroneous advise caused nonacceptance of plea bargain to applicant's Richland charges then advised applicant to plea to the Richland charges anyway but with additional Lexington charges, to avoid LWOP, that had convictions and sentence (ten) that were Constitutionally invalid and further proceedings led to a less favorable outcome to applicant's Richland convictions and sentences. Counsel advice fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment applicable to the States through the Fourteenth Amendment.
    b. The applicant should not have taken counsel's advice to plead guilty to the Richland and Lexington charges together and should have either taken the Richland 20 year plea offer or

> went to trial for the Richland charges. Either disposition, plea offer or trial, would have been lesser that what the applicant received for his Richland charges after he still pled on counsel's inadequate and/or erroneous advice.

Applicant then filed a document captioned "ATTACHMENT 5(c) For Post Conviction Relief Application Question 16(a)," on June 8, 2012, where he argues a closing letter from the South Carolina Attorney General's office to the Lexington County solicitor is newly discovered evidence. Applicant also cites Lafler v. Cooper, 132 S.Ct. 1376 (2012) in support of his arguments. Applicant then filed a document captioned "ATTACHMENT 5(d) For Post Conviction Relief Application Question 16(a)," on December 27, 2012, where Applicant argues that the South Carolina Supreme Court ruled on an issue that was unpreserved for appellate review. Finally, Applicant filed a document captioned "ATTACHMENT 5(e) For Post Conviction Relief Application Question 16(a)," on March 25, 2013. In that document Applicant cites Martinez v. Ryan, 132 S. Ct. 1309 (2012) in support of his ineffective assistance of counsel argument.

Before this Court are the records of the Richland County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to the previous application for post-conviction relief. S.C. Code Ann. § 17-27-90 (2003) 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations could have been raised in the proceedings based on Applicant's prior application for post-conviction relief, and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish 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. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

Statute of Limitations

This Court further finds that this Application for post-conviction relief must 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, et. seq. S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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). Applicant pleaded guilty to the offenses he challenges on December 1, 2003. The Remittitur from Applicant's direct appeal was issued on January 3, 2006, so he was therefore required to file his application on or before January 3, 2007. This Application was filed on April 23, 2012, which was over five (5) years after the statutory filing period had expired.

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) (2003) 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." Therefore, this Court summarily dismisses the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Res Judicata

This Court further finds that the doctrine of *res judicata* bars the Applicant's claims of ineffective assistance of counsel and that his plea was entered into unintelligently and involuntarily. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. The Applicant has raised issues of

ineffective assistance of counsel and the voluntariness of his guilty plea in his previous PCR application. The public interest in the finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court finds that these claims are barred by *res judicata*.

Newly and After Discovered Evidence

Applicant's claim of alleged "newly-discovered evidence" is extremely vague and fails to make a *prima facie* showing that he is in actual possession of such evidence or how that evidence likely would have changed the outcome at trial. While under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained, Applicant has failed to set forth with any specificity what the evidence is, how it would have affected the outcome if used at trial, or why such alleged evidence was not readily discoverable at the time of trial or his previous PCR action. Before the Court will hold an evidentiary hearing, the 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 entirely failed to make such a *prima facie* 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.

Ineffective Assistance of Counsel – Lafler v. Cooper

Applicant argues the following United States Supreme Court companion cases are applicable to his case: Lafler v. Cooper, ___ U.S. ___, 132 S. Ct. 1376 (2012) and Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399 (2012). As these opinions were issued on March 21, 2012,

however, this Court finds they cannot be applied retroactively to this proceeding. The Supreme Court did not indicate that either of these opinions were new constitutional rules that were intended to be retroactive.

In order to conclude whether the holding announced in these cases constitutes an "old rule" or a "new rule" for the purposes of determining whether it can be applied retroactively, it must be examined under the framework set forth in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). In Teague, the United States Supreme Court found "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301, 109 S. Ct. at 1070. The Teague Court also noted the concern that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309, 109 S. Ct. at 1074. The Teague Court held that – unless they fell into one of two (2) exceptions, the general rule applies: "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310, 109 S. Ct. at 1075.

The first exception that would allow a new rule to be applied retroactively is "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311, 109 S. Ct. at 1075 (internal quotation and citation omitted). This exception has been subsequently defined as being a substantive (not procedural) new rule. See, e.g., Beard v. Banks, 542 U.S. 406, 411 n.2, 124 S. Ct. 2504, 2510 n.2 (2004) ("Rules that fall within what we have referred to as Teague's first exception are more accurately characterized as substantive rules not subject to Teague's bar.") (internal quotation and citation omitted); see also Wharton v. Bockting, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180 (2007).

The second exception that would allow a new rule to be applied retroactively is "if it requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 311, 109 S. Ct. at 1076 (internal quotation and citation omitted). The Teague Court explained this second exception was "to be reserved for watershed rules of criminal procedure" and limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." Id. at 311, 313, 109 S. Ct. at 1076-77. To determine whether a new rule is a watershed rule, it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." See Wharton, 549 U.S. at 418, 127 S. Ct. at 1182 (internal quotations and citations omitted).

This Court finds the holdings in the companion cases of Lafler v. Cooper and Missouri v. Frye do not set forth a new rule that should be applied retroactively. These cases did *not* enact a substantive new rule in criminal procedure. Further, nothing in these opinions indicates the United States Supreme Court intended their decisions to be a watershed rule retroactively applicable to all prior criminal convictions. In fact, nine of the eleven United States Courts of Appeal have addressed this issue and none have found these cases to be a new rule of constitutional law and retroactive. See Pagan-San Miguel v. United States, No. 13-1343 (1st Cir. filed Nov. 20, 2013); In re Liddell, 722 F.3d 737 (6th Cir. 2013); In re Graham, 714 F.3d 1181 (10th Cir. 2013); Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013); Williams v. United States, 705 F.3d 298 (8th Cir. 2013); Buenrostro v. United States, 697 F.3d 1137 (9th Cir. 2012); In re King, 697 F.3d 1189 (5th Cir. 2012); Hare v. United States, 688 F.3d 878 (7th Cir. 2012); In re Perez, 682 F.2d 930 (11th Cir. 2012). While the Fourth Circuit Court of Appeals has not yet addressed whether Lafler v. Cooper and Missouri v. Frye are retroactive, it is highly doubtful

that court would reach the conclusion that these cases set forth a new watershed rule of criminal procedure. See Berry v. United States, 884 F. Supp.2d 453 (2012), appeal dismissed 490 F. App'x. 583, 2012 WL 5914019 (4th Cir. November 27, 2012) (holding that Teague's procedural bar applied to Petitioner's claim of ineffective assistance of counsel relating to plea negotiations and that the claim was not cognizable on collateral review).

This Court finds that Applicant cannot sustain his claim that the holdings in these March 2012 cases should be retroactively applied to a conviction on December 1, 2003.

Ineffective Assistance of Prior Collateral Counsel

Finally, Applicant contends he is able to file a successive state PCR action alleging ineffective assistance of previous collateral counsel. This Court finds this contention to be without merit. The ruling in Martinez v. Ryan, 132 S. Ct. 1309 (2012) has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding. See

Martinez, *supra* at 6 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental "cause and prejudice" standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining "[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter." Id.

Additionally, Martinez's interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina's interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to –160. Therefore, the South Carolina Supreme Court's opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under 17-27-90.") The South Carolina Supreme Court has found – in a published order – that "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). This Court finds Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

III. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is g ranted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
J. Clayton Mitchell, Esquire
PCR Division – 5th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 13 day of October, 2014.

L. CASEY MANNING
Chief Judge for Administrative Purposes
Fifth Judicial Circuit

Columbia, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4002863

John Wallace #271763 Hayward
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 28 October 2014 to attorneys of record or to parties (when appearing pro se) as follows:

John Wallace #271763 Hayward

Megan E. Harrigan

John Wallace #271763 Hayward
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

JOHN HAYWARD #291763
BRCI Monticello #253
250
Broad River Rd
Columbia SC 29210

The Supreme Court of
South Carolina
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211