ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JULIUS SMITH,

APPELLANT

APPELLATE CASE NO. 2014-001366

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether Appellant's case should be remanded for an evidentiary hearing and findings of fact in light of the intervening case of Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), which articulated a new test for relief sought based on newly discovered evidence following a guilty plea.

II. Whether Appellant's case should be remanded for further findings of fact where the motion court's cursory Order of Dismissal is insufficient for appellate review?

III. Whether Appellant's guilty plea should be vacated and his case remanded for a new trial where the motion court erred in denying Appellant's request for new trial after Appellant showed that the newly discovered evidence met the traditional five-factor test?

IV. Whether Appellant's case should be remanded for further findings of fact where the motion court erred in finding that the standard for resentencing based on newly discovered evidence annunciated in State v. South 310 S.C. 504, 427 S.E.2d 666 (1993), applied only to capital cases?

STATEMENT OF THE CASE

Guilty Plea, Direct Appeal, and PCR

On December 18, 2008, Appellant John Julius Smith waived presentment to the Richland County Grand Jury and pled guilty to the offense of infliction of great bodily injury upon a child before the Honorable Howard P. King. R. 1 – 19. Smith was represented by assistant public defender Kris Hines, and the State was represented by assistant solicitor Heather Weiss. R. 1. Smith was sentenced to eighteen years incarceration. R. 25, ll. 11-14.

A direct appeal was filed and dismissed for failure to comply with Rule 203(d)(1)(B)(iv) requiring an explanation of the issue(s) to be raised on appeal. R. 41, ll. 6-7.

Smith filed an application for post-conviction relief ("PCR") on March 29, 2010. The State filed its Return on May 17, 2010. An evidentiary hearing was held on August 29, 2011 before the Honorable James R. Barber. Smith was represented by Steven Smith McKenzie, and the State was represented by Assistant Attorney General Brian T. Petrano. At some point during the evidentiary hearing and based on the advice of PCR counsel, Smith withdrew his PCR application to pursue a Motion for New Trial based on After-Discovered Evidence. R. 47, ll. 11-21.

On September 7, 2011, Judge Barber filed an Order of Dismissal with Prejudice, concluding that Smith made a knowing, voluntary, and intelligent decision to withdraw his post-conviction application and dismissing the application with prejudice.

Motion for New Trial based on After-Discovered Evidence

On August 7, 2012, Smith filed a *pro se* Rule 29(b) Motion for New Trial based on After-Discovered Evidence. R. 27 (Pro Se Mot. New Trial). On December 12, 2012, Smith filed a Supplemental Amendment to the motion. R. 32 (Supp. Pro Se Mot. New Trial).

On May 15, 2013, Smith filed a petition for writ of mandamus. On August 22, 2013, the Supreme Court of South Carolina dismissed the petition for writ of mandamus following the Richland County Clerk of Court's confirmation that the new trial motion was filed and receipt of a letter from the Fifth Circuit Deputy Solicitor advising they would endeavor to have the matter heard within the next ninety days. On December 13, 2013, Smith made an inquiry into the status of his motion. The Supreme Court was advised in the Return that a counsel for Smith was appointed and would be meeting with the solicitor in the near future. On March 10, 2014, the Supreme Court of South Carolina issued an Order requiring the motion for new trial to be heard within thirty days.

On April 3, 2014, a hearing was held on Smith's motion for new trial before the Honorable Robert E. Hood. Smith was represented by Tynika Claxton and Tristan Shaffer, and the State was represented by assistant solicitors Dan Goldberg and Brent Arant. R. 37. On June 16, 2014, Judge Hood issued an Order denying Smith's motion for new trial. R. 103 (Order Denying Mot. New Trial).

A timely Notice of Appeal was filed June 20, 2014.[1]

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[1] The appellate division was appointed to represent Smith by Order of this Court on August 28, 2014 due to the fact that this case involves medical records that were prohibited from being released to Smith per the lower court's order such that he cannot effectively represent himself.

STATEMENT OF FACTS

Plea Hearing

While providing the factual basis in support of the plea, the solicitor indicated that the alleged victim was Smith's infant daughter. R. 12, ll. 7-8 and 11-12. The child's mother, Kara King, was a co-defendant in the case. R. 12, ll. 10-11. The State alleged that incidents began occurring in approximately the beginning of March 2008, at which time the child would have been approximately one month old.[2] R. 12, ll. 8-10. The solicitor stated that the child was taken to the emergency room at Palmetto Baptist hospital on May 5, 2008 by King and the child's grandmother. R. 12, ll. 13-14. Doctors found that the child had a fractured skull, swollen head and temple, burns on her cheek, possible healing fracture of her right knee, and healing burns on her right wrist and left leg. R. 12, ll. 14-20. The child was transferred to Richland Memorial Hospital. R.12, ll. 20-22.

King and the grandmother told investigators that Smith was the primary daytime caregiver for the child in their shared home while King attended school. R. 12, l. 23 – 13, l. 2. King also told them that she came home on April 30th to find the baby had a swollen head and that Smith made excuses[3] for the injury and advised them not to take the child to the doctor. R. 13, l. 5 – 14, l. 9. King said she waited until May 5th to take the child to the doctor because they had to sneak the child away while Smith was out of the house. R. 14, ll. 9-13.

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[2] According to the "Consultation Report" submitted to the motions court, King first noticed swelling of the child's head on April 30, 2008. R.106 (Supp. Medical Records).

[3] The alleged explanations provided by Smith were that the child rolled off the couch or had caught an infection that he had in his wisdom tooth. R. 13, ll. 9-13 and 19-24.

The solicitor referenced the report of forensic pediatrician Dr. Olga Rosa regarding the results of the child's MRI (magnetic resonance imaging). R. 14, ll. 16-19. The report confirmed "a left posterior brain contusion, which is bruising with swelling. It was evolving showing early signs of encephalomalacia, which indicates permanent loss of brain tissue in the area. And there was a mild ex-vacuo dilation of the left lateral ventricle which was the response of the brain to fill the void by the permanent brain loss." R. 14, ll. 19-25; see R.100 (Mot. Hr'g Ct. Ex. 4, Letter from Dr. Rosa, May 9, 2008). The solicitor then stated "so that is the evidence of the permanent damage to the child. There's definitely permanent brain loss." R. 15, ll. 1-2. The solicitor also pointed to the liquid burns to the child's mouth, splash burns to the child's arm, and other injuries at various stages of healing. R. 15, ll. 2-8.

In response to the court's question, the police investigator confirmed that none of the burns were from cigarettes. R. 15, ll. 9-16. The court appointed guardian ad litem, Susan Kennedy, also referenced statements by King that she had come home on multiple occasions to find the child's arm burned, mouth burned, head swollen, and bruised. R. 16, ll. 13-20. Kennedy stated that the doctors were unable to know how the brain damage would affect the child. R. 17, ll. 2-9.

After reciting Smith's prior record, which did not include any prior child abuse, the solicitor asked the court to impose as much jail time as it felt "appropriate." R. 16, l. 21 – 17, l. 5; R. 18, ll. 17-18.

The court accepted Smith's guilty plea. R. 18, l. 22 – 19, l. 1-3.

Sentencing

At sentencing, plea counsel indicated that Smith was 29 years old. R. 19, l. 5. He attended parenting and Bible classes at the correctional institution since September 2008 and had no disciplinary infractions. R. 19, ll. 6-16. At the time of the alleged incident, Smith was attending Benedict College and studying criminal justice. R. 19, ll. 16-18. He had one year remaining to complete his degree. R. 19, ll. 18-20. He has four children including the alleged victim, all of whom he would like to support. R. 19, ll. 20-23. He also had a strong work history, attending Job Corps and working at D's Wings and Lizard Thicket. R. 20, ll. 2-5.

Smith then addressed the court and said that he was sorry for what happened to his daughter, and stated that he loved her. R. 20, ll. 18-20. He stated that he was unaware of how to take care of an infant, but never did anything to intentionally hurt her. R. 20, ll. 20-23. He indicated that he left her for a minute to get a diaper out of another room and then heard a thump. R. 20, ll. 23-25. When he returned, it appeared that the dog had jumped up and knocked her off into a table. R. 20, l. 25 – 21, l. 3. She cried for a minute but then stopped and that he, King, and the grandmother decided to give it some time to see if the swelling went down. R. 21, ll. 3-12. He stated that the swelling appeared to subside, so he did not think it was a serious problem. R. 21, ll. 12-14. If he had known it was something serious, Smith stated that he would have taken her to the hospital because he loves his daughter. R. 21, ll. 14-16. Regarding the heal fractures, Smith pointed out that King and the grandmother also cared for the child. R. 21, l. 21 – 22, l. 2. With respect to the burns, he indicated that he heated the bottle for twenty-seconds per King's instructions. R. 22, ll. 5-12.

Judge King stated that he found Smith's explanation "hollow" and noted the numerous injuries to the child who was less than two months old at the time of her initial treatment. R. 23, ll. 8-12. He also pointed to Smith's failure to take the child to the doctor when the head injury was discovered and said that if Smith thought someone else was responsible for the other injuries to the child, he should not have pled guilty. R. 23, ll. 22-24; R. 24, ll. 18-21. Judge King told Smith that he was not a young father and should know how to raise children. R. 24, l. 21 – 25, l. 1. He concluded by saying:

> You just simply did not take care of this child and the child was defenseless and completely dependent on you. ***And you're lucky that the child did not die.***
> ...
> Because if the child had died, you would be facing 20 years to life imprisonment for homicide by child abuse. Your conduct is reprehensible. The sentence of the Court is defendant is committed to the state department of [corrections] for a term of 18 years.

R. 25, ll. 5-13 (emphasis added).

Motion for New Trial

Smith filed his Motion for New Trial based on Newly Discovered Evidence on August 7, 2012, indicating that when plea counsel testified at the August 29, 2011 PCR hearing he learned that the alleged injuries to the child were not as severe as indicated at the plea and sentencing hearing. Having learned that information, he no longer believed that the alleged acts rose to the level of inflicting "great bodily injury." R.27 (Pro Se Mot. New Trial).

At the hearing on the motion before Judge Hood held on April 3, 2014, defense counsel noted that Smith was originally charged with unlawful conduct toward a child,

which carries a penalty of zero to ten years incarceration.[4] R. 43, ll. 14-17; see S.C. Code Ann. § 63-5-70. That charge was dismissed and Smith was instead charged with the more serious offense of infliction of great bodily injury upon a child. R. 44, ll. 2-6. Smith entered a "straight up plea" such that there was no negotiation as to sentencing. R. 45, ll. 6-8. At the PCR hearing on August 29, 2011, Smith learned for the first time that the results of the child's injuries were not as severe as alleged at the plea hearing.[5] R. 47, ll. 11-15; R. 49, l. 19 – 50, l. 11. On the advice of his PCR attorney, he dismissed the PCR action in order to file the motion for new trial. R. 47, ll.16-21. However, when Smith could not afford PCR counsel's additional fee, he filed the motion for new trial himself. R. 47, ll. 22-25.

Defense counsel pointed to several documents indicating that the child was improving. R. 50, l. 25 – 52, l. 13; see also R.91 (Mot. Hr'g Ct. Ex. 1, SC DSS Report, after Apr. 13, 2009); R.93 (Mot. Hr'g Ct. Ex. 3, Medical Reports, July 8, 2009 and Jan. 8, 2009). He argued that in laying the foundation for the plea, the State gave the impression that the child was going to be limited in some way throughout her life. R. 55, ll. 13-19. The evidence discovered afterward shows that the child is bright, happy, and active, and on target for her age, though she continued to be monitored. R. 57, ll. 12-24. Defense

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[4] There was some confusion at the motion hearing over whether Smith was also charged with assault and battery of a high and aggravated nature (AB/HAN). The indictment, guilty plea transcript, and sentencing sheet, all reflect that Smith pled guilty to infliction of great bodily injury upon a child. However, the public index erroneously lists the offense as ABHAN.

[5] There was discussion of providing the transcript of the PCR hearing to the Court as a supplement because defense counsel had only an electronic copy of the transcript. However, no copy of the transcript could be located in the lower court's file. Appellate counsel also spoke with defense counsel Claxton, who indicated that they were mistaken when they said they had the PCR transcript and that she does not have it.

counsel argued that the evidence showing that the injury was not as severe as indicated in the plea transcript meets all five Spann[6] factors. R. 58, ll. 15-25.

The State argued that the motion for new trial was improper because Smith pled guilty, and that the proper avenues for addressing the issue raised were direct appeal and post-conviction relief. R. 59, l. 22 – 25, l. 6. Defense counsel argued that post-conviction relief and a motion for new trial are alternate remedies, either of which is proper. R. 61, l. 19 – 62, l. 7. The motion hearing judge did not address this argument in his Order.

Regarding the merits of the motion, the State argued that even though the DSS report says "there are no medical issues present but due to serious injury, she is closely monitored," that this information would not have changed the result if a new trial were granted. R. 67, ll. 9-21. The solicitor supported this argument by pointing to the plea judge's reference to the child's other injuries beyond the permanent brain damage and the failure to take the child to the hospital immediately. R. 67, l. 22 – 70, l. 17. He further stated than even assuming *arguendo* that the child is functioning "one-hundred percent today," that it would not change anything either. R. 70, l. 18 – 71, l. 1. The solicitor further argued that the information was discoverable because the defendant did not have to waive presentment and enter the guilty plea that day, but could instead have waited longer for future information on the child's status. R. 71, l. 2 – 72, l. 6.

The solicitor also argued that the evidence is not material because even if the child functions normally today, the injuries themselves created a substantial risk of death. R. 72, l. 7 – 73, l. 7. He analogized an assault case, stating that just because someone heals from the injuries does not mean that they did not suffer great bodily injury. R. 73,

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[6] State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999).

ll. 8-13. The solicitor further argued that the child also has impairment of the function of an organ, her brain. R. 73, ll. 15-20. He also pointed to the July 8, 2009 report that states that the child's minor speech problems are likely related to her left parietal encephalomalacia, which the State noted was listed to be a result of the brain injury in Dr. Rosa's report. R. 73, l. 21 – 75, l. 1.

Defense counsel responded that the burns and fractures do not fall under the definition of great bodily injury in the statute under which Smith pled guilty. R. 77, ll. 18-21. He further argued that in the event that the Court did not find a new trial to be the proper remedy, re-sentencing may be an alternative because the nature of permanent brain loss played a large role in the judge's sentence. R. 78, l. 1 – 79, l. 23; R. 80, l. 11 – 81, l. 9; R. 82, ll. 9-16. The Court granted defense counsel's request to hold the record open for submission of additional medical records. R. 89, ll. 16-18.

Smith also testified briefly at the hearing and stated that he pled guilty because plea counsel told him that the child's mother and grandmother would testify against him and that he would likely get up to the twenty year maximum sentence if he went to trial. R. 85, l. 22 – 86, l. 11; R. 87, ll. 18-21; R. 88, ll. 1-3. Smith further recalled that the child's grandmother called police after the child's head injury and that the officers did not find any indications of neglect or abuse but recommended that Smith stay elsewhere that night so emotions could calm. R. 86, 21 – 87, l. 17. Regarding sentencing if he pled guilty, plea counsel told Smith that he had other children and had never been accused of mistreatment of them in the past and would likely just get a "slap on the wrist" and be able to finish his education. R. 86, ll. 12-17; R. 88, ll. 10-18. Lastly, Smith confirmed that had he known

about the DSS report indicating that the child was functioning normally he would not have pled guilty. R. 88, ll. 19-23.

On June 16, 2014, Judge Hood issued an Order denying Smith's motion for new trial. The motion court's Order outlined the procedural posture of the case and listed the after discovered evidence as the subsequent medical records of the child, including supplemental records submitted to the court. The order simply stated that "[a]fter a review of the facts of the case, the motions and arguments, and all evidence presented, this Court finds that such evidence is insufficient to change the results of the Defendant's December 18, 2008 guilty plea." R.103 (Order Denying Mot. New Trial).

This appeal follows.

ARGUMENT

I. Appellant's case should be remanded for an evidentiary hearing and findings of fact in light of the intervening case of Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), which articulated a new test for relief sought based on newly discovered evidence following a guilty plea.

Both the transcript of the April 3, 2014 evidentiary hearing and the June 16, 2014 Order denying Smith's motion for new trial, reflect that the traditional five-factor test for newly discovered evidence was argued and applied in Smith's case. However, since that date the South Carolina Supreme Court issued its decision in Jamison v. State, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (2014), in which it determined that the five-factor test should not be applied to a PCR applicant's request for relief on the basis of newly discovered evidence following a guilty plea and annunciated a new test to be applied in such cases. In the present case, Smith dismissed his PCR application on the advice of PCR counsel and filed a motion for new trial based on newly discovered evidence under Rule 29(b), SCRCrimP.[7] Though there was discussion at the motion hearing of whether a motion for new trial was a proper avenue for relief following a guilty plea, the motion judge did not address this procedural issue and instead heard and ruled upon the merits of the case.

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[7] When Smith could not pay the additional fee requested, PCR counsel would not file the Rule 29(b) motion on Smith's behalf. Thus, Smith filed the motion for new trial *pro se*. R. 47, ll.16-25.

While it appears the PCR application, prepared by PCR counsel, may have been untimely filed on March 29, 2010, it is difficult to understand why PCR counsel instructed Smith to proceed under Rule 29(b). The Uniform Post-Conviction Procedure Act provides a mechanism to address newly discovered evidence and there would have been no timing problem because filing need only occur within one year of discovery of the new evidence, which in the present case occurred at the PCR hearing. See S.C. Code Ann. § 17-27-45(C). Thus, under the Uniform Post-Conviction Procedure Act, a filing alleging after-discovered evidence would ***always be proper***, though it would require the applicant to make an initial showing that the evidence was discovered within one year of the filing.

Both the criminal rule on post-trial motions and the Uniform Post-Conviction Procedure Act[8] provide avenues for defendants to address newly discovered evidence. Rule 29(b), SCRCrimP, provides:

> A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

S.C. Code Ann. § 17-27-45(C) of the Uniform Post-Conviction Procedure Act provides:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

However, S.C. Code Ann. § 17-27-20(B) states that the remedy provided for in the PCR Act "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."

"Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a

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[8] One of the purposes of the Uniform Post-Conviction Procedure Act was to set forth a uniform procedure for appointment of counsel, presentation of evidence, and issuance of orders that include sufficient findings of fact and conclusions of law. That uniformity is respectfully preferable to the inconsistency of a Rule 29 motion where counsel may or may not be appointed and the final order is not explicitly required to contain the specific findings of fact and express conclusions of law required in PCR.

new trial is had; (2) has been discovered since 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." Jamison, 410 S.C at 467, 765 S.E.2d at 128; see also State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011); State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999). Prior to the South Carolina Supreme Court's decision in Jamison, this five-part test was also applied in post-conviction proceedings related to newly discovered evidence. See Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

In Jamison, the Court reversed the post-conviction relief granted to Jamison after the filing of his second PCR application alleging newly discovered evidence. 410 S.C at 460, 765 S.E.2d at 124. Jamison was originally indicted for murder but pled guilty to voluntary manslaughter and was sentenced to twenty years incarceration. Id. at 459-60, 765 S.E.2d at 124-25. Jamison admitted to firing shots during an altercation between rival drug dealers in a crowded parking lot after a concert. Id. One of the shots struck and a killed a fifteen year old bystander who was not a part of the dispute. Id. at 460, 765 S.E.2d at 125. The intended target went by the street name Jig and was part of a group that had attacked Jamison several weeks prior to the incident. Id. At the first PCR hearing, defense counsel testified that the defense theory of the case was that Jig had a gun and "came at" Jamison, but they could not locate any witness to verify this version of events. Id. at 462, 765 S.E.2d at 126. The solicitor's comments at the plea hearing confirmed that locating witnesses who were willing to testify was an "extremely difficult task." Id. at 462 n.2, 765 S.E.2d at 126 n.2.

In his second PCR application, Jamison alleged that while serving his prison sentence, a fellow inmate, Bellamy, informed him that he witnessed the shooting and was willing to provide testimony to support Jamison's self-defense claim. Id. at 463-64, 765

S.E.2d at 126. Jamison testified at the PCR hearing that his decision to plead guilty was influenced by his inability to corroborate that he acted in self-defense. Id. Bellamy also testified at the PCR hearing, stating that he knew members of Jig's group and that they carried guns. Id. Just before the shooting, he saw Jig with a gun in his pants and saw Jig and his group gesture at Jamison like they were going to pull out weapons. Id. at 464, 765 S.E.2d at 127. Bellamy testified that Jamison shot at Jig before Jig could shoot at him. Id. He stated that he did not come forward previously because Jig threatened him and his family, but that he felt more comfortable now because Jig was incarcerated in federal prison. Id. The PCR court granted relief, finding that despite Jamison's knowledge of a self-defense claim at the time of his plea, which was a weak claim at that time, "fundamental fairness" required a new trial. The Court of Appeals affirmed and the Supreme Court granted certiorari. Id. at 464-65, 765 S.E.2d at 127.

In rejecting the State's assertion on appeal that Jamison was not entitled to PCR relief on the basis of newly discovered evidence because he pled guilty, the Court noted that the PCR Act applies to "any person" and not just to individuals who proceed to trial. Id. at 467-69, 765 S.E.2d at 128-29. However, the Court "acknowledged that a valid guilty plea must be treated as final in the vast majority of cases." Id. at 469, 765 S.E.2d at 129. It thus concluded "that the traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea." Id. The Court held that, instead,

> relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that,

> under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated.

Id. at 470, 765 S.E.2d at 130. The Court then applied this new test to the facts of Jamison's case and found that though the evidence could not have been discovered prior to the plea, the interests of justice did not require a new trial. Id. at 470-72, 765 S.E.2d at 130-31. The Court also noted the requirement under S.C. Code Ann. § 17-27-20(A)(4) that the new evidence be of material facts and found that Bellamy's testimony at most supported a theory of transferred self-defense, which has not been recognized in South Carolina. Id.

Because Jamison's holding related specifically to applications made under the PCR Act, the decision left unclear what applicability, if any, this new test has to a motion for new trial made under Rule 29(b) by a defendant who pled guilty. Additionally, while the Jamison majority did not clearly state whether its decision applies retroactively, as it clearly promulgates a new rule, their application of the rule to Jamison's case seems to imply that it should apply retroactively. To the extent that this Court finds the new rule of Jamison should apply to Smith's case, the case should be remanded for an evidentiary hearing and findings of fact consistent with the Jamison opinion. See id. at 473, 765 S.E.2d at 131 (Pleicones, J., dissenting) ("The majority implicitly acknowledges, as I believe it must, that it is adopting a new test . . . . Since this is a new rule, were we to adopt it, I would apply it prospectively. Further, even were we to apply this new test to Respondent, I would find the "interest of justice" standard requires a factual determination and is one which should be made by the PCR judge. Therefore, I would remand to the PCR judge to

determine whether Bellamy's testimony constitutes after discovered evidence under this new analytical framework.") (internal citation omitted).

II. Appellant's case should be remanded for further findings of fact where the motion court's cursory Order of Dismissal is insufficient for appellate review.

In the event that this Court finds that the Jamison test does not apply to Smith's case, the motion court's order lacks the findings and analysis necessary for appellate review. On appeal from the denial of a motion for new trial based on after discovered evidence, this court must defer to the findings of fact made by the trial court and can only reverse the ruling if it finds an error of law or abuse of discretion. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Unfortunately, neither the Order nor the record in Smith's case provide any findings of fact to which this Court can defer and is insufficient to evaluate whether the motion judge made an error of law or abused his discretion.

While ordinarily there does not appear to be any affirmative requirement that a court articulate its findings and conclusions of law in deciding a post-trial motion, an order may still be insufficient if the appellate court cannot ascertain the basis for the circuit court's ruling from the record on appeal. See Woodson v. DLI Properties, LLC, 406 S.C. 517, 526-27, 753 S.E.2d 428, 433 (2014); Clark v. South Carolina Dep't of Pub. Safety, 353 S.C. 291, 312, 578 S.E.2d 16, 26 (Ct. App. 2002), aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005); Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 857 (8th Cir.1996) (explaining that although courts are not normally required to make findings of fact or conclusions of law in ruling on motions, the court "may remand when the lack of findings by the district court would substantially hinder" appellate review); see also In re Treatment & Care of Luckabaugh, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002) ("The absence of factual findings makes our task of reviewing the court order impossible because the reasons underlying the decision are left to speculation.") (internal quotation omitted); Atkinson v. Atkinson, 279 S.C. 454, 456, 309 S.E.2d 14, 15 (Ct. App.

1983) ("Proper appellate review is extremely difficult, if not impossible, where a lower court omits specific findings of fact to support its legal conclusions.").

In the present case, the motion court issued a two-page Order, the majority of which was a recitation of the procedural posture of the case and summary of the standard for a motion for new trial based on after-discovered evidence. R.103 (Order Denying Mot. New Trial.) The motion court stated that the "primary evidence presented at the hearing by the Defendant was an incomplete medical assessment on [the victim] taken after the date of the Defendant's guilty plea." R.103 (Order Denying Mot. New Trial 1). The court noted that additional records were provided for supplemental review, but provided no indication of what was contained in those records or how they affected the court's decision. R.103 (Order Denying Mot. New Trial 1-2); see R.* (Supp. Med. Records). The court then simply stated "[a]fter a review of the facts of the case, the motion and arguments, and all evidence presented, this Court finds that such evidence is insufficient to change the results of the Defendant's December 18, 2008 guilty plea." R.103 (Order Denying Mot. New Trial 2).

While the court listed the five factors necessary for the granting of a new trial, the Order does not specify which of those factors it found Smith failed to meet or why. The first factor is that the new evidence "is such as will probably change the result if a new trial is granted" but the Court's sole "finding" was that the evidence was "insufficient to change the results of the Defendant's December 18, 2008 guilty plea." Perhaps the court was attempting to articulate that it did not find the evidence material, or perhaps it was applying an incorrect standard altogether. See Doe v. Howe, 367 S.C. 432, 448-49, 626 S.E.2d 25, 34 (Ct. App. 2005) ("At this point, we can only speculate about the reason the trial judge determined Doe could not proceed on this claim. Despite a number of possible

explanations as to why the trial judge held as he did, we are reluctant to pass judgment on his ruling based on mere conjecture as to how he reached his decision.").

The record does not make the court's decision any more clear. At the end of the proceedings the motion judge said "All right. You have one week to get me the rest of the medical records. I'll let you know my decision, we'll do a written order once I decide that." R. 89, ll. 16-18. Though the judge asked questions of all counsel, he did not make any findings on the record to which this Court can defer.

Therefore, the Order Denying Defendant's Motion for a New Trial does not comply with the mandate of S.C. Code Ann. § 17-27-80 that the court's findings be specific and that the court state expressly its conclusions of law and is insufficient for appellate review. Its scant nature leaves both Smith and this Court to speculate regarding the basis for the motion court's decision. Thus, Smith's case should be remanded for further fact finding.

III. Appellant's guilty plea should be vacated and his case remanded for a new trial where the motion court erred in denying Appellant's request for new trial after Appellant showed that the newly discovered evidence met the traditional five-factor test.

In the event that this Court finds that no further fact finding is required, the trial court erred in finding the evidence presented "insufficient to change the results of the Defendant's December 18, 2008 guilty plea hearing." The new evidence presented in this case included a DSS report and medical records. R. 91 (Mot. Hr'g Ct. Ex. 1, SC DSS Report, after Apr. 13, 2009); R.93 (Mot. Hr'g Ct. Ex. 3, Medical Reports, July 8, 2009 and Jan. 8, 2009); R.106 (Supp. Med. Records). These documents reflected that the injuries to the alleged victim were not so severe as to meet the statutory definition of "great bodily injury" required to support a conviction for infliction of great bodily injury upon a child and to support the eighteen year sentence imposed by the plea judge. Smith made the required showing under the traditional five factor test to obtain a new trial, including that the new evidence: "(1) would probably change the result if a new trial is had; (2) has been discovered since 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." Jamison, 410 S.C at 467, 765 S.E.2d at 128 (citations omitted). Defense counsel also argued that even if the motion court did not find the evidence sufficient to vacate Smith's guilty plea, the court could alternatively order re-sentencing because the new evidence was mitigating.

Regarding the first factor that the evidence would "probably change the result if a new trial is had, Smith testified that he would not have pled guilty if he had seen the reports prior to entering his plea, and would have instead gone to trial. R. 88, ll. 19-23. Were Smith to proceed to trial now, in light of the newly discovered evidence there is a reasonable

probability that he would have been successful. He would argue that the alleged injuries did not meet the statutory definition of "great bodily injury" to support a conviction for infliction of great bodily injury upon a child. See S.C. Code Ann. § 16-3-95. Subsection (c) of the statute defines "great bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." While it may be that the child's brain tissue was permanently lost, there is no indication in Dr. Rosa's report that this loss created a substantial risk of death or protracted loss or impairment of the ***function*** of the brain. See R. 100 (Mot. Hr'g Ct. Ex. 4, Letter from Dr. Rosa, May 9, 2008). Instead, the subsequent reports indicate that the child is "thriving an on target for her age" and experienced only "minor speech issues." R.91 (Mot. Hr'g Ct. Ex. 1, SC DSS Report, after Apr. 13, 2009); R.93 (Mot. Hr'g Ct. Ex. 3, Medical Reports, July 8, 2009). Further, even if Smith were still found guilty of the offense, Smith's sentence would also likely be less in light of the fact that the child's injury was not as severe as eluded to by the State at the plea hearing. R. 79, l. 6 – 82, l. 16; see Argument 4 infra, on sentencing.

The State argued that that the plea judge did not rely solely on the issue of permanent damage to the child in regards to his sentence and understood the uncertainty of whether the injury would affect the child's daily life. It pointed to the plea judge's reference to the other injuries to the child and Smith's failure to seek immediate medical care. R. 67, l. 9 – 70, l. 17. Thus, the State primarily focused on how the new evidence may have affected the sentence in light of the alternative of remand for re-sentencing, but it did not address how the new evidence would affect the results of a new trial, except by

way of its argument on the fourth factor of materiality. Despite the plea court's recognition of other injuries and the delay in seeking care, the plea court's statement that Smith is "lucky that the child did not die" reflects his misperception of the severity of the child's injury based upon the State's recitation of the facts.

In this case, the probability that the new evidence will change the result of a new trial and the fourth factor that the evidence is material to the issue of guilt or innocence are closely related. The materiality of the new evidence is again linked to the insufficiency of the evidence to convict Smith of the offense to which he pled guilty because the new evidence reveals that the child did not suffer "great bodily injury."

The State pointed to Dr. Rosa's letter listing "early signs of encephalomalacia" as a result of the brain injury and loss of brain tissue and the July 8, 2009 medical report, which states "I ***think*** her ***minor*** speech issues are ***likely related*** to her left parietal encephalomalacia." R. 74, l. 5 – 75, l. 12; compare R. 100 Mot. Hr'g Ct. Ex. 4 (Letter from Dr. Rosa, May 9, 2008), with R. 93 Mot. Hr'g Ct. Ex. 3 (Medical Report, July 8, 2009) (emphasis added). However, the July 8, 2009 report does not make an unequivocal link between the speech issues and the encephalomalacia. Moreover, the State mischaracterized the requirement of the statute as "a loss or impairment of an organ," forgetting both the words "protracted" and "function" in the statute. R. 75, ll. 4-7. Thus, even if the two were conclusively linked, minor speech issues do not rise to the level of "protracted loss or impairment of the function of the brain" required under the statute.

The State further argued that a "two month old with a skull fracture bleeding inside their brain and multiple fractures..." that was not treated promptly "create[s] a substantial risk of death." R. 82, l. 23 – 83, l. 4. However, none of the medical reports

indicate "bleeding" in the brain and the State provided no documentation to support its theory that the injuries or delay in treatment created a substantial risk of death. Additionally, the other injuries, including heal fractures and liquid burns, would not rise to the level of "great bodily injury." It is clear from the guilty plea record that Smith denies responsibility for those injuries and he would undoubtedly attempt to exclude any reference to those injuries at a new trial because they are more prejudicial than probative and risk confusing the issue before the jury. R. 23, l. 18 – 24, l. 2.

Regarding the second factor that the evidence has been discovered since trial, or in this case the guilty plea, there was no dispute that the DSS report was issued sometime after April 13, 2009, which is listed as the date of the child's last physical exam, and that the medical reports supplied at the hearing were from January 8, 2009 and July 8, 2009. R.91 (Mot. Hr'g Ct. Ex. 1, SC DSS Report, after Apr. 13, 2009); R.93 (Mot. Hr'g Ct. Ex. 3, Medical Reports, July 8, 2009 and Jan. 8, 2009). These reports were all issued after Smith's guilty plea on December 18, 2008 and their content was not known to him prior to the PCR hearing held on August 29, 2011. R. 47, ll. 11-15; R. 49, l. 19 – 50, l. 18.

Regarding the third factor that the evidence could not have been discovered before trial, in this case prior to the guilty plea, the solicitor argued that the information was discoverable because Smith did not have to waive presentment and enter the guilty plea that day, but could instead have waited longer for future information on the child's status. R. 71, l. 2 – 72, l. 6. However, Smith's case may still have been called prior to the additional medical reports, and there can be no certainty that Smith would have obtained those reports from the solicitor's office or through his attorney. Further, while the Court's Order Denying the Motion for New Trial is vague, there is nothing in the Order

indicating that the motion court based its decision on any negative finding regarding Smith's diligence.

Regarding the fifth factor that the evidence is not merely cumulative or impeaching, the State did not present any contrary argument on this point. The new evidence in this case goes directly to the issue of whether the alleged injuries to the child rise to the level of "great bodily injury" given that doctors can now assess whether there is actual protracted loss or impairment of the function of the brain, which they could not do when the child was an infant.

Therefore, to the extent that this Court does not find Jamison applies retroactively and does not determine to remand the case due to the insufficiency of the motion court's Order, Smith met his burden of establishing that the after-discovered evidence meets the requirements of the traditional, five-factor test for newly discovered evidence and is entitled to a new trial.

IV. Appellant's case should be remanded for further findings of fact where the motion court erred in finding that the standard for resentencing based on newly discovered evidence annunciated in State v. South 310 S.C. 504, 427 S.E.2d 666 (1993), applied only to capital cases.

In the event that the motion court did not find that the new evidence was material to guilt or innocence, defense counsel argued that the court could alternatively order re-sentencing, citing State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993). In the present case, the motion court's Order does not address Smith's request for resentencing, but the record makes clear that the motion court rejected this argument. R. 83, ll. 9-23. Specifically, the Court found that reliance on South was misplaced and that the Court was not authorized under the statute to order resentencing. R. 83, ll. 9-12 and 21-23.

In South, five years after his trial the defendant was diagnosed with a brain tumor that was undisputedly present but unknown at the time of his murder conviction and imposition of a death sentence. 310 S.C. at 506, 427 S.E.2d at 668. With leave of the Supreme Court, South filed a motion for new trial based on this after discovered evidence.[9] Id. While the request for new trial was denied because South failed to show that the tumor rendered him legally insane such that its presence would probably change the result of a new trial, the trial court granted South a resentencing proceeding. Id.

In reviewing the propriety of resentencing, the Court held the traditional five-factor test for newly discovered evidence "appl[ies] to motions for resentencing proceedings with a modification of the fourth factor, such that the newly discovered evidence must be material to any mitigating or aggravating circumstances." Id. at 509, 427 S.E.2d at 669-

[9] There is no indication in South that the defendant filed a separate motion for resentencing rather than just requesting it as an alternate form of relief under his motion for new trial based on newly discovered evidence.

70. South's case was remanded for application of the correct standard after the Court found that the trial court erred in holding that "there is a *significant possibility* that the outcome of the sentencing *could* have been different" rather than determining whether the newly discovered evidence probably would change the result. Id. (emphasis in original).

Though South was a capital case, requiring a bifurcated sentencing proceeding, the Court did not specify that this ruled applied only to such cases. Id. Thus, the standard for resentencing based on newly discovered evidence articulated in South should have been applied in this case. The motion court failed to make any finding regarding whether the new evidence was material to any issues at sentencing and whether the new evidence probably would change the result of the sentencing hearing. "If justice is to be done, a sentencing judge should know all the material facts." State v. Franklin, 267 S.C. 240, 245, 226 S.E.2d 896, 897 (1976). "Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding." Id. "Hence, the judge is required to listen and give serious consideration to any information material to punishment." Id.

Therefore, Smith's case should be remanded so that the motion court can apply the correct standard and consider his request for resentencing based on the after-discovered evidence.

CONCLUSION

For the reasons set for the herein, Appellant John Julius Smith respectfully requests that his guilty plea be vacated and his case be remanded for a new trial or resentencing, or alternatively, that his case be remanded for a further evidentiary hearing and/or further findings of fact as ordered by this Court.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN JULIUS SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 22nd day of December, 2015.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 22, 2015

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