STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

v.

JAMES C. WILLIAMS,

Appellant.

Appellate Case No. 2013-001849

FINAL BRIEF OF RESPONDENT

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APPELLANT'S QUESTION PRESENTED

Whether the court erred for not informing appellant of his right against self-incrimination?

STATEMENT OF THE CASE

This is an appeal from the denial of appellant's *Rule 29(b), SCRCrP, Motion for a New Trial Based on After-Newly Discovered Evidence* by the Honorable William P. Keesley, Circuit Court Judge. Appellant filed the motion on July 23, 2012. Judge Keesley heard the Motion on June 20, 2013. The Motion was denied by written Order issued on August 16, 2013 and filed August 19, 2013. (Motion, Tr. June 20, 2013, Order denying Motion for a New Trial Based On Newly-After Discovered Evidence).

Procedural Background

Appellant murdered his wife on September 15, *1999* in Lexington County. Appellant was arrested the following day, September 16, 1999, in Barnwell County. Appellant was indicted at the January 2000 term of the Lexington County grand jury for murder (Indictment Number *2000-GS-32-689*) and possession of a weapon during a violent crime (Indictment Number *2000-GS-32-688*). Appellant was represented by William E. Gorski, Esquire. (R. 7-48, 118-19, App. pp. 1-42, 112-13).

On March 18, 2002, appellant's case was called for trial before the Honorable Marc Westbrook, Circuit Court Judge, and a jury was selected. Appellant then decided to change his plea, and appellant pled guilty to murder (*2000-GS-32-689*) on March 21, 2002.[1] The weapon charge was dismissed in exchange for appellant pleading guilty to murder. Also in exchange for the plea of guilty, the State recommended the minimum mandatory sentence of thirty (30) years for murder. Judge Westbrook accepted the plea of guilty to murder and followed the recommendation of the State and sentenced appellant to thirty (30) years confinement. (R. 7-48,

[1] The jury was selected on Monday; defense counsel became ill; and, testimony was to begin on Thursday morning, at which time appellant decided to change his plea and entered a plea of guilty to murder. (R. 7-48, App. pp. 1-42).

App. pp. 1-42).

Appellant directly appealed his guilty plea conviction to this Court by way of an Anders[2] brief. He was represented in the appeal by Robert M. Dudek, Esquire. In the Anders brief, appellant raised the following issue to this Court:

> Whether the court erred by informing appellant he could appeal the results of his guilty plea in the same manner as a guilty verdict from a jury, since this erroneously informed appellant an appellate court could vacate the plea in the absence of an objection, undermined the finality of the plea, and made it an impermissible conditional plea?

(R. 52, 49-57, Anders brief, p. 3, App. pp. 43-51). Mr. Dudek certified to this Court the appeal was without merit and asked to be relieved as counsel. (R. 56, 49-57, Anders brief, p. 7, App. pp. 43-51). Appellant did not file a *pro se* Response to the Anders brief. On May 13, 2003, this Court, after careful consideration of the record pursuant to Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), dismissed the appeal in an unpublished opinion and granted counsel's motion to be relieved. State v. Williams, Opinion No. 03-UP-329 (Ct. App. 2003). (R. 58-59, App. pp. 52-53). The Remittitur was issued on June 17, 2003. (Remittitur).

Appellant filed an application for post-conviction relief (PCR) on May 21, 2003 (R. 60-75, Civil Action # *2003-CP-32-1863*). The State filed a Return. On June 27, 2005, an evidentiary merits hearing was held before the Honorable James W. Johnson, Jr., Circuit Court Judge ("the PCR Court"). Appellant was represented by Robert N. Boorda, Esquire. On August 1, 2005, the PCR Court issued an Order of Dismissal denying and dismissing the PCR application with prejudice. (R. 60-117, App. pp. 54-111).

Appellant appealed the denial of his PCR application by way of a Johnson Petition to the South Carolina Supreme Court. Appellant was represented in this appeal by Robert M. Pachak, Esquire. In the Johnson Petition, Petitioner raised the following issue to the Supreme Court:

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[2] Anders v. California, 386 U.S. 738 (1967).

Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama?

(R. 128, Johnson Petition, p. 2). Counsel certified to the Court the appeal was without merit and asked to be relieved. Appellant filed *pro se* Responses to the Johnson Petition.[3] (R. 134-44, *Pro se* Responses to the Johnson Petition). The appeal was transferred to this Court by the Supreme Court. On September 21, 2007, this Court, after careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), denied the petition for writ of certiorari and granted counsel's request to withdraw. (R. 145-46, Order of this Court, dated September 21, 2007, James C. Williams v. State). The Remittitur was issued on October 10, 2007. (R. 147, Remittitur, 1st PCR Appeal).

Appellant filed a second (2nd) Application for PCR on August 27, 2008 (R. 148-57, Civil Action Number *2008-CP-32-3561*) (2nd PCR Application). The State moved to dismiss. (Return and Motion to Dismiss). The Honorable Knox McMahon, Circuit Court Judge ("the 2nd PCR Court") granted the motion and dismissed this action as time barred and successive in a Conditional Order of Dismissal and then a Final Order of Dismissal issued January 29, 2012, and filed January 30, 2012. (R. 163-70, Conditional Order of Dismissal & Final Order of Dismissal).

Appellant appealed the dismissal of his 2nd PCR application to the South Carolina Supreme Court by way of a Rule 243(c), SCACR, explanation. (Rule 243(c), SCACR, Explanation). On April 20, 2012, the South Carolina Supreme Court dismissed the appeal finding appellant had failed to show there was an arguable basis for asserting that the determination by the lower court was improper. (R. 171, Order dated April 20, 2012, James C. Williams v. State). The Remittitur was issued May 16, 2012. (R. 172, Remittitur, 2nd PCR

[3] In his Johnson Petition, appellant raised for the first time the issue he raises to this Court on appeal from the denial of his Rule 29, SCRCrP, Motion for a New Trial.

Appeal).

Appellant filed a petition for federal habeas corpus relief in the United States District Court (Civil Action Number *3:07-3714-GRA-JRM*)(Federal Habeas Petition). Respondent filed a Return and moved for summary judgment. (R. 174, Supp.R. 1-30, Motion for Summary Judgment & Return and Memorandum of Law In Support of Motion for Summary Judgment). Appellant moved to dismiss his application without prejudice for failure to exhaust state remedies. The federal Magistrate, the Honorable Joseph R. McCrorey, addressing the merits of the claims, found they had no merit and recommended that Respondent's motion be granted. (Supp. R. 31-42, Report and Recommendation).[4] The District Court, the Honorable G. Ross Anderson, adopted the Magistrate's Report and Recommendation only to the extent it found appellant had not properly exhausted his state remedies, explicitly declined to adopt the Report and Recommendation, and granted appellant's motion to dismiss without prejudice. (R. 176-79, Order of the U.S. District Court).

Appellant filed this *Rule 29, SCRCrP, Motion for a New Trial Based on After-Newly Discovered Evidence* (R. 180-88) in the Circuit Court of General Sessions in Lexington County. And, as previously stated, the Motion was denied by Judge Keesley.

[4] Ground three of the federal habeas petition raised basically the same ground raised in this appeal. (Supp. R. 1-42, See Respondent's Return and Memorandum of Law in Support of Motion for Summary Judgment & Report and Recommendation).

RESPONDENT'S STATEMENT OF FACTS

On the night of September 15, 1999, appellant, James Chester Williams, murdered his wife, Kathy Williams ("the victim"). On that night, the Lexington County Sheriff's Office, responded to an apartment in River Oaks Apartment complex, located in Lexington County. When they arrived, they found the body of the victim who was forty-one (41) years old. She had been shot in the neck. Also in the home were three (3) of the victim's children, who were frantically running around the apartment trying to get help for their mother. (R. 7-11, 37-48, App. pp. 1-5, 31-42).

Police questioned the children who were present in the apartment when their mother was shot. At that time, their ages were eight (8), thirteen (13), and fifteen (15). The children were able to tell law enforcement that on that evening their father/stepfather, **the appellant**, came over to their mother's apartment to speak to their mother supposedly to bring some money so the youngest child could play little league football. At that point in time, appellant and the victim were living separately. The victim had moved out of the marital home and into River Oaks Apartments some time previous to the night of the murder. (R. 43-45, App. pp. 37-39).

According to the children, the night of the victim's murder, the victim and appellant argued about appellant coming over to the victim's apartment all the time. At that point, appellant left the apartment, went to his car, armed himself with a shotgun, took one (1) shotgun shell and loaded the shotgun, and went back to the apartment. Appellant re-entered the victim's apartment and went straight to the victim's bedroom and motioned for the victim to come in the bedroom with him [i.e. out of the view of the children]. (R. 43-45, App. pp. 37-39).

The children heard some more arguing. Two (2) of the children heard the victim say in a very strong voice: "What are you going to do? Shoot me?" Immediately after the victim made

this statement, the children heard a gunshot fired. Appellant shot the victim with his shotgun. Appellant then ran out of the apartment taking the shotgun with him. The victim died on her bedroom floor from the gunshot wound to her neck. (R. 43-45, App. pp. 37-39).

Police received a tip as to where appellant may be located. Appellant had some family in Barnwell County. The following morning police went to Barnwell County to the home of appellant's brother. They found appellant in his brother's home. Police found the car appellant had driven to Barnwell County hidden behind another home in the area as well as a sawed-off shotgun hidden in an old refrigerator behind the mobile home and a box of shot gun shells. One (1) shotgun shell was missing from this box. A palm print of appellant was found on the box of ammunition. (R. 45, App. p. 39).

The autopsy determined the victim died from a shotgun blast to the neck that severed her spinal cord. The pathologist approximated that the gun was less than six (6) inches from the victim's neck when appellant shot the victim. The victim had no chance of surviving the shotgun blast. (R. 45, App. p. 39).

Gunshot residue tests performed on the victim revealed that the residue on her hands was consistent with the victim having her hands up in a defensive position when she was shot in the neck. She did not have her hands on the weapon. (R. 45-46, App. pp. 39-40).

The State was also prepared to call witnesses from appellant's workplace, if the case had proceeded with the trial, that appellant had indicated for at least weeks before the crime that he was going to kill the victim and then kill himself. (R. 46, App. p. 40).

Appellant had previously been convicted of criminal domestic violence on the same victim in 1999. He had also been convicted previously of grand larceny in 1994. (R. 46, App. p. 40).

At his guilty plea, appellant admitted he was guilty of the murder of his wife. Appellant

also apologized to the victim's children for killing their mother. (R. 37-48, App. pp. 31-42).

ARGUMENT

The issue appellant raises on appeal from the denial of his Rule 29, SCRCrP, Motion for a new trial based on after discovered evidence is not preserved for appellate review, is barred, and is not proper in this appeal; and, even if the issue was preserved, it is not a proper issue to raise in a Rule 29, SCRCrP, Motion for a New Trial based on after-discovered evidence because the motion was not timely filed and the evidence is not after-discovered evidence; further, there is no merit to this argument; therefore, this appeal must be denied and dismissed.

What Occurred Below

On June 20, 2013, Judge Keesley conducted a hearing on the motion for a new trial based on after-discovered evidence. Appellant had been represented by court appointed counsel, David M. Mauldin, Esq.; however, appellant had moved to relieve Mr. Mauldin prior to the hearing.[5] Appellant raised several evidentiary claims in support of his motion; however, Mr. Mauldin informed the Court he had investigated these matters and this information was in the possession of appellant's trial/plea attorney before appellant's trial/guilty plea so there was no Rule 5 or Brady[6] violation and it was not after-discovered evidence.[7] Appellant then alleged that his plea was involuntary because the plea judge [Judge Westbrook] did not inform him of his constitutional rights including the right against self-incrimination. Judge Keesley obtained a transcript of the guilty plea transcript, reviewed it on the record with appellant, and explained that his constitutional rights, including the right against self-incrimination, had been explained to appellant, and appellant agreed. (R. 233-39, Tr. June 20, 2013, pp. 40-46). Appellant then raised other arguments of an involuntary guilty plea and asserted he was actually innocent.

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[5] Judge Keesley took the extraordinary precaution of appointing counsel to represent appellant on the motion for a new trial based on after-discovered evidence. (R. 252-267, See Order on Motion for a New Trial Based on After-Discovered Evidence).

[6] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

[7] Mr. Mauldin also informed Judge Keesley he believed appellant's PCR counsel had this information as well.

Appellant eventually admitted he lied to Judge Keesley regarding what a S.L.E.D. agent told him after the S.L.E.D. agent was called to the hearing on the motion and testified. (R. 241-51, Tr. June 20, 2013, pp. 49-64. The hearing on the motion was concluded the same day. (R. 194-249, Tr. June 20, 2013, pp. 1-56).

On August 16, 2013, Judge Keesley issued his Order denying and dismissing the motion for a new trial based on after-discovered evidence and specifically addressed the issue appellant now raises to this Court. Judge Keesley held as follows:

> Mr. Williams claimed that he was never told about certain rights, including his right against self-incrimination. The transcript of the guilty plea completely refutes his assertions in this regard. When he persisted in this claim, the court read to him out loud, the portions of the transcript where the judge covered his rights and asked the defendant to explain how he has any claim of not knowing his rights. He had no specific response, other than to keep asserting denials. It is clear that the judge covered those issues adequately. Further, Mr. Williams had two PCR cases, and he did not prevail. He did not pursue federal habeas corpus relief against his PCR counsel.

(R. 262-63, Order, pp. 6-7). Judge Keesley also found this claim, along with the other claims appellant asserted in his motion and before the Court, were not claims of after-discovered evidence, and his claims would be procedurally barred in any event because he had filed two (2) PCR actions and had appeals which did not grant relief. (R. 263-67, Order, pp. 7-11).

Lack of Preservation/The Issue is Barred

On appeal from the denial of his "Rule 29, SCRCrP, Motion for a New Trial Based on After-Newly Discovered Evidence," appellant, proceeding *pro se*, raises only one (1) issue. Appellant argues the plea/sentencing court erred *or* his guilty plea in 1999 was involuntary because the plea/sentencing court [Judge Westbrook] did not advise him of his privilege against self-incrimination. (Initial Brief & Final Brief of Appellant). This issue is not preserved for appellate review whether raised as a claim of involuntary guilty plea or as one of trial/plea court error, for several reasons.

First, this issue [that his plea was involuntary for this reason] is not preserved because there was no objection by appellant at his guilty plea that his guilty plea was involuntary for any reason, including this one. State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (2002)(defendant challenging free and voluntary nature of a plea was procedurally barred on appeal where the issue was not raised to the court that accepted the plea); State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982)(absent timely objection at plea proceeding, unknowing and involuntary nature of guilty plea can be attacked only through post-conviction relief); State v. Bradley, 263 S.C. 223, 209 S.E.2d 435 (1974)(finding defendant who failed to assert at his plea that his guilty plea was involuntarily entered was precluded from consideration of such claim on direct appeal); In the Interest of Arisha K., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998)(issue of voluntariness of guilty plea held not preserved for appellate review below because there was no objection below even where defendant raised issue by way of an Anders brief.).

Second, appellant's claim that the *trial* [plea] *court erred* was not raised at appellant's guilty plea. As a result, it is not preserved for appellate review. South Carolina is an issue preservation state. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000). If an issue is not raised to the plea judge, then it is defaulted and cannot be raised on appeal. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000).

Third, this issue cannot now be raised on appeal from the denial of a Motion for a New Trial based on after-discovered evidence [i.e. on appeal from the denial of a post-trial motion]. Appellant cannot bootstrap an issue that was not raised during his guilty plea by raising it in a post-trial motion ten (10) years after the fact. S.C. Dep't. of Trans. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007)("It is well settled that an issue may not be

raised for the first time in a post-trial motion."); Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)(holding issue first raised in post-trial motion is not preserved for appellate review); State v. Taylor, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012)(issue cannot be preserved by first raising it in a post-trial motion), *citing* Dixon v. Dixon, *supra*; *see also* Wilder Corp. v. Wilkie, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)(explaining purpose of post-trial motions). The time for appellant to have raised this issue was during his guilty plea and **on direct appeal** in his Anders brief or in a *pro se* Response to the Anders brief. The issue appellant now raises was not raised in his Anders brief and appellant filed no *pro se* Response to his the Anders brief.[8] Therefore, this issue is not preserved for appellate review.

This issue is also barred on appeal by *res judicata*, *collateral estoppel*, and the principle of *the law of the case*. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989); Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).[9] *See* Gilbert v. Moore, 134 F.2d 642, 657, n.12 (4th Cir. 1998). In 2003, this Court conducted an Anders review of appellant's guilty plea pursuant to the requirements of Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991) and found there were no preserved issues of arguable merit. *See* State v. James Chester Williams, Opinion No. 03-UP-329 (Ct. App. 2003). (App. pp. 52-53). This Court's previous determination is the law of the case and is *res judicata* as to the issue appellant now raises. State

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[8] Pursuant to the Anders review process, this Court would have reviewed the record below for any preserved issue of merit. This Court correctly found there were no preserved issues of merit and dismissed the direct appeal. *See* State v. James Chester Williams, Opinion No. 03-UP-329 (Ct. App. 2003) (R. 58-59, App. pp. 52-53). In fact, appellant did not raise this issue at his 1st PCR. (See R. 60-117, App., pp. 54-111). The first time appellant ever raised the specific issue he raises to this Court was in his Johnson Petition on appeal from the denial of his 1st PCR action; however, the issue was not preserved below. (R. 126-33, See Johnson Petition). This Court denied the Petition for Writ of Certiorari. (James C. Williams v. State [1st PCR appeal]).

[9] *See also* Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004); Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993).

v. Bacote, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); Hilton Head Ctr. off S.C. Inc. v. Publ. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Appellant is also *collaterally estopped* from raising this issue again.[10] Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997); Beal v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984). As a result, this issue is not preserved for appellate review or is barred and must be dismissed.[11]

Standard of Review
(General Appellate Standard)

In criminal cases, an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Thus, the appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.; State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004). On appeal, the appellate court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005).

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[10] The U.S. District Court's determination of this issue is also *the law of the case*, *res judicata*, and *collaterally estops* appellant from raising this issue **at least as far as the issue not being preserved.** *See* State v. Gilbert, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981). *Compare* Collins v. Sigmon, 199 S.C. 464, 468-69, 385 S.E.2d 835, 837-38 (1989). The District Court adopted the Magistrate's Report and Recommendation to the extent it found Petitioner did not properly exhaust his state remedies, i.e. Petitioner did not raise this claim to the state's highest appellate courts. Magistrate Judge McCrorey also found that this issue had no factual merit as the plea court advised appellant of his constitutional rights, including his right not to testify against himself, and appellant's plea was voluntarily entered, but this Report and Recommendation was not adopted. (R. 176-79, Supp. R. 31-42, See Order of the U.S. District Court & Report and Recommendation, which will be contained in this Record on Appeal).

[11] Appellant, appearing *pro se*, also appears to argue in the body of his brief that Judge Westbrook erred or his plea was involuntary because he was not advised of other rights such as the right to confrontation, and the right to a jury trial. As with the above issue, none of these issues are preserved for appellate review for the same reasons. They are also barred by *res judicata*, *collateral estoppel*, and *the law of the case* and are not proper on appeal from the denial of Rule 29, SCRCrP, Motion for a New Trial based on After-Discovered evidence.

(Motion for a New Trial based on after discovered evidence)

"The granting of a new trial because of after-discovered evidence is not favored," and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. State v. Irvin. 270 S.C. 539, 545, 243 S.E.2d 195, 197–98 (1978); State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). As the South Carolina Supreme Court held in State v. Rhodes, 44 S.C. 325, 327, 21 S.E. 807 (1895):

> We, however avail ourselves of this opportunity to say that the universally recognized doctrine is that applications of this kind should be scrutinized with great caution, in order to avoid delays, and prevent any obstructions to the administration of justice. As was said by the late Chief Justice Simpson in the case of State v.David, 14 S.C. at page 432, "There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and as was said in the case of State v. Harding, 2 Bay, 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed, to allow one with his life in danger, an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice"

Rhodes, 44 S.C. at 327, 21 S.E. 807.

"A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvin, 270 S.C. at 545, 243 S.E.2d at 197; State v. Harris, 391 S.C. at 544, 706 S.E.2d at 529. The credibility of newly-discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); Harris, 391 S.C. at 545, 706 S.E.2d at 529. Only the trial court, and not the appellate court, has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. Id.; Harris, 391 S.C. at 545, 706 S.E.2d at 529. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); Harris, 391 S.C.

at 545, 706 S.E.2d at 529. "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." Id.; Harris, 391 S.C. at 545, 706 S.E.2d at 529.

Traditionally, in South Carolina, to obtain a new trial on after discovered evidence, a defendant must show the five (5) factors set forth in State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). McCoy v. State, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)(*quoting* Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993).[12] However, this test proved unworkable where the defendant pled guilty. "Indeed, the traditional, newly discovered evidence factors are 'difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial.'" Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014),(*quoting* In re Reise, 192 P.3d 949, 954 (Wash. Ct. App. 2008). As the Court noted in Jamison, in the case of a guilty plea:

> [I]t was not an independent trial of fact that determined the defendant's guilt based upon sworn trial testimony—it was the defendant who acknowledged his own guilt. Because of that simple fact, the trial court handling the post-conviction proceeding is necessarily in a different position. That court does not have the full record of the prior trial, but it does have the defendant's own statements of guilt. [The traditional, five-factor newly discovered evidence test] presumes that the [PCR] judge is in a position to weigh the new testimony against that provided at the prior trial and assess whether an acquittal verdict would enter based upon new evidence. In the circumstance in which there never was a trial on the charges, the [PCR] court is hampered in that assessment.

Jamison, 410 S.C. at 469-70, 765 S.E.2d at 129-30 (*quoting* People v. Schneider, 25 P.3d 755, 761 (Colo. 2001). As a result, in Jamison, our Supreme Court held where a criminal defendant seeks relief on the basis of after discovered evidence from a guilty plea, relief is appropriate only where the defendant presents evidence showing that (1) the newly discovered evidence was

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[12] *See* State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993). *See also* Mercer, 381 S.C. at 166, 672 S.E.2d at 565; State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998); Johnson v. Catoe, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

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 of that particular case, the "interest of justice" requires the defendant's guilty plea to be vacated. Id. at 470, 765 S.E.2d at 130. "In other words, a defendant may successfully disavow his guilty plea only where the interest of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interest in maintaining the finality of guilty-plea convictions." Id. The Court pointed out:

> In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated....on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. *Cf.* Reise, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice).

Jamison, 410 S.C. at 470, 765 S.E.2d at 130.

The Lack of Merit of this Issue

Even if appellant could raise such an issue on appeal from the denial of a motion for new trial based on after discovered evidence, the issue has no merit because the issue is not one of after-discovered evidence. Appellant pled guilty in 2002.

Whether the plea/sentencing judge [Judge Westbrook] advised appellant of his right against self-incrimination was known to appellant at the time of his plea, on direct appeal when a transcript was generated and provided to this Court, and throughout his 1st PCR action. Appellant did not file his motion for a new trial based on after-discovered evidence until **2012**, ten (10) years after his guilty plea. The motion is not proper under Rule 29. *See* Rule 29(b), SCRCrP (motion for a new trial based on after-discovered evidence must be made within one (1) year after 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.). Judge Keesely did not err in denying the motion.

Further, the evidence does not meet the test of after discovered evidence as defined by the South Carolina Supreme Court and this Court: (1) that there is evidence that would probably change the result if a new trial were granted; (2) which was discovered since the plea; (3) which would not in the exercise of due diligence have been discovered prior to the plea; (4) that is material; (5) and, is not merely cumulative or impeaching. Spann. And, it does not meet the new test set forth by our Supreme Court in Jamison for guilty pleas.

The issue appellant raises on appeal, that the trial court erred *or* his guilty plea was involuntary because the plea/sentencing court [Judge Westbrook] did not advise him of his right against self-incrimination, is simply not newly-discovered evidence. Spann. Nor is it evidence which requires his guilty plea be overturned to correct manifest injustice. Jamison. As a result, this appeal must be dismissed.

Finally, there is no factual merit to the argument appellant raises. The guilty plea transcript reflects that at the beginning of appellant's plea, Judge Westbrook inquired of plea counsel whether prior to his plea of guilty, appellant was advised by counsel of his constitutional rights in this matter and whether he understood them; and, plea counsel informed the court that he had advised appellant of the same and appellant understood them. (R. 37, App. p. 31, ll. 10-17). *See* Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000), *citing* State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171 (1993)(a knowing and voluntary waiver may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both.). The record also reflects appellant was advised by the court of his privilege against self-incrimination. (R. 39-40, App. pp. 33-34). While the court did not use these exact words, he advised appellant

of the substance of this right. (R. 40-41, App. pp. 34-35). Appellant was also advised of his right to a trial by jury. (R. 38-39, App. pp. 32-33). The record reflects appellant was advised of his right to confront his accusers or the witnesses against him. (R. 39, App. p. 33). Further, the record reflects appellant knew all these rights because he had exercised them prior to pleading guilty when he elected to proceed with a jury trial on March 18, 2002. Furthermore, appellant's trial/plea counsel testified at appellant's 1st PCR hearing that he advised appellant of all these rights prior to his guilty plea. (R. 106, 107, 109, App. pp. 100, 101, 103). Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000)("When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing."); Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972)(to determine whether a guilty plea was taken in accordance with constitutional standards, the Court will consider the entire record including facts presented at a PCR hearing).[13]

As the record reflects, appellant's plea of guilty to murder was entered knowingly, intelligently, and voluntarily according to the mandates of Boykin v. Alabama, 395 U.S. 238 (1969) and later cases developing that doctrine. *See* Vickery v. State. The transcript of the guilty plea clearly shows appellant understood the charge to which he was pleading and the possible sentences he could receive. There is no doubt appellant was aware of the consequences of his plea. The plea judge recited on the record the maximum sentence appellant could receive for

[13] As previously stated, in the body of his brief appellant appears to argue he was not advised of other rights by the plea/sentencing court [Judge Westbrook]. To the extent appellant is raising these arguments as a claim of trial court error or the basis for an involuntary guilty plea argument, like the issue raised above, these claims were not timely filed, do not constitute after-discovered evidence, do not meet the Jamison test, and have no merit. The record reflects appellant was appropriately advised of his rights by both Judge Westbrook and his attorney. (Appendix).

murder. Appellant acknowledged he wanted to plead guilty, and *he was in fact guilty of the crime*. Appellant asked the victim's children to forgive him for what he had done, murdering their mother. Appellant received a substantial benefit for himself by his plea; the State dismissed the weapon charge and recommended the mandatory minimum sentence for murder, and he has not shown anything that would overcome the "strong-presumption of veracity" carried by his statements at the guilty plea hearing of a voluntary decision to plead guilty. *See* United States v. Morrow, 914 F.2d 608 (4th Cir. 1990).

Appellant was informed that by pleading guilty he would waive and give up his right to a jury trial, the right to remain silent, the right to make the State prove him guilty, the right to confront witnesses, and the right to put up his own defense. Appellant understood all the judge told him and asked him during the plea. Appellant admitted on the record his plea was his decision, and he made it of his own free will. Appellant stated he was satisfied with his attorney's representation. There simply is no merit to this claim, and appellant is not entitled to any relief. Id.; United States v. Marquez, 909 F.2d 738, 742 (2nd Cir. 1990)(a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison). *See* State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009)(finding trial court's credibility determination was reasonably supported by the evidence and therefore the motion for a new trial was properly denied). The decision of Judge Keesely is reasonably supported by the evidence and must be affirmed. Id. Appellant has failed to show that this is the rare case where the interests of justice will require that a knowing and voluntary guilty plea be vacated. Jamison. There is no merit to this appellate issue.

While the fact that a defendant has pled guilty is not a *per se* bar to making a motion for a new trial on after discovered evidence, *see* State v. Williams, 108 S.C. 295, 93 S.E. 1006 (1917),

a guilty plea is still a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmates' right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct 1621 (1977); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566, (4th Cir. 1976); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007).

Appellant's "[s]olemn declarations in open court carry a strong presumption of veracity." Blackledge, 431 U.S. at 74; United States v. Eades, 583 Fed. Appx. 257, 2014 W.L. 4792062 (4th Cir. 2014)(*not reported in federal reporter*); Fields v. Attorney Gen., 956 F.2d 1290, 1299 (4th Cir. 1992)("Absent clear and convincing evidence to the contrary, a defendant is bound by the representations he makes under oath during a plea colloquy"); Beck v. Angelone, 261 F.3d 377, 395-96 (4th Cir. 2001)(similar). A guilty plea is a "'grave and solemn act,' which is 'accepted only with care and discernment.'" United States v. Hyde, 520 U.S. 670, 677, 117 S.Ct. 1630 (1997). *See also* United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992)(If an appropriately conducted plea colloquy and proceeding is to serve a meaningful function, on which the criminal justice system can rely, "..it must be recognized to raise a strong presumption that the plea is final and binding."). Indeed, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

Appellant has not shown anything which would overcome the "strong presumption of veracity" carried by his statements at the guilty plea and sentencing hearing. *See* United States v.

Morrow, 914 F.2d 608 (4th Cir. 1990). "A plea of guilty is an admission or a confession of guilt, and as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." Jamison, 410 S.C. at 468, 765 S.E.2d at 129; State v. Fuller, 254 S.C. 260, 174 S.E. 774 (1970)(*citing* 21 Am Jur. (2d) Criminal Law, section 495; 22 C.J.S. Criminal Law s 424(1); State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967) [*and the cases cited therein*]), *reversed on other grounds* Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). *See also* North Carolina v. Alford, 400 U.S. 25, 37 (1970)(guilty pleas constitute an express admission of guilt upon which a sentence may be imposed).

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." Jamison, 410 S.C. at 471, 765 S.E.2d at 130 (*quoting* Brady v. United States, 397 U.S. 742, 757 (1970). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Id. Indeed, "[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." Jamison, 410 S.C. at 469, 765 S.E.2d at 129 (*quoting* McMann v. Richardson, 397 U.S. 759, 773 (1970)(noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). "Furthermore, there must be some consequence attached to the decision to plead guilty." Id., (*quoting* People v. Schneider, 25 P.3d 755, 761 (Colo. 2001)("A defendant who voluntarily and knowingly enters a plea accepting

responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea.").

This appeal has no merit. It must be denied and dismissed.

CONCLUSION

The issue appellant raises on appeal from the denial of his motion for a new trial based on after-discovered evidence is not preserved for appellate review and is improperly raised here and barred. Furthermore, the issue has no merit because the motion was not timely brought, and the evidence is not newly discovered evidence and does not meet the test set forth in Jamison. Finally, there is no merit to this issue. For all of these reasons, this appeal must be denied and dismissed.

Respectfully submitted,

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January 19, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Lexington County
Honorable William P. Keesley, Circuit Court Judge

THE STATE,

Respondent,

v.

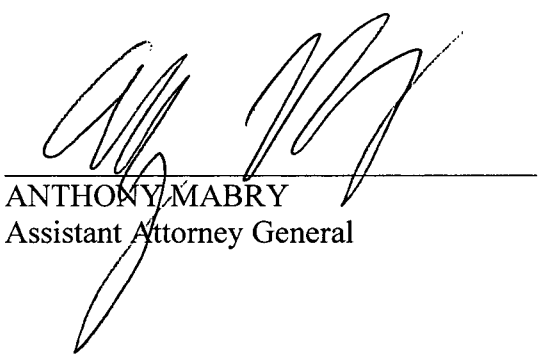
JAMES C. WILLIAMS,

Appellant.

Appellate Case No. 2013-001849

CERTIFICATE OF COMPLIANCE

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



ANTHONY MABRY
Assistant Attorney General

January 19, 2016

CERTIFICATE OF SERVICE

I Anthony Mabry, hereby certify that I have served the Final Brief of Respondent in the foregoing action by depositing copy in the United States Mail to James C. Williams, #282929, Kershaw Correctional Institution, 4848 Goldmine Highway, Kershaw, SC 29067 this 19th of January 2016.

ANTHONY MABRY
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