

**EXHIBIT B**  
**RESPONSE TO CONDITIONAL ORDER OF**  
**DISMISSAL**

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
<b>ROBERT LOUIS GARRETT, #291096,</b>	)	<b>CASE NO.: 2012-CP-43-2007</b>
	)	
Applicant,	)	
	)	
v.	)	RESPONSE TO CONDITIONAL ORDER
	)	OF DISMISSAL
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

NOW COMES the Applicant in the above-captioned action, acting by and through undersigned counsel, hereby submitting this response to the Conditional Order of Dismissal filed on April 9, 2014, and served on counsel for the Applicant on April 24, 2014. The Applicant would argue that the Conditional Order of Dismissal should not become final for the following reasons:

As an initial matter, the Applicant would note that “[w]hen considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant.” McCoy v. State, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013). With the applicable standard of review in mind, the Applicant turns to this Court’s findings in its Conditional Order of Dismissal. The Conditional Order dismisses the Applicant’s current PCR application on four bases: (1) the evidence supporting the application did not meet any of the requirements for after-discovered evidence; (2) the PCR is successive; (3) the PCR is time-barred; and (4) the doctrine of *res judicata* requires dismissal because the issues raised in the PCR were raised and ruled upon in his 2009 PCR. The Applicant respectfully contends that this Court should not

summarily dismiss this PCR on any of these bases. The Applicant will address each of the Conditional Order's grounds for dismissal in turn.

**A. After-Discovered Evidence**

“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.” S.C. Code Ann. § 17-27-45(C). “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 new trial is had;
- (2) has been discovered since the trial;
- (3) could not have been discovered before trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.”

Clark v. State, 315 S.C. 385, 387-388, 434 S.E.2d 266, 267 (1993). The Conditional Order states that this PCR does not meet any of the requirements for establishing after-discovered evidence. The Applicant respectfully submits that the new evidence presented in this PCR satisfies all of § 17-27-45(C)'s requirements.

At the Applicant's trial, the State's theory of the case was that the Applicant, in conjunction with his co-defendants Andre China, Arthur Davis, and Desmond Cunningham abducted the victims, assaulted them, shot them, and left them naked in a field in Sumter. Neither victim was able to identify any of the perpetrators. Instead, the primary testimony introduced at trial that the Applicant was involved in the offense came from Cunningham, who

testified that the Applicant and China instigated the offense by initially assaulting the victims and putting them in the trunk of France's vehicle. Additionally, Cunningham testified that the Applicant drove France's vehicle away from the location where the victims were first abducted and that the Applicant directly assaulted the victims later on in the night. Davis, who was tried jointly with the Applicant, gave a statement to the police which, as redacted, stated that China, Davis, Cunningham, and "the other guy" were involved in the crime but that China and the Applicant began the incident by abducting the victims. Davis did not testify at the joint trial.

The new affidavits which have been introduced in this action are recantations by Cunningham and Davis. In Cunningham's affidavit, he stated that the Applicant "spent most of [his] time in the vehicles," and that he did not "recall seeing [the Applicant] holding a gun or putting his hands on either victim." Furthermore, he stated that the Applicant "never told either victim to do anything nor did he take anything from them." In Davis' affidavit, he stated that "I never saw [the Applicant] take any money or valuables from these men" and that he "never saw [the Applicant] do anything I'd consider criminal."

The Applicant believes that the new affidavits meet each of § 17-27-45(C)'s requirements. Regarding the timing requirements—the second and third requirements of § 17-27-45(C)—the recantations have clearly been discovered since the trial, which meets the second requirement. Furthermore, they could not have been discovered prior to the trial, given that Cunningham testified *against* the Applicant at the trial and Davis did not testify and had given a statement implicating the Applicant. Consequently, the third requirement is met as well.

With regard to the merits requirements—the first, fourth, and fifth requirements of § 17-27-45(C)—the new evidence is clearly material to the issue of guilt or innocence, would probably change the result at trial, and is not merely cumulative or impeaching since

Cunningham's testimony formed the base of the State's case against the Applicant and his new affidavit recants all of his substantive testimony against the Applicant. Indeed, Cunningham states that the Applicant never even touched the victims and that he never took anything from the victims. In other words, the Applicant was not guilty of carjacking, kidnapping, or ABHAN—the primary offenses he was convicted of. It is difficult to see how the Applicant could have been convicted of any of the charges against him with Cunningham's affidavit. Moreover, the evidence is not simply cumulative or impeaching because no evidence like Cunningham's affidavit was presented at trial and it constitutes substantive evidence. If the trial was held today, Cunningham would be impeached with his trial testimony, not the other way around. Therefore, the Applicant respectfully submits that all of § 17-27-45(C)'s requirements are met with the new affidavits, and this matter should not be dismissed on the basis that the Applicant failed to demonstrate how any of the requirements are met. This is particularly true given the standard of review that this Court must employ: viewing the evidence in the light most favorable to the Applicant. See McCoy, supra.

### **B. Successiveness**

“[T]o be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). In the present case, the PCR is not successive to the Applicant's first PCR because the after-discovered evidence simply was not available. The Applicant's second PCR clearly demonstrates the difficulty the Applicant had in obtaining any favorable information from either Cunningham or Davis while he was incarcerated.

With regard to the Applicant's second PCR, the Applicant contends that this Court's own findings in dismissing the second PCR provide the basis for the filing of this PCR:

Further, Applicant has failed to carry the burden placed on him to show sufficient reason why the Conditional Order should not become final. Applicant's bare assertions alone regarding alleged co-defendant recantation statements (coupled with one supposedly written recantation statement that lacks any witness signatures, notarization or markings of authenticity) have not sufficiently persuaded this court to withhold judgment on the successive and untimely nature of this application.

Final Order—2009-CP-43-2965—at 4 (filed October 3, 2011). In other words, this Court dismissed the Applicant's second PCR because the Applicant could not provide the documentation that would ensure that the second PCR was not time-barred or successive. The Applicant could not provide those authenticated statements from his co-defendants because they simply were not available at the time the second PCR was pending. The Applicant filed his second PCR with the hope that this Court would appoint an attorney to represent him in order to obtain the affidavits; however, no appointment of counsel was ever made because the Applicant needed to have the affidavits before returning to court.

The Applicant now has the affidavits which he could not obtain prior to the filing of his second PCR. In essence, he has cured the defect which infected his second PCR. It would not be fair or just to proclaim the second PCR successive because the Applicant could not obtain the affidavits and then to proclaim this PCR successive because the Applicant did not have the affidavits at the time of his second PCR. The Applicant would respectfully request that this Court not dismiss this PCR because to do so would place the Applicant in a Catch-22 where he could never return to court on the basis of the co-defendants' recantations.

### C. Statute of Limitations

This Court finds that the Applicant “was ... required to file his application on or before October 2, 2005” pursuant to S.C. Code Ann. § 17-27-45(A). Conditional Order at 6. This Court, however, neglected to address the other bases for filing a timely PCR, namely § 17-27-45(C): “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.” The Applicant contends that this PCR is timely pursuant to § 17-27-45(C).

This PCR was filed on October 10, 2012. The affidavits filed in support of this PCR were dated July 12, 2012 (Davis), and September 13, 2012 (Cunningham). These affidavits contained “evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence.” § 17-27-45(C). Furthermore, this PCR was filed “within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence” because the PCR was filed within one year after the affidavits were signed.<sup>1</sup> § 17-27-45(C). Inasmuch as this PCR clearly meets the requirements of § 17-27-45(C), it should be considered timely.

### D. Res judicata

“To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992). Here,

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<sup>1</sup> Again, the Applicant tried to obtain these affidavits by filing his second PCR to secure appointed counsel so that counsel could track down Davis and Cunningham. It was only after this Court dismissed the second PCR that the Applicant realized that the only way he could obtain the affidavits would be hire counsel on his own. He should not be punished for making a good-faith effort to obtain the affidavits through the court system before having to expend a considerable amount of money to hire an attorney and an investigator to obtain the affidavits.

the Applicant concedes that the first element of *res judicata* is met. However, the Applicant does not believe that the issue of whether or not the Applicant's co-defendants' recantations warranted a new trial was addressed in the second PCR, rendering *res judicata* inappropriate. As with the successiveness inquiry, the Applicant again looks to this Court's order dismissing the second PCR:

Further, Applicant has failed to carry the burden placed on him to show sufficient reason why the Conditional Order should not become final. Applicant's bare assertions alone regarding alleged co-defendant recantation statements (coupled with one supposedly written recantation statement that lacks any witness signatures, notarization or markings of authenticity) have not sufficiently persuaded this court to withhold judgment on the successive and untimely nature of this application.

Final Order—2009-CP-43-2965—at 4 (filed October 3, 2011). In other words, this Court dismissed the second PCR on successiveness and statute of limitations grounds—this Court did *not* address the merits of the Applicant's arguments regarding his co-defendants' statements. Consequently, *res judicata* is inapplicable to this situation.

Even if this Court had addressed the merits of the Applicant's arguments, *res judicata* still should not apply in this case. As this Court noted, the Applicant only filed one statement in support of his claim that Davis and Cunningham were willing to recant. That statement did not go to the same level of detail that the affidavits introduced by the Applicant in this PCR have gone. Indeed, the focus of the Applicant's second PCR was on his contention that Davis and Cunningham were willing to come to court and testify that they had signed recantations in 1999 prior to the Applicant's trial; the new affidavits provided in this PCR go much further and provide far more substantive evidence of the Applicant's innocence than the statements the Applicant sought to introduce in his second PCR. Inasmuch as the evidence introduced in this

PCR was not considered by this Court in the Applicant's second PCR, *res judicata* should not bar this action.

WHEREFORE, having set forth his grounds, the Applicant respectfully submits that this Court should not make its Conditional Order of Dismissal final, and should hold an evidentiary hearing on all of the Applicant's allegations.

Respectfully submitted,

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This \_\_\_ day of May, 2014.