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J. Christopher Wilson
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Reply to:
Post Office Box 1150
Bamberg, SC 29003

April 3, 2017

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

Re: *Juan Nimmons, #256828 v. State of South Carolina*
Case No. 2012-CP-05-0131

Dear Mr. Shearouse:

Enclosed please find for filing a Notice of Intent to Appeal in the above matter along with proof of service and a copy of the Order being appealed. Please file the original and return a certified copy to me in the self-addressed, stamped envelope provided. No filing fee is required because this is an appeal from a court-appointed post-conviction relief case with an indigent Applicant.

Thank you for your attention to this matter and if you have any questions please feel free contact me directly.

Sincerely,

Janek C. Kazmierski

JCK/nk
Enclosure

cc: Julie A Coleman
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Juan Nimmons

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No.: 2012-CP-05-0131

Juan Nimmons, #256828 ..... Appellant/Petitioner,

v.

State of South Carolina ..... Respondent.

NOTICE OF INTENT TO APPEAL

Juan Nimmons hereby appeals the Order Denying Post-Conviction Relief entered in the above matter on March 24, 2017. A copy of the Order Denying Post-Conviction Relief is attached hereto.

April 3, 2017

WILSON & LUGINBILL, LLC

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APR 07 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BAMBERG)

CERTIFICATE OF MAILING

I, Janek C. Kazmierski, attorney for Appellant/Petitioner in the case of Juan Nimmons v. State of South Carolina, Case No.: 2012-CP-05-131, do hereby certify that I have served the foregoing Notice of Intent to Appeal, by mailing a copy of the same, with postage prepaid, by United States mail to the attorney(s) at the address(es) indicated as follows:

Julie A. Coleman
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

WILSON & LUGINBILL, LLC

By: _____
Janek C. Kazmierski
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Attorney for Appellant/Petitioner

Bamberg, South Carolina

April 3, 2017

STATE OF SOUTH CAROLINA COUNTY OF BAMBERG	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Juan M. Nimmons, Applicant, vs. State of South Carolina, Respondent.	)	Case No.: 2012-CP-05-00131 **ORDER DENYING POST-CONVICTION RELIEF**

This matter comes before the Court by way of a post-conviction relief ("PCR") application filed on July 17, 2012. An evidentiary hearing was convened before this Court on September 30, 2016, at the Orangeburg County Courthouse. After due deliberation, review of the motions and supporting documents, and hearing arguments on behalf each party, for the reasons stated below, this court denies Defendant's motion.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. Applicant was indicted at the March 1999 term of the Bamberg County Grand Jury for Murder (1999-GS-05-0028) and Armed Robbery (1999-GS-05-0029). He was represented on both charges by Joshua Koger, Esquire. Applicant proceeded to a jury trial and was convicted on both charges. On March 10, 1999, Applicant was sentenced by the Honorable Gary E. Clary to life without parole for Murder and to a consecutive term of thirty (30) years imprisonment for Armed Robbery.

A notice of appeal was filed and an appeal perfected. Following an Anders review, the appeal was dismissed. State v. Nimmons, Op. No. 2002-MO-051 (S.C. Sup. Ct. filed June 13, 2002). Applicant's Petition for Rehearing was denied, and the Remittitur was sent on August 7, 2002.

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2003-CP-05-00068

Applicant subsequently filed a PCR application on May 1, 2003 (2003-CP-05-00068), wherein Applicant raised the following issues:

1. Ineffective assistance of counsel:
    a. Failure to submit notice of alibi defense and present alibi witnesses;
    b. Failure to object to solicitor's closing argument.
    c. Failure to object to sentence;
    d. Failure to request a Jackson v. Denno hearing;
    e. Failure to subpoena Rowland Dowling;
    f. Failure to move for directed verdict on the charge of Armed Robbery;
    g. Failure to request a jury charge on alibi;
    h. Failure to object to solicitor's "pitting of witnesses";
    i. "[F]ailing to motion to reveal Rule 404(b), S.C.R.Evid., State v. Lyle, evidence";
    j. Failure to move for a continuance;
    k. "[F]ailing to subpoena the coroner/toxicologist as there was not time of death, which could have changed the outcome of proceedings because witnesses observed different individuals entering victim's residence this particular night";
2. Ineffective assistance of appellate counsel;
3. The Court lacked subject matter jurisdiction on Armed Robbery charge.

The State made its Return on September 11, 2003. An evidentiary hearing was convened on August 8, 2007, before the Honorable J. Michael Baxley. Applicant was present and represented by Sherry Stoney, Esquire. Judge Baxley dismissed the application with prejudice by order dated September 18, 2007. The South Carolina Supreme Court denied Applicant's Writ of Certiorari on September 3, 2009. The Remittitur was send on September 21, 2009.

2009-CP-05-00200

Applicant filed his second PCR application on October 2, 2009 (2009-CP-05-00200). In his application, Applicant set forth the following grounds for relief:

1. "Was Petitioner denied his one bite of the apple when PCR counsel failed to [e]nsure that all grounds for relief were raised in Petitioner's prior PCR application and addressed at Petitioner's PCR hearing?"
2. "Was Petitioner denied due process of law and equal protection when trial counsel and PCR counsel failed to challenge the defects in the indictments that allowed Petitioner to be tried and convicted on defective instruments that have unduly prejudiced Petitioner and denied him of his constitutional rights?"
3. "Was Petitioner denied due process of law and equal protection when counsel failed to raise the issue of trial counsel conceding Petitioner's guilt to the jury?"
4. "Was PCR counsel ineffective for failing to raise trial counsel's failure to ask the court that the sentences that were handed down be run concurrent as mandated by S.C. Code Ann. 17–25–50?"

In a Conditional Order dated May 24, 2010, the Honorable Doyet A. Early III found that the application should be dismissed based on the statute of limitations and successiveness; Applicant was given twenty (20) days in which to respond. After consideration of Applicant's responses to the Conditional Order, a Final Order of Dismissal was signed by Judge Early on August 13, 2010, and filed August 17, 2010. In an order dated September 28, 2010, the Supreme Court dismissed the matter for failure to show an arguable basis why the determination by the lower court was improper pursuant to Rule 243(c), SCACR. The Remittitur was sent on October 15, 2010.

2010-CP-05-00205

Applicant filed a third PCR application on October 7, 2010 (2010-CP-05-00205). In this application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of appellate counsel:
   a. "Counsel failed to raise meritorious issues."
   b. "Counsel acted under a conflict of interest."
   c. "Counsel failed to show-up or attend the PCR hearing."

Respondent made its Return and Motion to Dismiss on March 28, 2011, requesting the application be summarily dismissed as successive and barred by the statute of limitations. In a Conditional Order dated March 29, 2011, the Honorable Doyet A. Early III found that the application should

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be dismissed based on the statute of limitations and successiveness; Applicant was given twenty (20) days in which to respond. After receiving no response from Applicant, Judge Early signed a Final Order of Dismissal dismissing the application on July 6, 2011. Applicant did not appeal the denial of his third application for post-conviction relief.

Current Allegations

In his fourth and current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. "Applicant is entitled to a new trial based upon the after-discovered evidence of his actual innocence wherein another individual admitted to commission of the crime for which Applicant was convicted."
    a. "On or about September 27, 2011, an individual sent an email to another member of Applicant's family in which that person admitted to the murder of Applicant's mother and that Applicant did not commit the crimes. Applicant was contacted and received this information in February 2012.

Respondent submitted its Return and Motion to Dismiss on October 8, 2012. A Conditional Order of Dismissal was signed by the Honorable Doyet A. Early III on October 11, 2012, and filed on October 17, 2012, provisionally denying and dismissing the PCR application, but allowing Applicant twenty (20) days to set forth specific reasons why this dismissal should not become final. Applicant filed a response asking Judge Early to recuse himself due to a conflict of interest, to which Judge Early recused himself from the case. Subsequently, the Honorable Clifton Newman granted Applicant's Discovery Motion and ordered an evidentiary hearing.

An evidentiary hearing was convened before this Court on September 30, 2016, at the Orangeburg County Courthouse. Both parties waived venue to allow the hearing outside of the Second Judicial Circuit. Applicant was present at the hearing and was represented by Janek

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Kazmierski, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman.

At the evidentiary hearing, Applicant presented testimony from Darryl Williams ("Williams"). The crux of Williams's testimony at the evidentiary hearing concerned a Facebook Messenger conversation that he had with Marcella Curry-Hooker ("Curry-Hooker") concerning Applicant; however, some context is necessary before delving into that conversation.

Williams is a cousin of Applicant, and the two grew up together. Williams testified that he and Applicant saw each other at least five (5) days per week. Additionally, he stated that the victim, Zola "Pat" Robinson ("Pat") was like a mother to him and his family. Despite this, Williams testified against Applicant at Applicant's trial in 1999. During that testimony, Williams testified that he saw Applicant the night of the incident, that Applicant left a social gathering in which Williams attended, and that Applicant came back later and had money with him that Williams had not seen before. He also testified that he had borrowed Pat's car the night of the incident and he returned it the next morning to his uncle, William Nimmons, who is now deceased. He stated that he was working at Piggly Wiggly at the time and needed to borrow her car. Williams was the last person in possession of Pat's vehicle before she was found murdered in her trailer that morning. Ultimately, Applicant was convicted, namely due to a voluntary statement that he gave to law enforcement in which he admitted to beating his mother with a hammer and taking one-hundred and twenty dollars ($120.00) from her person.

At the evidentiary hearing in September 2016, Williams recalled a Facebook conversation that he had with Curry-Hooker in 2011. Curry-Hooker was a family member of Williams, and he had known her all his life. It was not unusual for them to speak with each other via Facebook, although he admitted that he had not spoken to her in several years. The conversation occurred

while Williams was working as a residence hall supervisor at Voorhes College. While using a computer supplied by Voorhes College, Williams and Curry-Hooker began discussing Applicant and his case. Williams stated that he was trying to pay attention to work and type at the same time, and he was distracted by the kids. The conversation progressed as follows:

> **Williams**: "he did what he say"
>
> **Curry-Hooker**: "he asked how is everyone and said you testified against him for the state and asked for money"
>
> **Williams**: "i had to there was going to lock my ass up to if i did not"
> "i told the true"
>
> **Curry-Hooker**: "i told him sometimes we have to do what we have to do to get by"
>
> **Williams**: "i no"
> "it hurt me to do it but i did"
> "i did kill pat"
>
> **Curry-Hooker**: "boy take it with you"
>
> **Williams**: "my bad cuz my computer acting up"
> "i holla at u later got 2 do some work im at work no"

Curry-Hooker ultimately reported this conversation to the authorities, prompting SLED to conduct an investigation.

Williams testified that he did not recall writing, "i did kill pat," but he remembered reviewing this statement when he met with SLED and gave a voluntary statement. He testified that he did not mean to write that in his Facebook message. He stated that there was a chance his computer was acting up, which caused him to write this. This would also explain why he stated, "my bad cuz my computer acting up." In any case, Williams testified that he did not kill the victim. He also stated that he makes mistakes on Facebook all the time, but when this mistake came to his

attention, he corrected it by telling SLED that it was not true. Williams further testified that he has always told the truth in all of his testimony.

DISCUSSION

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442 (1985). The Uniform Post-Conviction Relief Act provides that a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17–27–20(4). If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the application 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). "The granting of a new trial because of after-discovered evidence is not favored." State v. Irvin, 270 S.C. 539, 545 (1978).

In order for Applicant to obtain a new trial on the basis of newly discovered evidence, the party requesting the new trial must show that the evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. E.g., Hayden v. State, 278 S.C. 610, 611–12 (1983). The following general principles are applicable:

> Evidence, not known to [the] accused at his trial, which will tend to prove that the crime of which he has been convicted was committed by another person, may be a ground for a new trial. A new trial on this ground rests in the sound discretion of the trial court, and depends largely on the credibility of the new evidence. Where newly discovered evidence is incredible and improbable under all the circumstances, the motion will be denied.

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State v. Fowler, 264 S.C. 149, 155–56 (1975) (quoting 24 C.J.S. Criminal Law § 1454c).

A. As an initial matter, this Court finds that Williams's testimony was credible and that the purported "newly discovered evidence" was incredible and improbable under the totality of the circumstances.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment. State v. Porter, 269 S.C. 618, 621 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); see also State v. Deese, 266 S.C. 534, 538 (1976) (stating that the trial court is tasked with assessing the new evidence in a motion for a new trial); State v. Pierce, 263 S.C. 23, 33 (1974) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit court judge to whom it is offered. In him . . . resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). However, the Court is sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. State v. Mercer, 381 S.C. 149, 170 (2009). This sensitivity forms part of the Court's consideration. Id.

Williams testified at Applicant's trial in 1999, gave a statement to SLED, was deposed by PCR counsel, and testified at the evidentiary hearing. All of this testimony was consistent. Williams never changed his story and consistently recalled the same facts from the day of the murder. Therefore, this Court finds that Williams was a credible and reliable witness. Furthermore, because Williams consistently and directly disputed the newly discovered evidence presented at the evidentiary hearing, this Court finds that the newly discovered evidence is not credible. Williams made it clear in his testimony that the words he typed were in error and that he did not

kill Pat. The newly discovered evidence offered by Applicant is incredible and improbable under the circumstances, lending this newly discovered evidence to carry little weight.

B. In light of the above, the newly discovered evidence is not such as would probably change the result if a new trial was had and the evidence is merely cumulative or impeaching.

As noted above, a party requesting a new trial based on newly discovered evidence must show that the evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611–12 (1983). While the newly discovered evidence arguably meets the standards delineated in subsections (2), (3), and (4) outlined above, the evidence would not change the result if a new trial was had and the evidence is merely cumulative or impeaching.

1. The evidence would not change the result if a new trial was had.

In order to show third-party guilt, Applicant would have to present evidence that meets the third-party guilt standard outlined in State v. Gregory, which states the following:

> [T]he evidence offered by accused as to the commission of the crime by another must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. 98, 104–05 (1941).

The evidence in this action for post-conviction relief has no value other than to cast a bare suspicion upon Williams. Williams never admitted to any involvement in the murder and never confessed to killing the victim. Rather, Williams's testimony that he meant to type "I did not kill Pat" is plausible. When read in the context of normal conversation, and considering the informality of Facebook, the fact that Williams said that his testimony in 1999 was the truth, and Williams's testimony that he was distracted by his work and kids while typing, it is reasonable to assume that Williams made a typographical error.

Furthermore, this Facebook "confession" which is disputed by the author likely would not counter the amount of the State's evidence against Applicant. Applicant alleges that if law enforcement had this evidence before the trial in 1999, it would have changed their investigation and thus changed the jury's verdict at trial. However, the proper standard is whether the jury would have found Applicant not guilty if this evidence were presented at trial, along with the other evidence offered by the State against Applicant. This Court finds that this evidence would not have changed the outcome of the trial, and a new trial should not be granted.

Accordingly, this Court finds that the evidence would not change the result if a new trial was had.

2. The evidence is merely impeaching, and, therefore, is insufficient to warrant a new trial for Applicant.

Evidence is "impeaching" so as to bar a new trial if it is outside the evidence already given and impeaches that evidence by attacking the character, the motives, the integrity, or the veracity of those who gave the evidence. Evatt v. Campbell, 234 S.C. 1, 13–14 (1959). The evidence produced by Applicant does not meet the standard for newly discovered evidence because it is merely impeaching. The evidence does not automatically counteract all evidence against Applicant; rather, such evidence would only be used to call into question the veracity of Williams's

testimony that he did not kill the victim. See Clark v. State, 315 S.C. 385, 388 (1993) (stating that a new trial based on "after discovered evidence" requires a showing that the evidence is material to a claim of actual guilt or innocence, and does more than merely impeach).

Accordingly, because the evidence presented by Applicant is merely impeaching, it does not meet the standard of newly discovered evidence that would warrant a new trial for Applicant.

CONCLUSION

Therefore, for the reasons stated above, this Court orders that Applicant's application for post-conviction relief should be, and hereby is, DENIED and DISMISSED WITH PREJUDICE.

AND IT IS SO ORDERED.

Edgar W. Dickson
Presiding Judge, Second Judicial Circuit

March 10, 2017
Orangeburg, South Carolina

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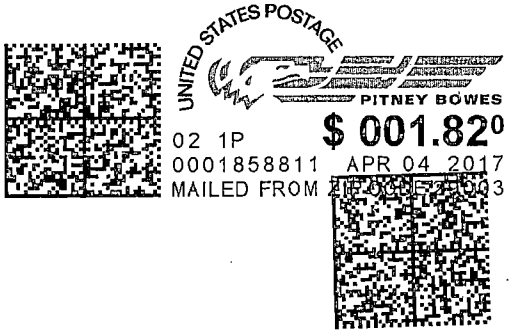

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