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ATTORNEYS AT LAW

*A PROFESSIONAL ASSOCIATION*

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July 17, 2017

**RECEIVED**

JUL 24 2017

S.C. SUPREME COURT

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

Re: John Willie Mack, Sr. vs. State of South Carolina  
Case No: 2015-CP-42-3806

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal, Explanation and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Please filed the copies that I have enclosed and return the copies to me.

Lastly, by copy of the letter, I am advising Mr. Mack to submit an explanation. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/  
enclosures  
cc: Valerie Garacia Giovanoli, Esquire  
John Willie Mack

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

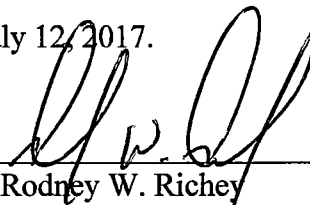
RESPONDENT.

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**NOTICE OF APPEAL**

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John Willie Mack, Sr. appeals the denial of his Post- Conviction Relief. The Post- Conviction Relief action was heard and denied by the Honorable Robin B. Stilwell, Circuit Judge on June 29, 2017 and Order issued on July 2, 2017 and filed on July 7, 2017. The Appellant received notice of the judgment on July 12, 2017.



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Rodney W. Richey  
Attorney for the Appellant  
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Other Counsel of Record:  
Valerie Garcia Giovanoli, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

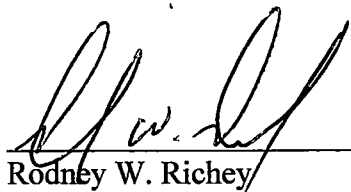
RESPONDENT.

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**EXPLANATION**

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John Willie Mack, Sr. appeals the denial of his Post- Conviction Relief. Mr. Mack filed this Post-Conviction Relief case to get an appeal from his DNA Testing hearing. His counsel did not appeal the Court's denial of his request for DNA Testing. He is requesting that this Court allows him to appeal the ruling of trial judge. This was the only method he had to get the appeal.



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Other Counsel of Record:  
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

HONORABLE ROBIN B. STILWELL

2015-CP-42-3806

JOHN WILLIE MACK, SR., SCDC#: 257219,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

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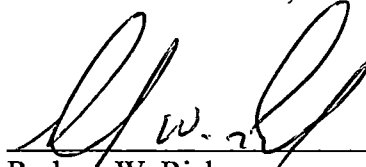
**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on July 17, 2017, addressed to their attorney of record, Valerie Garcia Giovanoli, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: July 17, 2017

RICHEY & RICHEY, P.A.



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Rodney W. Richey  
Attorney for the Appellant  
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STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
 John Willie Mack, Sr., )  
 S.C.D.C. No. 257219, )  
 Applicant, )  
 v. )  
 State of South Carolina )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-42-3806

**ORDER OF DISMISSAL**

CLERK OF COURT  
 SPARTANBURG COUNTY  
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This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by John Willie Mack, Sr. (“Applicant”) on September 10, 2015 (“the Application”). Respondent made its Return and Motion to Dismiss, requesting the Application be summarily dismissed. On June 29, 2017, a hearing on Respondent’s Motion to Dismiss was convened at the Spartanburg County Courthouse. Applicant was present and represented by Rodney W. Richey, Esquire. Assistant Attorney General, Valerie Garcia Giovanoli, represented Respondent.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Spartanburg County Grand Jury for grand larceny (2006-GS-42-1166) and burglary in the first degree (2006-GS-42-1167). J. Roger Poole, Esquire, represented Applicant. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on February 23, 2011. Judge Cole sentenced Applicant to

imprisonment for concurrent terms of 5 years for grand larceny and life without parole (LWOP) for burglary.

Applicant filed a timely notice of appeal and a direct appeal was perfected by LaNelle Cantey DuRant, Esquire. By opinion decided April 17, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Mack, Op. No. 2013-UP-161 (S.C. Ct. App. dated April 17, 2013). The Remittitur was returned to the circuit court on May 7, 2013.

**First PCR Application: 2013-CP-42-2063**

Applicant filed his first application for post-conviction relief on May 6, 2013 (2013-CP-42-2063). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that;
  - a. Counsel failed to object to the amendment of the indictment,
  - b. Counsel failed to object to the admission of evidence when the State failed to produce tangible items or pictures of items swabbed,
  - c. Counsel failed to object to Applicant's prior criminal history being presented to the jury,
  - d. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury,
  - e. Counsel failed to file a motion for a speedy trial,
2. Trial court error, in that;
  - a. The trial judge improperly stated that only one aggravating circumstance had to be proven,
3. Misconduct of the Solicitor's office and law enforcement with regards to DNA evidence,
  - a. Brady violation because the State did not turn over the blood evidence.

Respondent made its return on March 18, 2014. An evidentiary hearing into the matter was convened on January 14, 2015, before the Honorable Deadra L. Jefferson. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on

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SPARTANBURG COUNTY  
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his own behalf, and J. Roger Poole, Esquire, also testified. By written Order, dated April 6, 2015 and filed April 10, 2015, Judge Jefferson denied and dismissed the application.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, filed a Johnson Petition for Writ of Certiorari<sup>1</sup> on Applicant's behalf and petitioned to be relieved as counsel. By Order dated August 11, 2016, the Supreme Court of South Carolina denied counsel's petition to be relieved and directed the parties to submit a petition and return. This matter remains pending before the Supreme Court.

### Application for Forensic DNA Testing

Applicant filed an application for Post-Conviction DNA Testing in the Spartanburg County Court of General Sessions under the original indictment numbers for the burglary and grand larceny convictions pursuant to S.C. Code Ann. § 17-28-10, et seq. (2014). The general sessions' post-conviction DNA application was heard by the Honorable J. Derham Cole on October 31, 2014. Applicant was represented by Leah Moody, Esquire, and the State was represented by Assistant Solicitor Anthony Leibert, Esquire. The application was denied by order dated May 18, 2015, and filed on May 19, 2015.

Applicant thereafter filed a notice of appeal. The South Carolina Court of Appeals dismissed Applicant's appeal as not timely served by Order filed July 16, 2015. Mack v. State, S.C. Sup. Ct. Order filed July 16, 2015. The Remittitur was returned to the circuit court on August 4, 2015.

### Current PCR Application

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

1. Ineffective assistance of counsel, in that:

<sup>1</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

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- a. "DNA counsel, Leah B. Moody, was ineffective for failure to appeal defendant's DNA application timely under DNA Act Sec. 17-28-90(6)
- b. "DNA counsel, Leah B. Moody, was ineffective for failure to have the trial judge recuse or remove himself from the DNA hearing when requested by Defendant."

Also before this Court are the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, Applicant's prior PCR records, and the records of this current PCR action.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Failure to State a Claim

This Court finds the application must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A).

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. An allegation of ineffective assistance of counsel appointed pursuant to the "Access to Justice Post-Conviction DNA Testing Act" ("DNA Counsel") does

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 SPARTANBURG COUNTY

not form a collateral attack on the validity of the conviction or sentence, and may not form the basis for relief in any post-conviction relief action. S.C. Code Ann. § 17-28-60; see also Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (“PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a).”) (emphasis redacted).

Furthermore, this Court finds Applicant’s allegation of ineffective assistance of DNA counsel is specifically precluded by § 17-28-60, S.C. Code Ann., which states in relevant part, “[t]he performance of counsel pursuant to this article **shall not** form the basis for relief in any post-conviction relief proceeding.” (emphasis added.) The legislature has set forth plain and unambiguous language in this section of the Access to Justice Post-Conviction DNA Testing Act and therefore it is clear that PCR is not the proper venue for challenging the performance of DNA counsel.

Furthermore, according to Judge Cole’s order denying relief under the DNA Act, the evidence Applicant was seeking to be tested was previously subjected to DNA testing and further testing would not provide a more probative result. This Court notes that the DNA Act is an avenue for a defendant to obtain DNA testing of evidence not tested prior to trial. This was not the case for Applicant. Therefore, this Court finds an appeal of Judge Cole’s order would be futile.

#### **Statute of Limitations**

To the extent that the application may be interpreted or amended to attack Applicant’s underlying convictions, the Court finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. Section §17-27-45(A) provides:

*Handwritten initials/signature*

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An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the charges he challenges in this application on February 23, 2011. The Remittitur was returned May 7, 2013. Therefore, Applicant was required to file this PCR application no later than May 7, 2014. This application was filed on September 10, 2015, which was *more than one year beyond* the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Court shall summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

#### Successiveness

To the extent that the application may be interpreted or amended to attack Applicant's underlying convictions, the Court finds it must also summarily dismiss the current application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally

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SPARTANBURG COUNTY  
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adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, the Court shall summarily dismiss the application because it is successive.

*[Remainder of page left blank intentionally]*

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SPARTANBURG COUNTY  
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**CONCLUSION**

For the foregoing reasons, the application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

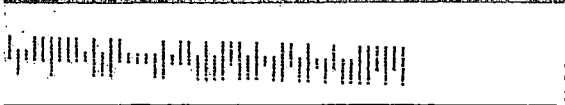
This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice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

AND IT IS SO ORDERED this 2 day of JULY, 2017.



ROBIN B. STILWELL  
Presiding Judge  
Seventh Judicial Circuit

Cokerville, South Carolina



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The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
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