

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM CALHOUN COUNTY

OCT 24 2017

Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-09-00004

Mikal Mahdi,.....Petitioner,

v.

State of South Carolina, ...Respondent.

Notice of Appeal

The Petitioner, Mikal Mahdi, appeals the following Orders:

- Order of Dismissal of Hon. Doyet A. Early, III, dated June 27, 2017 and filed July 6, 2017 (Ex. A.)
- Order Denying Rule 59(e) Motion, dated September 15, 2017 and filed September 25, 2017 (Ex. B)
- Order Denying Rule 59(e) Motion, dated October 10, 2017 and filed October 12, 2017¹ (Ex. C)

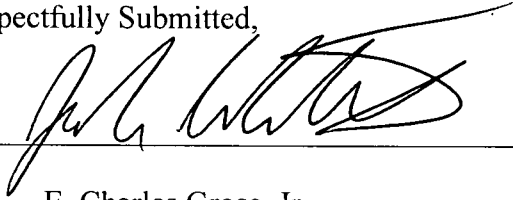
In addition to this case involving an appeal of an order denying post-conviction relief, Rule 243(a), SCACR, this appeal is directly to this Court because the underlying case involves a sentence of death. See Rule 203(d)(1)(A)(i), SCACR. A Rule 243 explanation has been provided and is attached as Exhibit D.

(Signature Page Follows)

¹ At the request of the Attorney General's Office, Judge Early amended the caption of this order to delete the word "proposed."

Respectfully Submitted,

By



E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

John L. Warren, III
S.C. Bar No. 101414
Simmons Law Firm, LLC
1711 Pickens St.
Columbia, SC 29201
(803) 779-4600
(803) 254-8874 (fax)
Email: jwarren@simmonsllawfirm.com

Attorneys for Petitioner Mikal Mahdi

October 24, 2017

Other Counsel of Record:

J. Anthony Mabry, Esquire
S.C. Attorney General's Office
PO Box 11549
S.C. Attorney General's Office
Columbia, SC 29211

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Proof of Service

The undersigned hereby certifies that on the date indicated below he served counsel for Respondent State of South Carolina with a copy of the *Notice of Appeal with Attached Orders and Rule 243 Explanation* by hand delivery at the below listed address, this 24th day of October 2017.

Anthony Mabry
South Carolina Attorney General's Office
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

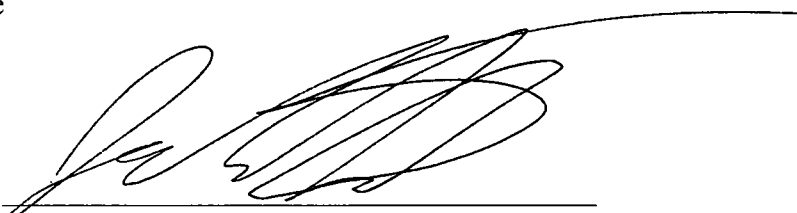
By: 
John L. Warren

EXHIBIT A



RECEIVED
DATE *7, 6, 17*
DOCKETED

ALAN WILSON
ATTORNEY GENERAL

July 3, 2017

Honorable Kenneth Hasty
Clerk of Court, Calhoun County
902 South F.R. Huff Drive
St. Matthews, SC 29135

Re: Mikal Mahdi v. State of South Carolina
Capital PCR
2017-CP-09-0004

Dear Mr. Hasty:

Enclosed please find the **Order of Dismissal** signed by the Honorable Doyet A. Early, III on June 27, 2017 dismissing the 2nd Successive PCR Application in the above-referenced matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Thank you for your assistance.

Sincerely,

Lonetta B. Brawley
Lonetta B. Brawley
Legal Assistant to Anthony Mabry
Senior Assistant Attorney General

/lbb
Enclosure

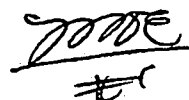
cc: E. Charles Grose, Jr., Esquire
John L. Warren, III, Esquire
Trisha Allen, Victims Assistance

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	C/A No. 2017-CP-09-00004
	)	
Mikal Mahdi, SCDC #5238,	)	*CAPITAL PCR*
	)	
Applicant,	)	
vs.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

On January 10, 2017, Applicant, Mikal Mahdi ("Mahdi"), a death sentenced inmate, filed the above captioned second (2nd) or successive PCR action in the Court of Common Pleas for Calhoun County, again collaterally challenging his guilty plea convictions and sentence of death previously imposed by the Honorable Clifton Newman, Circuit Court Judge. Mahdi first (1st) collaterally challenged his guilty plea convictions and death sentence in a 2009 PCR application (2009-CP-09-00164) that was denied and dismissed by this Court, after a PCR evidentiary merits hearing, in an Amended Order of Dismissal. Mahdi's appeal from the denial of his 2009 PCR application was denied by both the South Carolina Supreme Court and the United States Supreme Court. By Order, the South Carolina Supreme Court has re-appointed this Court to preside over this current action and hear all motions.

Respondent's Motion

On February 10, 2017, Respondent filed a "Return and Motion to Dismiss" this 2nd or successive PCR action for the following reasons: (1) the action is time barred and improperly successive under South Carolina law; (2) the action is barred by the doctrine of laches; (3) several of Mahdi's grounds are barred by the doctrines of res judicata, collateral estoppel, judicial estoppel, and the principle of "the law of the case;" (4) Mahdi's direct appeal grounds



are not cognizable on post-conviction relief; and (5) there is no merit to any of Mahdi's direct appeal grounds because of extant case law and the record in this case. For all of these reasons, Respondent asserted the application must be denied and dismissed with prejudice pursuant to: (1) S.C. Code Ann. § 17-27-45 (the PCR statute of limitations); (2) S.C. Code Ann. Section 17-27-90 (the successiveness bar); (3) S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); and, (4) S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRPC* (defining the standard for granting a motion for summary judgment).¹ Mahdi filed a Response opposing Respondent's Motion. Respondent filed a detailed Reply to that Response. On April 13, 2017, this Court notified counsel for both Mahdi and the State that a hearing would be held on the State's motion on May 1, 2017 at 10:30 a.m. at the Bamberg County Courthouse.

The Hearing on the Motion to Dismiss

On May 1, 2017, at the Bamberg County Courthouse, this Court held a hearing on Respondent's motion to dismiss this current action for the above stated reasons. Present were Mahdi's federal habeas counsel E. Charles Grose Jr. and John L. Warren, III., Esquires.

¹ Mahdi contends the State moved to dismiss this 2nd or successive application pursuant to Rule 12(b)(6), SCRPC; however, Respondent moved to dismiss this application pursuant to S.C. Code Ann. Sections 17-27-45 (the PCR statute of limitations); 17-27-90 (the successiveness bar) and 17-27-70(b) & (c). Section 17-27-70(c) provides the same standard for dismissal of a PCR application as a motion for summary judgment under Rule 56, SCRPC. Further, Mahdi admits the SCRPC are applicable to PCR actions. As a result, Rule 56, SCRPC would be just as applicable as Rule 12(b)(6). Further, Rule 71.1(a), SCRPC provides where there is an applicable PCR statute, the statute controls over the Rule of Procedure.

Respondent was represented by Assistant Attorney General J. Anthony Mabry who filed the motion on behalf of Respondent. Mahdi waived his presence at the hearing.² No evidence or affidavits were submitted by either party at the motion hearing. This Court heard argument from both Respondent and the Applicant and considered the legal authority submitted at the hearing on the motion. On June 6, 2017, this Court notified counsel for both parties that: (1) pursuant to S.C. Code Ann. § 17-25-45, this Court found the current 2nd or successive PCR application to be outside the statute of limitations for PCR actions; (2) pursuant to S.C. Code Ann. § 17-27-90, this Court found the current application was improperly successive under South Carolina law; (3) pursuant to S.C. Code Ann. § 17-27-70(b) summary disposition was proper and is allowed under the terms of the statute; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, this Court found there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law pursuant to S.C. Code Ann. § 17-27-70(c) and Rule 56, S.C.R.C.P. This Court directed Mr. Mabry to submit a proposed Order of Dismissal consistent with these findings using his previous briefs submitted to the Court as an outline for the Order. This Order of Dismissal follows.

This Court's Ruling on the Motion

After consideration of Respondent's Motion, Mahdi's response, Respondent's Reply, and the arguments of counsel at the hearing on the motion and the legal authority submitted, this Court finds and concludes this application must be denied and dismissed with prejudice for the following reasons: (1) the application is time barred under the South Carolina statute of limitations for PCR actions (S.C. Code Ann. § 17-27-45); (2) the application is improperly

² On April 12, 2017, counsel for Mahdi notified this Court by e-mail that after conferring with Mr. Mahdi, Mr. Mahdi waived his presence at the hearing on the State's motion and the motion hearing could proceed in his absence. Counsel for Mahdi also agreed the hearing on the State's motion could proceed in Mahdi's absence and notified this Court of the same by e-mail.


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successive under South Carolina law (*S.C. Code Ann. § 17-27-90*); (3) based on the pleadings and the record Respondent is entitled to judgment as a matter of law (*S.C. Code Ann. § 17-27-70(b)*); and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there is no genuine issue of material fact and Respondent is entitled judgment as a matter of law (*S.C. Code Ann. § 17-27-70(c)* and/or *Rule 56, SCRPC*).

I.

PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and formally charged with Myers' murder, the theft of his truck, and the burglary of his shed/cabin.³ Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > \$5,000, and burglary 2nd degree (violent) (Ind. #s 2004-GS-09-243 - 44). The State sought the death penalty for the murder. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi.⁴ The South Carolina Supreme Court assigned the Honorable Clifton Newman, Circuit Court Judge, to preside over the capital trial. From November 26-29, 2006, individual juror *voir dire* and capital jury selection was completed with a jury and 4 alternates impaneled.

³ The building referred to in the record as "the shed" is more like a cabin. It is located on victim James Myers' farm, and contains furniture and a television. Myers' and his wife were married there. Myers' wife had an office in the "shed"/cabin.

⁴ Mr. Grant suffered a serious injury the early summer of 2006 and was relieved as counsel. Glenn Walters was substituted as 1st chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2nd chair counsel.

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The Guilty Pleas

Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury determination of guilt and sentencing, and entered pleas of guilty to all charges. (R 123-1336). Judge Newman accepted Mahdi's pleas of guilty and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed. (R 1259-84).

The Sentencing Proceeding

After the required 24 hour waiting period, the sentencing proceeding was conducted December 1-6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed the same date. (R 1726-42, 1810-26, 1842-53). Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed in the commission of a grand larceny; and (2) the murder was committed in the commission of a burglary. (R 1730-31, 1814-15, 1845). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

The Direct Appeal

Mahdi directly appealed only his death sentence to the South Carolina Supreme Court. On June 15, 2009, the Court affirmed. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, the South Carolina Supreme Court granted the stay assigning this Court to hear the PCR action.

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The 1st PCR Action

Mahdi filed a PCR application on August 18, 2009 (C/A # 2009-CP-09-00164) and several subsequent amended applications raising numerous grounds. Mahdi was appointed two (2) statutorily qualified capital PCR attorneys pursuant to S.C. Code Ann. § 17-27-160(B) (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant), to represent him in the PCR action, Teresa Norris and Robert Lominack, Esquires. See *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The State filed a Return to each PCR application and amendment.

On March 9, 2011, an evidentiary (PCR) merits hearing was held before this Court. Present were Mahdi, his PCR attorneys, along with the Attorney General's Office. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Lawanda Burwell, Doctors Craig Haney, DeRossett Myers, Nicholas Cooper-Lewter, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James Woodley, Dora Wynn, Doug Pond, and Sandra Burwell and introduced documentary exhibits. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, James Gordan, Doctors Thomas Martin and Geoffrey McKee. Additionally, exhibits were introduced by Respondent. At the evidentiary hearing, this Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in the case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses

A handwritten signature in black ink, appearing to be "T. Norris" or similar, with a stylized flourish underneath.

and evidence introduced, this Court found the application to be without merit and denied and dismissed the application and all grounds with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRPC, Motion to Alter or Amend one (1) of the findings in the Order.⁵ On February 11, 2013, this Court heard argument on the Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, this Court granted the State's Rule 59 Motion as to that one (1) portion of the Order and entered an Amended Order of Dismissal denying and dismissing all grounds as the final Order of Dismissal. Mahdi filed a Rule 59 Motion, which was denied by this Court.

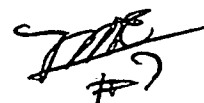
The Appeal from the Denial of PCR

Mahdi appealed the denial of his PCR application (2009-CP-09-00164) by way of a Petition for Writ of Certiorari [a merits petition] in the South Carolina Supreme Court. Mahdi was represented by Seth Farber, Brandon Duke, and Teresa Norris, Esquires. Those three (3) PCR appellate attorneys, including one (1) of Mahdi's PCR attorneys, chose to raise only one (1) issue from the denial of PCR. The State filed a Return to the Petition. Mahdi filed a Reply to the State's Return. On September 8, 2016, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on September 26, 2016.

The Petition for Writ of Certiorari in the U.S. Supreme Court

Mahdi appealed from the South Carolina Supreme Court's denial of certiorari from PCR to the United States Supreme Court by way of a Petition for Writ of Certiorari. Respondent filed its Brief in Opposition to the same. Mahdi filed a Reply to Respondent's Brief in Opposition.

⁵ In its Rule 59 Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding Mahdi had not established prejudice under the same ground.



On February 21, 2017, the Petition for Writ of Certiorari was denied by the United States Supreme Court.

The Federal Habeas Petition

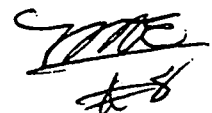
Mahdi previously filed an application for a stay of execution in the United States District Court for South Carolina to file a federal habeas petition (*Mahdi v. Stirling*, C/A No 16-mc-402, D.S.C. filed Oct. 5, 2016). The stay request was granted Oct. 5, 2016. Counsel was appointed on October 13, 2016. When the stay expired, Mahdi filed a place-holder petition and was granted a further stay of execution. Mahdi has not yet filed his final amended federal habeas petition. It is anticipated, in the federal habeas petition, Mahdi will allege grounds he previously raised in state court but which were denied *and* attempt to raise pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) the unexhausted, but technically exhausted, claims he raises in this 2nd or successive PCR application.⁶

The 2nd Successive PCR Action

After filing his federal habeas stay request and while that stay was still pending, Mahdi filed this 2nd or successive PCR application, through federal habeas counsel, in this Court on January 10, 2017. In this 2nd PCR application, Mahdi raises the following grounds:

10(a)/11(a) S.C. Code Ann. Section 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury

⁶ *Martinez* held, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial, and (2) where appointed PCR counsel in the initial-review collateral proceeding, should have raised the claim, i.e. counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Martinez*, at 1318-19.



finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016). S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigation circumstances, and determine whether a death sentence should be imposed.

10(b)/11(b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the guilt or innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation. Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

10(c)/11(c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E. 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in the initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

- Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived Petitioner of the right to effective assistance of counsel.
- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
- Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
- Counsel failed to assert that S.C. Code Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2001). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence namely that he has accepted responsibility for the crime. While this issue has been rejected by state

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courts, see *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

- At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. See *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

10(d)/11(d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled upon by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal. In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

(See C.A. # 2017-CP-09-00004, pp. 2-4).

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mahdi has already had a full round of PCR remedies (C/A No. 2009-CP-09-00164). Mahdi's 2009 PCR action challenging his guilty plea convictions and sentence of death [raising numerous grounds] was denied and dismissed with prejudice after a full evidentiary (PCR) merits hearing by this Court ("the PCR Court"). (Amended Order of Dismissal, C.A. # 2009-CP-09-164). Mahdi's Rule 59, SCRCP, Motion to Alter or Amend was also denied by this Court.

During the pendency of his 2009 PCR action and at the evidentiary PCR merits hearing, Mahdi was represented by two (2) statutorily qualified PCR counsel, Teresa Norris and Robert Lominack, Esquires. S.C. Code Ann. § 17-27-160(B) (identifying requisite qualifications for

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counsel appointed to represent an indigent, capital PCR applicant). Compare *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Mahdi conceded at the hearing on the present motion that Ms. Norris and Mr. Lominack were statutorily qualified PCR counsel pursuant to Section 17-27-160(B). This Court would also note that Mahdi has never alleged as a ground for relief in this 2nd or successive PCR Application that his 1st PCR counsel were not statutorily qualified.⁷ Mahdi has not submitted the affidavit of either PCR counsel asserting they were not statutorily qualified to represent him in his 1st PCR action. Compare *Robertson, supra*.

Mahdi appealed the denial of his 1st PCR action to the South Carolina Supreme Court by way of a Petition for Writ of Certiorari [a merits petition]. On appeal from the denial of PCR, Mahdi was represented by three (3) PCR appellate attorneys, and Mahdi raised the following issue to the South Carolina Supreme Court:

Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsels' decision to rely entirely on a single expert witness to present mitigating evidence about Petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

(Petition for Writ of Certiorari, p. 2). Respondent filed a responsive brief. The South Carolina Supreme Court denied certiorari. The Remittitur was issued.

Mahdi filed a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a Brief in Opposition. Mahdi filed a Reply. The United States Supreme Court denied the Petition for Writ of Certiorari. As a result, Mahdi has had one (1) complete round of PCR remedies.

⁷ (See Successive Application for PCR, Amended Successive Application for PCR).

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On December 14, 2016, the South Carolina Supreme Court decided *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The Court ruled *Martinez v. Ryan*, 132 S.Ct. 1309, was not a reason to allow the filing of a 2nd or successive PCR application in a capital case. The Court also ruled the fact that a capital PCR applicant was not represented by statutorily qualified PCR counsel at his first (1st) PCR was a sufficient reason to allow the filing of a 2nd or successive PCR application. The Court remanded the case to the Circuit Court solely to determine: (1) if Robertson's 1st PCR counsel were statutorily qualified or not; and, (2) if not statutorily qualified, whether Robertson was prejudiced by the fact that his 1st PCR attorneys were not statutorily qualified. *Id.* Subsequent to the Court's opinion in *Robertson*, Mahdi filed this 2nd or successive PCR action. Mahdi does not assert in this 2nd or successive PCR application that his 1st PCR attorneys were not statutorily qualified. Respondent filed its Motion to Dismiss relying on *Robertson* and other South Carolina case law asserting this application is time barred and improperly successive.

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code Ann. § 17-27-45 (A) provides a PCR action "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 upon an appeal, whichever is later." S.C. Code Ann. § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." As a result, for the reasons set forth herein, Mahdi is not entitled to file this 2nd or successive PCR application. *Robertson v. State*, *supra*. Mahdi's present application must be dismissed as untimely and improperly successive. *Robertson*. See *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) ("An individual under PCR effectively is granted one chance to argue for relief and must do so within

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a year of his final appeal”). *Accord In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (to receive a stay from the state to pursue “a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court” death-sentenced applicant “must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay”) (emphasis added).

A. The Present Action is Time Barred

This present 2nd PCR Application is time barred under the South Carolina Statute of Limitations for PCR actions and must be dismissed with prejudice. South Carolina Code Ann. § 17-27-45(a) reads as follows:

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 upon an appeal, whichever is later.

Mahdi was convicted on November 30, 2006 and sentenced to death on December 8, 2006. The final decision in the appeal was issued by the South Carolina Supreme Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi was therefore required to file this application before July 1, 2010. The current application was filed on January 10, 2017, which was more than six (6) years after the statutory filing period expired.

However, § 17-27-45 also states:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

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. § 17-2745(B)&(C). Thus, to overcome the time bar, Mahdi must show he fits under one (1) of the categories of Section 17-27-45 (B) or (C). This Court has carefully reviewed the allegations of Mahdi's 2nd or successive PCR Application and is thoroughly familiar with the Record in this case. Based on the undisputed facts and the law, all of Mahdi's claims raised in this 2nd or successive PCR Application, except his so-called "*Austin*" claim, could have been raised timely at his plea/sentencing before Judge Newman or at his previous 1st PCR hearing before this Court. (See discussion, *infra*).

Hurst v. Florida does not overcome the time bar

Mahdi relies first on *Hurst v. Florida*, 136 S.Ct. 616 (2016) in an effort to overcome the statute of limitations time bar. In his 2nd or successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20(B), alleging it is unconstitutional because it requires judge sentencing after a guilty plea. However, Mahdi has not established a new rule of constitutional law to be retroactively applied and applicable to him. And, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in 2006 or during the prior PCR action in 2009. In fact, this Court decided this issue in the 1st PCR proceeding and found there was no merit to it. (Amended Order of Dismissal, pp. 123-33).⁸

⁸ This Court decided this issue in the 1st PCR action under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. Section 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. See generally *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

Mahdi argues *Hurst* created a new constitutional rule applicable and retroactive to him. However, *Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New York*, 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing. *Hurst*, 136 S.Ct. 616; *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*); *Garza v. Ryan*, 2017 WL 105983 (D. Ariz. 2017)(*Slip Copy*); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016); *Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017; *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016) *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016) (*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*).

The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge when the defendant exercised his right to jury fact finding at sentencing, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22; *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). *Hurst* found Florida's capital sentencing scheme violated the holdings of *Ring* and *Apprendi* when the

defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.⁹

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.

We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment fails.

Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017. *Accord Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016

⁹ See *Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(Unpublished); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

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W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

Similarly, the South Carolina Supreme Court held in *State v. Downs*:

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See e.g. *Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), app. denied 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379

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(5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Return, the United States Supreme Court has not found S.C. Code Ann. § 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. See *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); see also *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015)(citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, the Fourth Circuit found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; see also *Nunley*, 784 F.3d at 472 (citing *Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *State v. Inman*, 395 S.C. 539, 555-56, 720 S.E.2d



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31, 40 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)(when a defendant pleads guilty in a capital case, statutorily mandated sentencing by the trial judge does not violate the holding in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* did not involve jury trial waivers and is not implicated when a defendant pleads guilty); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004)(finding Section 16-3-20(B) constitutional).¹⁰ Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015); *State v. Nunley*, 341 S.W.3d 611, 620 (Mo. 2011); *State ex rel. Taylor v. Steele*, 341 S.W.2d 634, 646-49 (Mo. 2011); *Leon v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *Byrom v. State*, 927 So.2d 709, 728 (Miss. 2006); *Mack v. State*, 75 P.3d 803, 806 (2003); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002); *People v. Altom*, 788 N.E.2d 55, 60-61 (Ill. 2003); *State v. Ketterer*, 855 N.E.2 48, 69 (Ohio 2006); *Thacker v. State*, 100 P.3d 1052 (OK 2004); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002). In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as was raised in the above cited cases.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and

¹⁰ Additionally, the South Carolina Supreme Court has repeatedly reversed the plea and death sentence in cases where a defendant was allowed to plead guilty and have jury sentencing in contravention of the statute. *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Truesdale*, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (1982).

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have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve (12) jurors and four (4) alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

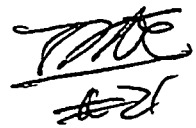
Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve (12) jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge [Judge Newman] would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

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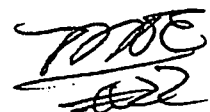
Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994)(record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the 1st PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). At the 1st PCR, Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. This Court previously found Mahdi made a strategic decision, after selecting a jury, that he wanted Judge Newman to sentence him, not the jury he had selected and was impaneled. (Amended Order of Dismissal, pp. 131-32). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been

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upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel* as this issue was previously decided by this Court in the 1st PCR action. (Amended Order of Dismissal). *See generally* *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of his 1st PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, on this issue, is "the law of the case," and Mahdi waived and abandoned this issue. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993)(discussing "law of the case"); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2 583 (Ct. App. 1997); *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473 427 S.E.2d 646 (1993)(the trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996)(unappealed ground becomes the law of the case); *Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997)(the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson v. Charleston & Western Carolina RR Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957); *See Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999)(discussing the difference between the law of the case and *res judicata*).

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As a result of all of the above, Mahdi has not shown a new rule of constitutional law or material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a untimely successive PCR application. *See S.C. Code § 17-27-45 (B) & (C)*. *Ring* was decided in 2002 and *Apprendi* was decided in 2000 long before Mahdi's guilty plea/sentencing and his 1st PCR Application and 1st PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a *Ring* and/or *Apprendi* challenge to the death penalty statute at the time of his guilty plea/sentencing in 2006 or in his 1st PCR action in 2009. Furthermore, Mahdi may not raise this issue now because he is bound by this Court's previous determination in the 1st PCR case that he [Mahdi] made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim that could have been raised previously. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Further, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel*, *collateral estoppel*, and the law of the case.



Lafler and Frye do not overcome the time bar

Mahdi also relies on *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) in an attempt to overcome the statute of limitations time bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him or this claim would present material new facts not previously presented. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015). And, Mahdi has not shown new material facts not previously presented because those facts were known to Mahdi at the time of his guilty plea and sentencing and before his first PCR. See S.C. Code Ann. Section 17-27-45 (C).

Every federal appellate Court to consider the issue has held that *Lafler* and *Frye* did not establish a “new rule of constitutional law.” See *Wert v. United States*, 596 Fed.Appx. 914, 917–18 (11th Cir.2015) (“As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively.”); *United States v. Crisp*, 573 Fed.Appx. 706, 708–09 (10th Cir.2014) (“No reasonable jurist would debate the district court’s determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3).”); *Navar v. Warden Fort Dix FCI*, 569 Fed.Appx. 139, 140 n.1 (3d Cir.2014) (“[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion.”); *Gallagher v. United States*, 711 F.3d 315, 316 (2d Cir.2013) (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Pagan San Miguel v. United States*, 736 F.3d 44, 45 (1st Cir.2013)(per curiam); *In re King*, 697 F.3d 1189 (5th Cir.2012); *Hare v. United States*, 688 F.3d

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878, 878–80 (7th Cir.2012); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir.2012) (“[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law.”); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir.2013); *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013); *United States v. Lawton*, 2012 WL 6604576 at *3 (10th Cir., Dec. 19, 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012); *Miller v. Thaler*, 714 F.3d 897, 902 (5th Cir. 2013)(The Fifth Circuit has repeatedly held that *Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), to a specific factual context); *In re King*, 697 F.3d 1189 (5th Cir. 2012)(“we agree with the Eleventh Circuit’s determination in *In re Perez*, 682 F.3d 930, 933–34 (11th Cir.2012), that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”). Most of these cases are compiled in *Hestle v. United States*, 2013 WL 1147712 (E.D.Mich., March 19, 2013). See also *Hough v. United States*, 177 F. Supp. 3d 782, 785 (W.D.N.Y. 2016); *Stewart v. Stephens*, Civ. 2015 WL 6522828, at *2 (N.D. Tex. Oct. 26, 2015); *Alvarado v. Stephens*, 2015 WL 3775416, at *3 (S.D. Tex. June 16, 2015); *Etheridge v. Morgan*, 2015 WL 4041707, at *5 (W.D. La. May 11, 2015), adopted, 2015 WL 4042152 (W.D. La. July 1, 2015); *Brown v. Director, TDCJ-CID*, 2014 WL 892170, at *3 (E.D. Tex. Mar. 3, 2014); *Johnson v. Rader*, 2014 WL 198165, at *5 (E.D. La. Jan. 14, 2014); *Suitt v. McCain*, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016); *Williams v. Cain*, 2016 WL 4063863, at *1 (E.D. La. July 29, 2016); *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); *Landron-Class v. United States*, 86 F. Supp. 3d 64, 75 (D.P.R. 2015) (collecting cases); *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016); *Nechovski v. Snyder-Norris*, 2016 WL

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3552196, at *6 (E.D. Ky. June 23, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015)

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher v. United States*, 2013 WL 1235668 [711 F.3d at 315]; *Baker v. Ryan*, 497 Fed.Appx. 771, 773 (9th Cir. 2012) (the cases of *Missouri v. Frye* and *Lafler v. Cooper* did not announce a “newly recognized” right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *United States v. Ocampo*, 919 F. Supp. 2d 898, 915 (E.D. Mich. 2013); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (“[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.”). In short, neither *Lafler* nor *Frye* satisfies § 17-23-45. Therefore, the one-year period of limitations began to run when Mahdi's conviction became final. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015); *Villega-Angulo v. United States*, 2016 WL 7030741, at *8 (D.P.R. Sept. 30, 2016). Conclusively, the statute of limitation has well run, as has Mahdi's time limit. *Villega-Angulo v. United States*, 2016 WL



7030741, at *8 (D.P.R. Sept. 30, 2016); *Suitt v. McCain*, No. CV 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016).

Other states considering this same issue have agreed. See *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa.Super. 2013) (explaining *Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment; petitioner's reliance on these decisions to satisfy Section 9545(b)(1)(iii) exception to PCRA's time restrictions is unavailing). See also *Commonwealth v. Hernandez*, 79 A.3d 649 (Pa.Super. 2013) (holding appellant's claim that his petition fits within Section 9545(b)(1)(iii) exception lacks merit because neither *Lafler* nor *Frye* created new constitutional right); *Commonwealth v. Gallman*, 2016 WL 1436489, at *5 (Pa. Super. Ct. Apr. 12, 2016) ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]") Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Commonwealth v. Norris*, 2016 WL 1064472, at *6 (Pa. Super. Ct. Mar. 17, 2016) (Defendant's reliance on *Lafler* and *Frye* to avoid the time-bar is misplaced. Contrary to his claims, neither case announced a new constitutional right in Pennsylvania which would allow Defendant to avoid the time-bar); *Black v. State*, 2016 WL 763163, at *1 (Nev. App. Feb. 17, 2016), cert. denied, 2017 WL 69340 (U.S. Jan. 9, 2017); *Young v. State*, 2013 Ark. 513, 2, n. 1 (2013). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely.

This 2nd or successive Application was not brought within one year of a newly recognized right made retroactively applicable to cases on collateral review. Further, this Application was

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brought more than one (1) year after *Frye* and *Lafler* were decided. *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016; *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016). As a result, he cannot fit under the time bar exception of Section 17-27-45(C). Mahdi has not shown evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, because in order to fit under this exception the application must be filed under this chapter within one (1) 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 § 17-27-45 (C)*. Mahdi cannot meet this test. As stated above, *Lafler* and *Frye* are not new rules of constitutional law, but a simple application of *Strickland*. *Gallagher*, 711 F.3d at 316 (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *Miller*, 714 F.3d at 902 ((*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 (“we agree with the Eleventh Circuit's determination in *In re Perez*, [citation omitted], that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”); *Gallman*, 2016 WL 1436489, at *5 (“neither *Frye* nor *Lafler* created a new constitutional right.” Rather, they “simply applied the Sixth Amendment right to counsel, and the


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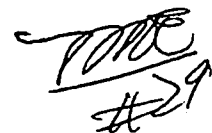
Strickland test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]"). Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a *Strickland* claim in this regard at his 1st PCR hearing.

Mahdi is not entitled to an *Austin* appeal

Finally, the *Austin* claim simply must be dismissed because Mahdi is not entitled to an *Austin* appeal under South Carolina law. Mahdi has already had an appeal from the denial of his 1st PCR application to both the South Carolina Supreme Court and the United States Supreme Court, which he lost. *Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991); *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992). Neither of which occurred in this case.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception or an excuse allowing the filing of a second or successive PCR application in violation of the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013)

In addition to the statutory provisions listed, our Supreme Court has made specific exceptions, as well. To ensure one full round of remedies, the Court has found the one year limitations period does not apply; (1) where an applicant was denied a direct appeal due to ineffective assistance, see *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); and (2) where an applicant was denied an appeal from denial of post-conviction relief, see *Odom*

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v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Mahdi cannot claim any of these exceptions. He had both a direct appeal and an appeal from the denial of his 1st PCR action.

Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action.¹¹ This action, consequently, is not timely filed, and is barred by the South Carolina statute of limitations for PCR actions.

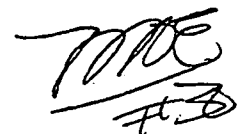
B. The Present Action is Improperly Successive

Further, the application is barred as improperly successive. *Cf. Graham v. State*, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive). Successive applications are historically disfavored, but are not categorically disallowed. See *S.C. Code §17-27-45 (B) and (C)* (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) ("belated review of appellate issues," in an *Austin* appeal or "rare procedural circumstances" are reasons to allow successive actions). None of the exceptions, however, can be met with regard to Mahdi's new

¹¹ Mahdi has not shown the bases for these claims could not have been discovered previously or that such was not discovered. The statute requires:

(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.*

S.C. Code Ann. § 17-27-45 (C) (emphasis added).

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allegations. Mahdi's prior PCR counsel could have discovered the facts and claims asserted in the present application at the time of Mahdi's 1st PCR. And, Mahdi is not entitled to an *Austin* appeal under South Carolina law.

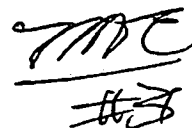
"In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Mahdi cannot do so. As a result, this application must be dismissed with prejudice.

To the extent that Mahdi would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, to the extent Mahdi is seeking to establish cause to excuse the default of previously unexhausted claims in his federal litigation, he has mixed concepts. The Supreme Court of South Carolina so found in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Accord *Robertson v. State*, supra. In *Kelly*, a PCR applicant attempted to rely on United States Supreme Court precedent establishing a narrow exception within federal habeas corpus litigation as announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to avoid the state successiveness bar. Our Supreme Court rejected the argument, noting a great agreement among the States in similarly interpreting the exception:

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013) (collecting cases). The South Carolina Supreme Court reaffirmed its holding in *Kelly* in *Robertson*, supra. Thus, the

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applicability of *Martinez* is limited to federal habeas corpus actions. Any reliance Mahdi should make on same to avoid the state successiveness and time bars is misplaced. *Robertson v. State*.

Again, it has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. Our Supreme Court has noted the dangers of a contrary position, specifically in capital cases:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

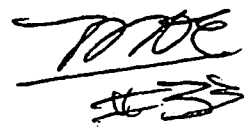
Mahdi fails to argue any valid basis for exercise of a "rare exception" of allowing a successive application. See e.g. *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)(permitting successive PCR application where applicant did not receive an appeal from the dismissal of his 1st PCR Application or any appellate counsel assistance in seeking an appeal); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996)(permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987)(authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982)(allowing successive PCR

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application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing). Successive capital PCR applications filed in an attempt to exhaust previously unexhausted claims are no exception to the rule barring successive applications. *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Furthermore, in the present case, Mahdi was represented at PCR before this Court by Teresa Norris and Robert Lominack, Esquires. See *S.C. Code Ann. § 17-27-160(B)* (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). Both of these attorneys were **statutorily qualified** to represent Mr. Mahdi in his 1st PCR action. Mahdi does not even contend in his 2nd PCR Application that his 1st PCR attorneys were not statutorily qualified. Compare *Robertson*, 418 S.C. 505, 795 S.E.2d 29. As a result, there is no merit to this successive PCR application. *Id.* All of Mahdi's allegations in his 2nd PCR Application, including those alleging ineffective assistance of counsel, are improperly successive.

South Carolina's bar to raising direct appeal issues on PCR does not provide exception to either the successiveness bar or the time bar. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

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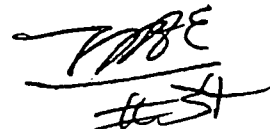
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In his successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, because it requires judge sentencing after a guilty plea. Again, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in 2006 or during the prior PCR action in 2009. In fact, this Court decided this issue and found there was no merit to it. (Amended Order of Dismissal, pp. 123-33).¹² Nor has Mahdi established a new rule of constitutional law to be retroactively applied and applicable to him.

***Hurst v. Florida* does not overcome the successiveness bar**

Again, Mahdi relies upon the recently decided case of *Hurst v. Florida*, 136 S.Ct. 616, decided January 12, 2016, which dealt with Florida's capital sentencing scheme, in an attempt to overcome the successiveness bar, but his position fares no better for essentially the same reason. The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22. See *Downs*, 361 S.C. at 146, 604 S.E.2d at 380. *Hurst* found Florida's capital sentencing scheme

¹² This Court decided this issue under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. § 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. See generally *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).



violated the holdings of *Ring*, 536 U.S. 584, 122 S.Ct. 2428 and *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348, when the defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.¹³

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.

We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment fails.

Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017. Accord *Brandt v. State*, 197

¹³ See *Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(Unpublished); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

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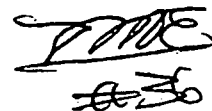
So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

Similarly, our Supreme Court held in *Downs*:

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

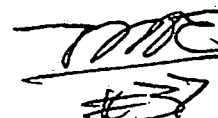
In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See e.g. *Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), app. denied 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380. As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017) (*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017) (*Slip Copy*) (*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D. Ariz. 2017) (*Slip Copy*) (*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively



to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

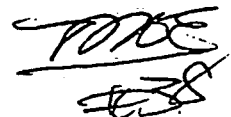
As of the date of this Order, the United States Supreme Court has not found S.C. Code Ann. Section 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. See *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); see also *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, it found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; see *Nunley*, 784 F.3d at 472 (citing *Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *Inman*, 395 S.C. at 555-56, 720 S.E.2d at 40; *Allen*, 386 S.C. 93, 687

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S.E.3d at 25-26; *Crisp*, 362 S.C. 412, 608 S.E.2d 429; *Downs*, 361 S.C. at 146, 604 S.E.2d at 380; *Wood*, 362 S.C. 135, 607 S.E.2d 57. Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis*, 609 F.3d at 309; *Nunley*, 784 F.3d at 472; *State v. Nunley*, 341 S.W.3d at 620; *Steele*, 341 S.W.2d at 646-49; *Leon*, 797 N.E.2d at 750; *Byrom*, 927 So.2d at 728; *Mack*, 75 P.3d at 806; *Colwell*, 59 P.3d at 474; *Altom*, 788 N.E.2d at 60-61; *Ketterer*, 855 N.E.2 at 69; *Thacker*, 100 P.3d 1052; *Moore*, 771 N.E.2d 46. In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as raised in the above cited cases. He chose not to.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a jury and alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing on Mahdi's competency to plead guilty. (R. 1336-43). Dr. Cross testified Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible

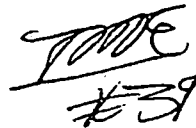
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consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified he understood if he pled guilty in front of Judge Newman the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath he understood he had the right to a jury sentencing, and in order to sentence him to death all twelve (12) jurors would have to unanimously agree he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath he understood if he pled guilty, Judge Newman would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin*, 395 U.S. 238; *Rayford*, 314 S.C. 46, 443 S.E.2d 805 (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled.

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(PCR Tr. 682-84). At his 1st PCR, Mahdi offered no testimony on this issue and offered no evidence contradicting counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea. This Court found Mahdi made a strategic decision, after selecting a jury, he wanted Judge Newman to sentence him, **not** the jury he had selected and impaneled. (Amended Order of Dismissal, pp. 131-32). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. *See generally Lifshultz Fast Freight, Inc.*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415.

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, that this issue had no merit, is **the law of the case**, and Mahdi waived and abandoned this issue. *Bailes*, 315 S.C. 166, 432 S.E.2d 482 (discussing "law of the case"); *Lindsay*, 328 S.C. 329, 491 S.E.2 583; *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp.*, 310 S.C. 473 427 S.E.2d 646 (trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson*, 323 S.C. 522, 476 S.E.2d 475 (unappealed ground becomes the law of the case); *Ross*, 328 S.C.

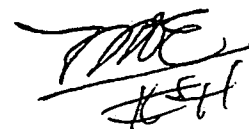


51, 492 S.E.2d 62 (the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson*, 231 S.C. 351, 98 S.E.2d 798; *See Lifshultz Fast Frieight, Inc.*, *supra* (discussing the difference between law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law or material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a successive PCR application. *See S.C. Code § 17-27-90*. *Ring* was decided in 2002 and *Apprendi* was decided in 2000 long before Mahdi's guilty plea/sentencing and his 1st PCR Application and PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Furthermore, Mahdi may not raise this issue because he made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred and improperly successive. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim. Further, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel*, *collateral estoppel*, and *the law of the case*.

2.

Mahdi also relies on *Lafler*, 132 S.Ct. 1376 and *Frye*, 132 S.Ct. 1399 in an attempt to overcome the successiveness bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law to be retroactively applied

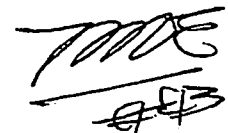
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to Mahdi. *Waters*, 2015 WL 5317516, at *2. Every federal appellate Court to consider the issue has held *Lafler* and *Frye* did not establish a “new rule of constitutional law.” See *Wert*, 596 Fed.Appx. at 917–18 (“As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively.”); *Crisp*, 573 Fed.Appx. at 708–09 (“No reasonable jurist would debate the district court’s determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3).”); *Navar*, 569 Fed.Appx. at 140 n.1 (“[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion.”); *Gallagher*, 711 F.3d at 316 (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *In re Liddell*, 722 F.3d at 738; *Pagan San Miguel*, 736 F.3d at 45; *In re King*, 697 F.3d 1189; *Hare*, 688 F.3d at 878–80; *Buenrostro*, 697 F.3d at 1140 (“[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law.”); *Williams*, 705 F.3d at 294; *In re Graham*, 714 F.3d at 1183; *Lawton*, 2012 WL 6604576; *In re Perez*, 682 F.3d at 932–34; *Miller*, 714 F.3d at 902 (*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 (“...*Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”). Thus, Mahdi’s current PCR application remains time barred, and the court must dismiss it as untimely. See also *Hough*, 177 F. Supp. 3d at 785; *Hestle*, 2013 WL 1147712; *Stewart*, 2015 WL 6522828, at *2; *Alvarado*, 2015 WL 3775416, at *3; *Etheridge*, 2015 WL 4041707, at *5, adopted, 2015 WL 4042152; *Brown*, 2014 WL 892170, at *3; *Johnson*, 2014 WL 198165, at *5; *Suitt*, 2016 WL 5395843, at *5, report and recommendation adopted, 2016 WL 5390396; *Williams*, 2016



WL 4063863, at *1; *Cruz*, 2016 WL 4083326, at *2; *Landron-Class*, 86 F. Supp. 3d at 75 (collecting cases); *Hough*, 2016 WL 3820562, at *6; *Nechovski*, 2016 WL 3552196, at *6; *Shawley*, 2016 WL 1643460, at *3, report and recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; *Armour*, 2016 WL 1259113, at *3, appeal dismissed; *Leon*, 2015 WL 6769146, at *2, report and recommendation adopted, 2015 WL 6749743. Other states considering this same issue have agreed. See *Feliciano*, 69 A.3d 1270 (*Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment); *Hernandez*, 79 A.3d 649 (neither *Lafler* nor *Frye* created new constitutional right); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]") Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Norris*, 2016 WL 1064472, at *6 (Defendant's reliance on *Lafler* and *Frye* is misplaced. Contrary to his claims, neither case announced a new constitutional right); *Black*, 2016 WL 763163, at *1, cert. denied, 2017 WL 69340; *Young*, 2013 Ark. 513, 2, n. 1.

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher*, 2013 WL 1235668 [711 F.3d at 315]; *Baker*, 497 Fed.Appx. at 773 (the cases of *Frye* and *Lafler* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *Ocampo*, 919 F. Supp. 2d at 915; *Armour*, 2016 WL 1259113, at *3; *Shawley*, 2016 WL 1643460, at *3, report and

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recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; See *Tyler*, 533 U.S. at 663 (“[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.”).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *Cruz*, 2016 WL 4083326, at *2; *Hough*, 2016 WL 3820562, at *6. As a result, Mahdi has not shown new material facts not previously presented because those facts were within his knowledge at the time of his plea and sentencing and prior to his 1st PCR hearing. *S.C. Code Ann. § 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). As *Lafler* and *Frye* did not announce new rules of constitutional law, but were applications of *Strickland*, Mahdi could have brought a *Strickland* claim on pre-plea advice at his 1st PCR. As a result, this claim is improperly successive and must be dismissed with prejudice.

3.

In his successive PCR application, Mahdi also alleges he is entitled to an *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), appeal because PCR appellate counsel did not raise certain issues on appeal from the denial of his 1st PCR that he now wishes to raise. Mahdi is not entitled to an *Austin* appeal under these circumstances. *Austin*, 305 S.C. 453, 409 S.E.2d 395. Mahdi's 1st PCR counsel filed an appeal from the denial of his 1st PCR application and collateral appellate counsel chose to raise only one (1) issue from the denial of his PCR application. (Petition for

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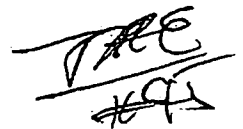
Writ of Certiorari [merits petition]). The South Carolina Supreme Court denied certiorari in the PCR appeal. Mahdi then filed a Petition for Writ of Certiorari in the United States Supreme Court raising the same issue and certiorari was denied. However, *Austin* does not entitle Mahdi to another appeal from the denial of his 1st PCR where PCR appellate counsel chose not to raise certain issues in the 1st PCR appeal. *Austin* "is applicable to its particular factual situation..." *Aice*, 305 S.C. at 452, 409 S.E.2d at 394. That is where the applicant wished to appeal from the denial of PCR but was denied **the opportunity** to seek appellate review or the right to appellate review of a previous PCR order **was not knowingly and intelligently waived**. *Austin*, supra; *Aice*, supra; *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. at 348-49, 417 S.E.2d 868. Neither of these occurred in this case.¹⁴ Mahdi is not entitled to an *Austin* appeal under South Carolina law. Thus, he cannot overcome the successiveness bar and this application must be dismissed.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception allowing the filing of a second or successive PCR application or an excuse to avoid the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*.

C. Applicant's Grounds are barred by the defense of laches

Mahdi's Grounds asserted in his 2nd Application for post-conviction relief are also barred by the defense of laches. Laches is an equitable doctrine, which "arises upon the failure to assert a known right. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005): "Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording the opportunity for

¹⁴ To accept Mahdi's argument would result in every capital *and* non-capital PCR Applicant being entitled to a 2nd PCR appeal when they did not agree or later claimed they did not agree with the issues raised by PCR appellate counsel.

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diligence, to do what in law should have been done.” *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). The claims Mahdi is raising in this 2nd Application for post-conviction relief could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of PCR. Mahdi was represented by death penalty qualified counsel at trial/plea and sentencing. Mahdi was represented at PCR by statutorily qualified counsel. See *Robertson v. State*. And, Mahdi was represented on appeal from the denial of PCR by three (3) competent counsel, including one (1) his PCR attorneys. Mahdi has waited an unreasonable and unexplained length of time to assert the grounds he is now asserting. As a result, all of Mahdi’s Grounds asserted in this successive PCR Application are barred by the defense of laches.

D. This Court cannot address grounds abandoned or not addressed in the 1st PCR

In his 2nd or Successive PCR Application, Mahdi also asks this Court to rule on any grounds that were not addressed or that were abandoned at the 1st PCR. This Court is not aware of any legal authority or rule that would allow this Court to address any issue that was not addressed at the 1st PCR or was abandoned by prior PCR counsel at the 1st PCR. As a result, this ground is also time barred and improperly successive under South Carolina law in that it seeks this Court to rule on an issue or issues raised at the 1st PCR but not ruled on or abandoned at the 1st PCR. This Court also dismisses this claim as not cognizable before this Court and barred by laches, res judicata, collateral estoppel, judicial estoppel, and/or the law of the case.

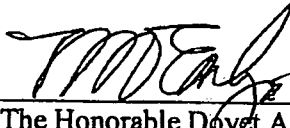
CONCLUSION

Consequently, for all the foregoing reasons, this Court dismisses this action as time barred under South Carolina law pursuant to S.C. Code Ann. § 17-27-45. This Court also dismisses this action because it is improperly successive under South Carolina law pursuant to

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S.C. Code Ann. § 17-27-90. This Court also finds Mahdi's claims in this successive PCR Application are barred by the doctrines of laches; and, Mahdi's direct appeal ground is not cognizable in PCR and/or is barred by the doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case. Finally, Mahdi is not entitled to an *Austin* appeal under South Carolina law where he has already had one (1) full PCR appeal. As a result, based on all of the foregoing, this 2nd or successive PCR Application is properly dismissed with prejudice pursuant to S.C. Code Ann. § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."). Finally, based on all the foregoing, there is no genuine issue of material fact and this action must be dismissed pursuant to S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRPC* (defining the standard for granting a motion for summary judgment).

IT IS SO ORDERED.

By: 
The Honorable Doyet A. Early, III.
Presiding Judge


June, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

Mikal Mahdi, SCDC #5238,)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

C/A No. 2017-CP-09-00004

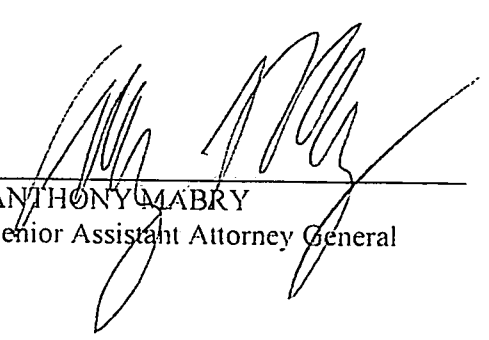
CAPITAL PCR

CERTIFICATE OF SERVICE

I, Anthony Mabry, Assistant Attorney General, certify that I have served the foregoing
Order of Dismissal on Applicant by depositing one copy of same in the United States mail,
postage prepaid, addressed to Applicant's present counsel as follows:

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, SC 29646

John L. Warren, III, Esquire
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201



ANTHONY MABRY
Senior Assistant Attorney General

This 3rd day of July, 2017.

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	C/A No. 2017-CP-09-00004
	)	
Mikal Mahdi, SCDC #5238,	)	*CAPITAL PCR*
	)	
Applicant,	)	(PROPOSED)
vs.	)	ORDER DENYING APPLICANT'S
	)	RULE 59, SCRPC, MOTION TO
State of South Carolina,	)	ALTER OR AMEND OR RECONSIDER
	)	THE ORDER OF DISMISSAL
	)	
Respondent.	)	
	)	

This matter is before this Court on Applicant, Mikal Mahdi's Rule 59, SCRPC, Motion to Alter or Amend or Reconsider this Court's previous Order of Dismissal, denying and dismissing this 2nd or successive PCR Application, issued on June 29, 2017 and filed July 6, 2017. Madhi filed the Rule 59, Motion on July 12, 2017. The State filed a Response to the Rule 59, Motion.

On August 15, 2017, at the Aiken County Courthouse, this Court held a hearing and heard argument on the Rule 59, Motion by both parties. Applicant was represented by E. Charles Grose, Esquire. Respondent was represented by Assistant Attorney General Anthony Mabry.

This Court has carefully reviewed the Record in this case and considered the arguments presented in the Rule 59 Motion to Alter or Amend or Reconsider and those made at the hearing on the Motion, and finds no cause to alter or amend or reconsider the prior Order of Dismissal of this Court. Therefore, based on complete review of the Record, the Motion and the Response, the arguments presented, and the legal authority submitted, this Court denies the Rule 59, SCRPC, Motion to Alter of Amend or to Reconsider the Court's Order of Dismissal in this matter. For the reasons fully set forth in this Court's Order of Dismissal, this 2nd or successive PCR application is denied and dismissed with prejudice.

IT IS SO ORDERED.

By: 
The Honorable Doyet A. Early, III.
Presiding Judge

September 15, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

Mikal Mahdi, SCDC #5238,)

C/A No. 2017-CP-09-00004

Applicant,)

CAPITAL PCR

vs.)

CERTIFICATE OF SERVICE

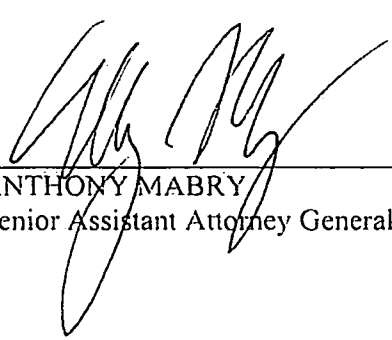
State of South Carolina,)

Respondent.)

I, Anthony Mabry, Senior Assistant Attorney General, certify that I have served the foregoing *Order Denying Applicant's Rule 59, SCRCP, Motion to Alter or Amend or Reconsider the Order of Dismissal* on Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
Greenwood, SC 29646

John L. Warren, III, Esquire
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201



ANTHONY MABRY
Senior Assistant Attorney General

This 20th day of September, 2017.

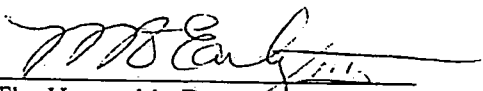
EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
Mikal Mahdi, SCDC #5238,	)	C/A No. 2017-CP-09-00004
	)	*CAPITAL PCR*
Applicant,	)	
vs.	)	ORDER DENYING APPLICANT'S
	)	RULE 59, SCRCP, MOTION TO
State of South Carolina,	)	ALTER OR AMEND OR RECONSIDER
	)	THE ORDER OF DISMISSAL
Respondent.	)	
_____	)	

This matter is before this Court on Applicant, Mikal Mahdi's Rule 59, SCRCP, Motion to Alter or Amend or Reconsider this Court's previous Order of Dismissal, denying and dismissing this 2nd or successive PCR Application, issued on June 29, 2017 and filed July 6, 2017. Madhi filed the Rule 59, Motion on July 12, 2017. The State filed a Response to the Rule 59, Motion.

On August 15, 2017, at the Aiken County Courthouse, this Court held a hearing and heard argument on the Rule 59, Motion by both parties. Applicant was represented by E. Charles Grose, Esquire. Respondent was represented by Assistant Attorney General Anthony Mabry.

This Court has carefully reviewed the Record in this case and considered the arguments presented in the Rule 59 Motion to Alter or Amend or Reconsider and those made at the hearing on the Motion, and finds no cause to alter or amend or reconsider the prior Order of Dismissal of this Court. Therefore, based on complete review of the Record, the Motion and the Response, the arguments presented, and the legal authority submitted, this Court denies the Rule 59, SCRCP, Motion to Alter of Amend or to Reconsider the Court's Order of Dismissal in this matter. For the reasons fully set forth in this Court's Order of Dismissal, this 2nd or successive PCR application is denied and dismissed with prejudice.

By: 
The Honorable Doyet A. Early, III.
Presiding Judge

October 10, 2017

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EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-09-00004

Mikal Mahdi,.....Petitioner,

v.

State of South Carolina,.....Respondent.

Rule 243(c), SCACR Explanation

Rule 243(c), SCACR does not require an explanation because the post-conviction relief (“PCR”) court did not dismiss Mikal Mahdi’s PCR application solely because the PCR “action is barred as successive or being untimely under the statute of limitations,” but out of an abundance of caution, counsel will provide one.

This appeal raises two novel questions of law that should be addressed by this Court and which were ruled upon *on the merits* by the PCR. The first issue is whether *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, intended to apply retroactively, that can be addressed pursuant to S.C. Code Ann. § 17-27-45(B). If Mr. Mahdi is correct, then *Hurst* invalidates the portion of S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution because a judge rather than a jury finds facts required for imposition of

a death sentence. The second issue is whether prior PCR counsel's failure to brief "all arguable issues," as mandated by *Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002), entitles Mr. Mahdi to an appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a long-recognized exception to the bar against successive PCR applications and the statute of limitations. Mr. Mahdi also raises a third issue, which is whether the PCR Judge applied to correct standard of review in evaluating the merits of each of Mahdi's claims.

These issues will likely arise in numerous other PCRs across this State, and this case provides an ideal vehicle for this Court intervene. Particularly, a decision on the *Austin* issue is critical to state postconviction practitioners. This Court often states that PCR applicants should not get more than one bite at the apple, but that first bite at the apple has always been construed as including appellate review of a PCR court's decision. This case raises the important question of what happens when PCR counsel ignores their statutory mandate and selectively appeals certain issues, while leaving unappealed issues as law of the case. This Court, in deciding *Austin*, *Wade*, and their progeny, has always placed a special importance on the duty of PCR counsel to file an appeal of "all arguable issues"—a duty which was ignored in this case. This appeal provides the Court with an opportunity to clarify for the bench and the bar what the consequences are for applicants whose counsel abandons them at the appellate stage. Similarly, this Court has the opportunity to review the all important question that governs every PCR case—what standard of review applies

at the initial motion to dismiss stage?¹ Finally, this Court can clarify the application of *Hurst* on South Carolina's capital sentencing scheme.

Mr. Mahdi respectfully requests that this Court accept the Rule 243 application provided and allow the appeal to proceed in its ordinary course.

I. *Hurst v. Florida*.

Mr. Mahdi's PCR Application alleges:

S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution . . . because a judge rather than a jury finds facts required for imposition of a death sentence.

PCR Application, ¶ 10(a). Mr. Mahdi further alleges our state's capital sentencing procedure denied him his Sixth Amendment "right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed." PCR Application, ¶ 11(a). Mr. Mahdi relies on *Hurst*, "which is a constitutionally binding decision from the Supreme Court of the United States that can be raised pursuant to S.C. Code § 17-27-45(B)." (PCR Application ¶ 16).²

The PCR court reached the merits and ruled, "*Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied

¹ This issue is addressed in the Rule 243 explanation, *infra* Section III, in the context of Mr. Mahdi's claims pursuant to *Missouri v. Frye*, 132 S. Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). However, the issue of the proper standard of review was thoroughly briefed in relation to all issues pled in Mr. Mahdi's PCR application, and will likely be raised as a standalone issue in the appeal.

² The State argues this issue was decided adversely to Mr. Mahdi in his initial PCR case. (Mot. to Dismiss at 30). The Amended Order of Dismissal, signed on August 14, 2014, did not consider *Hurst*, which was decided on January 12, 2016. (A. 189–91).

Ring v. Arizona, 536 U.S. 584 (2002) and *Apprendi v. New York* [sic],³ 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing.” Order of Dismissal at 15. *Hurst*, however, established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty. Understanding the new rule requires reviewing *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Ring* considered the application of *Apprendi* to Arizona’s capital sentencing scheme. *Apprendi* held that the Sixth Amendment does not permit a defendant to be

expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . even if the State characterizes the additional findings made by the judge as sentencing factor[s].

Ring 536 U.S. at 588-89 (internal citations and quotations omitted; emphasis supplied by Court). *Ring*, however, was expressly limited to whether “the Sixth Amendment required jury findings on the aggravating circumstances.” *Id.* at 597 (fn. 4). *Ring* did not address whether a jury must consider mitigation and “make the ultimate determination whether to *impose* the death penalty.” *Id.* (emphasis added). *Ring*, accordingly, was limited to a jury

³ The correct cite is *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Attorney General’s Office, not the PCR judge, drafted the order of dismissal. In his Rule 59(e), SCRC motion, at 3-4, Mr. Mahdi argued, “The findings of fact and conclusions of law are those of an advocate and the [PCR] court.” “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court below did not do that, but rather delegated that responsibility to the Attorney General’s Office. Although the Attorney General addressed the merits of each issue presented in the PCR application, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. In capital PCR cases, this Court “strongly encourages PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004)

determination regarding *eligibility* for the death penalty. *Hurst*, however, involved a challenge to Florida's capital sentencing procedure where the jurors render an "advisory sentence" but "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 136 S.Ct. at 620. *Hurst* held the Sixth Amendment requires jurors make the "critical findings necessary to *impose* the death penalty." 136 S.Ct. at 622 (emphasis added). *Ring*, accordingly, addressed only *eligibility* for the death penalty. *Hurst* addressed *imposition* of the death penalty. *Hurst*, therefore, decided constitutional issues not considered in *Ring*.

Because Mr. Mahdi pleaded guilty to murder, S.C. Code Ann. § 16-3-20(B) mandated his "sentencing proceeding must be conducted before the judge." The guilty plea to murder did not make him eligible for the death penalty. Under South Carolina's capital sentencing scheme, a "statutory aggravating circumstance [must be] found beyond a reasonable doubt" before someone convicted of murder is eligible for the death penalty. S.C. Code Ann. § 16-3-20(A)-(C). The statutory aggravating circumstances are set forth in § 16-3-20(C). Although Mr. Mahdi also pleaded guilty to burglary and larceny, the prosecution had the burden of proving beyond a reasonable doubt that "[t]he murder was committed while in the commission of" a burglary and/or larceny with the use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (f). Although the prosecution had a "head start," based on Mr. Mahdi's guilty plea, towards persuading the judge to find these statutory aggravating circumstances, the statute still required the additional findings of fact.

A finding that a statutory aggravating circumstance exists beyond a reasonable doubt does not require imposition of the death penalty. The sentencing authority must consider statutory mitigating circumstances, S.C. Code Ann. § 16-3-20(C)(b), and non-

statutory mitigating circumstances, *see, e.g., State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The sentencing authority is “authorized to impose a life sentence even if it did not find any mitigating circumstances.” *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). The sentencing authority must consider “the specific circumstances of the crime and the characteristics of the person who committed the crime.” *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990). Pursuant to *Payne v. Tennessee*, 501 U.S. 808, (1991), South Carolina allows consideration of victim impact evidence. *See, e.g., State v. Bixby*, 388 S.C. 528, 555, 698 S.E.2d 572, 586 (2010). Even after all of these considerations, a life sentence may be imposed “for any reason or no reason at all, including as an act of mercy.” *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10.

The PCR court additionally ruled *Hurst* “does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme.” Order of Dismissal at 15. Mr. Mahdi’s guilty plea, however, does not preclude application of *Hurst*. The Supreme Court of the United States applied *Apprendi* “to instances involving plea bargains” in *Blakely v. Washington*, 542 U.S. 296 (2004). *Hurst v. Florida*, 136 S. Ct. at 621. *Blakely* “was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that *Blakely* had acted with ‘deliberate cruelty.’ The facts supporting that finding were neither admitted by [*Blakely*] nor found by a jury.” *Id.* The Court held, “[T]he State’s sentencing procedure did not comply with the Sixth Amendment” and *Blakely*’s “sentence [was] invalid.” *Id.* at 305.

This Court, therefore, must consider whether the trial court judge found any fact to support imposing the death sentence beyond Mr. Mahdi's admissions during his guilty plea. When announcing the sentence, the trial court judge addressed whether the murder was committed during a burglary or larceny while armed with a deadly weapon:

The State presented *additional evidence* during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the defendant was committing these crimes. *Further evidence* was presented indicating that the defendant stole from the victim his police issued vehicle and two rifles, one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

A. 3691 (emphasis added). The trial court additionally considered "nonstatutory aggravating circumstances" including "prior and subsequent bad acts of the defendant, which are relevant to show his bad character, evil nature and malignant heart." Although some of these bad acts were supported by juvenile adjudications or criminal convictions, the trial court considered other facts. For example, the trial judge found Mr. "Mahdi's behavior was maladaptive, assaultive and demonstrated utter disrespect for authority" during periods of incarceration. Also, the trial judge expressly stated:

I find that the State has established by clear and convincing evidence the defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the defendant's characteristics, but not as proof of any alleged statutory aggravating circumstances.

A. 3692-95.

Indeed, there is no question that the trial court made findings of fact necessary to impose the death penalty. The sentencing order demonstrates that the trial court considered, but assigned little weight to, statutory and non-statutory mitigating circumstance, including Mr. Mahdi's young age, childhood and family life, adaptability to incarceration, and decision to plead guilty. The trial judge also considered victim impact evidence, the

prosecution's plea for "justice" and Mr. Mahdi's plea for "mercy." The trial court judge expressly found, "[i]n extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved and consciousnessless manner, the defendant, Mikal Deen Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court." And, "I find, as an affirmative fact, that the evidence in this case warrants imposition of the death penalty. A. 3695-3701.

The PCR court recognized this Court's holding in *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) requires the trial court judge to conduct a sentencing hearing following a guilty plea. Order of Dismissal at 15, 36.⁴ *Downs* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley*, *supra*. Once *Hurst* and *Blakeley* are considered together, our state's capital sentencing procedure following a guilty plea cannot withstand Sixth Amendment scrutiny.

Finally, the PCR court ruled, "[T]he record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence." Order of Dismissal at 38. The record does not support this conclusion. The guilty plea colloquy merely establishes that Mr. Mahdi was giving up his right to have the jurors determine his sentence. The record does not establish that Mr. Mahdi understood his Sixth Amendment right to have the jurors make additional findings regarding aggravating circumstances, consider statutory and non-statutory

⁴ This Court also addressed this issue in *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); and *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004). *Crisp*, and *Wood* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley*, *infra*. All of these cases predated and, therefore, could not have considered *Hurst*. Appellate counsel abandoned this issue in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011).

mitigating circumstances, and make the additional factual findings necessary to impose the death penalty. A. 3219-44. Once Mr. Mahdi entered his guilty plea, life imprisonment without the possibility of parole was the maximum possible sentence that could be imposed for murder without any additional findings of fact. *Hurst* requires jurors, rather than a judge, make these findings of fact. This Court should allow Mr. Mahdi to present this issue in a petition for writ of *certiorari*.

II. *Wade v. State & Austin v. State.*

Pursuant to *Austin*, Mr. Mahdi seeks an appeal on all of the issues raised in his initial PCR Application. PCR Application ¶ 10(c). Here, the record before the Court unequivocally demonstrates that PCR counsel alleged numerous causes of action in Mr. Mahdi's initial PCR Application. A. 000059–133 (Amended Order of Dismissal). The PCR court ruled, “*Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” Order of Dismissal at 39.

The PCR court misunderstood the obligations of counsel in litigating PCR cases. S.C. Code Ann. § 17-27-160 sets forth procedures for appointment of counsel in capital PCR cases. Once appointed, “[c]ounsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.” Rule 71.1, SCRCRCP. Following an evidentiary hearing, the PCR “court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” S.C. Code Ann. § 17-27-80. This Court holds PCR appellate attorneys to high standards, noting that “PCR actions are the only type of case which [this Court] mandates appellate counsel must

brief all arguable issues, despite counsel's belief the appeal is frivolous." *Wade* 348 S.C. at 263, 559 S.E.2d at 847. *Austin* is the recognized remedy when PCR counsel fails to perfect an appeal.

In his direct appeal, Mr. Mahdi alleged the trial "judge improperly punished [him] for initially exercising his right to a jury trial" by assigning "no significant weight" to his guilty plea. *Mahdi v. State*, 383 S.C. 135, 137-38, 678 S.E.2d 807, 808 (2009). This Court held, because "there was no objection to this passage at trial, no issue has been preserved for this Court's review." *Id.* In his prior PCR application, Mr. Mahdi alleged his trial counsel was ineffective by not objecting to this improper basis for imposing a death sentence, and the PCR judge denied the issue on the merits. A. 80-82. This Court consistently holds it is impermissible for a trial judge to consider the defendant's exercise of the right to a jury trial during sentencing. *See, e.g., Castro v. State*, 417 S.C. 77, 789 S.E.2d 44 (2016); *State v. Hazel*, 317 S.C. 368, 453 S.E.2d 879 (1995). Yet, Mr. Mahdi has not had the opportunity for this Court to consider this issue in his case.

In his prior PCR application, Mr. Mahdi alleged his trial counsel failed to investigate, develop, and present mitigation evidence about his family, social, institutional, and mental health history. At the evidentiary hearing, Mr. Mahdi presented testimony or affidavits from family members, teachers, community leaders, Nicholas Cooper-Lewter (a social historian), Dr. deRossett Myers (a clinical psychologist), Dr. Craig Haney (a psychologist with experience studying the effects of institutional environments), and Dr. Donna Schwartz-Watts (a forensic psychiatrist). Mr. Mahdi presented his school records, Virginia Department of Juvenile Justice records, mental health records from the Walter Carter Center, and the Virginia Department of Corrections. The PCR court addressed the

merits of all of this evidence. A. 85-181. In the petition for writ of *certiorari*, prior counsel asked this Court to consider only trial counsel's failure to call "available lay witnesses who could have provided detailed and specific testimony in mitigation." Trial counsel is ineffective in capital cases for failing to present "readily available mitigating evidence." *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014). *See also Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (failure to adequately investigate and present mitigation evidence prejudiced defendant). Yet, Mr. Mahdi has not had the opportunity for this Court to fully consider this issue in his case.

In his prior PCR application, relying on *Ring*, Mr. Mahdi challenged the constitutionality of S.C. Code Ann. § 16-3-20 requirement of judge sentencing following a guilty plea. The PCR court addressed the merits of this issue. A. 189-90. Prior counsel did not include this issue in the petition for writ of *certiorari*. As noted in Section I, *supra*, this Court has never addressed the application of *Blakeley* to an *Apprendi-Ring* challenge to § 16-3-20. If the PCR Court is correct that *Hurst* is not a new constitutional rule, then Mr. Mahdi has been prejudiced by his prior counsel's failure to raise this issue in the petition for writ of *certiorari*.

Finally, in his prior PCR application, Mr. Mahdi alleged his trial counsel failed to adequately advise him about the advantages of jury sentencing, which led him to plead guilty and purport to waive his right to jury sentencing. The PCR court addressed the merits of this issue. A. 82-85. Prior counsel did not include this issue in the petition for writ of *certiorari*.

Austin is the recognized remedy when PCR counsel fails to perfect an appeal, and this Court should allow Mr. Mahdi a belated appeal.

III. *Guilty Plea Advice.*

Mr. Mahdi's current PCR application alleges he "was denied the right to effective assistance of counsel . . . because his trial counsel advised him that the guilty plea would be considered as mitigation," but the trial court judge did not consider the guilty plea to be mitigating. PCR Application ¶¶ 10(b) and 11(b). This claim is based on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012), which were decided after the evidentiary hearing in Mahdi's initial PCR case.⁵ Mahdi alleges *Frye* and *Lafler* are "are constitutionally binding decisions." PCR Application ¶ 16. This claim also involves consideration of "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." S.C. Code Ann. § 17-27-45(C). As seen, in Section I, *supra*, the trial court record does not establish that Mahdi was aware of his Sixth Amendment right for the jurors to determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and make the additional findings of fact required to impose the death penalty.

The PCR court purported to address this issue on the merits, focusing mostly on an analysis of whether *Frye* and *Lafler* apply retroactively. Order of Dismissal at 24-29. As set forth in his Rule 59(e) motion, Mahdi pled facts sufficient to state a cause of action on this claim and has not even had *the opportunity* to present any evidence on the issue of what advice his counsel gave him on the issue of his guilty plea and its potential effect on mitigation, much less any evidence about when, if at all, his counsel discussed *Frye* and

⁵ The initial PCR court convened Mahdi's evidentiary hearing on March 9, 2011, issued the order of dismissal in December 8, 2013, and issued the amended order of dismissal on August 18, 2014. The Supreme Court of the United States decided *Frye* and *Lafler* on March 21, 2012..

Lafler with him. Pursuant to the appropriate standard of review—that of a Rule 12(b)(6), SCRCF motion⁶—Mr. Mahdi should have been allowed to develop and present evidence on this claim. Thus, in light of South Carolina Code Section 17-27-45(C), the PCR court erred in dismissing Mahdi’s claim as successive and time barred, and this Court should permit the appeal to proceed.

CONCLUSION

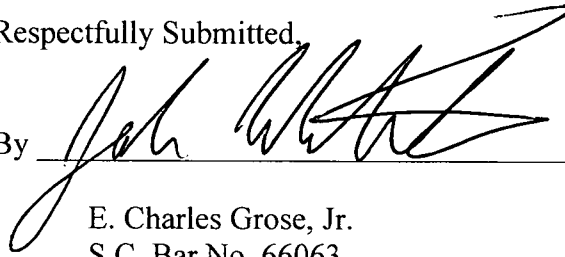
Regarding Sections I & II, Rule 243(c), SCACR does not require an explanation because the post-conviction relief (“PCR”) court did not dismiss Mikal Mahdi’s PCR application solely because the PCR “action is barred as successive or being untimely under the statute of limitations.” Sections I & II present purely issues, and the PCR court reached the merits of these issues. Regarding Section III, summary dismissal was not appropriate because Mr. Mahdi’s well-pled PCR application required the PCR court to convene a hearing to determine whether the discovery rule applied, thereby allowing the court below to reach the merits.

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⁶ “When 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.” *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (quoting *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)). “Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion.” *Id.* (quoting *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005)).

Respectfully Submitted,

By



E. Charles Grose, Jr.
S.C. Bar No. 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

John L. Warren, III
S.C. Bar No. 101414
Simmons Law Firm, LLC
1711 Pickens St.
Columbia, SC 29201
(803) 779-4600
(803) 254-8874 (fax)
Email: jwarren@simmonsfirm.com

Attorneys for Applicant Mikal Mahdi

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