

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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CERTIORARI TO SPARTANBURG COUNTY  
The Court of General Sessions (DNA Testing Act)

J. Mark Hayes, II, Circuit Court Judge

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Indictment Nos. 2007-GS-42-0996 & -0998  
Appellate Case No. 2017-001544

**RECEIVED**

APR 16 2018

SC Court of Appeals

Robert A. Young, .....Appellant,

v.

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Did the lower court properly deny Appellant's successive application for post-conviction DNA testing where he failed to assert grounds for DNA testing which, for sufficient reason, were not asserted or were inadequately raised in the original, supplemental, or amended application?

## STATEMENT OF THE CASE

### Trial and Conviction

Appellant is currently incarcerated in the Lieber Correctional Institution pursuant to an order of commitment from the Clerk of Court of Spartanburg County. Appellant was indicted at the February 2007 term of the Spartanburg County Grand Jury for armed robbery (07-GS-42-0998), assault and battery with intent to kill (ABWIK) (07-GS-42-0996), and grand larceny (07-GS-42-0997). (App.p.489-p.494). On February 4–6, 2008, Appellant was tried before the Honorable J. Derham Cole and a jury. (App.p.1-p.385). Public Defender William H. McPherson represented Appellant at trial. Assistant Solicitors Derrick B. Balsa and Lauren Barnwell represented the State. (App.p.1). The jury found Appellant guilty of armed robbery and assault and battery with intent to kill (ABWIK) and not guilty of grand larceny. (App.p.380-p.383). Judge Cole sentenced Appellant to thirty (30) years imprisonment for armed robbery and twenty (20) years consecutive imprisonment for ABWIK conviction. (App.p.383-p.385). Trial counsel filed a notice of appeal on Appellant's behalf. The parties submitted briefs and in an unpublished opinion filed June 28, 2010, the South Carolina Court of Appeals affirmed Appellant's convictions. (App.p.386).

### Application for Post-Conviction Relief

Appellant filed an application for post-conviction relief (PCR) on October 18, 2010. (App.p.387-p.395).<sup>1</sup> The State made its return to the application on July 15, 2011. (App.p.396-p.400). An evidentiary hearing was convened on December 5, 2011, before the Honorable J. Mark Hayes. Appellant was present and represented by J. Kenneth Robertson, Esquire. The State was represented by Assistant Attorney General Suzanne H. White. (App.p.401-p.445). By

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<sup>1</sup> It appears there are several intermittent pages of Appellant's PCR application that are missing from the Appendix.

order dated March 16, 2012, and filed March 19, 2012, Judge Hayes found that Appellant had not established any constitutional violations or deprivations and, accordingly, denied and dismissed the PCR application with prejudice. (App.p.446-p.455).

### **Post-Conviction Relief Appeal**

PCR counsel filed a notice of appeal on Appellant's behalf on July 16, 2012, and on March 4, 2013, LaNelle Cantey Durant, an Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a petition for writ of certiorari, raising the issue, "Did the PCR court err in failing to find trial counsel ineffective for not objecting to the state's repeated reference to Appellant's black T-shirt with the slogan 'snitches get stitches' which was improper character evidence and prejudicial to Appellant when the victim made no reference to the slogan?" (App.p.456-p.470). On July 22, 2013, AAG White filed a return to the petition for writ of certiorari. (App.471-p.480). In an order dated December 12, 2014, the South Carolina Court of Appeals denied the petition. (App.p.481).

### **First Application for DNA Testing**

On May 25, 2016, Appellant filed an Application for Forensic DNA Testing dated May 13, 2016, in the Spartanburg County Court of General Sessions. (Supp.App.p.1-p.5). On June 1, 2016, the State filed a response arguing the application should be denied and dismissed on grounds that Appellant's identity as the perpetrator of the crimes was proven beyond a reasonable doubt at trial both by way of eyewitness identification by the victim and DNA testing which proved the victim's blood was found on Appellant's pants and t-shirt. (App.p.482-p.483). On June 9, 2016, the Honorable R. Keith Kelly issued an order denying and summarily dismissing the application for forensic DNA testing pursuant to Section 17-28-50(C) of the

Code. In that order, the court specifically found “no further purpose would be served by any further proceedings.” (App.p.484-p.485). Appellant did not appeal that order.

### **Second (Current) Application for DNA Testing**

On May 26, 2017, Appellant filed a second Application for Forensic DNA Testing and a “Notice of Sentence Modification,” both dated May 12, 2017, in the Spartanburg County Court of General Sessions. On May 29, 2017, the State filed a response arguing Appellant had not timely filed his application pursuant to section 17-28-30(B) of the South Carolina Code, and asking that it be summarily dismissed without a hearing. (App.p.486). On July 6, 2017, the Honorable J. Mark Hayes, II, in his capacity as Chief Administrative Judge for the Court of General Sessions for the Seventh Judicial Circuit, issued an order denying the relief requested by Appellant, including the application for DNA testing. In dismissing the matters submitted by Appellant, the court incorporated by reference the prior order of Judge Kelly dated June 9, 2016, denying Appellant’s first application for DNA testing. (App.p.487-p.488). Appellant timely filed a notice of appeal from the dismissal of his second application for DNA testing and a petition for writ of certiorari has now been filed on his behalf by Assistant Appellate Defender LaNelle Cantey DuRant of the South Carolina Office of Appellate Defense. This Return to Appellant’s petition for a writ of certiorari now follows.

### **STATEMENT OF FACTS**

#### **Trial**

Appellant was convicted of the armed robbery of, and the assault and battery with intent to kill, Dixon Ijioma, a taxi driver. (App.p.380-p.384). Ijioma testified that Appellant called him on the night of November 1, 2006 asking for a ride from Amos Street to Locust Court in Spartanburg, South Carolina. Appellant was one of Ijioma’s regular customers, and Ijioma had

dropped Appellant off at Locust Court in the past. During the drive, Appellant shot Ijioma twice in the head and then pointed the gun at Ijioma and threatened him, instructing him to give Appellant all of his money or Appellant would kill him. Ijioma gave his cell phone and his money to Appellant and then ran away. Ijioma ran to a bar, and the people in the bar called 911. Ijioma told the people at the bar that the man who shot him lived on Locust, and they relayed that information to police, who arrived shortly after midnight. (App.p.106-p.145).

Detective Joseph Bohon testified that he learned that the person who had shot Ijioma lived on Locust Court, and he began canvassing the neighborhood in the early morning hours of November 2nd. At the first house Bohon went to, he spoke with Appellant. Though it was 2:29 a.m., Appellant answered the door fully dressed, wearing black pants, shoes, and a black shirt that said “snitches get stitches.” Bohon told Appellant that he was looking into the shooting of a cab driver in the area, and he asked Appellant if he had heard or seen anything. Appellant responded, “No.” Bohon asked if anyone in the neighborhood got cabs in the area, and Appellant responded, “No.” Appellant also denied that he ever got cabs. Bohon moved on and continued canvassing the area. After speaking with other neighbors, Bohon determined that he needed to go back and speak with Appellant. Bohon returned to Appellant’s house at 2:40 a.m. and “confronted him about having cabs out to his house, and he still insisted that he hasn’t.” (App.p.196-p.222).

After some further investigation, Bohon took a six-person photo lineup to Ijioma, and Ijioma identified Appellant “immediately without hesitation.” Ijioma also told police that Appellant was wearing dark clothing when he shot Ijioma. Bohon got an arrest warrant for Appellant around 2:10 p.m. on November 2nd. Police then arrested Appellant at his home on Locust Court. Appellant gave police permission to search his residence. (App.p.196-p.222).

Police found the shirt that said “snitches get stitches” as well as several pairs of black pants in Appellant’s laundry hamper. (App.p.238-p.239). Some of the clothing tested positive for blood. (App.p.245; p.258-p.259). The blood on Appellant’s clothing—including the blood from the “snitches get stitches” shirt—was later tested and found to be Ijioma’s blood. (App.p.288-p.289). The clothing recovered from the residence matched the clothing Bohon had seen Appellant wearing in the early morning hours of November 2nd. (App.p.231).

When police again questioned Appellant, he admitted that he used cabs regularly. (App.p.214-p.215). He also gave a statement in which he said he was on South Liberty Street all day and then went to Ramona Fernanders’s house on Palisade Street that night. (App.p.217-p.218). He stated that Fernanders gave him a ride home and that he got home around 1:20 a.m. (App.p.218). Appellant further stated “At no time did I ever ride in a taxi cab that day or night.” (App.p.218). After police confronted Appellant about having blood on his clothes, he changed his statement and told police the following:

Late last night I was walking down Amos Street on the south side near the Pepsi plant and I noticed a black and yellow cab parked beside a vacant house. It was dark, and I walked up to the cab and I opened the door and looked inside, and I seen blood everywhere. So I shut the door and left. If there is blood on my pants that is the reason why. There was blood all over the driver’s-side door.

(App.p.219-p.220).

#### **Access to Justice Post-Conviction DNA Testing Act (DNA Act)**

As noted in the procedural history above, on May 26, 2017, Appellant filed an Application for Forensic DNA Testing and a “Notice of Sentence Modification” in the Spartanburg County Court of General Sessions. (Supp.App.p.6-p.24). This was his second application for forensic DNA testing, the first having been dismissed by Judge Kelly on June 9, 2016. Appellant did not reference his first application in either document, and he did not assert

grounds for DNA testing which, for sufficient reason, were not asserted or were inadequately raised in his original, supplemental, or amended application. On May 29, 2017, the State filed a response arguing Appellant had not timely filed his application pursuant to section 17-28-30(B) of the South Carolina Code, and asking that it be summarily dismissed without a hearing. (App.p.486). On July 6, 2017, the Honorable J. Mark Hayes, II, issued an order denying the relief requested by Appellant, including the application for DNA testing. In dismissing the matters submitted by Appellant, the lower court found:

After reviewing the present “Notification of Sentence Modification”, the Application for DNA Testing, and the State’s reply to those documents, the court denies the Defendant the relief he requests. By reference, this court incorporates the prior order of Judge Kelly dated June 9, 2016. The court also notes that much of the allegations contained in his request for sentence modification are allegations related to ineffective assistance of prior trial, appellate and PCR counsels. Such allegations, even if true, do not constitute bases for relief through a sentence modification request. The remaining allegations involve Defendant’s completion of certain educational and rehabilitative programs at the Department of Corrections. He then relies upon a “proposed bill” as establishing his right to a modification of his sentence. The court researched the “proposed bill” and cannot find that the proposed legislation was enacted by the General Assembly. The remaining parts of his sentence modification involve issues which should have been addressed through a direct appeal of earlier cases. Therefore, finding no basis for the requested modification of his sentence, the request is denied.

(App.p.487-p.488). The court made no finding whatsoever about the timeliness of the DNA testing application or that the dismissal was in any way based upon the seven year statute of limitations in section 17-28-30(B). Instead, in regard to the request for DNA testing, the lower court focused entirely on the existence of the prior application for forensic DNA testing and the denial of that application. (App.p.487-p.488).

## ARGUMENT

**The lower court properly denied and dismissed Appellant's successive application for post-conviction DNA testing where he failed to assert grounds for DNA testing which, for sufficient reason, were not asserted or were inadequately raised in his original, supplemental, or amended application.**

Appellant argues the lower court erred in denying his application for forensic DNA testing because the judge relied in part on the State's response that the application was not timely filed within seven (7) years from the date of sentencing pursuant to section 17-28-30(B), and the correct statute was section 17-28-30(A) which does not specify a time limit. The State disagrees and submits Appellant's argument is without merit. The DNA judge denied and dismissed Appellant's successive forensic DNA application solely by way of incorporating by reference Judge Kelly's substantive order denying Appellant's prior application for forensic DNA testing. The court made no finding the application was untimely under section 17-28-30(B). Thus, it appears the DNA court specifically did NOT rely on the State's response or the statutory subsection Appellant now argues is inapplicable to his case. Certiorari should be denied.

### Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001); *State v. Lynch*, 375 S.C. 628, 632, 654 S.E.2d 292, 294 (Ct. App. 2007). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a

prejudicial abuse of discretion amounting to an error of law.” *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs only when the trial court’s conclusions lack evidentiary support or are controlled by an error of law. *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

### **Discussion / Analysis**

The Access to Justice Post-Conviction DNA Testing Act (DNA Act) provides a defendant, who asserts he is innocent of the offense for which he was convicted, an opportunity to apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication. S.C. Code Ann. § 17-28-30 (2014). It allows for successive applications, but only in very limited circumstances. Specifically, it provides: “If the applicant has filed a previous application for DNA testing, the applicant may file a successive application, provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.” S.C. Code Ann. § 17-28-50(D) (2014).

Appellant did not reference his first application in his second application or his request for sentence modification, and he did not assert grounds for DNA testing which, for sufficient reason, were not asserted or were inadequately raised in his original, supplemental, or amended application. In the order denying relief, the lower court simply denied and dismissed Appellant’s successive DNA application by incorporating by reference Judge Kelly’s substantive order denying Appellant’s prior application for DNA testing. The State submits this was simply an acknowledgement that Appellant had failed to make the requisite assertion or showing to be able to proceed with his successive DNA application.

In his petition, Appellant claims: “The judge provided scant reason for dismissing Young’s DNA application **except to state that he relied on the State’s response** and Judge Kelly’s order of dismissal from June 9, 2016 which addressed Young’s first DNA application.” This is not accurate. The DNA court judge never stated he relied upon the State’s response. Indeed, the court merely noted it had reviewed the State’s response. (App.p.487). The court made no finding whatsoever about the timeliness of the second DNA testing application and never found the dismissal was in any way based upon the seven year statute of limitations set forth in section 17-28-30(B). Thus, contrary to Appellant’s argument on appeal, the DNA court specifically did NOT rely on the State’s response or the statute Appellant argues is inapplicable to his case.

Appellant further argues that pursuant to section 17-28-50(C) he was not given sufficient opportunity to reply to the proposed dismissal. He claims “there was no evidence that Young knew he could reply.” However, this argument fails for two reasons. First, subsection (C) addresses circumstances where the DNA court intends to summarily dismiss the **original or first** application for forensic DNA testing without a hearing as set forth in section 17-28-90 (2014). S.C. Code Ann. § 17-28-50(C) (2014). It mandates that the applicant be given an opportunity to reply to the proposed dismissal. *Id.* Subsection (D), by comparison, addresses circumstances where an applicant seeks to file a successive application. S.C. Code Ann. § 17-28-50(D) (2014). It includes no similar language requiring an applicant an opportunity to reply to the court’s dismissal after he has failed to make the requisite assertion and showing. *Id.* Thus, Appellant was not entitled to a reply.

Second, to the extent this Court finds the subsection (C) opportunity to reply to a proposed dismissal should also apply to the dismissal of a successive DNA application pursuant

to subsection (D), the statute itself demonstrates Young “knew” he could reply. *See State v. Adams*, 409 S.C. 641, 653, 763 S.E.2d 341, 348 (2014) (recognizing the well-established principle that ignorance of the law is no excuse); *see also Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210-11, 470 S.E.2d 858, 860 (Ct. App. 1996) (“Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests.”). Here, Appellant failed to do so. The DNA court’s conclusion that Appellant failed to make the showing needed to pursue a second DNA application under 17-28-50(D) is supported by ample evidence in the record; therefore, it must stand.

## CONCLUSION

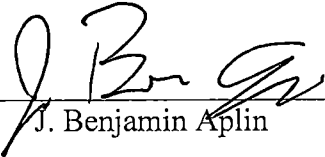
For the reasons stated above, Respondent submits this Court should deny Appellant's Petition for a Writ of Certiorari and affirm the lower court's decision dismissing his successive application for DNA testing. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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Attorney General

J. BENJAMIN APLIN  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 8729

BARRY J. BARNETTE  
Solicitor, Seventh Judicial Circuit

By:   
\_\_\_\_\_  
J. Benjamin Aplin

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April 16, 2018.

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Robert A. Young, ..... APPELLANT,

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**PROOF OF SERVICE**

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 16<sup>th</sup> day of April, 2018.

  
ANGELA BENNETT  
Administrative Coordinator

Office of Attorney General  
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(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

April 16, 2018

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
APR 16 2018  
SC Court of Appeals

Re: Robert A. Young v. The State  
Appellate Case No: 2017-001544

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

J. Benjamin Aplin  
Senior Assistant Deputy Attorney General  
S.C. Bar No: 8729

JBA/ab  
Enclosures

cc: LaNelle C. DuRant, Esquire  
Victim Advocacy Division