AIKEN & HIGHTOWER, PA
Attorneys at Law
2231 Devine Street, Suite 201
Columbia, SC 29205
Phone: 803-799-5205
Fax: 803-799-5206

RECEIVED
JUL 08 2019
S.C. SUPREME COURT

Arthur K. Aiken ***A. Bea Hightower***

July 2, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Russell Montgomery v. State of South Carolina
Civil Action No.: 2013-CP-38-01488

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Russell Montgomery, in the above captioned post-conviction relief case. I have enclosed an original and a copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy to me..

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Orangeburg County Court of Common Pleas. I have also served these filings on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

cc: Clerk, Orangeburg County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Russell Montgomery (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 08 2019
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2013-CP-38-01488

Russell Montgomery..Applicant/Appellant

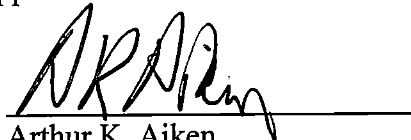
v.

State of South Carolina...Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on July 6, 2019 in this case. Appellant received written notice of the Order of Dismissal by email on July 7, 2019. A copy of the Order of Dismissal appealed from is attached.

July 2, 2019



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:
Office of the Attorney General of the State of South Carolina
Attorney General Alan Wilson
PO Box 11549
Columbia, SC 29211
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Russell Montgomery, S.C.D.C. No. 294838, Plaintiff, vs. State of South Carolina, Defendant.	CASE NO.: 2013-CP-38-01201 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**
Russell Montgomery, S.C.D.C. No. 294838, Plaintiff, vs. State of South Carolina, Defendant.	CASE NO.: 2013-CP-38-01488

2019 JAN -9 PM 10:00

FOR RECORD

This matter is before the Court by way of an application for Post-Conviction Relief ("PCR") filed by Plaintiff Russell Montgomery ("Montgomery") on September 27, 2013 ("the Application"). Defendant State of South Carolina ("the State") made its return, requesting that the Application be summarily dismissed for the following reasons: 1) as barred by the doctrine of *res judicata*; 2) for Montgomery's failure to file the Application within the requisite statute of limitations period; and 3) as successive to Montgomery's previous PCR application(s). A hearing was convened before this Court on July 20, 2017, at the Orangeburg County Courthouse. Applicant was represented by Arthur K. Aiken, Esquire. Respondent was represented by Assistant Attorney General Ruston W. Neely. After review of the motions, supporting documents, statutes, case law, and arguments of counsel, and for the reasons stated below, this Court grants Defendant's Motion to Dismiss.

ATTEST: TRUE COPY

1/11 [signature: Winnya B. Clark]

CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

PROCEDURAL HISTORY

Montgomery is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to order of commitment of the Orangeburg County Clerk of Court. Montgomery was indicted during the August 2002 term by the Orangeburg County Grand Jury for Kidnapping (2002-GS-38-01573) and Armed Robbery (2002-GS-38-01574). He was represented by Margaret Peggy Hinds, Esquire in his July 16, 2003 jury trial where he was convicted of Kidnapping and the lesser offense of Strong Arm Robbery. The Honorable Edward B. Cottingham sentenced Montgomery to twenty (20) years confinement for Kidnapping and fifteen (15) years for Robbery, consecutively.

A notice of appeal was filed and an appeal perfected. Following review, the appeal was dismissed. State v. Montgomery, Op. No. 2005-UP-284 (S.C. Ct. App. filed April 20, 2005). Applicant's Petition for Rehearing was denied, and the remittitur was sent on July 27, 2005.

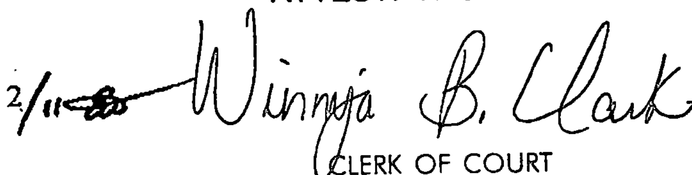
2006-CP-38-000209

Applicant subsequently filed a PCR application on February 21, 2006 (2006-CP-38-000209), wherein Applicant raised the following issues:

1. Ineffective assistance of counsel:
    a. Failure to properly prepare for the trial of this case;
    b. Failure to request continuance based on untimely receipt of discovery;
    c. Failure to move to suppress evidence;
    d. Failure to object to evidence and witnesses not timely revealed in response to discovery request;
    e. Failure to object to impeachment evidence;
    f. Failure to object to improper questions by Solicitor; and
    g. Such other grounds as may become apparent after a complete review of the record.

The State made its return on December 7, 2006. An evidentiary hearing was convened before the Honorable James C. Williams, Jr. on January 12, 2007. Applicant was present and represented by

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

C. Bradley Hutto, Esquire. Judge Williams dismissed the application finding that counsel was not ineffective.

Montgomery filed a notice of appeal represented by Appellate Defender Katherine H. Hudgins. Counsel filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina and moved to be relieved as counsel. Montgomery subsequently was advised of his right and did file a *pro se* brief on January 29, 2008. The matter was transferred to the South Carolina Court of Appeals which denied the petition and granted Hudgins' request. The remittitur was issued February 20, 2009.

2009-cv-0078-HMH

Montgomery then filed a writ of habeas corpus on March 31, 2009 in federal district court. Montgomery raised the following issues:

1. Ineffective assistance of counsel:
    a. Failure to request continuance;
    b. Failure to suppress evidence;
    c. Failure to object to evidence not timely revealed in response request;
    d. Failure to object to impeachment evidence;
    e. Failure to request exclusion of impeachment evidence; and
    f. Failure to object to improper questions by the Solicitor
2. Whether the courts erred by allowing Applicant to be impeached with his prior Robbery conviction where he was on trial for Robbery, since the prejudicial effect of that conviction outweighed its probative value under Rule 403 SCRE.

The State filed its return on August 10, 2009 along with its motion for summary judgment. The Court granted the motion on January 20, 2010, finding the claims without merit. Montgomery filed his notice of appeal on February 5, 2010. The Fourth Circuit of Appeals issued its order enforcing the judgment on May 28, 2010.

ATTEST: TRUE COPY
3/15 Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

2011-CP-38-0857

Montgomery filed a second PCR application on July 20, 2011 (2011-CP-38-0857).

Applicant set forth the following grounds for relief verbatim:

1. Does the extraordinary circumstances in the instant case entitle Petitioner to a second application to address the remaining issue the PCR court failed to address in the original application, since PCR counsel failed to file a timely Rule 59(e) motion to address all of Petitioners claims that were presented in his original applicant and this court's barring of hybrid representation that precluded Petition from filing a pro-se Rule 59(e) motion, that resulted in a denial of due process and equal protection.

The State filed its return and Motion to Dismiss on October 9, 2012. The court issued a Conditional Order of Dismissal on November 13, 2012, giving the Applicant twenty (20) days from the date of service to respond as to why the case should not be dismissed. Montgomery responded on October 18, 2012 by way of a document "Answer to Respondents Motion for Dismissal." This Court signed a Final Order of Dismissal on May 16, 2013, denying relief.

Current Allegations

Montgomery filed his third and current PCR application on September 27, 2013 (2013-CP-38-01201). Applicant then filed a fourth PCR application on December 30, 2013 (2013-CP-38-01488). On April 22, 2014 this Court ordered the merger of the applications; treating the latter as an amendment to the former. In this application, Montgomery sets forth the following grounds for relief:

1. Ineffective assistance:
    a. Counsel failed to request a continuance based on untimely receipt of discovery;
    b. Counsel failed to object, move to suppress evidence;

ATTEST: TRUE COPY
4/11
Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

c. Counsel failed to object to evidence and witness(es) not timely revealed in response to discovery;
d. Counsel failed to impeach evidence;
e. Counsel failed to request exclusion of impeachment evidence;
f. Counsel failed to object to improper questions by the Solicitor.

2. "New case law precedent (Christopher Broadnax Appellate v. State)."

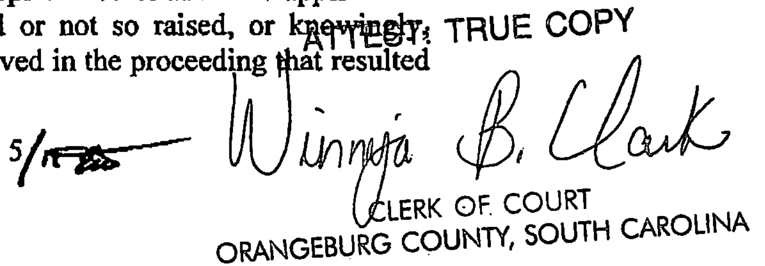
Respondent submitted its Return and Motion to Dismiss on May 16, 2014.

The State asks this Court to dismiss the Applicant's allegations because it is barred by the doctrine of *res judicata*, fails to comply with filing procedures set forth in S.C. Code Ann. §§ 17-27-10 to 160; the Uniform Post-Conviction Procedure Act ("the Act"), and is successive to the previous application.

DISCUSSION

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442 (1985). The Act provides that a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17–27–20(4). If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the application or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17–27–45(c). "The granting of a new trial because of after-discovered evidence is not favored." State v. Irvin, 270 S.C. 539, 545 (1978). Section 17–27–90 of the South Carolina Code of Laws states the following:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted



> in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

A. Montgomery's application is not barred by the Statute of Limitations.

PCR applications filed after July 1, 1996 must be filed within one year after the entry of judgment; within one year after the sending of the remittitur to the lower court from an appeal; or the filling of the final decision upon an appeal, whichever is later. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The applicable statute provides that an applicant alleging evidence of material fact not previously presented and heard must file within one year after the date of actual discovery or after the date when the facts could have been ascertained with reasonable diligence. S.C. Code Ann. § 17-27-45.

This Court recognizes that Montgomery would have been required to file his application within one year after the remittitur was issued on July 27, 2005. S.C. Code Ann. § 17-27-45(a) (Supp. 2003). At first glance, the application filed on September 27, 2013 falls outside the statutory requirements for those material issues previously presented. However, Montgomery takes the position that "new case law precedent" requires a review of his application. The case relied upon was before the Court of Appeals and decided on Jan. 9, 2013. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). That ruling was appealed and a final decision by the Supreme Court was issued July 29, 2015. State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789 (2015) (rehearing granted September 8, 2015) (hereinafter "Broadnax"). As a result, Montgomery, citing Broadnax, would be required to file the current application by Jan. 9, 2014. That is assuming he could have reasonably discovered the ruling at that time. Montgomery filed his current application

ATTEST: TRUE COPY
Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

on September 27, 2013. Therefore, because Montgomery's application raises facts not previously presented as to case law precedent, the current application is timely as to the statute of limitations.

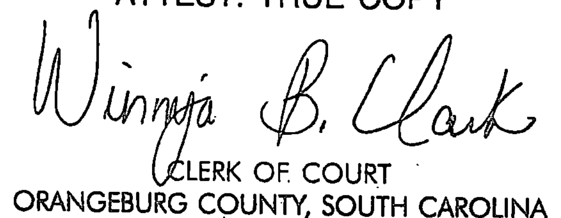
B. The doctrine of *res judicata* is not applicable to Montgomery's assertion that new case law supports his position.

The State submits that Montgomery's current application is barred by the doctrine of *res judicata*. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013). Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding. Id. Thus, parties are precluded from relitigation on the merits those issues which were actually and necessarily determined in the first suit. Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 790 (Ct. App. 1992). The doctrine of *res judicata* flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action, while the doctrine of collateral estoppel, or issue preclusion, rests generally on equitable principles. S.C. Pub. Interest Found, 401 S.C. 377 at 386.

In the current matter, Montgomery raises a new question. Specifically, whether his filing is justified based simply on the holding of Broadnax which came after his initial application. Broadnax, 414 S.C. 468. Many of Montgomery's current assertions mirror his prior applications. Among these are: failure to properly prepare for the trial of this case; failure to request continuance based on untimely receipt of discovery; failure to move to suppress evidence; failure to object to evidence and witnesses not timely revealed in response to discovery request; failure to object to impeachment evidence; failure to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

ATTEST: TRUE COPY

7/11-25



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

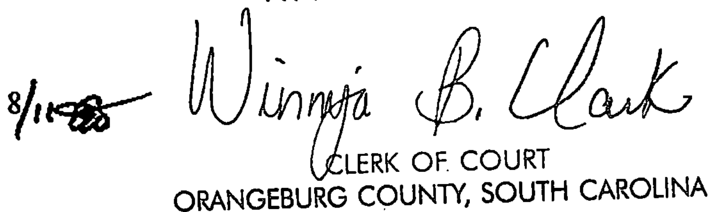
Nonetheless, Montgomery does not stop there. In the current matter he suggests the "new case law precedent" is deserving of an equitable review. This Court is inclined to agree since Montgomery's argument is that it would essentially be impossible to have raised the issue at least until the Court of Appeal's decision. Therefore, Montgomery's current application may be considered notwithstanding the doctrine of *res judicata*.

C. Montgomery's allegations are successive to his previous post-conviction relief applications.

Finally, the State avers that despite the holding of Broadnax, the current application is successive to those previous filed and therefore should be dismissed. Successive post-conviction relief applications are disfavored, but they are not prohibited. Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008). Successive applications are disfavored unless an applicant provides "sufficient reason" why new grounds were not previously raised or could not have been raised in the prior application. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); see also Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In comparing the current and previous applications, it is clear that Montgomery parrots his earlier allegations that counsel failed to 1) request continuance based on untimely receipt of discovery; 2) to object or suppress evidence; 3) object to evidence and witness(es) not timely revealed in response to discovery; and 4) to impeach evidence, request exclusion of impeachment evidence, and to object to improper questions.

Consequently, his only support would come from his position that "new case law precedent" supports his prior application. Specifically, he points to Broadnax, which held that the circuit court should have weighed the probative value of the defendant's prior convictions for armed robbery against their prejudicial effect prior to their admission. Broadnax, 414 S.C. 468. Therefore, the ultimate question is whether the holding of Broadnax should relate back and

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

retroactively apply to his 2003 trial where the government was permitted to cross-examine him on other strong-armed robbery offenses.

The US Supreme Court has found the retroactivity of federal criminal procedure decisions turns on whether they constitute a "new rule." Lucero v. State, 414 S.C. 238, 245–46, 777 S.E.2d 409, 413 (Ct. App. 2015) (citing Chaidez v. United States, 568 U.S. 342, 348, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013)). A case announces a new rule when it breaks new ground or imposes a new obligation on the government; or, if the result was not dictated by precedent existing at the time the defendant's conviction became final. Id. A person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding if the decision proscribes a "new rule." Id. Therefore, as applied an applicant may avail himself of the decision on collateral review only when the Court applies a settled rule. Id.

Conversely, a case does not announce a new rule when it is "merely an application of the principle that governed a prior decision to a different set of facts." Id. At the time of Montgomery's trial, a reasonable jurist in his case may well have relied on State v. Al-Amin, decided just four months prior to Montgomery's trial. State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). In Al-Amin, the court held that Armed Robbery *was* (emphasis added) a crime of dishonesty for purposes of impeachment, and therefore did not require a balancing test. Id. Montgomery's reliance on Broadnax is therefore misplaced.

The holding in Broadnax establishes a new rule which states that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of "crimen falsi" that bear upon a witness's propensity to testify truthfully; Armed Robbery does not. Broadnax, 414 S.C. 468 at 478. The holding does not preclude the introduction of past crimes of Armed Robbery. Instead, it allows the trial judge to conduct a balancing test pursuant to SCRE Rule 609(a)(2). Id.

ATTEST: TRUE COPY
9/1[illegible]
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

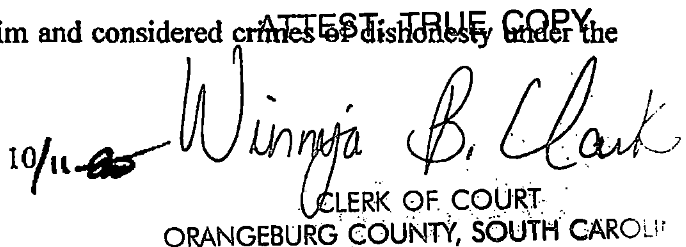
Furthermore, new procedural rules should not be applied retroactively to cases unless they fall into one of two exceptions. Lucero v. State, 414 S.C. 238, 250, 777 S.E.2d 409, 413 (Ct. App. 2015).

Whether a new rule relates back depends on its classification as substantive or procedural. Substantive rules prohibit the State from criminalizing certain conduct or to prohibit "a certain category of punishment for a class of defendants because of their status or offense." Aiken v. Byars, 410 S.C. 534, 540, 765 S.E.2d 572, 575 (2014). See also, Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding mandatory life without parole sentences on juveniles constituted cruel and unusual punishment). New substantive rules will apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Aiken, 410 S.C. 534 at 540-541.

By contrast, a rule that merely regulates the manner in which a defendant is adjudicated guilty is procedural. Id. Thus, a second exception allows relation back of a new rule which "requires the observance of those procedures that ... are implicit in the concept of ordered liberty." Lucero v. State, 414 S.C. 238, 250, 777 S.E.2d 409, 413 (Ct. App. 2015). This is reserved for "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. Id at 251. In order to qualify as "watershed rule" of criminal procedure, such as may be applied retroactively on collateral review, the decision must meet two requirements. First, it must be necessary to prevent impermissibly large risk of inaccurate conviction. Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). Second, it must alter the courts' understanding of bedrock procedural elements essential to fairness of proceeding. Id.

At the time of Montgomery's trial, impeachment evidence on other strong armed robbery offenses would have been permitted against him and considered crimes of dishonesty under the

ATTEST: TRUE COPY



10/11
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLI

rule of Al-Amin. That case's successor, Broadnax, did not announce a watershed rule of criminal procedure akin to the right to counsel or freedom from cruel and unusual punishment. Instead, the holding simply provides a new procedural rule which reinforces the discretion placed upon the trial judge in making evidentiary determinations.

CONCLUSION

Therefore, contrary to Montgomery's assertion, Broadnax does not preclude the trial judge from introducing evidence of past crimes, including Armed Robbery. Nor is the holding in Broadnax a "watershed rule" requiring retroactive application.

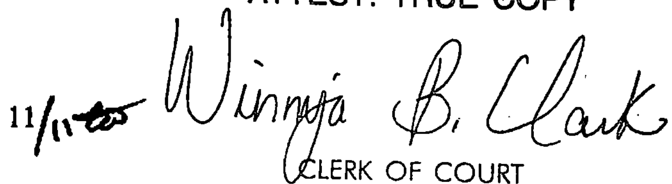
Accordingly, IT IS THEREFORE ORDERED that Montgomery's application for Post-Conviction Relief be, and hereby is DENIED and the Defendant's Motion to Dismiss is GRANTED.

AND IT IS SO ORDERED.

Edgar W. Dickson
Presiding Judge, First Judicial Circuit

June 6, 2019
Orangeburg, South Carolina

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2013-CP-38-01488

Russell Montgomery... Applicant/Appellant

v.

State of South Carolina...Respondent/Respondent

PROOF OF SERVICE AND FILING

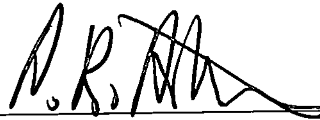
I certify that, on July 2, 2019, I served and filed the Notice of Appeal in the above appeal by mailing copies of those filings to the following:

Office of the Attorney General for South Carolina
Attorney General Alan Wilson
PO Box 11549
Columbia, SC 29201

and

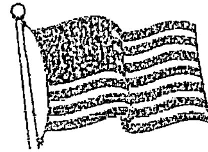
Office of the Orangeburg County Clerk of Court
1405 Amelia St.
Orangeburg SC 29115

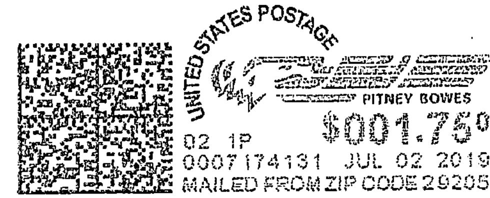
SIGNATURE ON THE FOLLOWING PAGE



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

Columbia, SC
July 2, 2019





RECEIVED
JUL 08 2019
S.C. SUPREME COURT

te 201

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330

AIKEN & HIGHTOWER, PA
Attorneys at Law
2231 Devine Street, Suite 201
Columbia, SC 29205
Phone: 803-799-5205
Fax: 803-799-5206

RECEIVED
JUL 08 2019
S.C. SUPREME COURT

Arthur K. Aiken ***A. Bea Hightower***

July 2, 2019

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Russell Montgomery v. State of South Carolina
Civil Action No.: 2013-CP-38-01201

Dear Mr. Shearouse:

I am appointed counsel for the Applicant, Russell Montgomery, in the above captioned post-conviction relief case. I have enclosed an original and a copy of a Notice of Appeal for this case. Please file the original and return the file stamped copy to me..

By copy of this letter with the filing enclosed, I have filed the filing with the Clerk of the Orangeburg County Court of Common Pleas. I have also served these filings on the Office of the Attorney General for South Carolina. Please call with any questions.

Thank you for your help

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

cc: Clerk, Orangeburg County Court of Common Pleas (w/enclosures)
Office of the Attorney General for South Carolina (w/enclosures)
Russell Montgomery (w/enclosures)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 08 2019
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2013-CP-38-01201

Russell Montgomery..Applicant/Appellant

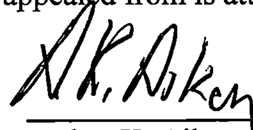
v.

State of South Carolina..Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal filed on July 6, 2019 in this case. Appellant received written notice of the Order of Dismissal by email on July 7, 2019. A copy of the Order of Dismissal appealed from is attached.

July 2, 2019



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

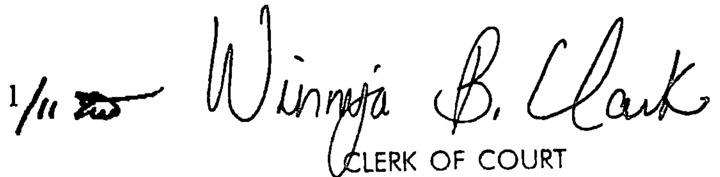
OTHER COUNSEL OF RECORD:
Office of the Attorney General of the State of South Carolina
Attorney General Alan Wilson
PO Box 11549
Columbia, SC 29201
ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Russell Montgomery, S.C.D.C. No. 294838, Plaintiff, vs. State of South Carolina, Defendant.	)	CASE NO.: 2013-CP-38-01201 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**
Russell Montgomery, S.C.D.C. No. 294838, Plaintiff, vs. State of South Carolina, Defendant.	)	CASE NO.: 2013-CP-38-01488

2013 JAN -6 PM 10:00
FILED FOR RECORD

This matter is before the Court by way of an application for Post-Conviction Relief ("PCR") filed by Plaintiff Russell Montgomery ("Montgomery") on September 27, 2013 ("the Application"). Defendant State of South Carolina ("the State") made its return, requesting that the Application be summarily dismissed for the following reasons: 1) as barred by the doctrine of *res judicata*; 2) for Montgomery's failure to file the Application within the requisite statute of limitations period; and 3) as successive to Montgomery's previous PCR application(s). A hearing was convened before this Court on July 20, 2017, at the Orangeburg County Courthouse. Applicant was represented by Arthur K. Aiken, Esquire. Respondent was represented by Assistant Attorney General Ruston W. Neely. After review of the motions, supporting documents, statutes, case law, and arguments of counsel, and for the reasons stated below, this Court grants Defendant's Motion to Dismiss.

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

PROCEDURAL HISTORY

Montgomery is presently confined in the South Carolina Department of Corrections ("SCDC") pursuant to order of commitment of the Orangeburg County Clerk of Court. Montgomery was indicted during the August 2002 term by the Orangeburg County Grand Jury for Kidnapping (2002-GS-38-01573) and Armed Robbery (2002-GS-38-01574). He was represented by Margaret Peggy Hinds, Esquire in his July 16, 2003 jury trial where he was convicted of Kidnapping and the lesser offense of Strong Arm Robbery. The Honorable Edward B. Cottingham sentenced Montgomery to twenty (20) years confinement for Kidnapping and fifteen (15) years for Robbery, consecutively.

A notice of appeal was filed and an appeal perfected. Following review, the appeal was dismissed. State v. Montgomery, Op. No. 2005-UP-284 (S.C. Ct. App. filed April 20, 2005). Applicant's Petition for Rehearing was denied, and the remittitur was sent on July 27, 2005.

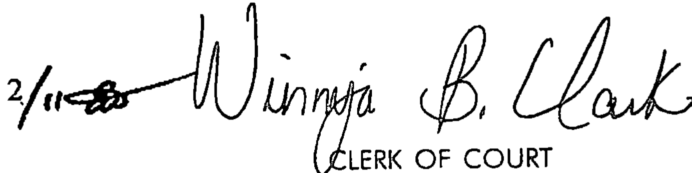
2006-CP-38-000209

Applicant subsequently filed a PCR application on February 21, 2006 (2006-CP-38-000209), wherein Applicant raised the following issues:

1. Ineffective assistance of counsel:
    a. Failure to properly prepare for the trial of this case;
    b. Failure to request continuance based on untimely receipt of discovery;
    c. Failure to move to suppress evidence;
    d. Failure to object to evidence and witnesses not timely revealed in response to discovery request;
    e. Failure to object to impeachment evidence;
    f. Failure to object to improper questions by Solicitor; and
    g. Such other grounds as may become apparent after a complete review of the record.

The State made its return on December 7, 2006. An evidentiary hearing was convened before the Honorable James C. Williams, Jr. on January 12, 2007. Applicant was present and represented by

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

C. Bradley Hutto, Esquire. Judge Williams dismissed the application finding that counsel was not ineffective.

Montgomery filed a notice of appeal represented by Appellate Defender Katherine H. Hudgins. Counsel filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina and moved to be relieved as counsel. Montgomery subsequently was advised of his right and did file a *pro se* brief on January 29, 2008. The matter was transferred to the South Carolina Court of Appeals which denied the petition and granted Hudgins' request. The remittitur was issued February 20, 2009.

2009-cv-0078-HMH

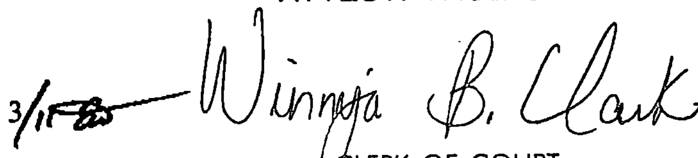
Montgomery then filed a writ of habeas corpus on March 31, 2009 in federal district court. Montgomery raised the following issues:

1. Ineffective assistance of counsel:
    a. Failure to request continuance;
    b. Failure to suppress evidence;
    c. Failure to object to evidence not timely revealed in response request;
    d. Failure to object to impeachment evidence;
    e. Failure to request exclusion of impeachment evidence; and
    f. Failure to object to improper questions by the Solicitor

2. Whether the courts erred by allowing Applicant to be impeached with his prior Robbery conviction where he was on trial for Robbery, since the prejudicial effect of that conviction outweighed its probative value under Rule 403 SCRE.

The State filed its return on August 10, 2009 along with its motion for summary judgment. The Court granted the motion on January 20, 2010, finding the claims without merit. Montgomery filed his notice of appeal on February 5, 2010. The Fourth Circuit of Appeals issued its order enforcing the judgment on May 28, 2010.

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

2011-CP-38-0857

Montgomery filed a second PCR application on July 20, 2011 (2011-CP-38-0857).

Applicant set forth the following grounds for relief verbatim:

1. Does the extraordinary circumstances in the instant case entitle Petitioner to a second application to address the remaining issue the PCR court failed to address in the original application, since PCR counsel failed to file a timely Rule 59(e) motion to address all of Petitioners claims that were presented in his original applicant and this court's barring of hybrid representation that precluded Petition from filing a pro-se Rule 59(e) motion, that resulted in a denial of due process and equal protection.

The State filed its return and Motion to Dismiss on October 9, 2012. The court issued a Conditional Order of Dismissal on November 13, 2012, giving the Applicant twenty (20) days from the date of service to respond as to why the case should not be dismissed. Montgomery responded on October 18, 2012 by way of a document "Answer to Respondents Motion for Dismissal." This Court signed a Final Order of Dismissal on May 16, 2013, denying relief.

Current Allegations

Montgomery filed his third and current PCR application on September 27, 2013 (2013-CP-38-01201). Applicant then filed a fourth PCR application on December 30, 2013 (2013-CP-38-01488). On April 22, 2014 this Court ordered the merger of the applications; treating the latter as an amendment to the former. In this application, Montgomery sets forth the following grounds for relief:

1. Ineffective assistance:
   a. Counsel failed to request a continuance based on untimely receipt of discovery;
   b. Counsel failed to object, move to suppress evidence;

ATTEST: TRUE COPY
4/11
Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

c. Counsel failed to object to evidence and witness(es) not timely revealed in response to discovery;
d. Counsel failed to impeach evidence;
e. Counsel failed to request exclusion of impeachment evidence;
f. Counsel failed to object to improper questions by the Solicitor.

2. "New case law precedent (Christopher Broadnax Appellate v. State)."

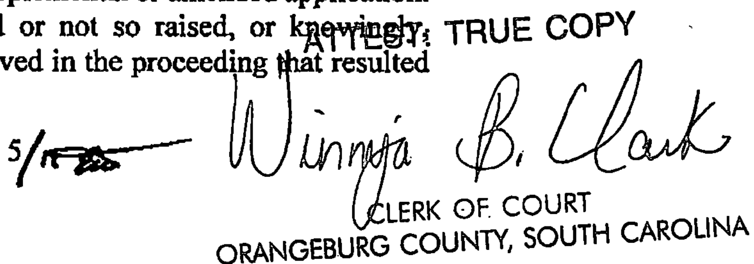
Respondent submitted its Return and Motion to Dismiss on May 16, 2014.

The State asks this Court to dismiss the Applicant's allegations because it is barred by the doctrine of *res judicata*, fails to comply with filing procedures set forth in S.C. Code Ann. §§ 17-27-10 to 160; the Uniform Post-Conviction Procedure Act ("the Act"), and is successive to the previous application.

DISCUSSION

In a PCR action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442 (1985). The Act provides that a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17–27–20(4). If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the application or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17–27–45(c). "The granting of a new trial because of after-discovered evidence is not favored." State v. Irvin, 270 S.C. 539, 545 (1978). Section 17–27–90 of the South Carolina Code of Laws states the following:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted



> in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

A. Montgomery's application is not barred by the Statute of Limitations.

PCR applications filed after July 1, 1996 must be filed within one year after the entry of judgment; within one year after the sending of the remittitur to the lower court from an appeal; or the filling of the final decision upon an appeal, whichever is later. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The applicable statute provides that an applicant alleging evidence of material fact not previously presented and heard must file within one year after the date of actual discovery or after the date when the facts could have been ascertained with reasonable diligence. S.C. Code Ann. § 17-27-45.

This Court recognizes that Montgomery would have been required to file his application within one year after the remittitur was issued on July 27, 2005. S.C. Code Ann. § 17-27-45(a) (Supp. 2003). At first glance, the application filed on September 27, 2013 falls outside the statutory requirements for those material issues previously presented. However, Montgomery takes the position that "new case law precedent" requires a review of his application. The case relied upon was before the Court of Appeals and decided on Jan. 9, 2013. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). That ruling was appealed and a final decision by the Supreme Court was issued July 29, 2015. State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789 (2015) (rehearing granted September 8, 2015) (hereinafter "Broadnax"). As a result, Montgomery, citing Broadnax, would be required to file the current application by Jan. 9, 2014. That is assuming he could have reasonably discovered the ruling at that time. Montgomery filed his current application

ATTEST: TRUE COPY
Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

on September 27, 2013. Therefore, because Montgomery's application raises facts not previously presented as to case law precedent, the current application is timely as to the statute of limitations.

B. The doctrine of *res judicata* is not applicable to Montgomery's assertion that new case law supports his position.

The State submits that Montgomery's current application is barred by the doctrine of *res judicata*. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013). Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding. Id. Thus, parties are precluded from relitigation on the merits those issues which were actually and necessarily determined in the first suit. Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 790 (Ct. App. 1992). The doctrine of *res judicata* flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action, while the doctrine of collateral estoppel, or issue preclusion, rests generally on equitable principles. S.C. Pub. Interest Found, 401 S.C. 377 at 386.

In the current matter, Montgomery raises a new question. Specifically, whether his filing is justified based simply on the holding of Broadnax which came after his initial application. Broadnax, 414 S.C. 468. Many of Montgomery's current assertions mirror his prior applications. Among these are: failure to properly prepare for the trial of this case; failure to request continuance based on untimely receipt of discovery; failure to move to suppress evidence; failure to object to evidence and witnesses not timely revealed in response to discovery request; failure to object to impeachment evidence; failure to object to improper questions by Solicitor; and such other grounds as may become apparent after a complete review of the record.

ATTEST: TRUE COPY
7/11-
Winnya B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

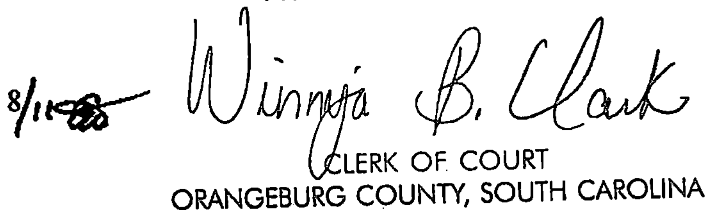
Nonetheless, Montgomery does not stop there. In the current matter he suggests the "new case law precedent" is deserving of an equitable review. This Court is inclined to agree since Montgomery's argument is that it would essentially be impossible to have raised the issue at least until the Court of Appeal's decision. Therefore, Montgomery's current application may be considered notwithstanding the doctrine of *res judicata*.

C. Montgomery's allegations are successive to his previous post-conviction relief applications.

Finally, the State avers that despite the holding of Broadnax, the current application is successive to those previous filed and therefore should be dismissed. Successive post-conviction relief applications are disfavored, but they are not prohibited. Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008). Successive applications are disfavored unless an applicant provides "sufficient reason" why new grounds were not previously raised or could not have been raised in the prior application. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); see also Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In comparing the current and previous applications, it is clear that Montgomery parrots his earlier allegations that counsel failed to 1) request continuance based on untimely receipt of discovery; 2) to object or suppress evidence; 3) object to evidence and witness(es) not timely revealed in response to discovery; and 4) to impeach evidence, request exclusion of impeachment evidence, and to object to improper questions.

Consequently, his only support would come from his position that "new case law precedent" supports his prior application. Specifically, he points to Broadnax, which held that the circuit court should have weighed the probative value of the defendant's prior convictions for armed robbery against their prejudicial effect prior to their admission. Broadnax, 414 S.C. 468. Therefore, the ultimate question is whether the holding of Broadnax should relate back and

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

retroactively apply to his 2003 trial where the government was permitted to cross-examine him on other strong-armed robbery offenses.

The US Supreme Court has found the retroactivity of federal criminal procedure decisions turns on whether they constitute a "new rule." Lucero v. State, 414 S.C. 238, 245–46, 777 S.E.2d 409, 413 (Ct. App. 2015) (citing Chaidez v. United States, 568 U.S. 342, 348, 133 S. Ct. 1103, 1107, 185 L. Ed. 2d 149 (2013)). A case announces a new rule when it breaks new ground or imposes a new obligation on the government; or, if the result was not dictated by precedent existing at the time the defendant's conviction became final. Id. A person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding if the decision proscribes a "new rule." Id. Therefore, as applied an applicant may avail himself of the decision on collateral review only when the Court applies a settled rule. Id.

Conversely, a case does not announce a new rule when it is "merely an application of the principle that governed a prior decision to a different set of facts." Id. At the time of Montgomery's trial, a reasonable jurist in his case may well have relied on State v. Al-Amin, decided just four months prior to Montgomery's trial. State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003). In Al-Amin, the court held that Armed Robbery *was* (emphasis added) a crime of dishonesty for purposes of impeachment, and therefore did not require a balancing test. Id. Montgomery's reliance on Broadnax is therefore misplaced.

The holding in Broadnax establishes a new rule which states that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of "crimen falsi" that bear upon a witness's propensity to testify truthfully; Armed Robbery does not. Broadnax, 414 S.C. 468 at 478. The holding does not preclude the introduction of past crimes of Armed Robbery. Instead, it allows the trial judge to conduct a balancing test pursuant to SCRE Rule 609(a)(2). Id.

ATTEST: TRUE COPY
9/1[illegible]
Winnjá B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

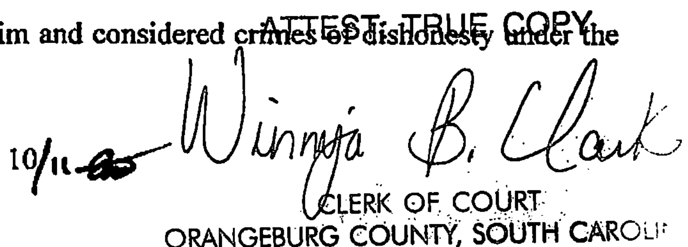
Furthermore, new procedural rules should not be applied retroactively to cases unless they fall into one of two exceptions. Lucero v. State, 414 S.C. 238, 250, 777 S.E.2d 409, 413 (Ct. App. 2015).

Whether a new rule relates back depends on its classification as substantive or procedural. Substantive rules prohibit the State from criminalizing certain conduct or to prohibit "a certain category of punishment for a class of defendants because of their status or offense." Aiken v. Byars, 410 S.C. 534, 540, 765 S.E.2d 572, 575 (2014). See also, Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding mandatory life without parole sentences on juveniles constituted cruel and unusual punishment). New substantive rules will apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." Aiken, 410 S.C. 534 at 540-541.

By contrast, a rule that merely regulates the manner in which a defendant is adjudicated guilty is procedural. Id. Thus, a second exception allows relation back of a new rule which "requires the observance of those procedures that ... are implicit in the concept of ordered liberty." Lucero v. State, 414 S.C. 238, 250, 777 S.E.2d 409, 413 (Ct. App. 2015). This is reserved for "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. Id at 251. In order to qualify as "watershed rule" of criminal procedure, such as may be applied retroactively on collateral review, the decision must meet two requirements. First, it must be necessary to prevent impermissibly large risk of inaccurate conviction. Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007). Second, it must alter the courts' understanding of bedrock procedural elements essential to fairness of proceeding. Id.

At the time of Montgomery's trial, impeachment evidence on other strong armed robbery offenses would have been permitted against him and considered crimes of dishonesty under the

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLI

rule of Al-Amin. That case's successor, Broadnax, did not announce a watershed rule of criminal procedure akin to the right to counsel or freedom from cruel and unusual punishment. Instead, the holding simply provides a new procedural rule which reinforces the discretion placed upon the trial judge in making evidentiary determinations.

CONCLUSION

Therefore, contrary to Montgomery's assertion, Broadnax does not preclude the trial judge from introducing evidence of past crimes, including Armed Robbery. Nor is the holding in Broadnax a "watershed rule" requiring retroactive application.

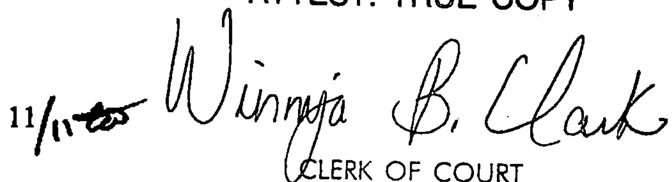
Accordingly, IT IS THEREFORE ORDERED that Montgomery's application for Post-Conviction Relief be, and hereby is DENIED and the Defendant's Motion to Dismiss is GRANTED.

AND IT IS SO ORDERED.

Edgar W. Dickson
Presiding Judge, First Judicial Circuit

June 6, 2019
Orangeburg, South Carolina

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2013-CP-38-01201

Russell Montgomery... Applicant/Appellant

v.

State of South Carolina..Respondent/Respondent

PROOF OF SERVICE AND FILING

I certify that, on July 2, 2019, I served and filed the Notice of Appeal in the above appeal by mailing copies of those filings to the following:

Office of the Attorney General for South Carolina
Attorney General Alan Wilson
PO Box 11549
Columbia, SC 29201

and

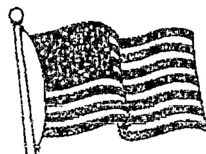
Office of the Orangeburg County Clerk of Court
1405 Amelia St.
Orangeburg SC 29115

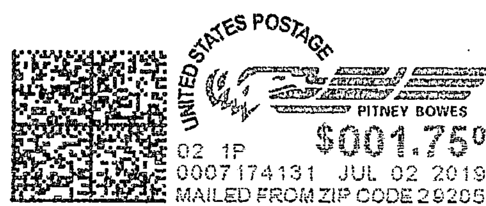
SIGNATURE ON THE FOLLOWING PAGE

Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Telephone: 803-799-5205
Fax: 803-799-5206
Email: art@aikenandhightower.com
ATTORNEYS FOR APPELLANT

Columbia, SC
July 2, 2019

ite 201





RECEIVED
JUL 08 2019
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
PO Box 11330