THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2012-CP-32-02180

John Henry # 299199.....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 entered in this case on September 11, 2018 and from the Order entered on May 20, 2020 that denies Appellant's timely filed Rule 59(e) SCRCP Motion to Alter or Amend. Appellant received written notice of the entry of the Order entered on May 20, 2020 by email from the South Carolina Attorney General's Office on June 24, 2020. Copies of the Orders appealed from are attached.

July 24, 2020

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
John Henry, #299199, Applicant, v. State of South Carolina, Respondent.	**ORDER OF DISMISSAL** **C. A. No. 2012-CP-32-2180**

This matter comes before this Court by way of the post-conviction relief application filed on May 29, 2012, the amendments filed on or about January 27, 2016, the amendments[1] filed on or about July 26, 2016, and the amendments filed on or about November 27, 2017, founded upon "newly discovered" evidence relating to a failure of the State to disclose a plea agreement with a testifying co-defendant. In its return, the Respondent requested the application be summarily dismissed as successive and untimely. A hearing was held February 20, 2018. Applicant was present and represented by Arthur Aiken, Esquire. Assistant Attorney General Susannah Cole represented Respondent. The State moved to dismiss the application with prejudice.

Following review of the arguments and testimony of Applicant presented at the hearing and all other evidence, this Court finds Applicant has failed to establish any sufficient reason why he could not have raised his allegations in his previous application for post-conviction relief

[1] Applicant captioned his filings as Motions for a New Trial, pursuant to Rule 29. In the first filing he also filed a motion to amend his PCR application and in his second filing he included the Order of the Court that authorized Applicant to file amendments to his post-conviction relief application. The filings also included the civil post-conviction relief case number and not the General Sessions number. Because at the time Applicant filed these documents he was *pro se*, the Court interprets these filings as amendments to the PCR application.

PROCEDURAL HISTORY

Applicant is currently incarcerated in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was indicted at May 2003 term of the Lexington County Grand Jury for criminal conspiracy (2003-GS-32-1942); attempted armed robbery with a deadly weapon (2003-GS-32-1943); burglary, first degree (2003-GS-32-1944); and kidnapping (2003-GS-32-1946); and during the August 2003 term for murder (2003-GS-32-3348). He was represented by Robert T. Williams, Esquire, on the charges. On January 16, 2004, Applicant proceeded to jury trial before the Honorable Marc H. Westbrook at which he was convicted of all charges. Applicant was sentenced to life imprisonment for murder and burglary, thirty (30) years' imprisonment for kidnapping, twenty (20) years' imprisonment for attempted armed robbery, and five (5) years' imprisonment for criminal conspiracy.

A timely Notice of Appeal was filed and an appeal was perfected. In a written opinion, the South Carolina Court of Appeals vacated Applicant's kidnapping conviction, but affirmed the remaining convictions and sentences. State v. Henry, Op. No. 2006-UP-058 (S.C. Ct. App. filed February 8, 2006). The Remittitur was issued on February 13, 2006.

First PCR Application: 2007-CP-32-0329

Applicant filed his first application for Post-Conviction Relief on January 29, 2007 (2007-CP-32-0329). Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
2. Lack of subject matter jurisdiction; and
3. Denial of due process.

Respondent made its Return on June 4, 2007, and an evidentiary hearing was convened into the matter on December 1, 2009, at the Lexington County Courthouse. Applicant was

present and represented by counsel, Charles T. Brook, III, Esquire. At the hearing, Applicant testified on his own behalf. Also testifying was Robert 'Theo' Williams, Esquire, Applicant's trial attorney. By order dated April 19, 2010, and filed April 21, 2010, the Honorable Michael G. Nettles denied and dismissed the application with prejudice.

Applicant filed a Notice of Appeal following the entry of the order denying his PCR. On November 29, 2010, Robert Pachak, Esquire, of the South Carolina Office of Indigent Defense filed a Petition for Writ of Certiorari on Applicant's behalf pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Applicant followed the petition with a *pro se* submission received January 13, 2011, by Respondent. In a written order filed May 8, 2013, the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari following a careful consideration of the entire record. The Remittitur was issued on May 30, 2013.

Second PCR Application: 2011-CP-32-1605

In his second application for post-conviction relief, filed April 25, 2011,[2] Applicant alleged he was being held in custody unlawfully for the following reasons:

4. Ineffective Assistance of Appellate Counsel.
5. Insufficiency of the Indictment.

The State made its Return and Motion to Dismiss on or about February 1, 2012, requesting that the application be dismissed. Pursuant to this request, the Honorable R. Knox McMahon issued a Conditional Order of Dismissal, dated February 2, 2012, provisionally denying and dismissing the application, while giving the Applicant twenty (20) days in which to show why the dismissal should not be final. Applicant failed to respond to the Conditional Order

[2] Applicant filed his second PCR application while the appeal on his first PCR application was still pending.

of Dismissal, and Judge McMahon issued a Final Order dated June 29, 2012, and filed July 3, 2012, denying and dismissing the application with prejudice. Applicant did not appeal.

Current PCR Application

In his *third* and current application for post-conviction relief, filed May 29, 2012,[3] Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Insufficiency of indictment;
2. Ineffective assistance of appellate counsel; and
3. Perjury and prosecutorial misconduct.

Applicant subsequently filed an amendment to his PCR application, captioned "Motion to Amend the Original Post-Conviction Application Pursuant to SCRCP Rule 15(A)," in which he alleged no additional grounds for relief, but instead – via a form of motion – "requests this Court grant a writ of mandamus, and issue an order specifically directing the lower Court to allow entry of belated objections, to hold invalid the unlawful grand jury process, and to squash the State's null indictment." Applicant appears to base this request on the allegation that his indictment was the product perjury, as well as a criminal conspiracy to cover up said perjury.[4]

On January of 2016, Applicant filed a Motion to Amend his application and include a filing that was captioned as a motion for a new trial pursuant to Rule 29. In that filing, which is treated as an amendment to his application, Applicant made the following allegation:

> Actual Innocence based on "after-discovered evidence that the Solicitor's Office failed to disclose it gave favorable treatment to the testifying codefendant Quincy McCoy."

After a hearing was held on May 13, 2016, the Court authorized amendments by Applicant in an order dated June 16, 2016. Applicant filed another filing captioned "motion for a

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[4] Applicant appears to concede, however, that such an allegation does not give rise to a claim that subject matter jurisdiction was lacking.

new trial, pursuant to Rule 29," which is also treated as an amendment and that made the same allegation of actual innocence based on after-discovered evidence.

In an order dated November 18, 2016, Judge William P. Keesley appointed Arthur K. Aiken, Esquire, to represent Applicant. On November 26, 2017, Applicant, through appointed counsel, amended his application to include the following ground:

> Willful violations of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) and other South Carolina and federal cases governing mandatory disclosure by the prosecution in criminal cases.

In his supporting facts, Applicant amended his application to include the following:

> Before his trial, Henry made two specific discovery requests requesting evidence of any favorable consideration being given to the State's star witness, Quincy McCoy. The State denied that it was giving McCoy any favorable consideration because of his cooperation. At trial, the State even had McCoy testify that he was being given no favorable consideration by the State.
>
> Years later, Henry obtained the transcript of McCoy's guilty plea and the transcript of McCoy's PCR hearing. These transcripts provide evidence that contrary to the State's denial in discovery and contrary to the testimony of McCoy that was offered by the State at trial, McCoy was given favorable consideration by the State in exchange for his cooperation. Henry's conviction and sentence are unlawful because they were procured in violation of the United States Constitution and the South Carolina Constitution.

Before the Court are the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the Department of Corrections, Applicant's current PCR application and amendments, the records from Applicant's relevant previous PCR action, and the relevant portions of the record from PCR action of Applicant's co-defendant Quincy McCoy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2014) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

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

Applicant could have raised each of the grounds for relief alleged in this application in his direct appeal or his prior post-conviction relief application. Applicant has failed to present

any reasons why he could not have raised the current allegations in his previous appeal and post-conviction relief applications. Therefore, this application is barred as successive.

Statute of Limitations

The Court also finds that the application for post-conviction relief must be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code §17-27-10 to –160 (2014). S.C. Code Section 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.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Moreover, ignorance of the statute of limitations for filing a petition for post-conviction relief is not an excuse for late filing. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005). Applicant was convicted of the offenses he challenges January 16, 2004, and following his appeal the Remittitur was issued on February 13, 2006. Applicant was therefore required to file his application on or before February 13, 2007. This Application was filed on May 29, 2012, which was over six years after the statutory filing period had expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon, 363 S.C. 432, 611 S.E.2d 494. In addition, this Court is authorized to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." § 17-27-70(c). Therefore, because Applicant failed to file within the time mandated by the Post-Conviction Procedure Act, Applicant's post-

conviction relief application must be summarily dismissed.

Newly Discovered Evidence

Applicant alleges a claim of newly discovered evidence. However, Applicant fails to make a prima facie showing that evidence would likely result in his guilty plea being vacated.

Generally, an applicant may raise a newly discovered evidence claim within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained. S.C. Code Ann. § 17-27-45(c) (2014). A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005).

Applicant's newly discovered evidence claim does not sufficiently or clearly present a "rare case" requiring a vacation in the interest of justice. Applicant claims Quincy McCoy testified at Applicant's January 16, 2004, trial that he had no deals with the State. Applicant submits portions of his trial transcript showing where McCoy is questioned about whether he can get 15 years to life on one of the charges he has already pleaded guilty to and where McCoy says he has no deals with the State and wishes he did. However, the trial transcript also shows Applicant's counsel cross examined McCoy on his potential bias by pointing out McCoy's murder charge was reduced to voluntary manslaughter.

Applicant then submits portions of a sentencing transcript for Mr. McCoy from several months ***after*** Applicant's trial, dated April 6, 2004, and claims the transcript shows there was a pre-existing deal that affected McCoy's testimony and should have been presented to the jury.

However, the transcript portion submitted to the Court clearly outlines where the solicitor says "his deal was this and this only: fifteen years to life, whatever your honor sees fit. . . . There are no recommendations from the state as to what you should give him. I did tell Mr. McCoy and his attorney that I would detail his cooperation with the state." (McCoy's PCR Appendix p. 49, lines 13-18.) Later, the solicitor informed the sentencing court he was present when McCoy discussed pleading guilty with his plea counsel, and neither he nor McCoy's plea counsel told McCoy he would receive a lesser sentence of only fifteen to thirty years' for his plea. (McCoy's PCR Appendix, p. 56, lines 3-22.)

Further, at McCoy's PCR evidentiary hearing, McCoy's plea counsel testified to the following:

> Well, there wasn't any technical offer on the table. The offer was we'll give you some assistance on the back end plead in front of one judge, whoever that was going to be. And I have no control over that, but whoever the trial judge was going to be we were going to be sentenced in front of. Quincy was going to testify, co-operate with them *in hopes* of getting some kind of leniency.

(McCoy's PCR Appendix, p. 124, lines 6-13 (emphasis added).) Trial counsel went on to testify the State never offered McCoy fifteen years and he only advised McCoy of the possible sentence range of fifteen years to life imprisonment. (McCoy's PCR Appendix, p. 125, lines 11-22.) Counsel also testified McCoy was sentenced outside the expected range of sentencing and received more time than counsel expected because McCoy attempted to "manufacture a PCR at the sentencing and therefore Westbrook punished him." (McCoy's PCR Appendix, p. 130, lines 1-3.)

In considering the substance of Applicant's "newly discovered" evidence, the supporting documentation from the plea, sentence and PCR evidentiary hearing of Applicant's co-defendant do not establish a claim requiring vacation of his conviction or sentence or requiring an

evidentiary hearing. The record containing the testimony of McCoy's counsel, as well as McCoy's transcript of his guilty plea, reflects McCoy was promised no sentence range in exchange for his testimony against Applicant. McCoy pled because he *hoped* to obtain the benefit of favorable consideration, but the State made no promises. Moreover, Applicant cannot show he was prejudiced by a failure to disclose favorable treatment because his trial counsel in fact pointed out McCoy's possible bias before the jury during Applicant's trial.

Applicant failed to set forth how the alleged newly discovered evidence's weight and quality require his conviction and sentence to be vacated in the interest of justice. Further, the supporting testimony was available to Applicant at the time of McCoy's PCR evidentiary hearing, which was held in June of 2006. Applicant filed his first PCR application six months later on January 29, 2007, and failed to raise this ground at the time. Indeed, Applicant waited five more years to allege "prosecutorial misconduct," or a Brady violation, in his amended successive application of 2012. Applicant cannot show that within one year of when, by the exercise of due diligence, such evidence could have been ascertained, he diligently pursued his claim. Applicant is not entitled to pursue this meritless and untimely claim in a successive action.

CONCLUSION

Good cause having been shown, the State's motion to dismiss the application for post-conviction relief should be and is therefore granted, and the application is dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his PCR attorney must serve and file a notice of appeal on Applicant's behalf. Applicant

and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. *Austin v. State*, 305 S.C. 453, 454-55, 409 S.E.2d 395, 396 (1991).

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 6 day of September, 2018.

J. DERHAM COLE
Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF **LEXINGTON**
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. **2012-CP-32-02180**

John **HENRY**, SCDCID #299199
Applicant,

The **STATE** of South Carolina,
Respondent,

FILED
2020 MAY 20 PM 2:18
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other - see formal order denying PCR.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☐ See formal order to follow; ☒ Statement of Judgment by the Court:

This matter originally came before this court for hearing on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-20*. The matter was heard and an order issued denying the request for post-conviction relief. The applicant filed a motion pursuant to Rule 59(e), SCRCP, to "alter or amend and for reconsideration" of the judgment entered by the Court.

Applicant contends in his motion that the Court failed to "explicitly rule on" his argument that there existed a genuine issue of material fact and therefore a further evidentiary hearing should be held.

Having considered the matter carefully, this Court finds that its Order complies with S. C. Code Ann. Section 17-27-80 and Rule 52(a), SCRCP, and finds there is no reason to alter or amend its previous ruling in this matter. To the extent that further clarification is needed this Court finds that based upon the record of this case, memoranda, and submissions, there is no "genuine" issue as to material fact and the application should be dismissed as a matter of law.

The applicant's **MOTION** pursuant to Rule 59, SCRCP, should be and **IS** therefore **DENIED**.

Dated at Spartanburg, South Carolina, this **14TH** day of **May, 2020**.

J. Derham Cole, Presiding Judge

This judgment was entered on the 20 day of May, **2020**, and a copy mailed first class this 20 day of May, **2020** to attorneys of record or to parties (when appearing pro se) as follows:

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LISA M. COMER, CLERK OF COURT (mh)

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