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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
CERTIORARI TO THE COURT OF APPEALS

The Honorable J. Derham Cole, Trial Judge
The Honorable J. Derham Cole, DNA Court Judge
The Honorable Robin B. Stillwell, PCR Judge

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Appellate Case No. 2020-000329

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JOHN WILLIE MACK, SR. ..... Petitioner,

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

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# BRIEF OF RESPONDENT

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### Petitioner's Statement of Issue on Certiorari

The Court of Appeals erred in affirming the Post-Conviction Relief (hereafter "PCR") court's dismissal of Petitioner's application for a belated appeal from the denial of his application for DNA testing where Petitioner did state a cognizable claim under the PCR Act, where the PCR application was not successive, where Petitioner complied with the statute of limitations in filing the application, and where this was the only avenue for Petitioner to obtain review of the DNA court's decision after DNA counsel failed to file an appeal.

### Respondent's Counterstatement of Issue on Certiorari

Did the Court of Appeals properly affirm the PCR court's dismissal of Petitioner's post-conviction relief application stemming from counsel's performance following the denial of his application for DNA testing pursuant to the Access to Justice Post–Conviction DNA Testing Act (S.C. Code Ann. §17-28-10 et seq.) because the DNA Act expressly forbids the institution of a PCR action based on the performance of DNA counsel, Petitioner did not state a cognizable claim under the Uniform Post-Conviction Procedure Act, Petitioner has other avenues to seek adequate relief, and Petitioner's claim fails on the merits?

## STATEMENT OF THE CASE

### *Trial Level Proceedings*

John Willie Mack, Sr. (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its April 2006 term, the Spartanburg County Grand Jury indicted Petitioner for first degree burglary (2006-GS-42-1167) and grand larceny (2006-GS-42-1166). (App. 364-67).

Three blood samples were left at the scene of the burglary. (App. 94-95). In 2006, a forensic DNA analyst determined the three samples of blood were all from the same unknown individual. (App. 94-95). Respondent obtained a confirmatory buccal swab from Petitioner in April 2009 that was sent to SLED for comparison. (App. 66; Supp. App. 3-10). SLED issued a report on October 29, 2009, identifying the sample from the scene and Petitioner's sample as a match. (App. 107, 318). The likelihood of having the same DNA profile matching was one in 1.3 quadrillion individuals. (App. 106).

After the match was made, the SLED requested confirmation, which resulted in a hearing on September 12, 2008, before the Honorable Clifton Newman. (App. 231, 254, 309-311). At the hearing, he was represented by William McPherson, Esquire. (App. 231, 254, 309-311). Mr. McPherson objected to giving a Buccal swab and Judge Newman ordered that Petitioner provide one. (App. 231). Thereafter, SLED released discovery reports confirming Petitioner was a match. (App. 231-32).

On February 22-23, 2011, the case proceeded to trial before the Honorable J. Derham Cole. (App. 1). Petitioner was represented by J. Roger Poole, Esquire. (App. 1). Seventh Circuit Solicitor Barry J. Barnette and Assistant Solicitor Anthony C. Leibert prosecuted the case. (App.

1). At trial, both the victim and her landlord testified that they did not know Petitioner and did not give him permission to enter the house. (App. 52, 113). Additionally, victim testified that the value of the stolen items was approximately $1700. (App. 48-51).

On February 23, 2011, the jury convicted Petitioner as indicted. (App. 157). Judge Cole sentenced Petitioner to life imprisonment without possibility of parole for first degree burglary and a concurrent term of five years' imprisonment for grand larceny. (App. 168).

Petitioner timely filed a notice of appeal, which was perfected by Appellate Defender LaNelle Cantley DuRant of the South Carolina Commission on Indigent Defense-Office of Appellate Defense (App. 355). On April 17, 2013, The South Carolina Court of Appeals affirmed Petitioner's convictions. *State v. Mack*, 2013-UP-161 (S.C. Ct. App. Dated April 17, 2013). The remittitur was returned to the circuit court on May 7, 2013. (App. 254).

***DNA Retesting Application Proceedings***

On September 27, 2012, Petitioner filed a *pro se* application for DNA retesting under the Access to Justice Post-Conviction DNA Testing Act. (App. 254). The hearing was held on October 31, 2014, before the Honorable J. Derham Cole. (App. 299). Petitioner was represented by Leah Moody, Esquire (hereafter "DNA Counsel"). (App. 299). The State was represented by Solicitor Barnette and Assistant Solicitor Leibert. (App. 299). At the hearing, Petitioner requested the actual items tested because photographs of the items were destroyed and the only evidence Petitioner had regarding the items tested at trial was testimony from State witnesses. (App. 304-07). Further, he wanted retesting because he maintained his innocence. (App. 305-06). The application was denied by order dated May 18, 2015, and filed on May 19, 2015. (App. 317-20). In the order, Judge Cole stated that the items Petitioner requested testing of were previously tested and further testing would not provide a more probative result. (App. 320).

Petitioner filed a notice of appeal which was dismissed by the South Carolina Court of appeals as untimely. *Mack v. State*, S.C. Sup. Ct. Order (filed July 16, 2015). The remittitur was issued on August 4, 2015. (App. 356).

***First PCR Action: (2013-CP-42-02063)***

Petitioner timely filed his first PCR application (2013-CP-42-02063), on May 6, 2013, alleging:

1. Ineffective Assistance of Counsel, in that:
    a. Counsel failed to object to the amendment of the indictment;
    b. Counsel failed to object to the admission of evidence when the State failed to produce tangible items of pictures of items swabbed;
    c. Counsel failed to object to Applicant's prior criminal history being presented to the jury;
    d. Counsel failed to thoroughly and properly examine a crucial prosecution witness to address her perjury; and
    e. Counsel failed to file a motion for a speedy trial.

2. Trial court error, in that the trial judge improperly stated that only one aggravating circumstance had to be proven.

3. Misconduct of the Solicitor's office and law enforcement with regards to DNA evidence, *Brady* violation because the State did not turn over the blood evidence.

    (App. 181-86).

Respondent made its return on March 18, 2014. (App. 187-92). The evidentiary hearing occurred on January 14, 2015, before the Honorable Deadra L. Jefferson. (App. 193). Leah B. Moody, Esquire, was the Petitioner's attorney. (App. 293). Assistant Attorney General Suzanne H. White of the South Carolina Attorney General's Office represented Respondent. (App. 193). Judge Jefferson denied and dismissed this application by written order, filed on April 10, 2015. (App. 253-81).

Petitioner appealed from this hearing. (App. 282-92). Deputy Chief Appellate Defender Wanda H. Carter of the South Carolina Commission on Indigent Defense-Office of Appellate

Defense, who filed a petition for writ of certiorari and petitioned to be relieved as counsel pursuant to *Johnson v. State*.[1] (App. 282-92). By order dated August 11, 2016, the Supreme Court of South Carolina denied counsel's petition to be relieved as counsel and directed parties to submit a petition and return. (App. 293).

At the PCR hearing, Petitioner's trial counsel, Roger Poole explained that Petitioner was initially matched to the blood at the house through a CODIS hit that was subsequently confirmed by buccal swab pursuant to a court order and over Petitioner's objection. (App. 231-32). He testified that he shared discovery and went over the blood evidence issue several times with Petitioner. (App. 232, 236). Trial counsel identified the DNA match as the biggest obstacle at trial and stated he did not pursue independent expert testing of the bloodwork because he thought it would only confirm SLED's findings. (App. 236-37). Trial counsel did not see flaws or ways of challenging SLED's findings. (App. 237-39).

Additionally, Petitioner argued at the PCR hearing that the blood swabs should be retested because he was actually innocent. (App. 305-06). Deputy Solicitor Barry Barnette also argued on behalf of the State that the evidence was already tested and that it would be impossible to go back now and obtain the actual items from which the samples were taken. (App. 306-07, 312). He also stated that the method of DNA testing has not changed since the original testing. (App. 308).

[1] 294 S.C. 310, 364 S.E.2d 201 (1988).

***Second PCR Action: (2015-CP-42-03806)***

On September 10, 2015, Petitioner filed his second PCR application (2015-CP-42-03806), alleging:

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

(App. 328).

Respondent filed a return and motion to dismiss on March 23, 2017, as untimely, successive, and for failure to state a cognizable claim. (App. 333-39). A hearing on the motion to dismiss occurred on June 29, 2017, before the Honorable Robin B. Stilwell. (App. 341). Petitioner was represented by Rodney Richey, Esquire. (App. 341). Respondent was represented by Valarie Giovanoli, Esquire. (App. 341). Judge Stilwell denied and dismissed the application with prejudice by written order as untimely, successive, and for failure to state a claim, filed on July 7, 2017. (App. 354-61). Petitioner, through PCR Counsel, filed an appeal from this order, along with an explanation stating that this application was filed as the only means to appellate review of the order issued by the DNA court. (App. 362-63).

Appellate Defender Durant filed a petition for writ of certiorari on March 16, 2018, alleging that the PCR court erred in denying a belated appeal because this was Petitioner's only avenue for a DNA appeal. Responded filed its return on July 12, 2018. This case was transferred to the South Carolina Court of Appeals on July 25, 2019, and certiorari was granted on March 6, 2019. Briefing by both parties was completed in August 2019. The Court of Appeals affirmed the second PCR Court's decision in an unpublished decision on December 18, 2019. *State v. Mack*, 2019-UP-386 (S.C. Ct. App. Dated December 18, 2019). Petitioner petitioned for

rehearing on December 20, 2019. (App. III. 3). The South Carolina Court of Appeals denied the petition for rehearing on January 23, 2020. (App. III. 10). The petition for writ of certiorari was submitted on March 3, 2020 and the return to petition submitted on April 14, 2020. The brief of petitioner was submitted September 18, 2020. This brief of respondent follows.

## STATEMENT OF FACTS

Sometime between September 1, 2005, and September 6, 2005, Petitioner broke into LaRhonda Moss' home and stole her television, computer, CD charger, and jewelry. (App. 48-51).

After a long Labor Day weekend, Moss returned to her home and immediately realized someone broke into her house through her bedroom window. (App. 47, 56, 60, 76). Petitioner's blood was found in three places in Moss' house: (1) on the entertainment center where Moss' television was stolen; (2) on the light switch near the window in the bedroom where Petitioner broke into the house; and (3) on the bookshelf in the hallway. (App. 53, 61-62). Moss testified that the blood found in her house was not in her house prior to September 2005. (App. 115). Investigator John Burgess took swabs of the blood found in all three sites and sent it to SLED for DNA testing. (App. 61-64).

In 2006, Manuel John Ortuna, a forensic DNA analyst from SLED, examined DNA from the three blood swabs taken from Moss' house and determined that the DNA belonged to the same unknown individual. (App. 94-95). Investigator Burgess, through investigation, ultimately developed Petitioner as a suspect and, over Petitioner's protests, the State obtained a buccal swab from Petitioner on April 1, 2009, and sent it for testing. (App. 66; App. II. 3-10). On October 29, 2009, Ortuno compared the DNA from the blood swabs from Moss' house to the DNA from Petitioner's buccal swabs. (App. 96). Ortuno concluded that the DNA samples collected from Moss' house originated from Petitioner. (App. 107). Further, Ortuno testified that the probability of randomly selecting an unrelated individual having the same DNA profile matching the DNA found in Moss' house was approximately one in 1.3 quadrillion individuals. (App. 106).

At trial, both Moss and Max Ballard, Moss' landlord, testified that they did not know

Petitioner, and they did not give Petitioner consent to enter Moss' house. (App. 52, 113). Additionally, Moss testified regarding the value of the property stolen from her house. (App. 48-51). She testified she paid approximately $200 for her television, $900 for her computer, and approximately $600 for her jewelry.

Roger Poole, Esquire, Petitioner's trial counsel, addressed his treatment of the blood and DNA evidence during the first PCR action. Poole explained how Petitioner was initially matched to the blood at the house through a CODIS hit, which was subsequently confirmed by a buccal swab of Petitioner pursuant to a court order over Petitioner's objections. (App. 231). The swab confirmed the CODIS match. (App. 231-32). Poole shared the discovery with Petitioner and went over the issue of the blood evidence "several times." (App. 232, 236). Poole identified the DNA match as the single biggest issue at trial, and explained he did not pursue independent expert testing of the blood evidence out of concern the testing would only further confirm SLED's findings. (App. 236-37). Poole perceived no flaws or means of challenging SLED's findings. (App. 237-39).

At the hearing on the application for post-conviction DNA testing, Petitioner argued the actual swabs of blood from the scene should be re-tested because he was actually innocent. (App. 305-06). The State testified the evidence was already tested, as testified to at trial, and that "to go back and get the actual items [from which the swabs were taken] would be impossible from this standpoint. Obviously, it was years ago." (App. 306-07, 312). The State further noted that the method of testing DNA had not changed since the original testing. (App. 308).

## STANDARD OF REVIEW

The PCR court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

**The Court of Appeals properly affirmed the PCR court's dismissal of Petitioner's post-conviction relief application stemming from counsel's performance following the denial of his application for DNA testing pursuant to the Access to Justice Post–Conviction DNA Testing Act (S.C. Code Ann. §17-28-10 et seq.) because the DNA Act expressly forbids the institution of a PCR action based on the performance of DNA counsel, Petitioner did not state a cognizable claim under the Uniform Post-Conviction Procedure Act, Petitioner has other avenues to seek adequate relief, and Petitioner's claim fails on the merits.**

Petitioner argues the Court of Appeals erred in affirming the PCR court's dismissal of Petitioner's PCR application challenging Counsel's performance in failing to file an appeal from the denial of his DNA application pursuant to the Access to Justice Post–Conviction DNA Testing Act (hereafter "DNA Act"), Section 17-28-10 et seq.. Specifically, Petitioner argues the PCR court improperly dismissed his application because he raised a cognizable claim for PCR, complied with the statute of limitations[2], his application was not successive[3], and this was the only avenue for him to seek review of the DNA court's decision after DNA counsel failed to file an appeal. However, the PCR court properly rejected this argument, finding the DNA Act expressly forbids the challenge of the performance of DNA counsel through a PCR action. The Court of Appeals properly affirmed the PCR court's dismissal. Thus, this court should affirm the holding of the lower court and deny post-conviction relief.

### a. The PCR court properly dismissed the application because the legislature has made clear that post-conviction relief actions challenging the performance of DNA counsel are prohibited under both the "Access to Justice Post-Conviction DNA Testing Act" and applicable case law.

The PCR court properly dismissed Petitioner's application because the legislature has made clear that PCR cases concerning ineffective assistance of DNA counsel claims are plainly

[2] Respondent concedes that this case should not be dismissed on the grounds of statute of limitations, because this allegation could not be litigated within a year of the trial.
[3] Respondent concedes that this case should not be dismissed on the grounds of successiveness, because this allegation could not be addressed in the first PCR application.

prohibited under the "Access to Justice Post-Conviction DNA Testing Act." Section 17-28-30(A)(15) of the DNA Act permits a person charged and convicted of "burglary in the first degree for which the person is sentenced to ten years or more", "who pled not guilty . . . was subsequently convicted . . . is currently incarcerated for the offense, and asserts he is innocent of the offense" to "apply for forensic DNA testing of his DNA and any physical evidence of biological material related to his conviction." S.C. Code Ann. § 1 7-28-30(A)(15). A hearing must be conducted regarding the application and, if the applicant is successful, the court shall order testing of the physical evidence or biological material. S.C. Code Ann. § 17-28-90(B).

Full disclosure of the DNA test results to the court is required and, if the results are exculpatory, the applicant can use the exculpatory results as grounds for moving for a new trial. S.C. Code Ann. § 17-28-100(A) & (B). Otherwise, the motion will be dismissed, unless the court decides to allow for additional testing upon receipt of inconclusive results. S.C. Code Ann. § 17-28-100(B). Both the applicant and either the solicitor or Attorney General "have the right to appeal a final order denying or granting DNA testing by writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules." S.C. Code Ann. § 17-28-90(G).

If the applicant cannot afford counsel to represent him at the hearing, one will be appointed for him, upon request, when the application is filed. S.C. Code Ann. § 17-28-60. PCR Counsel, if a PCR action is pending, will serve as DNA Counsel. S.C. Code Ann. § 17-28-60. However, "performance of counsel pursuant to this article *shall not form the basis for relief in any post-conviction relief proceeding*." S.C. Code Ann. § 17-28-60 (emphasis added).

In South Carolina, the "plain meaning rule" is used in statutory construction. In fact, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite

meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* Further, Courts are required to enforce the expressed intent of the legislature. *Id.* (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). Courts generally do not look beyond the plain meaning of the statute unless it would lead to absurd or futile results. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

Looking at the plain and unambiguous language in the DNA Act, it is clear that the legislature intended to prohibit PCR actions challenging the performance of DNA counsel. Though belated appellate review is sometimes permissible under *Austin v. State*[4], barring PCR actions taken against DNA Counsel does not produce an absurd or futile result and, consequently, does not render the plain meaning rule inapplicable when engaging in statutory construction. Rather, this interpretation barring PCR actions against DNA Counsel remains consistent with the Supreme Court's finding that "[t]here is no constitutional right to an attorney in state post-conviction proceedings" *Coleman v. Thompson*, 501 U.S. 722 (1991) (citing *Pennsylvania v. Finlev*, 481 U.S. 551 (1987); *Murray v. Girratano*, 492 U.S. 1 (1989)), and where there is no constitutional right to counsel there is no deprivation of effective assistance of counsel. *See Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

In *Austin v. State,* this Court acknowledged and circumvented the absence of the constitutional right to PCR counsel by observing the Court's extension of *Anders*[5] procedures to

[4] 305 S.C. 453, 409 S.E.2d 395 (1991) (setting forth the procedure for belated appellate review of a PCR action if PCR counsel neglects or otherwise fails to file an appeal).

[5] *Anders v. California*, 386 U.S. 738 (1967).

PCR matters, and the right under the then-Rule 50(6) to obtain appointment of counsel for appellate review from an adverse PCR ruling. 305 S.C. at 454, 409 S.E.2d 396 (citing *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988)); *see also* Rule 243, SCACR (evidently replacing old Rule 227, SCACR), Appendix A, SCACR (Rule 227, SCACR, supplanted Sup.Ct. Rule 50); Rule 71.1(g), SCRCP (providing for continuing representation of appointed PCR counsel on appeal unless automatically relieved under Rule 602, SCACR, or permitted to withdraw).

Further, though State law requires counsel be appointed when an applicant seeks appellate review from an unfavorable PCR holding, this right has never been extended to appeals from DNA Act hearings based upon ineffective assistance of counsel. Additionally, Section 17-28-60 explicitly states that you cannot file a PCR action against DNA Counsel, which is what Petitioner attempted to do here. Thus, Petitioner is explicitly barred from bringing a PCR action against DNA Counsel, based upon the plain meaning of the applicable statute.

**b. The Uniform Post-Conviction Procedure Act remains inapplicable in post-conviction DNA testing applications, because the applications do not challenge the validity of a conviction or sentence.**

Even if this Court finds that the DNA act did not unambiguously close off the possibility of challenging DNA Act counsel in a PCR context, PCR would still not be the appropriate avenue for relief. According to the Uniform Post-Conviction Procedure Act[6] (hereafter "PCR Act"), an applicant may commence a PCR action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and

[6] S.C. Code Ann. §17-27-10 to -160.

heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy….

S.C. Code Ann. § 17-27-20(A).

This Court has not extended the PCR Act for judgements rendered pursuant to unrelated statutes, nor to issues of solitary confinement, downgrading custody status, credits-related issues, and other conditions of imprisonment. *See Al-Shabazz v. State*, 338 S.C. 354, 368-69, 527 S.E.2d 742, 749-50 (2000) (holding that credits-related issues and other conditions of imprisonment are not properly raised in PCR proceedings); *Lance v. State*, 279 S.C. 144, 303 S.E.2d 100 (1983) (finding that the PCR act did not apply to adjudications under the Habitual Offender Act because the adjudication results in a sentence, not a conviction); *Tutt v. State*, 277 S.C. 525, 526, 290 S.E.2d 414, 415 (1982) ("[t]he provisions of the [PCR Act] may be invoked only by someone who is claiming the right to have a sentence vacated, set aside or corrected."); *Crowe v. Leeke*, 273 S.C. 763, 764, 259 S.E.2d 614, 615 (1979) (finding that allegations of constitutional rights violations consequent to transferring within the prison system and downgrading appellant's custody status were not properly raised in a PCR context).

Here, Petitioner's claim is not related to an act resulting in a sentence from a criminal conviction but, rather, an act that grants or denies DNA testing that may be used in a motion for a new trial. Thus, in keeping with past precedent, this court should find that the PCR Act is not an appropriate mechanism through which to review proceedings under the DNA Act. Consequently, Petitioner fails to state a cognizable claim upon which relief can be granted

because it does not challenge the validity of the conviction or sentence imposed.

**c. Petitioner remains entitled to other avenues of relief outside of post-conviction relief, allowing him to more properly address DNA Counsel's alleged error when handling the application under the DNA Act.**

Though Petitioner cannot appropriately raise his claims in PCR court, other avenues to seek relief through remain available to him; specifically, the option of raising this claim through a petition for original jurisdiction under Rule 245, SCACR, or a habeas action. "Before the adoption of the PCR Act, inmates often pursued post-appeal claims by petitioning the court for a writ of habeas corpus or other remedial writ." *Al-Shabazz*, 338 S.C. at 365, 527 S.E.2d at 747-48. However, the PCR Act now "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of a conviction or sentence." *Id.* (citing S.C. Code Ann. § 17–27–20(b) (1985); *Finklea v. State*, 273 S.C. 157, 255 S.E.2d 447 (1979) (the aim of PCR Act is to consolidate in one simple statute all the remedies presently available for challenging the validity of a sentence of imprisonment)). The Supreme Court maintains authority to "issue extraordinary writs and entertain actions in its original jurisdiction" when there is "an extraordinary reason such as a question of significant public interest or an emergency." *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991). Additionally, the Court have retained their ability to consider habeas petitions in its original jurisdiction and grant relief in those unusual instances where 'there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Al-Shabazz*, 338 S.C. at 365, 527 S.E.2d at 748.

Again, Petitioner's claim does not challenge the validity of a sentence or conviction but, rather, concerns an act granting or denying DNA testing that may be used when moving for a new trial. Thus, Petitioner's claim is improperly brought in PCR court. Instead, a petition for

original jurisdiction under Rule 245 or a habeas petition is more proper in this instance, and both remain avenues available to Petitioner for relief through which Petitioner can assert his claims.

**d. Petitioner's claim awards him no relief on the merits, because the evidence he seeks testing of was already tested before trial.**

Lastly, Petitioner does not meet the conditions necessary to obtain post-conviction DNA testing and, thus, is entitled to no relief on the merits. To be entitled to post-conviction testing, Petitioner must show the evidence to be tested:

1. Is available;
2. Is in a condition making the requested testing permissible;
3. Has been in a chain of custody sufficient to establish it has not been tampered with, altered, substituted, or replaced;
4. Is material to the issue of applicant's identity, regarding both the DNA results and the evidence itself;
5. If exculpatory, would count as new evidence;
6. Was not previously subjected to DNA testing or, if tested, would produce a substantially more probative result; and
7. Is made to demonstrate innocence, not delay the execution of the sentence or administration of justice.

S.C. Code Ann. § 17-28-90(B).

Here, Petitioner fails to meet the conditions outlined above that would permit him to seek post-conviction testing. The incident in question occurred almost fifteen years ago, and, as was argued in prior hearings, the physical objects once containing the DNA samples are no longer available. (App. 307). Additionally, this evidence has already been tested and there is no indication that a retest would produce a "more probative result." (App. 320). *See* S.C. Code Ann. § 17-28-90(B)(6). Further, Petitioner has made no showing that a new test would be conducted through more accurate means than it already was, or would otherwise produce a different result. Instead, it would presumably be cumulative, which is expressly forbidden by the statute. S.C. Code Ann. § 17-28-90(B)(5). Additionally, further testing may even be counter-productive because DNA testing procedures have not changed since the last testing and, conversely, with

retesting, "risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample." *District Attorney's Office for the Third Judicial Dist. V. Osbourne*, 557 U.S. 52, 82 (2009) (Alito, J., concurring). Thus, because Petitioner fails to meet the conditions qualifying him for a retesting, he is not entitled to relief on the merits.

## CONCLUSION

For the reasons stated above, this court should affirm Court of Appeals' holding that the PCR Court's findings that Petitioner was not entitled to a belated appeal of the DNA court's findings through the Uniform Post-Conviction Procedure Act because Petitioner had other avenues for relief outside of PCR court and Petitioner argument failed on the merits.

Respectfully submitted,

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