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S.C. SUPREME COURT

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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FOR THE SIXTH JUDICIAL CIRCUIT |
| COUNTY OF FAIRFIELD ) | |
| ) | |
| Curtis Lee Elgin, #258179, ) | Case No.: 2012-CP-20-0232 |
| Applicant, ) | |
| ) | **ORDER OF DISMISSAL** |
| v. ) | |
| ) | |
| State of South Carolina, ) | |
| Respondent. ) | |

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 31, 2012. Respondent made its Return on January 23, 2013. After a lengthy discovery process, Applicant, through counsel, amended the application on January 22, 2019. An evidentiary hearing into the matter was convened on January 24, 2019, at the Lancaster County Courthouse before the undersigned. Elizabeth Franklin-Best, Esquire, and E. Charles Grose, Jr., Esquire, represented Applicant. Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

At the hearing, Applicant presented testimony from a private investigator, Pete Skidmore, Jr., and the Honorable Gwendlyne Y. Jones, Applicant's original trial counsel. Keith Lewis and Frazier Craig, the investigating officers from the Fairfield County Sherriff's Department,[1] testified for the State.

At the close of all the evidence, the Court indicated it would take this matter under advisement, and the parties requested the opportunity to submit post-trial briefs. After a review of the testimony and evidence presented at the hearing, along with the arguments of counsel, this

[1] At the time of the hearing, Mr. Lewis was no longer employed as a law enforcement officer, and instead worked as an investigator for the Sixth Circuit Solicitor's Office.

Court finds Applicant has failed to meet his burden of proof as to newly discovered evidence. Relief is denied, and the application is dismissed with prejudice.

## PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections. The Fairfield County Grand Jury indicted Applicant at the July 2005 term for murder (2005-GS-20-0273). Gwendlyne Young Smalls (now Jones) represented Applicant. Then-Assistant Solicitor Douglas Barfield prosecuted the case for the State.

Applicant's case was called for trial on January 6-9, 2009, before the Honorable Brooks P. Goldsmith and a jury. The jury found Applicant guilty as indicted. On July 9, 2009, Judge Goldsmith sentenced Applicant to fifty years' imprisonment. Applicant filed a motion for a new trial on July 16, 2009. A hearing was held on the motion before Judge Goldsmith on September 15, 2009, after which Judge Goldsmith denied the request by written order.

Applicant then filed a timely notice of appeal, which was perfected by then-Appellate Defender Elizabeth Franklin-Best, who now represents Applicant in this PCR action. Ms. Best raised a single issue in Applicant's brief: whether the trial court erred in denying Applicant's motion for a new trial on the basis that a juror allegedly improperly discussed the case with her mother. The Court of Appeals affirmed in a published opinion filed May 16, 2012. State v. Elgin, 398 S.C. 39, 726 S.E.2d 231 (Ct. App. 2012). The remittitur was issued June 1, 2012.

## SUMMARY OF TESTIMONY AT TRIAL

The victim in this case, Audre Belton (Belton), was shot to death in her home on or about February 8, 1993. Applicant was convicted of her murder on July 9, 2009.

Belton was last seen on February 8, 1993, her birthday, leaving her job. (R. p. 34, line 12-p. 35, line 23; p. 42, lines 2-11). Co-workers recalled she was wearing jeans, a yellow shirt, and

an army jacket. (R. p. 32, line 22- p. 33, line 5; p. 34, lines 1-6; p. 45, line 22 - p. 46, line 6). One week later, on February 15, 1993, Constance Gaither (Gaither), Belton's sister, stopped by Belton's home to check on her because she was concerned and had not heard from Belton. Belton's car was in the carport with workbag in the back seat. (R. p. 60, line 4 - p. 61, line 14). Gaither felt "like something wasn't right," so she left and returned with her husband before entering Belton's home with a key. (R. p. 62, line 24 - p. 63, line 23). Gaither and her husband eventually found Belton's body in the back bedroom, still clad in jeans and a yellow shirt. (R. p. 63, lines 6-21; p. 68, line 23 - p. 69, line 23; p. 84, lines 1-25). Belton's army jacket was found splashed with blood in a separate bedroom. (R. p. 34, lines 7-11; p. 179, line 17 - p. 180, line 19).

Gaither ran next door and called for help. (R. p. 70, lines 2-8). By the time Gaither discovered the body, Belton had already been dead "for several days." (R. p. 126, line 18 - p. 127, line 2). Gaither later determined Belton's purse was missing, and in fact, neither the purse, nor any of its presumed contents - such as a driver's license - was ever found. (R. p. 74, lines 20-25; p. 75, lines 16-18; p. 76, lines 16-23).

Initially, the evidence and leads in the case were slim. Investigation of the site revealed an outside screen to a window was on the ground, though there was no sign of actual forced entry (R. p. 144, line 7 - p.145, line 2); a lunch bag had been dropped in the kitchen (R. p. 145, lines 5-24); a .22 bullet, a bullet fragment, and bullet holes were located in the bedroom where the army jacket was found (R. p. 180, line 23 - p. 181, line 8); additional bullets holes were found near the attic access area in the hallway and another in the hallway (R. p. 169, line 21 - p. 180, line 18; p. 175, lines 1-11); there was blood on a light switch, an electrical outlet and an air vent near one of the bullet holes in the second bedroom (R. p. 177, lines 15-21; R. p. 188, line 4 - p. 189, line 17); there were "bloodstain patterns" on "the wall and doorframe, the door jamb

area" of the second bedroom and evidence of "dripping blood" on the baseboard (R. p. 189, line 23 - p. 190, line 8); the thermostat was set at 52 degrees (R. p. 175, lines 6-10); and, in the master bedroom where Belton was found, there were "drag marks" in blood indicating Belton "was drug from another location" (R. p. 192, lines 2-7). Also, one finger print and two palm prints suitable for evaluation were recovered; however, none matched Applicant or any of the other initial suspects or known samples. (R. p. 158, line 3 - p. 159, line 6). Footwear prints were also recovered but discounted as likely matching emergency personnel. (R. p. 162, line 13 - p. 163, line 22).

Approximately four months later, on June 16, 1993, an officer with the Winnsboro Police Department, happened upon a discarded gun near the Uniroyal plant in Winnsboro. (R. p. 235, lines 1-13). Golf Course Road, where Belton lived, is approximately a "five minute walk maybe, three minutes" from the area where the gun was found. (R. p. 238, lines 13-19). The gun was located near two dumpsters. (R. p. 239, lines 3-6). Aware of the ongoing murder investigation, (R. p. 236, lines 6-20), officers secured the weapon and turned it over to the Fairfield County Sherriff's Department. (R. p. 242, lines 2-7). SLED analyst David Black then took receipt of the gun from a Fairfield County officer on June 23, 1993. (R. p. 185, lines 4-7). Agent Collins determined the bullet fragment recovered from Belton's abdomen as well as one of the bullets recovered in the home were both fired by the .22 caliber gun recovered behind the Uniroyal plant. (R. p. 272, line 22 - p. 273, line 9; p. 328, lines 20-24; p. 337, lines 6-9 p. 334, line 16 - p. 335, line 9; p. 337, line 23 - p. 338, line 8).

SLED traced the gun to Kenneth Wayne Haney, Sr. and Kenneth Wayne Haney, Jr. The elder Mr. Haney purchased the gun for his son on January 20, 1989, from Jimmy Ray Douglas at Carolina Furniture. (R. p. 222, lines 6-22). His son returned the gun to Jimmy Ray Douglas

approximately six to eight months later on trade. (R. p. 227, line 10 - p. 228, line 13).

Jimmy Ray Douglas testified that he took over Carolina Furniture from his father, Harold Douglas. Harold Douglas (who was unavailable at trial due to Alzheimers), not only sold furniture, but also sold firearms at the store, rented houses, and ran a bail bond business. (R. p. 201, lines 3 - p. 202, line 6; p. 207, lines 12-16). Jimmy Ray Douglas testified Applicant was employed by Carolina Furniture around the time of the murder, assigned to stock work and deliveries. (R. p. 202, line 18- p. 203, line 6). Jimmy Ray Douglas confirmed his father purchased the .22 pistol on January 20, 1989. (R. p. 204, line 10 - p. 206, line 8). He also confirmed the pistol was taken back from the younger Haney on trade. (R. p. 206, line 15 - p. 207, line 3). Jimmy Ray Douglas testified he then gave the pistol to his father, Harold, who put the pistol in a cabinet in the office. (R. p. 207, lines 4-8).

According to Jimmy Ray Douglas, his father apparently took the gun at some point and put it in the glove compartment of his father's personal truck (which he also used in his bail bond business). (R. p. 207, line 17 - p. 208, line 13). Jimmy Ray testified no one had "missed" the gun "[b]ecause daddy lost the key to his glove box... So he just didn't think anything about it." (R. p. 209, lines 16-24). After investigators inquired about the gun, Jimmy Ray Douglas requested the glove box be opened and discovered that gun was not there. (R. p. 209, line 9 - p. 210, line 9). Jimmy Ray testified he did not recall who Belton was until he saw her picture in a newspaper, but Carolina Furniture sold her a kerosene heater sometime prior to her death. (R. p. 210, line 25 – p. 211, line 10).

The store did not, however, deliver kerosene heaters, and Jimmy Ray Douglas testified there were no store records that indicated any deliveries had been made to Belton's home. (R. p. 217, line 5 - p. 218, line 8). In fact, the address Belton gave as her residential address at the

time of the heater's purchase was different than the Golf Course Road address where her body was discovered. (R. p. 218, lines 13-15). Jimmy Ray Douglas recalled, however, that delivery personnel at the store definitely had access to his father's personal truck and would "dr[ive] daddy's truck around from the back to the front each night when we were closing up." (R. p. 219, line 24 - p. 220, line 8). He did not recall whether Applicant ever accompanied his father on any bail bonding business. (R. p. 212, lines 12- 16).

On July 14, 1993, approximately one month after discovery of the gun, as part of a general investigation running down any and all leads, officers stopped Applicant on the street close to Belton's home and asked to question him. Officers were aware the rifle had been recovered and that Applicant had worked at Carolina Furniture. (R. p. 488, line 21 - p. 489, line 11). Applicant agreed to speak with the officers and told them he did not know Belton but knew who she was. He told them "his girlfriend lived about five doors down from her and that he would see her from time to time as he would walk back and forth to the house." (R. p. 494, lines 7-19; R. p. 112, line 22 - p. 113, line 5). He stated he walked by every afternoon, but had never been inside Belton's home. (R. p. 496, lines 3-4). Applicant also told the officers he had delivered furniture to a house Belton had lived in previously. (R. p. 495, lines 12-21). When asked about the .22, Applicant told officers he saw the gun when he accompanied Harold Douglas to a home about a surety bond. (R. p. 497, lines 22-25). Applicant recalled Harold unlocked the glove compartment to retrieve the gun. (R. p. 498, lines 1-4). Applicant stated, though, that he did not know where the glove compartment key was kept. (R. 498, lines 10-11).

Several years passed before additional information was obtained. Then, a federal inmate, Raymond Barnes (Barnes), who was serving a sentence for drug charges was transferred to the Fairfield County Detention Center to provide information and leads on an unrelated case. (R. p.

357, lines 1-25; p. 365, lines 1-12; p. 398, line 1 - p. 399, line 25; p. 411, lines 23-25). Applicant was also in the Fairfield County Detention Center at that time on a charge unrelated to either the case Barnes was originally brought there for or for the Belton murder. Barnes testified at trial he knew nothing about Belton's murder or Applicant at the time he was transferred to Fairfield County. (R. p. 400, line 3 - p. 401, line 24). Barnes, Applicant, and another man named Lindsay Goins were housed together in a cell. (R. p. 403, lines 1-8). Barnes testified he contacted a local officer, Frazier Craig, about information Applicant had given him about the murder. (R. p. 403, lines 9-16).

Barnes testified that sometime around June 27, 1996, Applicant told him "he did it," and gave the following additional details: (1) the murder occurred in February; (2) "the body was discovered a week or two later;" (3) the victim was Audre Belton; (4) Belton "was light skinned with long pretty black hair... a beautiful lady;" (5) Belton "was shot with a .22 pistol;" (6) Applicant worked in a furniture store; (7) Applicant "talk[ed] about a family with the last name of Douglas;" (8) Applicant used a ".22 based on a .32 frame" that "he stole... out of the office at the furniture store;" (9) Applicant had taken the pistol from the store, "but they thought that Mr. Douglas had it in his truck and that somebody at the detention center had stole[n] it;" (10) the murder occurred inside Belton's home; (11) Applicant had a key to the house from a delivery of furniture; (12) Applicant went into the home to rob Belton, and Belton was not there when he first entered the home; (13) Applicant wore socks on his hands to prevent leaving fingerprints; (14) Belton returned, surprised him, and began "hollering;" (15) Applicant shot Belton multiple times, including in the groin area, in the back, and in the back of the head; (16) Applicant also left bullet holes in the walls; (17) the shooting occurred in two bedrooms in the home; (18) Applicant recalled shooting multiple times and becoming "upset because she wouldn't die" and

"that's when he shot her in the back of the head;" (19) Applicant "turned the thermometer up" and was concerned his fingerprint may have been on there; and (20) Applicant "said he [threw] the gun behind a dumpster up by the Uniroyal Tire Company." (R. p. 404, line 7 - p. 410, line 3; p. 424, line 22 - p. 426, line 5; p. 427, line 17- p. 429, line 1).

Barnes further testified Applicant had additional contact with Belton in that he had offered to cut her grass. (R. p. 437, lines 8-9). Applicant further stated to Barnes that he was in Belton's neighborhood because "[h]is cousin lived next door." (R. p. 437, lines 10-12). Barnes wore a wire and attempted to get the conversation(s) on tape; however, the tapes were inaudible. (R. p. 402, lines 8-25; p. 426, line 15 - p. 427, line 16; p. 516, line 10 - p. 517, line 2). Barnes testified the he had never before been to Winnsboro, or even heard of Winnsboro, and he had no relatives or friends there. (R. p. 410, lines 7-20). Further, Barnes, who was from North Carolina, received no assistance on his federal sentence, and he testified he was a "free man" at the time of trial. In fact, he had returned to North Carolina after his release from federal custody in 2002. (R. p. 396, lines 5-17; p. 397, lines 5-21; p. 410, line 21 - p. 411, line 22).

This information stayed in the case file until November 2004, when investigators reopened the case. (R. p. 555, line 22 - p. 556, line 25). Investigators discovered Lindsey Goins (Goins), the third cellmate, had never been interviewed. (R. p. 557, lines 6-9). By that time, Goins had been released and was living in New York State. After making initial contact by telephone, investigators flew to New York and obtained a statement from Goins in December 2004. (R. p. 558, line 15; p. 449, lines 7-18; p. 461 , lines 12-23). Goins testified at trial in 2009.

Goins testified he mostly overheard the conversations between Barnes and Applicant concerning the victim, but Applicant also told him directly that he killed a girl "that don't stay too far from [him]." (R. p. 441, line 8 - p. 442, line 6; p. 442, line 25 - p. 443, line 4). Goins was

from Winnsboro and had lived on Golf Course Road. (R. p. 442, lines 4- 17). According to Goins, Applicant told him the murder occurred in Belton's home, and Applicant said "something about a screen" when explaining how he had entered the home. Specifically, Goins heard Applicant tell Barnes that he "took the screen off the back window." (R. p. 443, lines 5-20; p. 444, lines 5-11). Goins further recalled Applicant told Barnes that "he had got in the house relative to steal some money or something." (R. p. 444, lines 1-4). According to what Goins heard, "[Applicant] was in the house going through the drawers and when she came in, she asked him what he was doing, she tried to run and he ran in the hall and caught her.... He said he shot her four or five times" with a .22 (R. p. 444, line 18 - p. 445, line 8; p. 445, lines 20-21). Goins also recalled Applicant stating that he used a ".22 on a .32 frame." (R. p. 446, lines 5-6). Goins heard Applicant tell Barnes he shot the victim in the "upper body and somewhere down in the lower torso area," and he also shot the wall twice. (R. p. 445, lines 13-19). He also overheard Applicant say he obtained the gun through his work at Harold Douglas' furniture company. (R. p. 446, line 7 - p. 447, line 19). Goins testified Applicant "stated that he went to the back of the house and threw [the gun] across the railroad tracks behind the Uniroyal near by a dumpster somewhere." (R. p. 448, lines 1-3).

Two other inmates, Robert Green and Virgil Pauling, who had previously given statements implicating Applicant also testified at trial. However, both Green and Pauling disavowed their previous statements on the witness stand during trial and claimed not to know who killed Belton. (R. p. 470, line 9 - p. 471, line 18; p. 474, line 2); (R. p. 528, line 4-p. 529, line 4; p. 530). However, Captain Frazier Craig of the Fairfield County Sheriff's Office testified Barnes' statement was taken before Applicant's arrest, while Green's and Paulings's statements were taken after Applicant was arrested. (R. p. 355, lines 1-20; p. 571, lines 13-22). Moreover,

according to Craig, only Barnes' statement offered details that matched the evidence produced by the investigation. (R. p. 572, lines 15-22).

## ALLEGATIONS

Applicant's original application alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that:

    a. Counsel failed to object to hearsay;
    b. Counsel failed to properly argue Applicant's fingerprints did not match those found at the scene.

Applicant, through counsel, filed an amended application on January 22, 2019. At the evidentiary hearing, Applicant ultimately went forward on the following allegations:

1. "The witnesses against him at trial have recanted their testimonies. His conviction and sentence is the denial of his right to due process."

2. "Violation of the Sixth Amendment; Massiah v. United States, 377 U.S. 201 (1964)."

3. "Raymond Barnes... was receiving some benefits while he was in prison or while he was in the detention center that was not disclosed to trial counsel."

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has heard the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, the appellate records, Applicant's original and amended applications, the trial transcript, and, most importantly, the audio recordings entered as exhibits at the evidentiary hearing. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing establishes Applicant has failed to meet his burden of proof regarding newly discovered evidence

or that his constitutional rights were violated in any way. The Court denies relief and dismisses application with prejudice. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws:

***Newly Discovered Evidence***

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief 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(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

"Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal citations and quotations omitted); see also Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979) (setting forth the five factors to be analyzed when considering a newly discovered evidence claim). The granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

*Recantation*

In his amended application, Applicant alleges newly discovered evidence that "the witnesses against him recanted their testimonies" entitles him to a new trial. In support of this argument, Applicant introduced into evidence an audio recording, dated October 13, 2015, and approximately fourteen minutes long, of trial witness Raymond Barnes giving a statement to Applicant's private investigator, Pete Skidmore, Jr, which Applicant argues constitutes a recantation of Barnes' trial testimony. However, the State played for the Court additional audio recordings taken, apparently surreptitiously, of additional interviews with Barnes on March 3, 2015, and March 15, 2015.[2]

This Court finds the October 13, 2015, audio recording, taken alone, is misleading. In the March recordings, Barnes repeatedly affirmed his trial testimony that Applicant had confessed to Belton's murder; denied being pressured by law enforcement to fabricate testimony; and denied receiving any special treatment in exchange for his cooperation or testimony. Tellingly, Barnes only began to change his statements several months later, during the October interview, after Skidmore implied he knew with certainty Applicant had been wrongfully convicted, and he offered to "protect" Barnes from any repercussions of recanting his testimony.

When all of the recordings are reviewed together, this Court finds it is clear Barnes did not recant his trial testimony. In the initial interviews, Barnes repeatedly told Skidmore Applicant had voluntarily brought up his involvement in the murder to Barnes. Barnes also

[2] All of the recordings at issue were played for the Court during the evidentiary hearing and entered into evidence as Applicant's Exhibit 2.

repeatedly denied Craig "put [him] up" to eliciting a confession from Applicant or asked for a "favor" with his testimony. Barnes told Skidmore multiple times that he had no motive to lie as he had already been released from custody at the time of trial, and in any event, Craig was not a federal agent, so Craig had no power to help him with his charges. Although Barnes eventually told Skidmore he did not believe Applicant "did it," and he did not like that Applicant received "a life sentence," Barnes only offered these statements after Skidmore told him there was no evidence Applicant had committed the crime and law enforcement conducted the investigation by "throwing mud" to "see[] what sticks." Barnes repeatedly asserted he could not be charged with perjury because all he testified to was what Applicant said to him. Tellingly, even after Skidmore explicitly offered Barnes "protection," Barnes expressly denied ever lying in his testimony at trial.

This Court finds the statements by Barnes, over the course of all the recordings, are entirely insufficient to support Applicant's request for relief as newly discovered evidence of recantation. As discussed above, in order for Applicant obtain a new trial based on newly discovered evidence, he must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal citations and quotations omitted); see also Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979) (setting forth the five factors to be analyzed when considering a newly discovered evidence claim). In this case, the Court

finds Applicant has failed to meet the first prong – the alleged "recantation" of Barnes'[3] trial testimony is so unreliable and incredible there is no reasonable probability it would change the result at a new trial.

The granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011). Moreover, "[w]here a motion for a new trial is based on recantation of testimony given at the trial, such recantation is looked upon with utmost suspicion." United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973) (internal quotation omitted); see also State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.") (internal quotation omitted). "Where the circumstances surrounding the recantation suggest it is the result of coercion, bribery, or misdealing, the court... is justified in disregarding it." Johnson, 487 F.2d at 1279 (explaining trial court properly found recantation testimony not credible when it was given years after the defendant's conviction and "there was reason to suspect [the defendant] had exerted substantial pressure on [the witness] to withdraw his incriminating testimony").

The Court finds the recantation testimony in this case is wholly incredible and, like in Johnson, there is reason to suspect Barnes was improperly pressured or influenced by the investigator working on behalf of the applicant. Taking the recordings as a whole, this Court finds Skidmore exerted undue influence and inappropriate pressure to convince Barnes to change his story. Moreover, Barnes' new statements were given some twelve years after the trial and nearly twenty years after the events in question took place. Additionally, Barnes did not

[3] Applicant also alleges another witness, Lindsey Goins, recanted his testimony. However, Goins was not present at the hearing, and his testimony is not properly before the Court. Although he was deposed and the deposition marked for identification, the State objected to its admission, and it was not entered into evidence.

approach the Court, law enforcement, or Applicant's attorneys; instead, Applicant's investigator sought Barnes out and met with him repeatedly, finally convincing Barnes to change his story after he repeatedly asserted to Barnes that he could "protect" him, but "the lawyers just need to know what to protect [him] from." Despite this, Barnes immediately thereafter again denied he had lied in his trial testimony.

The Court finds these alleged "recantations" are so unreliable and not credible such that it is not reasonably likely they would change the result if a new trial were had. Because Applicant has failed to meet his burden as to newly discovered evidence, this Court denies relief and dismisses the allegation with prejudice.

*Special treatment of Barnes*

Applicant also asserts there is newly discovered evidence "Raymond Barnes was receiving preferential treatment. . . while he was assisting law enforcement with its investigation of Curtis Elgin. . ." and this information was not disclosed to the defense in violation of Brady. However, as discussed above, this Court finds the alleged recantation of Barnes' testimony is not credible. Thus, the Court finds, even if true, it would not have changed the result at trial. Moreover, based on the credible testify of Craig, the Court finds the information that Barnes was being taken from his cell to work with investigators on another case and occasionally receiving fast food for lunch when he was out of his cell during jail mealtimes was information that could have been discovered at the time of trial, and in fact, Craig testified at trial that Barnes "had the privilege" of being taken out of the detention center nearly every day to work as an informant on an unrelated case. Trial Tr. Vol. 2 p. 52. Applicant has therefore failed to meet his burden of proving this information is newly discovered evidence and/or constitutes a Brady violation.

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.' Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006).

As discussed above, the alleged new evidence that Barnes received a series of privileges in return for his cooperation with law enforcement in making a case against Applicant is highly suspect. In the March recordings, Barnes repeatedly denied receiving any benefit from his cooperation with Craig in obtaining Applicant's statements about his involvement in the murder or from his testimony at trial. Additionally, this Court finds Craig's testimony credible, and Craig testified Barnes did not receive special treatment. As Craig explained, when he was working with Barnes on the unrelated murder case – not the Belton case for which Applicant was convicted – Barnes sometimes needed to be out of the jail during meal times, so Craig bought him fast food instead. Additionally, Craig testified his interaction with Barnes regarding Applicant's case was limited to a few conversations around the time Barnes approached him with

information, and Craig was not assigned to investigate Applicant's case at the time. He testified once he passed Barnes's information on to his supervisors, he went back to working with Barnes on the other case. Thus, the Court finds Applicant has failed to prove, even if occasionally receiving fast food meals when out of the jail during meal times constitutes "special treatment," that it was related to Barnes's role in *this* case sufficient to require the State to turn over the information in Applicant's case.

Moreover, although Jones testified at the evidentiary hearing she was unaware of this "special treatment," and she would have used the information to impeach Barnes at trial, Jones was clearly aware Barnes was routinely being taken out of the jail to work with Craig as an informant on another case, and she cross-examined Craig on this issue at trial. Trial Tr. Vol. 2, p. 52. Additionally, Solicitor Barfield asked Craig if he had promised Barnes any help with his federal sentence or "to get pizza every night while he's in jail" in exchange for information related to Applicant. Trial Tr. Vol. 2 p. 65. Craig then, as now, denied Barnes received any such benefit, and this Court finds that testimony credible. It defies logic to believe Barnes – who at the time of trial had been released from custody, did not have any pending charges, and did not even live in South Carolina – would falsely testify against a person he knew to be innocent because Craig occasionally bought him fast food and cigarettes some *twelve years* earlier, in connection with his work on an entirely unrelated case.

Thus, the Court finds this information, even if newly discovered, is of limited impeachment value. Moreover, the Court finds there is no reasonable probability the result of the proceeding would have been different had this information been known to the defense at the time

of trial.[4] Applicant has failed to prove this information is newly discovered evidence that could not have been known at the time of trial or that it would change the result. As Brady information, Applicant has failed to prove the information was known to and suppressed by the prosecution, or that it was material to a determination of Applicant's guilt. This Court therefore denies relief as to this claim.

***Massiah claim***

Applicant also claims the testimony used against him at trial was obtained in violation of his Sixth Amendment rights, when investigators "placed Raymond Barnes in the cell with [Applicant] so [Barnes] could elicit incriminating statements from [Applicant]." In support of this claim, Applicant relies on Massiah v. United States, in which the government improperly obtained incriminating statements from the defendant and introduced them at trial. 377 U.S. 201 (1964). However, this Court finds Applicant has failed to meet his burden of proof as to this issue, and denies relief.

This Court finds Massiah is clearly and easily distinguishable from Applicant's case. Specifically, the key fact in Massiah was that the challenged statements in that case were obtained *after* the defendant was indicted and his right to counsel had attached. 377 U.S. at 205 (explaining precedent supported reversal of the conviction because "the confession had been deliberately elicited by the police *after the defendant had been indicted*, and therefore, at a time when he was clearly entitled to a lawyer's help") (emphasis added). Here, it is undisputed the

[4] This Court finds credible Jones's assertion she did not know this information. However, as discussed above, this Court is not convinced this information is true, and even if it is, whether it was relevant to Applicant's case in order to trigger a duty to disclose it. Craig's testimony, which this Court also finds credible, is he bought the meals for Barnes while they were working together on the other case, not Applicant's case, and it was not special treatment or something that was promised to Barnes in exchange for information; it was simply Craig providing lunch to an inmate in his custody while away from the jail.

statements testified to by Barnes were obtained years before Applicant was indicted for Belton's murder and at a time when he had no right to counsel in this case.

Moreover, Applicant did not introduce any evidence to support the assertion Barnes was placed in a cell with Elgin specifically for the purpose of eliciting incriminating statements. Craig testified Barnes approached him about this case while he and Barnes were working on an unrelated investigation. Craig stated Barnes gave him some information about Applicant's involvement, which was eventually recorded as a written statement and turned over to the assigned investigators. Although Craig acknowledged he was aware Barnes then attempted to record Elgin talking about the Belton murder, Craig stated this occurred after his initial conversation with Barnes, which Barnes initiated. Additionally, Craig testified the attempt at recording Applicant occurred in 1996; Applicant was not arrested for this crime until 2004. Craig also testified he was not assigned to investigate this case at the time Barnes offered the information about Elgin; he did not assign Barnes to Elgin's cell or have influence or control over Barnes's cell assignment; and he did not even know Elgin was in the jail at the time Barnes came to Fairfield to work with him on the other case. Applicant presented no evidence to contradict Craig's testimony, which this Court finds credible.

Because Applicant has failed to meet his burden of proof, and in any event, Massiah is plainly inapplicable to Applicant's case, the Court denies relief as to this ground and dismisses it with prejudice.

## CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not proven the existence of newly discovered evidence such that would likely change the result at trial, nor has he established any constitutional violations or deprivations which would require this Court to

grant relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

**IT IS THEREFORE ORDERED:**

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED.**

PAUL M. BURCH
Presiding Judge
Sixth Judicial Circuit

November 4th, 2021