No. 18-____

IN THE
SUPREME COURT OF THE UNITED STATES

MIKAL D. MAHDI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE COURT OF COMMON PLEAS FOR CALHOUN COUNTY, SOUTH CAROLINA

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

THIS IS A CAPITAL CASE

Mikal D. Mahdi respectfully requests leave to proceed *in forma pauperis*, in accordance with the provisions of Title 28 U.S.C. §1915. Mr. Mahdi is a South Carolina death-sentenced prisoner. The South Carolina Courts have appointed counsel to represent Mr. Mahdi during his guilty plea, sentencing hearing, direct appeal, and in his initial post-conviction relief application. Mr. Mahdi had *pro bono* counsel during the state court appeal of the order denying him post-conviction relief and in the subsequent petition for writ of *certiorari* filed in this Court.

The United States District Court for the District of South Carolina appointed undersigned counsel to represent Mr. Mahdi so he can seek *habeas corpus* relief pursuant to 28 U.S.C. §2244. *Mahdi v. Sterling*, C/A 8:16-cv-03911-TMC-JDA. Pursuant to Rule 39(1), a copy of the District Court's order appointing undersigned counsel is attached. Undersigned counsel assisted Mr. Mahdi

in filing his second application for post-conviction relief which is the subject of the attached petition for writ of *certiorari*. The South Carolina Supreme Court issued an order, a copy of which is attached, to review Mr. Mahdi's application for post-conviction relief and to consider whether to appoint counsel. Because of the procedural history of this case in the state court, the post-conviction judge never considered appointment of counsel. Undersigned counsel has represented Mr. Ms. Mahdi *pro bono* in the state court post-conviction procedures that are subject to this appeal and in preparing the attached petition for writ of *certiorari*.

Respectfully submitted,

By /s/ *E. Charles Grose, Jr.*

E. Charles Grose, Jr.
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Counsel for Petitioner Mikal D. Mahdi

September 24, 2018.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Mikal D. Mahdi, Petitioner, v. Bryan Stirling, Commissioner South Carolina Department of Corrections, Respondent.	)	Case No. 8:16-mc-00402-TMC-JDA **ORDER**

The petitioner in this matter, Mikal D. Mahdi ("Petitioner"), is a state prisoner convicted of murder, grand larceny, and second degree burglary and is sentenced to death. This matter is before the Court on Petitioner's motion to appoint counsel and motion to proceed in forma pauperis. [Docs. 1, 2.] Respondents filed a response on October 4, 2016, which addressed the motion to appoint counsel. [Doc. 10.] And on October 11, 2016, Petitioner filed a reply. [Doc. 17.] Accordingly, these motions are ripe for review.

Motion for Leave to Proceed In Forma Pauperis

Petitioner has filed a motion for leave to proceed in forma pauperis. The Court has reviewed this submission and finds that Petitioner has shown that he is indigent and qualifies to proceed in forma pauperis in this case. Accordingly, the Court grants Petitioner's motion to proceed in forma pauperis. [Doc. 2.]

Motion for Appointment of Counsel

The qualifications for appointed counsel in capital cases are governed by 18 U.S.C. § 3599 and the Plan of the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act. *See In re Amendments to the Plan of the U.S. Dist.*

Ct. for the Dist. of S.C. for Implementing the Criminal Justice Act, No. 3:10-mc-5005-CIV (D.S.C. May 5, 2010) ("CJA Plan"). The statutory authority for the federal courts to appoint legal counsel for indigent, death-sentenced prisoners seeking habeas corpus relief is contained in the following relevant portions of 18 U.S.C. § 3599:

> (a)(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).
> . . . .
>
> (c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.
>
> (d) With respect to subsection[] . . . (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

Courts interpreting the appointment of counsel provisions of § 3599 have held that this "provision grants a first time, indigent, capital habeas corpus petitioner 'a mandatory right to qualified legal counsel.'" *Staton v. Folino*, No. 3:11-cv-00144, 2011 WL 5085029, at *1 n. 1 (W.D. Pa. Oct. 26, 2011). Also, the United States Supreme Court has held that an attorney's assistance in preparing a capital habeas petition is crucial, owing to the complex nature of capital habeas proceedings and the seriousness of the death penalty. *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994). In particular, the *McFarland* Court

stated, "the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *Id.* at 858. At least one federal district court and one federal circuit court of appeals have construed the language of § 3599 as allowing appointment of counsel under subsection (d) either "alternatively or in addition" to an appointment under subsection (c). *See In re Lindsey*, 875 F.2d 1502, 1057 n.3 (11th Cir. 1989); *United States v. Sampson*, NO. CR. 01-10384-MLW, 2008 WL 2563374, at *1 (D. Mass.) (noting that the *Guide to Judicial Policies and Procedures*, vol. 7, ch. VI, §6.01(C)(3) describes § 3599(d) as a "waiver" provision, allowing appointment of an attorney whose experience level does not technically meet the requirements of §3599(c)). The CJA Plan further requires "in appointing counsel for death-sentenced state prisoners, consideration will be given to attorneys who are members of the first-tier of the death penalty CJA panel, which shall be maintained by the Office of the Clerk of Court. However, the Court shall not be precluded from making appointments from the second-tier death penalty CJA panel or from the general CJA panel." *See* CJA Plan at 19.

The statute provides for appointment of "one or more" counsel. 18 U.S.C. § 3599(a)(1)(B), (a)(2).

In his motion to appoint counsel, Petitioner seeks appointment of E. Charles Grose, Jr. and Elizabeth A. Franklin-Best as counsel pursuant to 18 U.S.C. § 3599. Petitioner outlines the qualifications of both E. Charles Grose, Jr. and Elizabeth A. Franklin-Best, generally indicating that both satisfy the provisions of 18 U.S.C. § 3599 such that appointing them would be appropriate under the statute.[1] Respondent does not object to

[1] Indeed, both Mr. Grose and Ms. Franklin-Best have been approved as lead counsel on the CJA Death Penalty Attorney List for the United States District Court in the

the appointment of counsel but notes that Petitioner does not have a constitutional right to the appointment of his counsel of choice. [Doc. 10 at 3.] Respondent further notes in its response that Ms. Franklin-Best's appointment may not be appropriate in this matter as she and state PCR counsel, Teresa Norris, may have been employed by the same firm during the pendency of the state PCR action. [Doc. 10 at 4 (citing *Fowler v. Joyner*, 753 F.3d 446 (4th Cir. 2014); *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013)).] Petitioner confirms in his reply that Ms. Norris (who also filed the motion to stay execution, motion to appoint counsel, and motion to proceed in forma pauperis in this case) and Ms. Franklin-Best are currently members of the same firm, but Petitioner indicates that Ms. Norris will be leaving the firm on November 1, 2016. [Doc. 17 at 2.] Petitioner further indicates that "Ms. Franklin-Best has not had any involvement in this case prior to now" and that "[d]uring the state post-conviction proceedings . . . , Ms. Franklin-Best did not read any pleadings, or engage in any legal strategy discussions. Ms. Franklin-Best did not assist in selecting claims to be raised." [Doc. 17 at 3.] As such, Petitioner maintains his request that Ms. Franklin-Best be appointed in his case. [Doc. 17 at 4.]

Having reviewed the submissions by both parties and the applicable law, the Court grants in part and denies in part Petitioner's motion for appointment of counsel. The Court grants Petitioner's motion to appoint E. Charles Grose, Jr. as first chair counsel. However, in light of *Juniper*, 737 F.3d 288, and the fact that Ms. Franklin-Best and Ms. Norris are members of the same firm, out of an abundance of caution, the Court finds it prudent to deny Petitioner's motion to appoint Elizabeth A. Franklin-Best as second chair counsel. By

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District of South Carolina.

October 24, 2016, Petitioner shall suggest qualified counsel to be appointed as second chair in this case; if Petitioner does not suggest counsel, the Court will appoint qualified counsel.

Cost Containment and Budgeting

The Court cautions counsel that duplication of efforts and unnecessary attorney time are to be avoided. The Judicial Council of the United States Court of Appeals for the Fourth Circuit has considered adoption of a resolution governing review of attorney compensation requests in death penalty habeas corpus cases.[2] Under this resolution, any request for compensation in excess of certain amounts ($50,000) per attorney at the district court level is deemed presumptively excessive. While the effective date of this resolution has been stayed pending public comment,[3] the Court encourages appointed counsel to make efforts to contain expenses and fees in this matter in light of the stated figure to the extent they can do so without detracting from their representation of Petitioner's positions in this case.

Toward that end, counsel shall submit a confidential proposed litigation budget within 30 days of the appointment of second chair counsel to Claire Woodward O'Donnell with the Federal Public Defender's Office. The proposed budget shall estimate the number of hours counsel anticipates expending for the following stages of the litigation: (1) preparation and filing of the petition for habeas corpus; (2) preparation of legal memoranda in opposition to the respondent's return; and (3) evidentiary hearing, if one is sought. The proposed

[2] *See Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases*, http://www.ca4.uscourts.gov/pdf/noticeofresolutionattorneycompensationcapitalcases.pdf.

[3] *See Suspension of Effective Date of Special Procedures for Reviewing Attorney Compensation requests in Death Penalty Cases*, http://www.ca4.uscourts.gov/pdf/noticeofsuspensionresolutionattorneycompensationcapitalcases.pdf.

budget shall also contain cost estimates for investigative, expert, or other services, including law clerks and paralegals, if any. A copy of the proposed budget shall be submitted to this Court. Additionally, counsel shall submit interim payment vouchers every 60 days to Ms. O'Donnell for payment consideration and so that costs and fees may be monitored.

State Court Record

For the Court's reference and for case management purposes, counsel for Respondents are directed to file a complete record of all state court proceedings to date in connection with this matter within 30 days of the date of this Order. Additionally, counsel shall provide one courtesy copy each to the assigned District Judge and Magistrate Judge.

Conclusion

Wherefore, based upon the foregoing, Petitioner's motion to proceed in forma pauperis is GRANTED, and his motion to appoint counsel is GRANTED IN PART, DENIED IN PART. The Court appoints E. Charles Grose, Jr., Esquire, as Petitioner's first chair counsel and directs Petitioner to suggest second chair counsel by October 24, 2016. Further, counsel shall submit a confidential proposed litigation budget within 30 days of the appointment of second chair counsel and shall file a complete record of all state court proceedings within 30 days of the date of this Order.

IT IS SO ORDERED.

s/Jacquelyn D. Austin
United States Magistrate Judge

October 13, 2016
Greenville, South Carolina

The Supreme Court of South Carolina

Mikal D. Mahdi, Applicant,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000074

ORDER

The State has filed a petition seeking assignment of a judge to applicant's second post-conviction relief action filed on January 10, 2017.[1] The State also requests expedited proceedings to consider whether the successive action should be heard or summarily dismissed. Applicant has filed a return in opposition to the petition.

The Honorable Doyet A. Early, III, is hereby assigned to the post-conviction relief action applicant has filed. Judge Early shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Applicant shall have ten days from the date of this order to serve and file any return to the State's motion to dismiss and provide a copy to Judge Early. Within thirty days of the date of service of applicant's return to the motion to dismiss, or if no return is served, within thirty days of the expiration of the time in which to serve a return, Judge Early shall issue a ruling on the motion.

If the motion to dismiss is denied, Judge Early shall, within thirty days of the date the order denying the motion is filed, conduct a hearing on applicant's desires regarding counsel. Within sixty days of the date the order denying the motion to dismiss is filed, Judge Early shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on

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[1] On February 10, 2017, the State filed a motion to dismiss the application.

the merits. The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to applicant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), Judge Early is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.

C.J.
FOR THE COURT

Columbia, South Carolina

March 24, 2017

cc:
Alan McCrory Wilson, Esquire
J. Robert Bolchoz, Esquire
Donald J. Zelenka, Esquire
J. Anthony Mabry, Esquire
E. Charles Grose, Jr., Esquire
John Lafitte Warren, III, Esquire
The Honorable Doyet A. Early, III
The Honorable Kenneth Hasty
Court Administration

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PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Is *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) a new substantive standard of constitutional law, binding on state court criminal procedures, that applies retroactively?

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LIST OF PARTIES AND CORPORATE DISCLOSURE

Mikal D. Mahdi, a death sentenced South Carolina prisoner, was the post-conviction relief applicant in the court below. The State of South Carolina was the respondent in the court below. No corporations are involved in this petition.

OPINION BELOW

The written order of the Honorable Doyet A. Early, III, filed on July 6, 2017, dismissing Mikal D. Mahdi's application for post-conviction relief, is unpublished and reprinted in the Appendix ("A.") at 70a-116a.

JURISDICTION

On July 12, 2017, Mr. Mahdi served a Rule 59(e), SCRCP motion. A. 117a-84a. By written order filed on October 13, 2017, Judge Early denied the motion. A. 185a-86a. Mr. Mahdi timely appealed to the South Carolina Supreme Court and, pursuant to Rule 243(c), SCACR, explained why he should be allowed pursue post-conviction relief pursuant to S.C. Code § 17-27-45(B). A. 187a-200a. On April 9, 2018, the South Carolina Supreme Court dismissed Mr. Mahdi's appeal. A. 201a. On May 3, 2018, Mr. Mahdi petitioned for rehearing. A. 202a-06a. On June 27, 2017, the South Carolina Supreme Court denied the petition for rehearing. A. 207a-08a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, applicable to the State through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Eighth Amendment, applicable to the State through the Fourteenth Amendment, provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 29, 2006, Mr. Mahdi pleaded guilty to murder, burglary, and grand larceny. A. 1a-31a. A sentencing hearing was conducted between December 1 and 6, 2006 before The Honorable Clifton Newman without a jury. Following that hearing, on December 8, 2006, Judge Newman issued a written sentencing order and sentenced Mr. Mahdi to death for murder, 15 years for burglary, and 10 years for grand larceny. A. 23a-59a. Mr. Mahdi timely appealed his convictions and sentences, and the South Carolina Supreme Court affirmed on June 15, 2009. *Mahdi v. State*, 678 S.E.2d 807 (S.C. 2009).

Mr. Mahdi then filed a *pro se* application for post-conviction relief on August 18, 2009. The Honorable Doyet A. Early, III, was assigned exclusive jurisdiction of the case. The post-conviction relief application was amended several times with the assistance of appointed counsel. An evidentiary hearing was held on March 9 to 11, 2011, and on December 18, 2012, Judge Early issued an Order of Dismissal, filed January 8, 2013, denying and dismissing the allegations of the Final Amended Application with prejudice. On January 28, 2013, Mr. Mahdi filed a notice of appeal. The State subsequently filed a Rule 59(e), SCRCP, Motion to Alter or Amend one of the findings in the Order of Dismissal.[1] Judge Early heard arguments on the State's Rule 59 Motion on February 11, 2013. On August 18, 2014, Judge Early granted the State's Rule 59 Motion and entered an Amended Order of Dismissal, filed August 20, 2014, denying and dismissing the allegations of the Final Application with prejudice. On August 27, 2014, Mr. Mahdi filed a Rule 59(e), SCRCP, Motion to Alter or Amend the Judgment. Judge Early denied the Rule 59 Motion on September 9, 2014. Mr. Mahdi timely filed a Notice of Appeal in the South Carolina Supreme

[1] The State also filed a Motion to Stay the appeal and remand to the circuit court for a ruling on the State's Rule 59(e), SCRCP, Motion. On March 4, 2013, the South Carolina Supreme Court dismissed Mahdi's notice of appeal without prejudice.

Court on October 8, 2014. Mr. Mahdi timely filed a petition for writ of *certiorari* to the South Carolina Supreme Court, which was denied on September 8, 2016. On December 7, 2016, Mr. Mahdi petitioned this Court for a writ of *certiorari*. On February 21, 2017, the Court denied the petition. *Mahdi v. South Carolina*, ___ U.S. ___, 137 S. Ct. 1081 (2017).

On September 26, 2016, Mr. Mahdi applied to the United States District Court for the District of South Carolina for a stay of execution and moved to appoint counsel so he can seek *habeas corpus* relief pursuant to 28 U.S.C. §2244. *Mahdi v. Sterling*, C/A 8:16-cv-03911-TMC-JDA. On February 9, 2017, with the assistance of appointed counsel, Mr. Mahdi filed a petition for writ of *habeas corpus*. He amended the petition on September 7, 2017.

On January 10, 2017, with the assistance of federal *habeas* counsel, Mr. Mahdi filed a second application for post-conviction relief in the Court of Common Pleas of Calhoun County. *Mahdi v. State of South Carolina*, Case No. 2017-CP-09-00004. A. 60a-69a. He alleged:

> S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution . . . because a judge rather than a jury finds facts required for imposition of a death sentence.

A. 62a. Mr. Mahdi further alleged South Carolina's capital sentencing procedure denied him his Sixth Amendment 'right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed." A. 64a. Mr. Mahdi relied on *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), which he contended "is a constitutionally binding decision from the Supreme Court of the United States" that can be raised pursuant to S.C. Code § 17-27-45(B)." A. 62a, 65a. Once again, Judge Early was assigned to review Mr. Mahdi's application for post-conviction relief. By written order filed July 6, 2017, Judge Early dismissed Mr. Mahdi's application for post-conviction relief. A. 70a-116a. On July 12, 2017, Mr. Mahdi served a Rule 59(e), SCRCP motion.

A. 117a-85a. By written order filed on October 13, 2017, Judge Early denied the motion. A. 185a. Mr. Mahdi timely appealed to the South Carolina Supreme Court and, pursuant to Rule 243(c), SCACR, explained why he should be allowed pursue post-conviction relief pursuant to S.C. Code § 17-27-45(B). A. 187a-200a. On April 9, 2018, the South Carolina Supreme Court dismissed Mr. Mahdi's appeal. A. 201a. On May 3, 2018, Mr. Mahdi petitioned for rehearing. A. 201a-06a. On June 27, 2017, the South Carolina Supreme Court denied the petition for rehearing. A. 207a-08a. This petition follows.

WHY THE WRIT SHOULD BE GRANTED

***Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, that applies retroactively.**

The post-conviction court reached the merits and ruled, "*Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v.* [*New Jersey*], 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing." A. 84a. A review of *Apprendi* and *Ring* reveals *Hurst* established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty. *Ring* considered the application of *Apprendi* to Arizona's capital sentencing scheme. *Apprendi* held that the Sixth Amendment does not permit a defendant to be

> expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . even if the State characterizes the additional findings made by the judge as sentencing factor[s].

Ring 536 U.S. at 588-89 (internal citations and quotations omitted; emphasis supplied by Court). *Ring*, however, was expressly limited to whether "the Sixth Amendment required jury findings on the aggravating circumstances." *Id.* at 597 (fn. 4). *Ring* did not address whether a jury must consider mitigation and "make the ultimate determination whether to *impose* the death penalty."

Id. (emphasis added). *Ring*, accordingly, was limited to a jury determination regarding *eligibility* for the death penalty. *Hurst*, however, involved a challenge to Florida's capital sentencing procedure where the jurors render an "advisory sentence" but "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 136 S.Ct. at 620. *Hurst* held the Sixth Amendment requires jurors make the "critical findings necessary to *impose* the death penalty." *Id.* at 622 (emphasis added). *Ring*, accordingly, addressed only *eligibility* for the death penalty. *Hurst* addressed *imposition* of the death penalty. *Hurst*, therefore, decided constitutional issues not considered in *Ring*. This Court must determine whether *Hurst* is a substantive constitutional rule that applies retroactively. This Court's precedent in *Montgomery v. Louisiana*, militates in favor of *Hurst* applying retroactively. __ U.S. ___, 136 S. Ct. 718 (2016) (*Miller v. Alabama*, 567 U.S. 460 (2012) prohibiting under Eighth Amendment mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review).

Because Mr. Mahdi pleaded guilty to murder, S.C. Code Ann. § 16-3-20(B) mandated his "sentencing proceeding must be conducted before the judge." The guilty plea to murder, standing alone, did not make him eligible for the death penalty. Under South Carolina's capital sentencing scheme, a "statutory aggravating circumstance [must be] found beyond a reasonable doubt" before someone convicted of murder is eligible for the death penalty. S.C. Code Ann. § 16-3-20(A)-(C). The statutory aggravating circumstances are set forth in § 16-3-20(C). Although Mr. Mahdi also pleaded guilty to burglary and larceny, the prosecution still had the burden of proving beyond a reasonable doubt that "[t]he murder was committed while in the commission of" a burglary and/or larceny with the use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (f). Although the prosecution had a "head start," based on Mr. Mahdi's guilty plea, towards persuading the judge

to find these statutory aggravating circumstances, the statute still required the additional findings of fact.

In South Carolina, a finding that a statutory aggravating circumstance exists beyond a reasonable doubt does not require imposition of the death penalty. The sentencing authority must consider statutory mitigating circumstances, S.C. Code Ann. § 16-3-20(C)(b), and non-statutory mitigating circumstances, *see, e.g., State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The sentencing authority is "authorized to impose a life sentence even if it did not find any mitigating circumstances." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). The sentencing authority must consider "the specific circumstances of the crime and the characteristics of the person who committed the crime." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990). Pursuant to *Payne v. Tennessee,* 501 U.S. 808, (1991), South Carolina allows consideration of victim impact evidence. *See, e.g.*, *State v. Bixby*, 388 S.C. 528, 555, 698 S.E.2d 572, 586 (2010). Even after all of these considerations, a life sentence may be imposed "for any reason or no reason at all, including as an act of mercy." *Rosemond,* 383 S.C. at 330, 680 S.E.2d at 10.

The post-conviction court additionally ruled *Hurst* "does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme." A. 84a. Mr. Mahdi's guilty plea, however, does not preclude application of *Hurst*. This Court applied *Apprendi* "to instances involving plea bargains" in *Blakely v. Washington,* 542 U.S. 296 (2004). *Hurst*, 136 S. Ct. at 621. Blakely "was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that Blakely had acted with 'deliberate cruelty.' The facts supporting that finding were neither

admitted by [Blakeley] nor found by a jury." *Id*. The Court held, "[T]he State's sentencing procedure did not comply with the Sixth Amendment" and Blakeley's "sentence [was] invalid." *Id*. at 305.

This Court, therefore, should consider whether the trial court judge found any fact to support imposing the death sentence beyond Mr. Mahdi's admissions during his guilty plea. When announcing the sentence, the trial court judge addressed whether the murder was committed during a burglary or larceny while armed with a deadly weapon:

> The State presented *additional evidence* during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the defendant was committing these crimes. *Further evidence* was presented indicating that the defendant stole from the victim his police issued vehicle and two rifles, one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

A. 52a (emphasis added). The trial court additionally considered "nonstatutory aggravating circumstances" including "prior and subsequent bad acts of the defendant, which are relevant to show his bad character, evil nature and malignant heart." Although some of these bad acts were supported by juvenile adjudications or criminal convictions, the trial court considered other facts. For example, the trial judge found Mr. "Mahdi's behavior was maladaptive, assaultive and demonstrated utter disrespect for authority" during periods of incarceration. Also, the trial judge expressly stated:

> I find that the State has established by clear and convincing evidence the defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the defendant's characteristics, but not as proof of any alleged statutory aggravating circumstances.

A. 55a.

Indeed, the trial court made additional findings of fact necessary to impose the death penalty. The sentencing order demonstrates that the trial court considered, but assigned little

weight to, statutory and non-statutory mitigating circumstance, including Mr. Mahdi's young age, childhood and family life, adaptability to incarceration, and decision to plead guilty. The trial judge also considered victim impact evidence, the prosecution's plea for "justice" and Mr. Mahdi's plea for "mercy." The trial court judge expressly found, "[i]n extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved and consciousless manner, the defendant, Mikal Deen Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court." And, "I find, as an affirmative fact, that the evidence in this case warrants imposition of the death penalty." A. 55a-60a

The post-conviction court recognized the state Supreme Court's holding in *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) requires the trial court judge to conduct a sentencing hearing following a guilty plea. A. 84a, 105a.[2] *Downs* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, supra*. Once *Hurst* and *Blakeley* are considered together, this Court should decide whether South Carolina's capital sentencing procedure following a guilty plea can withstand Sixth Amendment scrutiny.

Finally, the post-conviction court ruled, "[T]he record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence." A. 107a. The record does not establish that Mr. Mahdi understood his Sixth Amendment right to have the jurors make additional findings regarding aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and

[2] The South Carolina Supreme Court also addressed this issue in *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005); and *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004). *Crisp*, and *Wood* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, infra*. All of these cases predated and, therefore, could not have considered *Hurst*. Appellate counsel abandoned this issue in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011).

make the additional factual findings necessary to impose the death penalty. A. 1a-31a. Once Mr. Mahdi entered his guilty plea, life imprisonment without the possibility of parole was the maximum possible sentence that could be imposed for murder without any additional findings of fact. *Hurst* requires jurors, rather than a judge, make these findings of fact.

Finally, this Court should grant the writ because South Carolina's precedent conflicts with other states that have addressed this issue. Florida applies *Hurst* retroactively to death sentences that became final after this Court's opinion in *Ring*. *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Delaware applies *Hurst* retroactively. *Rauf v. State*, 145 A.3d 430 (Del. 2016) (Delaware's capital sentencing statute unconstitutionally allows a judge to find an aggravating circumstance for the weighing phase).

CONCLUSION

This Court, therefore, should grant the writ and consider the constitutional issue presented in this case.

Respectfully submitted,

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September 24, 2018.

courthouse, also.

THE COURT: All right. We will, therefore, be in recess in anticipation of the arrival of Doctor Cross. And we'll reconvene as soon as we can, hopefully not beyond the hour that the jurors will be here ready to start the case. And we'll be in recess and come back on the record for that guilty plea hearing. We'll be in recess.

MR. WALTERS: Thank you, Your Honor.

MR. PASCOE: Thank you, Your Honor.

(Brief Recess.)

THE COURT: Yes, sir, Mr. Solicitor.

MR. PASCOE: May it please the Court. It's my understanding that Mr. Mikal Mahdi intends to plead guilty to one count of murder, indictment 04-09-243, one count of grand larceny over $5,000, which is indictment number 04-242, and one count of burglary in the second degree violent, which is 04-GS-244.

Per Your Honor's instructions, Doctor Cross was able to come here today and was able to reevaluate Mr. Mahdi to determine his competency for the purpose of this plea. And if the Court wants to inquire into the defendant's competency, he is available.

THE COURT: Is that correct, Mr. Walters, the

defendant wishes to plead guilty to murder, burglary in the second degree and grand larceny of an amount over $5,000?

MR. WALTERS: That's correct, Your Honor.

THE COURT: Is that correct, Mr. Mahdi?

DEFENDANT MAHDI: Yes, sir.

THE COURT: Very well. We will receive some testimony from Doctor Cross in regard to competency to enter this guilty plea.

Doctor, if you'll come forward, please.

MICHAEL CROSS,

having been duly sworn, testified as follows:

THE CLERK: Please state your full name for the record, please.

THE WITNESS: Michael Cross, C-r-o-s-s.

THE COURT: Solicitor, will you exam him, please, or, Mr. Sorenson?

MR. SORENSON: Yes, sir. May it please the Court, Your Honor.

DIRECT EXAMINATION

BY MR. SORENSON:

Q Doctor Cross, thank you for coming this morning. You had an opportunity, I guess, back on November 20th to come testify before this court during the Blair hearing; is that correct?

A Yes, I did.

Q And at that point in time, I believe it was your opinion that Mr. Mahdi is competent to stand trial?

A Yes.

Q Have you had an opportunity to further come and evaluate him this morning with regards to his competency to be able to enter a guilty plea?

A Yes, I did.

Q Okay. If you would, tell the Court what your findings were this morning.

A Yes. Your Honor, I reevaluated him again, as we discussed, about two weeks ago when we were here during the Blair hearing. He demonstrated a good understanding of the legal proceedings against him and also had a factual knowledge of the legal system.

Likewise today, he understood the, you know, what a guilty verdict -- excuse me -- a guilty plea means. He also understood the risks and benefits of entering into this plea today and had a rational understanding of both, what the possible consequences for each might be.

Q Okay. And back on November 20th when you testified, is your opinion he was competent at that

point in time to have also entered into a guilty plea at that time?

A Yes.

Q And has anything changed from your evaluation of him this morning?

A No. He essentially looked unchanged from when I first saw him last year in December and when I saw him a second time a few weeks ago and today.

Q So is your opinion then that he, within a reasonable degree of medical certainty, that he would be competent today to enter into a guilty plea?

A Yes, that's my opinion.

MR. SORENSON: Thank you, Doctor Cross.

THE COURT: Mr. Koger.

CROSS-EXAMINATION

BY MR. KOGER:

Q Doctor Cross, just to reiterate, he had a good understanding of the process?

A Yes.

Q And he had a factual knowledge of the legal system?

A Yes.

Q And as of today, he knows what he is doing?

A Yes.

MR. KOGER: Okay. Thank you.

THE WITNESS: You're welcome.

THE COURT: I have no questions for you, Doctor. Thank you very much.

THE WITNESS: Thank you, Your Honor.

THE COURT: What's the State's position?

MR. PASCOE: The State's position, he's competent, Your Honor, to enter a plea.

THE COURT: And what is the defense's position?

MR. KOGER: That Mr. Mahdi's competent, Your Honor.

THE COURT: And, Mr. Mahdi, what is your position?

DEFENDANT MAHDI: That I'm competent.

THE COURT: And you wish to move forward with this guilty plea?

DEFENDANT MAHDI: Yes, sir.

THE COURT: All right. Thank you. You may be seated.

I find that the defendant is competent to proceed with this guilty plea. He's been examined now on several occasions by Doctor Cross and others, Doctor Cross from the second exam and the present as well and -- during the earlier examination and reexamined today. And he is competent -- has

previously been found competent to stand trial and he is competent to enter a guilty plea.

With regard to the guilty plea, if the defendant will stand, Mr. Walters as well, if you'll come forward next to the Sheriff, the defendant and counsel.

MR. WALTERS: May it please the Court. Your Honor, may I also have his grandmother present with him?

THE COURT: That will be fine.

Mr. Mahdi, if you'll come before the Clerk, Mr. Hasty, and be sworn, please.

Mr. Hasty, if you'll swear him, please, with the Bible.

DEFENDANT MAHDI: That's not necessary.

THE COURT: Pardon me?

THE CLERK: He says it's not necessary.

THE COURT: Mr. Mahdi, if you'll raise your right hand.

MIKAL DEEN MAHDI,

having been duly affirmed, testified as follows:

THE COURT: Mr. Mahdi, what's your full name?

DEFENDANT MAHDI: Mikal Deen Mahdi.

THE COURT: And you have been represented in this case for the past several months now by

attorneys, Glenn Walters and Joshua Koger?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And, Mr. Walters and Mr. Koger, have you explained to Mr. Mahdi the charges contained in the indictments against him?

MR. WALTERS: Yes, sir, Your Honor.

THE COURT: Have you explained to him the possible punishment involved in this case, including the possible punishment of either life imprisonment without the possibility of parole or the death penalty?

MR. WALTERS: Yes, sir, Your Honor.

MR. KOGER: Yes, sir.

THE COURT: And have you explained to him his constitutional rights, including the right to have a jury trial and the rights to have the jury determine whether his sentence would be life without the possibility of parole, if he were to be found guilty during the guilt phase of the trial, or the jury could return a verdict for death?

MR. WALTERS: Yes, sir, Your Honor.

THE COURT: In your opinion, does Mr. Mahdi understand the charges against him, the possible punishment and his rights?

MR. WALTERS: Your Honor, I believe Mr. Mahdi

fully understands.

THE COURT: And do you agree with his decision to plead guilty?

MR. WALTERS: Yes, sir, Your Honor.

THE COURT: From your investigation of the facts and circumstances of the case, do you feel the State could produce sufficient evidence to convince a jury beyond a reasonable doubt that if Mr. Mahdi were to stand trial, his conviction would be probable?

MR. WALTERS: Yes, sir.

THE COURT: Mr. Mahdi, before I can accept a plea of guilty, it is necessary that I make sure that your plea of guilty is made freely and voluntarily. Therefore, I must ask you a series of questions. If you do not understand a question, please let me know and I will explain it to you. You may consult with your lawyers about any matter during this questioning. And I see you're here with your grandmother?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And, ma'am, what is your name?

MS. BURWELL: Sir, Nancy Thomas Burwell.

THE COURT: Nancy Thomas Burwell?

MS. BURWELL: From Lawrenceville, Virginia.

THE COURT: Mr. Mahdi, you may confer with your lawyers and/or your grandmother, Ms. Burwell, at any stage of this proceeding as well. Do you understand that, sir?

DEFENDANT MAHDI: Yes, I do.

THE COURT: Mr. Mahdi, what is your age?

DEFENDANT MAHDI: Twenty-three.

THE COURT: And tell me your educational background.

DEFENDANT MAHDI: I have a GED and some community college.

THE COURT: A GED and some community college?

DEFENDANT MAHDI: Yes.

THE COURT: Do you have an occupational history or a work history?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And what is your occupational and work history?

DEFENDANT MAHDI: Mostly roofing, brick laying.

THE COURT: Have you ever been treated for the abuse of alcohol or drugs or for mental disease?

DEFENDANT MAHDI: No, sir.

THE COURT: Have you taken any medication, drugs or alcohol within the last 24 hours?

DEFENDANT MAHDI: No, sir.

THE COURT: Are you aware of any physical, emotional or a nervous problem that might keep you from understanding what you're doing?

DEFENDANT MAHDI: I have none of those problems, Your Honor.

THE COURT: And, Mr. Mahdi, are you pleading guilty to the offenses of murder of James E. Myers?

DEFENDANT MAHDI: Yes, Your Honor.

THE COURT: Grand larceny of his 2003 Dodge Ram Truck?

DEFENDANT MAHDI: Yes, Your Honor.

THE COURT: And, also, burglary in the second degree involving the building belonging to Mr. Myers and Amy Tripp Myers?

DEFENDANT MAHDI: Yes, Your Honor.

THE COURT: And, Mr. Mahdi, do you understand that the possible sentence in this case, if I were to accept your guilty plea, is a sentence of life without the possibility of parole or the -- or a sentence of death?

DEFENDANT MAHDI: Yes, Your Honor.

THE COURT: And, Mr. Mahdi, you do understand that we have selected a jury to hear the case and decide your guilt or innocence concerning these charges?

DEFENDANT MAHDI: I'm fully aware of that, sir.

THE COURT: And do you understand that that same jury, if they were to find you guilty, will then, in a second phase of the trial known as the penalty phase of a trial, would then hear additional evidence and determine whether or not your sentence should be death or life imprisonment without the possibility of parole?

DEFENDANT MAHDI: I understand that, sir.

THE COURT: And do you understand that in order for a jury to find you guilty, all 12 jurors must unanimously agree?

DEFENDANT MAHDI: I understand that, Your Honor.

THE COURT: And do you also understand that in order for a jury to recommend a death sentence, that all 12 jurors must agree to recommend the death sentence?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And do you understand that you have the constitutional right to have the jury decide your guilt or innocence and, also, you have the constitutional right to have the jury determine your sentence?

DEFENDANT MAHDI: I fully understand that, Your

Honor.

THE COURT: And do you understand that if I were to accept your guilty plea today, the jury will have no role in your sentencing and the decision as to what sentence you will receive will be left solely up to me?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And do you voluntarily give up such a right?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And do you understand what waiving that right means?

DEFENDANT MAHDI: I do, Your Honor.

THE COURT: And what does it mean?

DEFENDANT MAHDI: It means I've given up all of my rights to a 12 party jury. And I just admitted guilt to the crimes I'm being charged with.

THE COURT: Do you understand that if you were to proceed with the jury trial, the State has the burden of proving each and every element of each and every offense against you beyond a reasonable doubt?

DEFENDANT MAHDI: I fully understand that, Your Honor.

THE COURT: And do you understand that if you were to have a jury trial, you will -- you have the

constitutional right to remain silent and that the jury could not consider the exercise of that constitutional right in any way in determining whether or not you're guilty of the offense or offenses?

DEFENDANT MAHDI: I understand that, Your Honor.

THE COURT: And do you understand that prior to any guilty plea, you're presumed to be innocent of each and every charge?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Do you understand that your rights -- your lawyers will have the right to cross-examine any witnesses against you; do you understand?

DEFENDANT MAHDI: Yes, sir.

THE COURT: Do you understand that your lawyers will have the right to challenge any incriminating statements that you may have made and challenge any evidence that the State intends to offer against you?

DEFENDANT MAHDI: Yes, I do.

THE COURT: And do you understand that you have the right to have your lawyer subpoena any witnesses that you may have to come and testify on your own behalf?

DEFENDANT MAHDI: Yes, Your Honor.

THE COURT: And have you discussed with your lawyers thoroughly the constitutional safeguards that you have and the essential protections inherent in a jury trial?

DEFENDANT MAHDI: I was made fully aware of that by my attorneys.

THE COURT: Now, Mr. Mahdi, understanding all of that, do you wish to waive your right to a jury trial and plead guilty to these charges?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Has anyone promised you anything to get you to plead guilty?

DEFENDANT MAHDI: No, sir, Your Honor.

THE COURT: Have you had enough time to discuss your decision to plead guilty with your lawyers, as well as your family?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Mr. Mahdi, do you know of any defenses that you have to any of these charges?

DEFENDANT MAHDI: Very few, Your Honor.

THE COURT: And have you discussed any possible defenses that you might have with your lawyers?

DEFENDANT MAHDI: Yes, sir.

THE COURT: And do you understand that when you

plead guilty, you give up your right to present any defenses that you might have to these charges?

DEFENDANT MAHDI: I'm fully aware of that.

THE COURT: And is that what you want to do?

DEFENDANT MAHDI: That is what I want to do.

THE COURT: Are you satisfied with the services of your attorneys in this case?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Do you believe that they have represented you effectively?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Have you had an opportunity to talk with them as often as you would like or as long as you would like in order for them to properly represent you?

DEFENDANT MAHDI: Yes, sir.

THE COURT: Do you need anymore time to talk to your lawyers?

DEFENDANT MAHDI: Not at this moment, sir.

THE COURT: Have you understood your talks with your lawyers?

DEFENDANT MAHDI: Yes, sir.

THE COURT: Have your lawyers done everything for you that you feel they could or should have done to assist you?

DEFENDANT MAHDI: I feel they've done everything to the full extent of their power to assist me and defend me, sir.

THE COURT: Have they done anything in this case that you feel they should not have done?

DEFENDANT MAHDI: No, sir, Your Honor.

THE COURT: Are you completely satisfied with the services of your lawyers?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Do you have any complaint that you would want to make about your lawyers, the Solicitor, any of the police officers involved in this case?

DEFENDANT MAHDI: Yes, sir. I have one complaint. I was kept in full body restraints all night last night. And I was told that I was going to be kept in full body restraints through the whole trial all day, all night, Your Honor. And that's my complaint.

While I'm in a secure cell at the detention center, there is completely no need for me to be in full body restraints while in the cell. That's my only complaint, Your Honor.

THE COURT: And has that fact had any bearing whatsoever on your decision to plead guilty?

DEFENDANT MAHDI: I'd be lying if I said I didn't.

THE COURT: Sir?

DEFENDANT MAHDI: I'd be lying if I said it didn't.

THE COURT: The fact that you have been placed in a full body restraint, has --

DEFENDANT MAHDI: All night.

THE COURT: All night --

DEFENDANT MAHDI: Yes, sir.

THE COURT: Has that caused you to decide to plead guilty?

DEFENDANT MAHDI: Your Honor, there wasn't no -- it wasn't a very, you know, very big reasons. It's a small like a slight diversion, you know.

THE COURT: A slight diversion?

DEFENDANT MAHDI: Yeah, a slight diversion, but it's not nothing -- it's nothing major. There was no major persuasive mood. It's mostly irritating, extremely irritating. And I felt it was unnecessary. I'm in a secure cell, a secure location and it's just a means to hassle me, that's what I felt it was.

THE COURT: Means to do what?

DEFENDANT MAHDI: It's a means to hassle me.

THE COURT: To hassle you?

DEFENDANT MAHDI: Yeah. Yes, sir, Your Honor. But I, in no way, feel that that, you know, it's almost petty, you know, it's childish to me that the director of the Orangeburg Detention Center will resort to that childish ways, you know.

Yeah, and I said that on television. The Orangeburg director of the detention center is childish. He resorted to childish ways, okay, Your Honor, and -- but in no way, did that persuade me to plead guilty. It's just irritating. And I feel that -- I feel that it was unnecessary, Your Honor. It was extremely unnecessary.

But as far as Calhoun County, they did not mistreat me. I was not in coerced in any way by this county to plead guilty.

THE COURT: Do you wish to proceed with the guilty plea?

DEFENDANT MAHDI: Yes, Your Honor. I just felt it was necessary to mention that.

THE COURT: Are you, in fact, guilty of the charges against you?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: Have there been any plea negotiations in this case, Mr. Solicitor?

MR. PASCOE: No, Your Honor.

THE COURT: Mr. Walters?

MR. WALTERS: No, sir, Your Honor.

THE COURT: Mr. Mahdi?

DEFENDANT MAHDI: No, sir, Your Honor.

THE COURT: Understanding the nature of the charges, the possible penalties, including the possible penalty of a death sentence, the other possible consequences of your guilty plea, as well as having a full understanding of your constitutional rights, how do you plead, Mr. Mahdi?

DEFENDANT MAHDI: I plead guilty, Your Honor.

THE COURT: And do you believe that the State could produce sufficient evidence to convict you and establish your guilt beyond a reasonable doubt and that if you were to stand trial on these matters, you would most probably be found guilty of these charges?

DEFENDANT MAHDI: I feel that it's a likely possibility, Your Honor, 85 percent possibility that I would be found guilty.

THE COURT: Say it again, please.

DEFENDANT MAHDI: I feel it's a likely possibility that I would be found guilty, Your Honor, around 85, 90 percent.

THE COURT: All right. Mr. Solicitor, if you will tell the Court the facts of this matter.

MR. PASCOE: May it please the Court, Your Honor. And for the record, Mr. Mahdi is, and his lawyers, have filled out the sentencing sheets. I'll pass those to Mr. Hasty. They have been filled out.

Your Honor, the victim in this case was 56-year-old Captain Jimmy Myers of Orangeburg Public Safety. He had 31 years of public service both as a fireman and as a police officer.

A number of his family members and friends are here today. Among -- just a few of the family members are his father, Mr. Ed Myers, his wife, Amy Myers, his daughter, Meredith Firestone. They know that today is not the appropriate time to address the Court. They will wait until the sentencing phase to address the Court.

As far as the facts of the case, Your Honor, as you know, the defendant, Mr. Mahdi, is from Virginia, Richmond, Virginia. Back in July of 2004, he was living in Lawrenceville, Virginia.

We were going to prove that some time around July 14th, July 15th of 2004, Mr. Mahdi came into possession of a .380 caliber handgun, a stolen green

station wagon and some stolen license tags that belonged to another vehicle in the State of Virginia, stolen license tags from Virginia. He headed south. He got to South Carolina.

We were going to be able to prove, in fact, we have witnesses here today to testify that by late Friday morning, July 16th, 2004, he was in downtown Columbia, South Carolina. He had a little run in, a fender bender, with a man by the name of Mr. Kinard, who again is here to testify today. And Mr. Kinard was going to testify that he had gotten out of his vehicle to look at the damage of his car from when Mr. Mahdi hit him with the station wagon. He confronted Mr. Mahdi.

Mr. Mahdi told Mr. Kinard that he did not want him to call the police. Mr. Kinard decided since there was no damage to his vehicle, he wouldn't call the police, but he wanted some information from Mr. Mahdi first. And Mr. Mahdi gave him his information, told him his name was Mikal Mahdi, gave him an address in Richmond, Virginia. And Mr. Kinard was able to write down the license tag that was on that green station wagon. And all of this was written down on paper by Mr. Kinard, which would become relevant later.

Then we have witnesses that were going to place Mr. Mahdi that afternoon, Friday afternoon, at the Washington Street Methodist Church in downtown Columbia on the corner of Washington Street and Bull Street. This is relevant because we're going to be able to prove that the defendant stayed there pretty much in that parking lot in that area of Columbia for the next day and a half, from that Friday afternoon until the early morning hours of Sunday, July the 18th, at approximately 3:30 that morning.

We have witnesses, Your Honor, a young man named Corey Pitts who was here today who was going to testify that at 3:30 in the morning, he was driving down Washington Street, he had just dropped a friend off, and he was driving down Washington Street heading to another friend's house to go to sleep. He stopped at the stoplight on Washington and Bull Street just feet away from where Mr. Mahdi's green station wagon was parked in the parking lot at Washington Street Methodist Church.

Before I forget, one reason we were going to prove that, he was telling people he had to stay there and he was parked there because he was having car trouble. The station wagon wasn't going anywhere.

3:30 that morning while Mr. Pitts was at that stoplight, Mr. Pitts was going to testify that the defendant came up to him with a handgun, consistent with the chrome .380 that he took from Virginia, and car jacked Mr. Pitts from his red Ford Expedition. Mr. Pitts got out of his Expedition. The defendant got in the Expedition. Mr. Pitts went to Baptist Hospital where he called the police, he wasn't injured, but he called the police and reported the carjacking. The defendant went off in the Ford Expedition.

At some time while the defendant was in possession of the Ford Expedition, he then took those stolen Virginia license plate tags from the green vehicle and put them on the Ford Expedition.

He then ended up, Your Honor, some time -- I'm just going to use this exhibit right here that we were going to use in court, State's Exhibit 1. At some time around four o'clock in the morning or a little after 4:00, he ended up at the Hess station here in Calhoun County. It's a Hess station, there's an Arby's next to it.

As you can see, Your Honor, this is I-26, which is the way we were thinking the defendant probably came down, got off of the exit here, which is

Road 22 to get gas at the Hess station.

We have two witnesses from the Hess station that worked there, Your Honor, that were going to testify that Mr. Mahdi was trying to put gas in the red Ford Expedition using cards, credit cards either from the inside of the vehicle or that were already on Mr. Mahdi, but he was unsuccessful in getting those cards to work and he couldn't get any gas in the vehicle. At which time, they said that the defendant at one point then took the red Ford Expedition and parked it in the back of the Hess station.

The women, after a while, started to get concerned because they thought that Mr. Mahdi was acting suspicious. At some time after five o'clock that morning, those two women that worked at the Hess station called the police and a deputy from the Calhoun County Sheriff's Office arrived at the Hess station to see what was going on.

When the deputy got there, Your Honor, his testimony and the women's testimony is going to be the defendant was in the bathroom, the deputy decided to do his job, which was to go check on the red Ford Expedition to see if there was anything up with that. He checked on that, Your Honor. He

checked first on the license tag, the Virginia license tag, that came back stolen from Virginia. The deputy then checked the vin number of the red Ford Expedition. The Expedition came back stolen in a carjacking from Columbia and that person may be armed and dangerous.

Well, unbeknown to the deputy, unfortunately, Mr. Mahdi, we believe we were going to prove again through the two witnesses at the Hess station, saw that there was a deputy at the Hess station and the defendant, according to the two witnesses exited -- while the deputy's back here (indicating), he exited the side where the Arby's is and went this way heading towards these woods.

Now, this is around some time after 5:30 in the morning on July the 18th just 12 to 14 hours before the murder of Captain Jimmy Myers.

Captain Myers' property, Your Honor, is less than probably a half a mile from the Hess station right up here where he has a shed, a number of acres and a pond.

That night, Your Honor -- or we were going to have SLED agents come in and testify, Your Honor, that again some time the defendant found that shed. There was forced entry to the shed. We believe

we're going to be able to prove that the defendant used some type of instrument, such as a screw driver, to enter one of the doors to get into the shed.

Once inside the shed, he did a number of things, such as taking a T.V., propping it up and began to watch T.V. He took some items, some weapons that were in the shed that belonged to Captain Myers, such as a shotgun. He took the shotgun and took the time to cut off the stock and the barrel and spray paint the shotgun a different color. He spray painted it black.

We're also going to be able to prove that the defendant was able to break into a blue pick-up truck that was at the scene. And once inside the pick-up truck, was trying probably to get that truck started so he could take off and he couldn't get it started.

That evening, Your Honor, around seven -- about 6:30 now, July the 18th, Captain Jimmy Myers decided he wanted to go out and visit his dad because it was something he did and he tried to do everyday. He went and saw his dad in Orangeburg. He left his father's house around 6:55 and went out to his farm, his property, which only took him about ten minutes

to get to from his dad's place.

We were going to prove that the defendant confronted Captain Jimmy Myers and shot him, at least eight times, but shot nine rounds at him. And the weapon he used, Your Honor, was a .22 caliber semiautomatic rifle that actually belonged to the victim that the defendant was able to arm himself with inside the shed. The weapon was already in the shed when the defendant broke in.

The victim, Your Honor, suffered nine gunshot wounds most of which by themself were fatal. Three of the gunshot wounds were to the head.

His body was on the floor, Your Honor. The defendant then poured diesel fuel over the victim's body, lit him on fire and other areas of the shed on fire, we submit, to try to destroy evidence in this case.

SLED got there and processed the scene later that night. What happened was Ms. Amy Myers, the victim's wife, began to get concerned that her husband hadn't come home that night. He wasn't returning any of her pages so she went out looking for Captain Myers. And she's the one who discovered his body that night around 9:30, Sunday, July the 18th.

SLED came out, Your Honor, processed the scene. They found a number of items missing, of course, such as the .22 caliber semiautomatic rifle. They also -- most notably, everybody noticed that the victim's white Dodge Ram truck was missing from the scene and that was the truck that the victim had drove to his shed. It was a city issued police truck.

They also located a set of keys, Your Honor, inside the shed that didn't belong there. They learned that night that those keys that were found in the shed not far from the victim's body were the keys that belonged to the Ford Expedition that Mr. Mahdi had car jacked earlier that morning that was left at the Hess station.

SLED agents and officers from the sheriff's department went to go reinterview those two women that worked at the Hess station and they had those women do a composite of the person that they saw in that early morning before the murder. They did the composite, and this is early Monday morning, July 19th less than 12 hours after Captain Myers' body was discovered. That composite was faxed to the State of Virginia, Lawrenceville, Virginia.

The authorities up in Lawrenceville, Virginia

recognized the composite. And the reason they knew the facts up there is because of the stolen license tags from Lawrenceville, Virginia on the red Expedition. The officers up in Virginia then told the SLED agents and Calhoun Sheriff's Office that the man they might be looking for was Mikal Mahdi as a result of that composite.

Sure enough, Your Honor, SLED agents then tested the Expedition for fingerprints, lifted a number of prints on the Expedition and a number of prints off the license tag. Those fingerprints came back to the defendant, Mr. Mikal Mahdi. A nationwide BOLO was sent out to look for the defendant, Mikal Mahdi, possibly driving the victim's Dodge Ram, city issued police truck.

We were also going to put up witnesses, Your Honor, Mr. Dickerson and some police officers from Jacksonville, Florida, that not long after the 19th of July when the defendant was down in Florida, he sold the murder weapon, the .22 caliber semiautomatic rifle to Mr. Dickerson. He also sold the .380 caliber handgun he brought down with him from Virginia to Mr. Dickerson.

Finally, Your Honor, on Wednesday, July 21st, the defendant was spotted driving the victim's white

Dodge police truck in Satellite Beach, Florida. The police tried to pull the truck over, the authorities from Satellite Beach tried to pull the vehicle over. The defendant exited the vehicle while it was still moving. A short foot chase ensued where the defendant was captured and finally brought back here to South Carolina.

THE COURT: Are all of those facts true, Mr. Mahdi?

DEFENDANT MAHDI: Most of them, Your Honor. It was a little dramatized.

THE COURT: What facts stated by the Solicitor is not true -- what facts are not true?

DEFENDANT MAHDI: It's so petty, they're insignificant. Your Honor?

THE COURT: Yes, sir.

DEFENDANT MAHDI: I would like to say the facts -- yes, the facts were true, sir.

THE COURT: Did you willfully, unlawfully and with malice aforethought kill James E. Myers by shooting him with a .22 caliber firearm here in Calhoun County as alleged in the indictment and as stated by the Solicitor?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And did you, on or about July 18th,

2004, at around the same time and date as the murder, enter the building belonging to James E. Myers and Amy Tripp Myers without their consent, with intent to commit a crime therein? And while in the building or during the immediate flight or leaving the building, were you armed with a deadly weapon? And did you cause physical injury, including the killing of Mr. Myers with the pistol during this same burglary?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And did you steal the officer's -- the 2003 Dodge Ram truck in the possession of the officer and owned by the City of Orangeburg?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: I'll accept the guilty plea. The case will proceed to the second phase of this trial, the sentencing phase of the trial.

When will the State be ready to proceed?

MR. PASCOE: Monday, Your Honor.

THE COURT: And the defense?

MR. WALTERS: We're prepared for Monday, Your Honor.

THE COURT: The sentencing phase will commence at 10:00 a.m. on Monday morning.

MR. WALTERS: Thank you, Your Honor.

sentencing. Court will be in recess until that time.

MR. PASCOE: Thank you, Judge.

MR. WALTERS: Thank you, Your Honor.

THE COURT: Mr. Mahdi, if you will stand for me, please.

Mr. Mahdi, having heard the closing arguments by the State and the defense counsel, I want to once again give you an opportunity to address the Court concerning any closing argument or statement that you would like to make, if you care to make one.

DEFENDANT MAHDI: No, sir, Your Honor.

THE COURT: All right. You do not wish to address the Court regarding sentencing?

DEFENDANT MAHDI: No, sir, Your Honor.

THE COURT: All right. Thank you very much.

(Whereupon, the proceedings were concluded for December 6, 2006.)

(The following proceedings were held on December 8, 2006.)

THE COURT: Mr. Walters, Mr. Koger, anything before we proceed?

MR. WALTERS: No, sir, Your Honor.

THE COURT: If the defendant will come forward for sentencing.

First, I want to commend Solicitor Pascoe and Deputy Solicitor Sorenson, as well as defense counsel, Mr. Walters and Mr. Koger, for your professional advocacy and the efficient manner in which you have handled this case.

I also thank Mr. Hasty, the Clerk, and the courthouse staff, law enforcement and all of the witnesses for the courtesies and respect shown to the Court during this arduous proceeding.

I especially thank the, approximately, 400 citizens of Calhoun County who were summoned to jury duty and responded by appearing for this extremely important and essential civic responsibility.

Now, I advise all present against any outbursts of expression because some will agree and some will disagree with the Court's decision. The decorum of the Court, however, must be maintained at all times.

The defendant, Mikal Deen Mahdi, was indicted by the Grand Jury of Calhoun County for murder, burglary second degree and grand larceny of a motor vehicle, valued in excess of $5,000. Pursuant to South Carolina Code Section 16-3-26, the Solicitor timely notified the defendant that he intended to seek the death penalty as punishment for the murder of James E. Myers.

On November 30th, 2006, the defendant waived his right to a jury trial and pled guilty to all charges after the jury was seated, but not yet sworn. Mr. Mahdi acknowledged that he understood that as a consequence of his guilty plea to murder while in the commission of burglary and grand larceny, that the Court would conduct a separate sentencing proceeding and determine whether he should be sentenced to life imprisonment without the possibility of parole or death.

From December 4th through 6th, 2006, the Court heard additional evidence in extenuation, mitigation or aggravation of the punishment. The Court also heard the arguments of counsel for or against the sentence to be imposed. Mr. Mahdi waived his right to testify and to have the final closing argument regarding the sentence to be imposed.

On December 6th, 2006, the Court requested and subsequently received memoranda from both counsel for the State and counsel for the defense listing all statutory and nonstatutory aggravating and mitigating factors believed to have been established by the evidence.

This order that I am publishing today is as a result of the guilty plea and the separate

sentencing proceeding to determine whether the sentence of the defendant, Mikal Deen Mahdi, for the murder of James E. Myers should be life imprisonment without the possibility of parole or death.

The facts are that in the early morning of July 18th, 2004, after carjacking a vehicle in Columbia, South Carolina, the defendant pulled into the Wilco Travel Plaza off Interstate 26 in Calhoun County and attempted to use stolen credit or check cards -- and/or check cards. Employees at the Travel Plaza called the Calhoun County Sheriff's Office reporting that the defendant was acting in a suspicious manner.

When the sheriff's deputy arrived at the Travel Plaza, the defendant fled into the woods and eventually entered upon the land owned by James E. Myers and Amy Tripp Myers. Mr. Myers was an Orangeburg Department of Public Safety captain who was off duty, but on-call at the time.

Mr. Mahdi forcibly entered a shed located on the land. When Captain Myers arrived at his property, Mr. Mahdi was lying in wait.

Early that afternoon, Captain Myers and his wife, Amy, returned to their home in Orangeburg County from Edisto Beach after celebrating the

birthdays of Amy, his sister and his daughter. After returning home, he visited his father, who lived a short distance away. Captain Myers left his father's home and stopped by his farm in Calhoun County. He went to the shed located on the farm as he had done many times before.

The shed was where he and his wife were married. The shed was where their -- was their place of peace and serenity. And this shed held treasured memories and dreams of Captain Myers and his wife.

On the premises was Mikal Deen Mahdi who shot Captain Myers nine times with a .22 caliber semiautomatic rifle that was stored in the shed. Three of the bullets were to the head. The defendant poured diesel fuel over Captain Myers' body and lit him on fire. The defendant then stole Captain Myers' city issued truck and rifles and fled to Florida.

On July 21st, 2004, the police department in Satellite Beach, Florida apprehended the defendant after a chase. He was driving Captain Myers' truck.

Based upon the defendant's guilty plea, testimony presented and other evidence in this case, the Court finds and concludes as follows:

The State alleges the following statutory aggravating circumstances: One, that the murder of Captain James E. Myers was committed while in the commission of burglary in the second degree. Two, the murder of Captain James E. Myers was committed while in the commission of larceny with the use of a deadly weapon. Mikal Deen Mahdi pled guilty to murder, burglary in the second degree and grand larceny.

The State presented additional evidence during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the defendant was committing these crimes. Further evidence was presented indicating that the defendant stole from the victim his police issued vehicle and two rifles, one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

The State alleges the following as additional statutory aggravating circumstances: Three, that the murder of Captain James E. Myers was committed while in the commission of a robbery while armed with a deadly weapon. Four, the murder of Captain James E. Myers occurred during or because of the performance of his official duties.

There is strong evidence to suggest that items were taken from the person of Captain Myers, particularly since his police badge has never been recovered. The evidence also suggests that a South Carolina Law Enforcement Division investigative file on the premises being worked on by Amy Tripp Myers, then a SLED agent, had been disturbed during the time the defendant was alone in the shed. This is evidence that the defendant knew or should have known that he was on the premises of a person or persons involved in law enforcement.

I conclude, however, that the State has failed to prove these two aggravating circumstances beyond a reasonable doubt; therefore, I have neither considered nor given any weight to these two allegations as aggravating circumstances.

The State also alleges the following nonstatutory aggravating circumstances. The State presented compelling evidence of prior and subsequent bad acts of the defendant, which are relevant to show his bad character, evil nature and malignant heart. These incidents covered a period of over eight years showing the defendant committing a series of crimes, including housebreaking, stealing guns, robbing people, selling crack

cocaine, vandalism and malicious wounding.

These bad acts are summarized as follows: On January 7th, 1998, while in the Virginia Department of Juvenile Justice for grand larceny and breaking and entering, Mr. Mahdi, then 14 years of age, conveyed to a counselor doing an evaluation profile that his only strength was robbing people.

On June 30th, 1998, Mr. Mahdi, then 15 years old, was involved in an over nine-hour standoff with the Brunswick County, Virginia Sheriff's Department who was attempting to execute an order on the defendant to return him to a juvenile detention facility when Mr. Mahdi made the comment, according to Brunswick County Sheriff James Woodley, that, I'm going to kill a cop before I die.

On November 23rd, 2000, the defendant, then 17 years of age, attempted to grab the gun of a Richmond, Virginia Police Officer who was attempting to arrest Mr. Mahdi on a vandalism charge for slashing his mother's automobile tires. During this arrest, Mr. Mahdi commented, according to Officer Mike Koehler, that he should have killed that crazy bitch, referring to his mother.

On April 17th, 2001, then 18 years old, while attempting to break into an apartment in Richmond,

Virginia, Mr. Mahdi stabbed Moises Rivera, a maintenance supervisor, five times, resulting in a felony conviction for malicious wounding. Mr. Mahdi received a 15 year prison sentence suspended to the service of 39 months to be followed by 15 years of probation.

During each of these periods of incarceration, Mr. Mahdi's behavior was maladaptive, assaultive and demonstrated an utter disrespect for authority, including threatening the life of a detention officer.

Following Mr. Mahdi's release on probation on May 12th, 2004, his criminal activities escalated during a crime spree that resulted in his killing Christopher Jason Boggs during a robbery of an Exxon Station in Winston-Salem, North Carolina on July 15th, 2004.. Mr. Mahdi shot Mr. Boggs twice in the face at pointblank range with a weapon that had been stolen from his grandmother's neighbor's house in Lawrenceville, Virginia.

On July 18th, 2004, three days later at approximately 3:30 a.m., Mr. Mahdi carjacked Corey Pitts' automobile in Columbia, South Carolina using a chrome plated handgun.

Following his murder of Captain Myers,

Mr. Mahdi was apprehended on July 21st, 2004 in Satellite Beach, Florida, after jumping out of Captain Myers' city issued truck armed with a Ruger .223 assault rifle belonging to the Orangeburg Department of Public Safety.

Following his arrest, Mr. Mahdi stated that, according to Sergeant Darren Frost of the Satellite Beach Police Department, that he did not shoot Sergeant Frost only because the gun was stuck in a three shot burst and he did not think he could shoot him, the other cop, referring to the other police officer, and the F'ing dog.

While in safekeeping in the South Carolina Department of Corrections awaiting this trial, Mr. Mahdi made numerous threats to kill various department employees.

I find that the State has established by clear and convincing evidence the defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the defendant's characteristics, but not as proof of any alleged statutory aggravating circumstances.

I have considered all of the mitigating circumstances and nonmitigating circumstances argued by the defense, as well as other mitigating

circumstances supported by the evidence. Defense counsel argues that the defendant's youth should be considered by the Court in determining the appropriate sentence to be imposed.

Mikal Deen Mahdi was 21 years old at the time of the murder of Captain Myers. When last tested at age 14, the defendant's IQ was 108, slightly above average. While this is a young age for such a serious crime, Mikal Deen Mahdi began his criminal career at an early age having entered the Virginia Department of Juvenile Justice at age 14. He is experienced in the world of crime. By the time he committed these crimes, Mr. Mahdi was well aware of the severity of his crimes and the possible consequences.

I have considered the defendant's young age, but I have not afforded it great weight in reaching my decision. There is nothing about Mr. Mahdi's age or mentality that in any way mitigates, excuses or lessens his culpability and neither should it be given any significant weight in the Court's ultimate decision as to his sentence.

I have also given consideration to what the defense contends to be the defendant's turbulent and transient childhood and upbringing. In reviewing

the testimony of Marjorie Hammock, the defense's clinical social worker expert, there's no reference to physical or sexual abuse suffered by the defendant. In addition, records of the Virginia Department of Juvenile Justice indicates that the defendant's father, brother and grandmother continually expressed great care and concern for his well-being.

While Mr. Mahdi's family life may have been less than ideal, particularly without the presence of a loving and caring mother, I do not believe that his difficult childhood and family life contributed in any significant way to his senseless criminal activities; therefore, while I have considered this statutory -- this nonstatutory mitigating circumstance, I do not believe that it should be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The defense presented testimony from Mr. James Akin, a prison adaptability expert. Mr. Akin, a highly credential expert, testified concerning Mr. Mahdi's potential adaptability to prison life.

I have considered and reviewed Mr. Mahdi's records regarding his prior behavior in various correctional institutions. He has consistently been

disruptive and uncooperative and has threatened to kill prison employees. Officers have repeatedly found homemade weapons, ropes and other contraband in the defendant's cell.

During this trial, the defendant brought a homemade handcuff key into the courthouse with the intent of using it, if possible, to escape, thus, posing a serious threat to courtroom security. The Sheriff of Calhoun County testified that Mr. Mahdi stated to him that he made the key while being housed and monitored at the State's highest security level facility.

While Mr. Akin gave impressive testimony, based on Mr. Mahdi's behavior in correctional institutions throughout his adolescence and adult years, I do not believe that he is sufficiently adaptable to prison life for this nonmitigating circumstance to be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The defense further argues a nonstatutory mitigating circumstance -- argues as a nonstatutory mitigating circumstance that the Court should consider the defendant's guilty plea in determining the appropriate sentence to be imposed.

The defendant's guilty plea occurred during the

fourth day of his trial following jury selection, but prior to the jury being sworn. This was one day following his attempted escape through the use of a homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to this Court. Therefore, I conclude that no significant weight should be given to this nonstatutory mitigating circumstance and the Court's ultimate decision as to the sentence to be imposed.

As to victim impact, Mikal Deen Mahdi murdered a husband, a father, a grandfather, a son and a friend of many. Captain Myers was a well-respected police officer, an outdoorsman, a mentor and a treasured jewel of humanity. Mikal Deen Mahdi burglarized Captain Myers' farm shed and stole his family's sense of security and serenity. He robbed the Myers' family and their many colleagues and friends of their right to peaceful enjoyment of life.

In considering the appropriate sentence to be imposed, I'm acutely aware that I am being called upon to determine what few of my brethren and sisters on the beach have been called upon to do. It is being the sole judge of whether Mr. Mahdi should be sentenced to life imprisonment without the

possibility of parole or death by electrocution or lethal injection. It is an awesome task, which I do not take lightly.

United States Supreme Court Justice Potter Stewart referred to the penalty of death in the case of Furman versus Georgia as being different from all other forms of criminal punishment, not in degrees, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

My challenge and my commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity seems not to exist in Mikal Deen Mahdi.

The State pleads for justice. Mr. Mahdi's plea is for mercy. In evaluating these two ideals, I am reminded of my duty-sworn oath to preserve, protect and defend the Constitution of this state and of the United States of America. The obligation that I have applies not only to Mikal Deen Mahdi, but as importantly, it is an obligation that I have to all

of the citizens of the State of South Carolina. The State and the defendant are entitled to justice.

Today, the defendant also seeks mercy, the same mercy that perhaps Captain James E. Myers sought for an instant before Mikal Deen Mahdi fired nine bullets into Captain Myers' body from one of Captain Myers' prized weapons before setting his body on fire with matches and diesel fuel belonging to Captain Myers. In extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved and consciousless manner, the defendant, Mikal Deen Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court.

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain James E. Myers is death. As to burglary second degree and grand larceny, the sentence is 15 years and ten years respectively, consecutive to the sentence for murder and consecutive to each other.

I find, as an affirmative fact, that the evidence in this case warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion or any other arbitrary factor. It is, therefore, the judgment of the law

and the sentence of the Court that you, the defendant, Mikal Deen Mahdi, be taken to the South Carolina Department of Corrections, henceforth, to be kept in close and safe confinement until the 8th day of February 2007, upon which day, between the hours of 6:00 a.m. and six o'clock p.m., that you, the defendant, Mikal Deen Mahdi, shall suffer death in the manner provided by law. May God have mercy on your soul.

The execution of his sentence will be stayed pending the automatic appeals and reviews as required by law. This court is adjourned.

END OF PROCEEDINGS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)
)
The State of South Carolina)
)
v.)
)
Mikal Deen Mahdi,)
)
Defendant.)

IN THE COURT OF GENERAL SESSIONS

Indictment Nos.: 2004-GS-09-242
2004-GS-09-243
2004-GS-09-244

SENTENCING ORDER

Thank you. Please be seated.

Good Afternoon.

First, I commend Solicitor Pascoe, Deputy Solicitor Sorenson, and Defense Counsel Mr. Walters and Mr. Koger for your professional advocacy and efficient manner in which you have handled this case. I also thank the Clerk, Mr. Hasty, and the Courthouse staff, law enforcement and all of the witnesses for the courtesies and respect shown the Court during this arduous proceeding. I especially thank the approximately 400 citizens of Calhoun County who were summoned to jury duty and responded by appearing for this extremely important and essential civic responsibility.

I advise all present against any outbursts of expression. Some will agree. Some will disagree. The decorum of the Court, however, must be maintained at all times.

The Defendant, Mikal Deen Mahdi, was indicted by the Grand Jury of Calhoun County for murder, burglary second degree and grand larceny of a motor vehicle valued in excess of five thousand dollars ($5000.00).

Pursuant to South Carolina Code § 16-3-26, the Solicitor timely notified the Defendant that he intended to seek the death penalty as punishment for the murder of James E. Myers. On November 30, 2006, the Defendant waived his right to a jury trial and pled guilty to all charges after the jury was seated but not yet sworn. Mr. Mahdi acknowledged that he understood that as a consequence of his guilty plea to murder while in the commission of a burglary and grand larceny that the Court would conduct a separate sentencing proceeding and determine whether he should be sentenced to life imprisonment without the possibility of parole or death.

From December 4 – 6, 2006, the Court heard additional evidence in extenuation, mitigation, or aggravation of the punishment. The Court also heard the arguments of counsel for or against the sentence to be imposed. Mr. Mahdi waived his right to testify and to have the final closing argument regarding the sentence to be imposed.

On December 6, 2006, the Court requested and subsequently received memoranda from both counsel for the State and counsel for the Defendant listing all statutory and non-statutory aggravating and mitigating factors believed to have been established by the evidence.

This Order is as a result of the guilty plea and the separate sentencing proceeding to determine whether the sentence of the Defendant, Mikal Deen Mahdi, for the murder of James E. Myers should be life imprisonment without the possibility of parole or death.

FACTS

In the early morning of July 18, 2004, after carjacking a vehicle in Columbia, South Carolina, the defendant pulled into the Wilco Travel Plaza off Interstate 26 in

Calhoun County and attempted to use stolen credit and/or check cards. Employees at the Travel Plaza called the Calhoun County Sheriff's Office reporting that the defendant was acting in a suspicious manner. When the Sheriff's deputy arrived at the Travel Plaza, the defendant fled into the woods and eventually entered upon land owned by James E. Myers and Amy Tripp Myers. Mr. Myers was an Orangeburg Department of Public Safety Captain, who was off duty, but on call at the time. Mr. Mahdi forcefully entered a shed located on the land. When Captain Myers arrived at his property, Mr. Mahdi was lying in wait.

Earlier that afternoon, Captain Myers and his wife Amy returned to their home in Orangeburg County from Edisto Beach after celebrating the birthdays of Amy, his sister and his daughter. After returning home, he visited his father who lived a short distance away. Captain Myers left his father's home and stopped by his farm in Calhoun County. He went to the shed located on the farm as he had done many times before. This shed was where he and his wife were married; this shed was their place of peace and serenity; and this shed held treasured memories and dreams of Captain Myers and his wife. On the premises was Mikal Deen Mahdi who shot Captain Myers nine times, with a .22 caliber semiautomatic rifle that was stored in the shed. Three of the bullets were to the head. The defendant poured diesel fuel over Captain Myers's body and lit him on fire. The defendant then stole Captain Myers's city issued truck and rifles and fled to Florida. On July 21, 2004, the police department in Satellite Beach, Florida apprehended the defendant after a chase. He was driving Captain Myers's truck.

Based upon the defendant's guilty plea, testimony presented, and other evidence in the case, the court finds and concludes as follows:

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AGGRAVATING CIRCUMSTANCES

The State alleges the following statutory aggravating circumstances:

1. **The murder of Captain James E. Myers was committed while in the commission of burglary in the 2nd degree.**

2. **The murder of Captain James E. Myers was committed while in the commission of larceny with use of a deadly weapon.**

Mikal Mahdi pled guilty to Murder, Burglary in the 2nd degree and Grand Larceny. The State presented additional evidence during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the Defendant was committing these crimes. Further evidence was presented indicating that the Defendant stole from the victim his police issued vehicle and two rifles – one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

The State alleges the following as additional statutory aggravating circumstances:

3. **The murder of Captain James E. Myers was committed while in the commission of robbery while armed with a deadly weapon.**

4. **The murder of a Captain James E. Myers occurred during or because of the performance of his official duties.**

There is strong evidence to suggest that items were taken from the person of Captain Myers, particularly his police badge that was never recovered. The evidence also suggests that a South Carolina Law Enforcement Division (SLED) investigative file on the premises being worked on by Amy Tripp-Myers, then a SLED agent, had been disturbed during the time the Defendant was alone in the shed. This is evidence that the Defendant knew or should have known that he was on the premises of a person or

persons involved in law enforcement. I conclude, however, that the State has failed to prove these two aggravating circumstances beyond a reasonable doubt. Therefore, I have neither considered nor given any weight to these two allegations as aggravating circumstances.

The State also alleges the following non-statutory aggravating circumstances:

Characteristics of the Defendant

The State presented compelling evidence of prior and subsequent bad acts of the Defendant which are relevant to show his bad character, evil nature and malignant heart. These incidents covered a period over eight years showing the Defendant committing a series of crimes, including housebreaking, stealing guns, robbing people, selling crack cocaine, vandalism and malicious wounding. These bad acts are summarized as follows:

On January 7, 1998, while in the Virginia Department of Juvenile Justice for grand larceny and breaking and entering, Mr. Mahdi, then 14 years of age, conveyed to a counselor during an evaluation profile, that his only strength was robbing people. On June 30, 1998, Mr. Mahdi, then 15 years old, was involved in an over 9 (nine) hour standoff with the Brunswick County Virginia Sheriff's Department who was attempting to execute an Order to return the Defendant to a juvenile detention facility, when Mr. Mahdi made the comment according to Brunswick County Sheriff James Woodley that "I'm gonna kill a cop before I die." On November 23, 2000, the Defendant then 17 years of age, attempted to grab the gun of a Richmond, Virginia, police officer who was attempting to arrest Mr. Mahdi on a vandalism charge for slashing his mothers automobile tires. During this arrest, Mr. Mahdi commented, according to Officer Mike

Koehler that he "should have killed that crazy bitch," referring to his mother. On April 17, 2001, then 18 years old, while attempting to break into an apartment in Richmond, Virginia, Mr. Mahdi stabbed Moises Rivera, a maintenance supervisor, five (5) times, resulting in a felony conviction for malicious wounding. Mr. Mahdi received a fifteen (15) year prison sentence suspended to the service of thirty-nine (39) months to be followed by fifteen (15) years of probation.

During each of these periods of incarceration, Mr. Mahdi's behavior was maladaptive, assaultive, and demonstrated an utter disrespect for authority, including threatening the life of a Detention officer.

Following Mr. Mahdi's release on probation on May 12, 2004, his criminal activities escalated during a crime spree that resulted in his killing Christopher Jason Boggs during a robbery of an Exxon Station in Winston Salem, North Carolina on July 15, 2004. Mr. Mahdi shot Mr. Boggs twice in the face at point blank range with a weapon that had been stolen from his grandmother's neighbor's house in Lawrenceville, Virginia. On July 18, 2004, three days later at approximately 3:30 a.m., Mr. Mahdi carjacked Corey Pitts in Columbia, South Carolina using a chrome plated handgun. Following his murder of Captain Myers, Mr. Mahdi was apprehended on July 21, 2004 in Satellite Beach, Florida after jumping out of Captain Myers city-issued truck armed with a Ruger .223 assault rifle belonging to the Orangeburg Department of Public Safety. Following his arrest, Mr. Mahdi stated according Sergeant Darren Frost of the Satellite Beach Police Department that he did not shoot Sergeant Frost only because the gun was stuck in a three shot burst and he did not think he could shoot him, the other cop, referring to the other police officer, and the f'ing dog. While in safekeeping in the South

Carolina Department of Corrections awaiting this trial, Mr. Mahdi made numerous threats to kill various Department employees.

I find that The State has established by clear and convincing evidence the Defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the Defendant's characteristics, but not as proof of any alleged statutory aggravating circumstance.

MITIGATING CIRCUMSTANCES

I have considered all statutory mitigating circumstances and non-statutory mitigating circumstances argued by the Defense as well as other mitigating circumstances supported by the evidence.

Statutory Mitigating Circumstance

Defense counsel argues that the Defendant's youth should be considered by the court in determining the appropriate sentence to be imposed. Mikal Deen Mahdi was twenty-one (21) years old at the time of the murder of Captain Myers. When last tested at age 14, the Defendant's IQ was 108 – slightly above average. While this is a young age for such a serious crime, Mikal Deen Mahdi began his criminal career at an early age, having entered the Virginia Department of Juvenile Justice at age 14. He is experienced in the world of crime. By the time he committed these crimes, Mr. Mahdi was well aware of the severity of his crimes and the possible consequences.

I have considered the defendant's young age, but I have not afforded it great weight in reaching my decision. There is nothing about Mr. Mahdi's age or mentality that in any way mitigates, excuses, or lessens his culpability and neither should it be given any significant weight in the Court's ultimate decision as to his sentence.

Non-Statutory Mitigating Circumstances

I have also given consideration to what the defense contends to be the Defendant's turbulent and transient childhood and upbringing. In reviewing the testimony of Margie Hammock, the Defense's clinical social worker expert, there is no reference to physical or sexual abuse suffered by the Defendant. In addition, records of the Virginia Department of Juvenile Justice indicate that the Defendant's father, brother, and grandmother continually expressed great care and concern for his well-being. While Mr. Mahdi's family life may have been less than ideal particularly without the presence of a loving and caring mother, I do not believe that his difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore while I have considered this non-statutory mitigating circumstance, I do not believe that it should be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The Defense presented testimony from Mr. James Aiken, a prison adaptability expert. Mr. Aiken, a highly credentialed expert, testified concerning Mr. Mahdi's potential adaptability to prison life.

I have reviewed and considered Mr. Mahdi's records regarding his prior behavior in various correctional institutions. He has consistently been disruptive and

uncooperative and has threatened to kill prison employees. Officers have repeatedly found homemade weapons, ropes and other contraband in the Defendant's cell. During this trial, the Defendant brought a homemade handcuff key into the courthouse with the intent to use it, if possible to escape, thus posing a serious threat to courtroom security. The Sheriff of Calhoun County testified that Mr. Mahdi stated to him that he made the key while being housed and monitored at the State's highest security level facility.

While Mr. Aiken gave impressive testimony, based on Mr. Mahdi's behavior in correctional institutions throughout his adolescence and adult years, I do not believe that he is sufficiently adaptable to prison life for this non-mitigating circumstance to be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The defense further argues as a non-statutory mitigating circumstance that the Court should consider the Defendant's guilty plea in determining the appropriate sentence to be imposed. The Defendant's guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn. This was one day following his attempted escape through the use of the homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to the Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

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VICTIM IMPACT

Mikal Deen Mahdi murdered a husband, father, grandfather, son, and friend to many. Captain Myers was a well-respected police officer, an outdoorsman, a mentor and a treasured jewel of humanity. Mikal Deen Mahdi burglarized Captain Myers's farm shed and stole his family's sense of security and serenity. He robbed the Myers family and their many colleagues and friends of their right to peaceful enjoyment of life.

SENTENCING RATIONALE

In considering the appropriate sentence to be imposed, I am acutely aware that I am being called upon to determine what few of my brethren and sisters on the bench have been called upon to do. It is being the sole judge of whether Mr. Mahdi should be sentenced to life in prison without the possibility of parole or death by electrocution or lethal injection. It is an awesome task – which I do not take lightly.

United States Supreme Court Justice Potter Stewart referred to the penalty of death in the case of Furman v. Georgia as being different from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability; it is unique in its rejection of rehabilitation as a basic purpose of criminal justice; and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

My challenge and commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity seems not exist in Mikal Deen Mahdi.

The State pleads for justice- Mr. Mahdi's plea is for mercy.

In evaluating these two ideals, I am reminded of my duly sworn oath to preserve, protect, and defend the Constitution of this State and the United States of America. This obligation that I have applies not only to Mikal Dean Mahdi but as importantly it is an obligation that I have to all the citizens of the Sate of South Carolina.

The State and the Defendant are entitled to justice. Today, the Defendant also seeks mercy- the same mercy that perhaps Captain James E. Myers sought for an instant before Mikal Deen Mahdi fired nine bullets into Captain Myers' body from one of Captain Myers's prized weapons, before setting his body on fire with matches and diesel fuel belonging to Captain Myers.

In extinguishing the life, hope, and dreams of Captain Myers in such a wicked, depraved and conscienceless manner, the Defendant Mikal Deen Mahdi also extinguished any justifiable claim to receive the mercy he seeks from this Court.

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain James E. Myers is death. As to Burglary 2nd degree and Grand Larceny, the sentence is fifteen years and ten years, respectively, consecutive to the sentence for murder and consecutive to each other.

AFFIRMATIVE FINDING

I find as an affirmative fact that the evidence in this case warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

CW
11 of 12

It is therefore the judgment of the law and the sentence of the Court that you the Defendant Mikal Deen Mahdi be taken to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement, until the 8th day of February 2007, upon which day, between the hours of 6:00 a.m. and 6:00 p.m., that you the Defendant Mikal Deen Mahdi shall suffer death in the manner provided by law. May God have mercy on your soul.

The execution of the sentence will be stayed pending the automatic appeals and reviews as required by law.

THIS COURT IS ADJOURNED.

December 8, 2006

Clifton Newman
Presiding Judge

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CALHOUN	)	
	)	2017-CP-09-00004
Mikal D. Mahdi, SCDC # 5238,	)	Case No. 2017-CP-09-
Applicant,	)	
	)	**Application for Post-Conviction Relief**
vs.	)	
	)	
	)	
State of South Carolina,	)	
Defendant.	)	
	)	

FILED
2017 JUN 20 P 1:16

The applicant, Mikal D. Mahdi, submits the following application for post conviction relief:[1]

1) Mr. Mahdi in confined at the Lieber Correctional Institution.

2) The Honorable Clifton Newman, presiding judge for the Court of General Sessions of Calhoun County, by special assignment of the South Carolina Supreme Court, imposed the sentences.

3) There were not any co-defendants.

4) On November 30, 2006, Mr. Mahdi pleaded guilty to murder (2004-GS-09-00243), second-degree burglary, violent (2004-GS-09-00244), and grand larceny greater than $5,000.00 (2004-GS-09-00242).

5) On December 8, 2006, Judge Newman sentenced Mr. Mahdi to death for murder, fifteen years for second-degree burglary, and ten years for grand larceny. The sentences are consecutive.

6) Mr. Mahdi pleaded guilty.

[1] This pleading is based on SCRCPForm5, revised 3/2003, found on the South Carolina Judicial Department Website. Mr. Mahdi reserves the right to amend his application as provided by law.

7) Mr. Mahdi appealed the convictions and sentences to the South Carolina Supreme Court.

8) On June 15, 2009, the South Carolina Supreme Court affirmed the convictions and sentences. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). Mr. Mahdi did not appeal to the Supreme Court of the United States.

9) Not applicable because Mr. Mahdi filed an appeal.

10) Statement of grounds for relief:

a) S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016).

b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation.

c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in his initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

- Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
    - Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to

a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.

- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.

- Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

- Counsel failed to assert that S.C. Code Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

- Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

  - At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled on by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal.

11) Statement of facts that support each of the grounds for relief set forth in paragraph 10:

a) S.C. Code Ann. § 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

b) Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

c) Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

d) In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

12) Prior to filing this application, Mr. Mahdi has filed the following actions regarding these convictions and sentences:

a) On August 18, 2009, Mr. Mahdi filed an application for post-conviction relief in the Court of Common Pleas for Calhoun County, Case Number 2009-CP-09-00164. From March 9-11, 2011, the Honorable Doyet A. Early, III convened an evidentiary hearing. By written order dated December 18, 2012, Judge Early found trial counsel ineffective but dismissed the PCR Application because Mr. Mahdi failed to demonstrate prejudice. Pursuant to Rule 59(e), SCRCP, the State moved to alter or

amend the judgment. By written order dated August 18, 2014, Judge Early denied Mr. Madhi's application, concluding Mr. Mahdi had failed to demonstrate ineffective assistance of trial counsel. By written order dated September 8, 2016, the South Carolina Supreme Court denied Mr. Mahdi's petition for writ of *certiorari*, *Mahdi v. State*, S.C.S.Ct. Appellate Case No. 2014-002131. On December 7, 2016, Mr. Mahdi filed a petition for writ of *certiorari* in the Supreme Court of the United States, Case Number 16-741. That petition is still pending.

b) On September 26, 2016, Mr. Mahdi filed a motion for a stay of execution and appointment of counsel in the United States District Court for the District of South Carolina, Mahdi v. Sterling, Case No. 8:16-mc-00402-TMC-JDA. Mr. Mahdi has until September 8, 2017 to file a petition for writ of *habeas corpus*.

13) See response to number 12 above.

14) Grounds 10(c), 10(d), 11(c), and 11(d) were pled in Mr. Mahdi's initial application for post-conviction relief, as amended.

15) See response to number 14 above.

16) Grounds 10(a) and 11(a) are based *Hurst*, which is a constitutionally binding decision from the Supreme Court of the United States that can be raised pursuant to S.C. Code § 17-27-45(B). Grounds 10(b) and 11(b) are based on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012), which also are constitutionally binding decisions.

17) Prior Counsel:

a) Trial Counsel:

Carl B. Grant[2]
PO Box 1203
Orangeburg, SC 29116

Glenn Walters, Sr.
Glenn Walters & Associates, PA
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Orangeburg, SC 29116-1346

Joshua Koger, Jr.
The Law Offices of Joshua Koger, Jr.
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1237 Gadsden Street, Suite G
Columbia, SC 29201

b) Direct Appeal Counsel:

Katherine H. Hudgins
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PO Box 11589
Columbia, SC 29211

c) PCR Counsel:

Teresa L. Norris
Special Assistant Public Defender
Charleston County Public Defender's Office
101 Meeting Street, 5th Floor
Charleston, SC 29401

Robert Edward Lominack[3]
Law Offices of Robert E. Lominack, P.C.
6113 Hampton Ridge Road
Columbia, SC 29209

d) PCR Appellate Counsel (appeals to the Supreme Courts of South Carolina and the United States):

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[2] Mr. Grant was relieved as counsel prior to Mr. Mahdi's guilty plea.

[3] Mr. Lominack is an inactive member of the South Carolina Bar.

Seth C. Faber[4]
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

Brandon W. Duke
Winston & Strawn LLP
1111 Louisiana Street
Houston, TX 77002

Teresa L. Norris
Special Assistant Public Defender
Charleston County Public Defender's Office
101 Meeting Street, 5th Floor
Charleston, SC 29401

e) Federal *habeas corpus* counsel:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

John L. Warren, III
Simmons Law Firm, LLC
1711 Pickens St.
Columbia, SC 29201

18) See response to number 17 above.

19) This Court should vacate Mr. Mahdi's convictions and sentences and order a new trial. In the alternative, this Court should vacate Mr. Mahdi's death sentence and order a new sentencing hearing.

20) Mr. Mahdi is under sentences in North Carolina.

(Signature Page Follows)

[4] Mr. Faber and Mr. Duke were admitted *pro hac vice*.

Respectfully Submitted,

By 

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Attorneys for the Applicant

1/10, 2017

VERIFICATION

I, Makil D. Mahdi, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Mikal D. Mahdi

Sworn to and subscribed before me

this 10th day of Jan, 2017

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 5/31/2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF CALHOUN) C/A No. 2017-CP-09-00004

Mikal Mahdi, SCDC #5238,) *CAPITAL PCR*

Applicant,)

vs.) **ORDER OF DISMISSAL**

State of South Carolina,)

Respondent.)

On January 10, 2017, Applicant, Mikal Mahdi ("Mahdi"), a death sentenced inmate, filed the above captioned second (2nd) or successive PCR action in the Court of Common Pleas for Calhoun County, again collaterally challenging his guilty plea convictions and sentence of death previously imposed by the Honorable Clifton Newman, Circuit Court Judge. Mahdi first (1st) collaterally challenged his guilty plea convictions and death sentence in a 2009 PCR application **(2009-CP-09-00164)** that was denied and dismissed by this Court, after a PCR evidentiary merits hearing, in an Amended Order of Dismissal. Mahdi's appeal from the denial of his 2009 PCR application was denied by both the South Carolina Supreme Court and the United States Supreme Court. By Order, the South Carolina Supreme Court has re-appointed this Court to preside over this current action and hear all motions.

Respondent's Motion

On February 10, 2017, Respondent filed a "Return and Motion to Dismiss" this 2nd or successive PCR action for the following reasons: (1) the action is time barred and improperly successive under South Carolina law; (2) the action is barred by the doctrine of laches; (3) several of Mahdi's grounds are barred by the doctrines of res judicata, collateral estoppel, judicial estoppel, and the principle of "the law of the case;" (4) Mahdi's direct appeal grounds

are not cognizable on post-conviction relief; and (5) there is no merit to any of Mahdi's direct appeal grounds because of extant case law and the record in this case. For all of these reasons, Respondent asserted the application must be denied and dismissed with prejudice pursuant to: (1) S.C. Code Ann. § 17-27-45 (the PCR statute of limitations); (2) S.C. Code Ann. Section 17-27-90 (the successiveness bar); (3) S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); and, (4) S.C. Code Ann. § 17-27-70 **(c)** (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRCP* (defining the standard for granting a motion for summary judgment).[1] Mahdi filed a Response opposing Respondent's Motion. Respondent filed a detailed Reply to that Response. On April 13, 2017, this Court notified counsel for both Mahdi and the State that a hearing would be held on the State's motion on May 1, 2017 at 10:30 a.m. at the Bamberg County Courthouse.

The Hearing on the Motion to Dismiss

On May 1, 2017, at the Bamberg County Courthouse, this Court held a hearing on Respondent's motion to dismiss this current action for the above stated reasons. Present were Mahdi's federal habeas counsel E. Charles Grose Jr. and John L. Warren, III., Esquires.

[1] Mahdi contends the State moved to dismiss this 2nd or successive application pursuant to Rule 12(b)(6), SCRCP; however, Respondent moved to dismiss this application pursuant to S.C. Code Ann. Sections 17-27-45 (the PCR statute of limitations); 17-27-90 (the successiveness bar) and 17-27-70(b) **&** (c). Section 17-27-70(c) provides the same standard for dismissal of a PCR application as a motion for summary judgment under Rule 56, SCRCP. Further, Mahdi admits the SCRCP are applicable to PCR actions. As a result, Rule 56, SCRCP would be just as applicable as Rule 12(b)(6). Further, Rule 71.1(a), SCRCP provides where there is an applicable PCR statute, the statute controls over the Rule of Procedure.

Respondent was represented by Assistant Attorney General J. Anthony Mabry who filed the motion on behalf of Respondent. Mahdi waived his presence at the hearing.[2] No evidence or affidavits were submitted by either party at the motion hearing. This Court heard argument from both Respondent and the Applicant and considered the legal authority submitted at the hearing on the motion. On June 6, 2017, this Court notified counsel for both parties that: (1) pursuant to S.C. Code Ann. § 17-25-45, this Court found the current 2nd or successive PCR application to be outside the statute of limitations for PCR actions; (2) pursuant to S.C. Code Ann. § 17-27-90, this Court found the current application was improperly successive under South Carolina law; (3) pursuant to S.C. Code Ann. § 17-27-70(b) summary disposition was proper and is allowed under the terms of the statute; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, this Court found there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law pursuant to S.C. Code Ann. § 17-27-70(c) and Rule 56, S.C.R.C.P. This Court directed Mr. Mabry to submit a proposed Order of Dismissal consistent with these findings using his previous briefs submitted to the Court as an outline for the Order. This Order of Dismissal follows.

This Court's Ruling on the Motion

After consideration of Respondent's Motion, Mahdi's response, Respondent's Reply, and the arguments of counsel at the hearing on the motion and the legal authority submitted, this Court finds and concludes this application must be denied and dismissed with prejudice for the following reasons: (1) the application is time barred under the South Carolina statute of limitations for PCR actions (*S.C. Code Ann. § 17-27-45*); (2) the application is improperly

[2] On April 12, 2017, counsel for Mahdi notified this Court by e-mail that after conferring with Mr. Mahdi, Mr. Mahdi waived his presence at the hearing on the State's motion and the motion hearing could proceed in his absence. Counsel for Mahdi also agreed the hearing on the State's motion could proceed in Mahdi's absence and notified this Court of the same by e-mail.

successive under South Carolina law (*S.C. Code Ann. § 17-27-90*); (3) based on the pleadings and the record Respondent is entitled to judgment as a matter of law (*S.C. Code Ann. § 17-27-70(b)*; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there is no genuine issue of material fact and Respondent is entitled judgment as a matter of law (*S.C. Code Ann. § 17-27-70(c)* and/or *Rule 56, SCRCP*).

I.

PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and formally charged with Myers' murder, the theft of his truck, and the burglary of his shed/cabin.[3] Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > $5,000, and burglary 2nd degree (violent) (Ind. #s *2004-GS-09-243 - 44*). The State sought the death penalty for the murder. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi.[4] The South Carolina Supreme Court assigned the Honorable Clifton Newman, Circuit Court Judge, to preside over the capital trial. From November 26-29, 2006, individual juror *voir dire* and capital jury selection was completed with a jury and 4 alternates impaneled.

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[3] The building referred to in the record as "the shed" is more like a cabin. It is located on victim James Myers' farm, and contains furniture and a television. Myers' and his wife were married there. Myers' wife had an office in the "shed"/cabin.

[4] Mr. Grant suffered a serious injury the early summer of 2006 and was relieved as counsel. Glenn Walters was substituted as 1st chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2nd chair counsel.

The Guilty Pleas

Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury determination of guilt and sentencing, and entered pleas of guilty to all charges. (R 123-1336). Judge Newman accepted Mahdi's pleas of guilty and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed. (R 1259-84).

The Sentencing Proceeding

After the required 24 hour waiting period, the sentencing proceeding was conducted December 1-6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed the same date. (R 1726-42, 1810-26, 1842-53). Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed in the commission of a grand larceny; and (2) the murder was committed in the commission of a burglary. (R 1730-31, 1814-15, 1845). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

The Direct Appeal

Mahdi directly appealed only his death sentence to the South Carolina Supreme Court. On June 15, 2009, the Court affirmed. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, the South Carolina Supreme Court granted the stay assigning this Court to hear the PCR action.

The 1st PCR Action

Mahdi filed a PCR application on August 18, 2009 **(C/A # 2009-CP-09-00164)** and several subsequent amended applications raising numerous grounds. Mahdi was appointed two (2) statutorily qualified capital PCR attorneys pursuant to S.C. Code Ann. § 17-27-160(B) (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant), to represent him in the PCR action, Teresa Norris and Robert Lominack, Esquires. See *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The State filed a Return to each PCR application and amendment.

On March 9, 2011, an evidentiary (PCR) merits hearing was held before this Court. Present were Mahdi, his PCR attorneys, along with the Attorney General's Office. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Lawanda Burwell, Doctors Craig Haney, DeRossett Myers, Nicholas Cooper-Lewter, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James Woodley, Dora Wynn, Doug Pond, and Sandra Burwell and introduced documentary exhibits. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, James Gordan, Doctors Thomas Martin and Geoffrey McKee. Additionally, exhibits were introduced by Respondent. At the evidentiary hearing, this Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in the case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses

and evidence introduced, this Court found the application to be without merit and denied and dismissed the application and all grounds with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRCP, Motion to Alter or Amend one (1) of the findings in the Order.[5] On February 11, 2013, this Court heard argument on the Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, this Court granted the State's Rule 59 Motion as to that one (1) portion of the Order and entered an Amended Order of Dismissal denying and dismissing all grounds as the final Order of Dismissal. Mahdi filed a Rule 59 Motion, which was denied by this Court.

The Appeal from the Denial of PCR

Mahdi appealed the denial of his PCR application (**2009-CP-09-00164**) by way of a Petition for Writ of Certiorari [a merits petition] in the South Carolina Supreme Court. Mahdi was represented by Seth Farber, Brandon Duke, and Teresa Norris, Esquires. Those three (3) PCR appellate attorneys, including one (1) of Mahdi's PCR attorneys, chose to raise only one (1) issue from the denial of PCR. The State filed a Return to the Petition. Mahdi filed a Reply to the State's Return. On September 8, 2016, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on September 26, 2016.

The Petition for Writ of Certiorari in the U.S. Supreme Court

Mahdi appealed from the South Carolina Supreme Court's denial of certiorari from PCR to the United States Supreme Court by way of a Petition for Writ of Certiorari. Respondent filed its Brief in Opposition to the same. Mahdi filed a Reply to Respondent's Brief in Opposition.

[5] In its Rule 59 Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding Mahdi had not established prejudice under the same ground.

On February 21, 2017, the Petition for Writ of Certiorari was denied by the United States Supreme Court.

The Federal Habeas Petition

Mahdi previously filed an application for a stay of execution in the United States District Court for South Carolina to file a federal habeas petition (*Mahdi v. Stirling*, C/A No 16-mc-402, D.S.C. filed Oct. 5, 2016). The stay request was granted Oct. 5, 2016. Counsel was appointed on October 13, 2016. When the stay expired, Mahdi filed a place-holder petition and was granted a further stay of execution. Mahdi has not yet filed his final amended federal habeas petition. It is anticipated, in the federal habeas petition, Mahdi will allege grounds he previously raised in state court but which were denied *and* attempt to raise pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) the unexhausted, but technically exhausted, claims he raises in this 2nd or successive PCR application.[6]

The 2nd Successive PCR Action

After filing his federal habeas stay request and while that stay was still pending, Mahdi filed this 2nd or successive PCR application, through federal habeas counsel, in this Court on January 10, 2017. In this 2nd PCR application, Mahdi raises the following grounds:

10(a)/11(a) S.C. Code Ann. Section 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution , which is applicable to the states through the Fourteenth Amendment, because a judge rather that a jury

[6] *Martinez* held, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial, and (2) where appointed PCR counsel in the initial-review collateral proceeding, should have raised the claim, i.e. counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Martinez.* at 1318-19.

finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___U.S. ___, 136 S.Ct. 616 (2016). S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigation circumstances, and determine whether a death sentence should be imposed.

10(b)/11(b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the guilt or innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation. Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

10(c)/11(c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E. 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in the initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

> Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> - Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived Petitioner of the right to effective assistance of counsel.
>
> - Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
>
> - Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
>
> - Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
>
> - Counsel failed to assert that S.C. Code Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eight, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2001). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence namely that he has accepted responsibility for the crime. While this issue has been rejected by state

courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

- At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. See *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

10(d)/11(d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled upon by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal. In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

(See C.A. # 2017-CP-09-00004, pp. 2-4).

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mahdi has already had a full round of PCR remedies (**C/A No. 2009-CP-09-00164).** Mahdi's 2009 PCR action challenging his guilty plea convictions and sentence of death [raising numerous grounds] was denied and dismissed with prejudice after a full evidentiary (PCR) merits hearing by this Court ("the PCR Court"). (Amended Order of Dismissal, C.A. # 2009-CP-09-164). Mahdi's Rule 59, SCRCP, Motion to Alter or Amend was also denied by this Court.

During the pendency of his 2009 PCR action and at the evidentiary PCR merits hearing, Mahdi was represented by **two (2) statutorily qualified PCR counsel,** Teresa Norris and Robert Lominack, Esquires. *S.C. Code Ann. § 17-27-160(B)* (identifying requisite qualifications for

counsel appointed to represent an indigent, capital PCR applicant). Compare *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Mahdi conceded at the hearing on the present motion that Ms. Norris and Mr. Lominack were statutorily qualified PCR counsel pursuant to Section 17-27-160(B). This Court would also note that Mahdi has never alleged as a ground for relief in this 2nd or successive PCR Application that his 1st PCR counsel were not statutorily qualified.[7] Mahdi has not submitted the affidavit of either PCR counsel asserting they were not statutorily qualified to represent him in his 1st PCR action. Compare *Robertson*, *supra*.

Mahdi appealed the denial of his 1st PCR action to the South Carolina Supreme Court by way of a Petition for Writ of Certiorari [a merits petition]. On appeal from the denial of PCR, Mahdi was represented by three (3) PCR appellate attorneys, and Mahdi raised the following issue to the South Carolina Supreme Court:

> Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsels' decision to rely entirely on a single expert witness to present mitigating evidence about Petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

(Petition for Writ of Certiorari, p. 2). Respondent filed a responsive brief. The South Carolina Supreme Court denied certiorari. The Remittitur was issued.

Mahdi filed a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a Brief in Opposition. Mahdi filed a Reply. The United States Supreme Court denied the Petition for Writ of Certiorari. As a result, Mahdi has had one (1) complete round of PCR remedies.

[7] (See Successive Application for PCR, Amended Successive Application for PCR).

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On December 14, 2016, the South Carolina Supreme Court decided *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The Court ruled *Martinez v. Ryan*, 132 S.Ct. 1309, was not a reason to allow the filing of a 2nd or successive PCR application in a capital case. The Court also ruled the fact that a capital PCR applicant was not represented by statutorily qualified PCR counsel at his first (1st) PCR was a sufficient reason to allow the filing of a 2nd or successive PCR application. The Court remanded the case to the Circuit Court solely to determine: (1) if Robertson's 1st PCR counsel were statutorily qualified or not; and, (2) if not statutorily qualified, whether Robertson was prejudiced by the fact that his 1st PCR attorneys were not statutorily qualified. *Id.* Subsequent to the Court's opinion in *Robertson*, Mahdi filed this 2nd or successive PCR action. Mahdi does not assert in this 2nd or successive PCR application that his 1st PCR attorneys were not statutorily qualified. Respondent filed its Motion to Dismiss relying on *Robertson* and other South Carolina case law asserting this application is time barred and improperly successive.

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code Ann. § 17-27-45 (A) provides a PCR action "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." S.C. Code Ann. § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." As a result, for the reasons set forth herein, Mahdi is not entitled to file this 2nd or successive PCR application. *Robertson v. State*, supra. Mahdi's present application must be dismissed as untimely **and** improperly successive. *Robertson*. *See Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) ("An individual under PCR effectively is granted one chance to argue for relief and must do so within

a year of his final appeal"). *Accord In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (to receive a stay from the state to pursue "a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court" death-sentenced applicant "must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay") (emphasis added).

A. The Present Action is Time Barred

This present 2nd PCR Application is time barred under the South Carolina Statute of Limitations for PCR actions and must be dismissed with prejudice. South Carolina Code Ann. § 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.

Mahdi was convicted on November 30, 2006 and sentenced to death on December 8, 2006. The final decision in the appeal was issued by the South Carolina Supreme Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on **July 1, 2009**. Mahdi was therefore required to file this application before **July 1, 2010**. The current application was filed on January 10, 2017, which was **more than six (6) years after the statutory filing period expired**.

However, § 17-27-45 also states:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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. § 17-2745(B)&(C). Thus, to overcome the time bar, Mahdi must show he fits under one (1) of the categories of Section 17-27-45 (B) or (C). This Court has carefully reviewed the allegations of Mahdi's 2nd or successive PCR Application and is thoroughly familiar with the Record in this case. Based on the undisputed facts and the law, all of Mahdi's claims raised in this 2nd or successive PCR Application, except his so-called "*Austin*" claim, could have been raised timely **at his plea/sentencing** before Judge Newman or **at his previous 1st PCR hearing before this Court.** (See discussion, infra).

***Hurst v. Florida* does not overcome the time bar**

Mahdi relies first on *Hurst v. Florida,* 136 S.Ct. 616 (2016) in an effort to overcome the statute of limitations time bar. In his 2nd or successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20(B), alleging it is unconstitutional because it requires judge sentencing after a guilty plea. **However, Mahdi has not established a new rule of constitutional law to be retroactively applied and applicable to him**. And, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in **2006** or during the prior PCR action in **2009**. In fact, this Court decided this issue in the 1st PCR proceeding and found there was no merit to it. (Amended Order of Dismissal, **pp. 123-33**).[8]

[8] This Court decided this issue in the 1st PCR action under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. Section 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata, judicial estoppel* and *collateral estoppel. See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

Mahdi argues *Hurst* created a new constitutional rule applicable and retroactive to him. However, *Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New York*, 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing. *Hurst,* 136 S.Ct. 616; *Runyon v. United States,* ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*); *Garza v. Ryan*, 2017 WL 105983 (D. Ariz. 2017)(*Slip Copy*); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016); *Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017; *Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016) *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016) (*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*).

The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22; *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). *Hurst* found Florida's capital sentencing scheme violated the holdings of *Ring* and *Apprendi* when the

defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.[9]

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

> During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.
>
> We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment .....fails.

***Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016)**(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), **cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017.** *Accord Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016

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[9] *See Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(*Unpublished*); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

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W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State,* 209 So.3d 1248 (Fla. 2016).

Similarly, the South Carolina Supreme Court held in *State v. Downs*:

> The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).
>
> In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See e.g. Leone* v. *Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States,* ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379

(5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Return, the United States Supreme Court has not found S.C. Code Ann. § 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015)(citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, the Fourth Circuit found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; *see also Nunley*, 784 F.3d at 472 (*citing Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *State v. Inman*, 395 S.C. 539, 555-56, 720 S.E.2d

31, 40 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)(when a defendant pleads guilty in a capital case, statutorily mandated sentencing by the trial judge does not violate the holding in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* did not involve jury trial waivers and is not implicated when a defendant pleads guilty); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004)(finding Section 16-3-20(B) constitutional).[10] Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015); *State v. Nunley*, 341 S.W.3d 611, 620 (Mo. 2011); *State ex rel. Taylor v. Steele*, 341 S.W.2d 634, 646-49 (Mo. 2011); *Leon v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *Byrom v. State*, 927 So.2d 709, 728 (Miss. 2006); *Mack v. State*, 75 P.3d 803, 806 (2003); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002); *People v. Altom*, 788 N.E.2d 55, 60-61 (Ill. 2003); *State v. Ketterer*, 855 N.E.2 48, 69 (Ohio 2006); *Thacker v. State*, 100 P.3d 1052 (OK 2004); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002). In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as was raised in the above cited cases.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and

[10] Additionally, the South Carolina Supreme Court has repeatedly reversed the plea and death sentence in cases where a defendant was allowed to plead guilty and have jury sentencing in contravention of the statute. *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Truesdale*, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (1982).

have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve (12) jurors and four (4) alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve (12) jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge [Judge Newman] would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994)(record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the 1st PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). At the 1st PCR, Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. This Court previously found Mahdi made a strategic decision, after selecting a jury, that he wanted Judge Newman to sentence him, **not** the jury he had selected and was impaneled. (Amended Order of Dismissal, **pp. 131-32**). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been

upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel* as this issue was previously decided by this Court in the 1st PCR action. (Amended Order of Dismissal). *See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of his 1st PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, on this issue, is "**the law of the case**," and Mahdi waived and abandoned this issue. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993)(discussing "law of the case"); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2 583 (Ct. App. 1997); *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473 427 S.E.2d 646 (1993)(the trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996)(unappealed ground becomes the law of the case); *Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997)(the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson v. Charleston & Western Carolina RR Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957); *See Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999)(discussing the difference between the law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law **or** material facts that could not have been raised at his guilty plea/sentencing **in 2006** or his 1st PCR merits hearing **in 2009** entitling him to file a untimely successive PCR application. *See S.C. Code § 17-27-45 (B) & (C).* *Ring* was decided in **2002** and *Apprendi* was decided in **2000** long before Mahdi's guilty plea/sentencing and his 1st PCR Application and 1st PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a *Ring* and/or *Apprendi* challenge to the death penalty statute at the time of his guilty plea/sentencing in **2006** or in his 1st PCR action in **2009**. Furthermore, Mahdi may not raise this issue now because he is bound by this Court's previous determination in the 1st PCR case that he [Mahdi] made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim that could have been raised previously. *Cf. Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Further, this Ground is barred by the doctrines of *res judicata, judicial estoppel, collateral estoppel, and the law of the case.*

***Lafler* and *Frye* do not overcome the time bar**

Mahdi also relies on *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) in an attempt to overcome the statute of limitations time bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him or this claim would present material new facts not previously presented. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015). And, Mahdi has not shown new material facts not previously presented because those facts were known to Mahdi at the time of his guilty plea and sentencing and before his first PCR. See *S.C. Code Ann. Section 17-27-45 (C).*

Every federal appellate Court to consider the issue has held that *Lafler* and *Frye* did not establish a "new rule of constitutional law." See *Wert v. United States*, 596 Fed.Appx. 914, 917–18 (11th Cir.2015) ("As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively."); *United States v. Crisp*, 573 Fed.Appx. 706, 708–09 (10th Cir.2014) ("No reasonable jurist would debate the district court's determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3)."); *Navar v. Warden Fort Dix FCI*, 569 Fed.Appx. 139, 140 n.1 (3d Cir.2014) ("[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion."); *Gallagher v. United States*, 711 F.3d 315, 316 (2d Cir.2013) ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington.*"); *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Pagan San Miguel v. United States*, 736 F.3d 44, 45 (1st Cir.2013)(per curiam); *In re King*, 697 F.3d 1189 (5th Cir.2012); *Hare v. United States*, 688 F.3d

878, 878–80 (7th Cir.2012); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir.2012) ("[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law."); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir.2013); *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013); *United States v. Lawton*, 2012 WL 6604576 at *3 (10th Cir., Dec. 19, 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012); *Miller v. Thaler*, 714 F.3d 897, 902 (5th Cir. 2013)(The Fifth Circuit has repeatedly held that *Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), to a specific factual context); *In re King*, 697 F.3d 1189 (5th Cir. 2012)("we agree with the Eleventh Circuit's determination in *In re Perez*, 682 F.3d 930, 933–34 (11th Cir.2012), that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."). Most of these cases are compiled in *Hestle v. United States*, 2013 WL 1147712 (E.D.Mich., March 19, 2013). See also *Hough v. United States*, 177 F. Supp. 3d 782, 785 (W.D.N.Y. 2016); *Stewart v. Stephens*, Civ. 2015 WL 6522828, at *2 (N.D. Tex. Oct. 26, 2015); *Alvarado v. Stephens*, 2015 WL 3775416, at *3 (S.D. Tex. June 16, 2015); *Etheridge v. Morgan*, 2015 WL 4041707, at *5 (W.D. La. May 11, 2015), adopted, 2015 WL 4042152 (W.D. La. July 1, 2015); *Brown v. Director, TDCJ-CID*, 2014 WL 892170, at *3 (E.D. Tex. Mar. 3, 2014); *Johnson v. Rader*, 2014 WL 198165, at *5 (E.D. La. Jan. 14, 2014); *Suitt v. McCain*, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, *2016 WL 5390396 (E.D. La. Sept. 27, 2016); Williams v. Cain*, 2016 WL 4063863, at *1 (E.D. La. July 29, 2016); *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); *Landron-Class v. United States*, 86 F. Supp. 3d 64, 75 (D.P.R. 2015) (collecting cases); *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016); *Nechovski v. Snyder-Norris*, 2016 WL

3552196, at *6 (E.D. Ky. June 23, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015)

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher v. United States*, 2013 WL 1235668 [,711 F.3d at 315]; *Baker v. Ryan*, 497 Fed.Appx. 771, 773 (9th Cir. 2012) (the cases of *Missouri v. Frye* and *Lafler v. Cooper* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *United States v. Ocampo*, 919 F. Supp. 2d 898, 915 (E.D. Mich. 2013); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive."). In short, neither *Lafler* nor *Frye* satisfies § 17-23-45. Therefore, the one-year period of limitations began to run when Mahdi's conviction became final. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015); *Villega–Angulo v. United States*, 2016 WL 7030741, at *8 (D.P.R. Sept. 30, 2016). Conclusively, the statute of limitation has well run, as has Mahdi's time limit. *Villega–Angulo v. United States*, 2016 WL

7030741, at *8 (D.P.R. Sept. 30, 2016); *Suitt v. McCain*, No. CV 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016).

Other states considering this same issue have agreed. See *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa.Super. 2013) (explaining *Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment; petitioner's reliance on these decisions to satisfy Section 9545(b)(1)(iii) exception to PCRA's time restrictions is unavailing). See also *Commonwealth v. Hernandez*, 79 A.3d 649 (Pa.Super. 2013) (holding appellant's claim that his petition fits within Section 9545(b)(1)(iii) exception lacks merit because neither *Lafler* nor *Frye* created new constitutional right); *Commonwealth v. Gallman*, 2016 WL 1436489, at *5 (Pa. Super. Ct. Apr. 12, 2016)("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]" Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Commonweath v. Norris*, 2016 WL 1064472, at *6 (Pa. Super. Ct. Mar. 17, 2016)(Defendant's reliance on *Lafler* and *Frye* to avoid the time-bar is misplaced. Contrary to his claims, neither case announced a new constitutional right in Pennsylvania which would allow Defendant to avoid the time-bar); *Black v. State*, 2016 WL 763163, at *1 (Nev. App. Feb. 17, 2016), cert. denied, 2017 WL 69340 (U.S. Jan. 9, 2017); *Young v. State*, 2013 Ark. 513, 2, n. 1 (2013). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely.

This 2nd or successive Application was not brought within one year of a newly recognized right made retroactively applicable to cases on collateral review. Further, this Application was

brought more than one (1) year after *Frye* and *Lafler* were decided. *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016; *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016). As a result, he cannot fit under the time bar exception of Section 17-27-45(C). Mahdi has not shown evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, because in order to fit under this exception the application must be filed under this chapter within one (1) 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 § 17-27-45 (C).* Mahdi cannot meet this test. As stated above, *Lafler* and *Frye* are not new rules of constitutional law, but a simple application of *Strickland*. *Gallagher*, 711 F.3d at 316 ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington.*"); *Miller*, 714 F.3d at 902 ((*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 ("we agree with the Eleventh Circuit's determination in *In re Perez*, [citation omitted], that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the

Strickland test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]"). Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a *Strickland* claim in this regard at his 1st PCR hearing.

Mahdi is not entitled to an *Austin* appeal

Finally, the *Austin* claim simply must be dismissed because Mahdi is not entitled to an *Austin* appeal under South Carolina law. Mahdi has already had an appeal from the denial of his 1st PCR application to both the South Carolina Supreme Court and the United States Supreme Court, which he lost. *Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991); *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992). Neither of which occurred in this case.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception or an excuse allowing the filing of a second or successive PCR application in violation of the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013)

In addition to the statutory provisions listed, our Supreme Court has made specific exceptions, as well. To ensure one full round of remedies, the Court has found the one year limitations period does not apply; (1) where an applicant was denied a direct appeal due to ineffective assistance, *see Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); and (2) where an applicant was denied an appeal from denial of post-conviction relief, *see Odom*

v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Mahdi cannot claim any of these exceptions. He had both a direct appeal and an appeal from the denial of his 1st PCR action.

Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action.[11] This action, consequently, is not timely filed, and is barred by the South Carolina statute of limitations for PCR actions.

B. The Present Action is Improperly Successive

Further, the application is barred as improperly successive. *Cf. Graham v. State*, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive). Successive applications are historically disfavored, but are not categorically disallowed. See *S.C. Code §17-27-45 (B) and (C)* (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)("belated review of appellate issues," in an *Austin* appeal or "rare procedural circumstances" are reasons to allow successive actions). None of the exceptions, however, can be met with regard to Mahdi's new

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[11] Mahdi has not shown the bases for these claims could not have been discovered previously or that such was not discovered. The statute requires:

> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter *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) (emphasis added).

allegations. Mahdi's prior PCR counsel could have discovered the facts and claims asserted in the present application at the time of Mahdi's 1st PCR. And, Mahdi is not entitled to an *Austin* appeal under South Carolina law.

"In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Mahdi cannot do so. As a result, this application must be dismissed with prejudice.

To the extent that Mahdi would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, to the extent Mahdi is seeking to establish cause to excuse the default of previously unexhausted claims in his federal litigation, he has mixed concepts. The Supreme Court of South Carolina so found in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Accord *Robertson v. State*, supra. In *Kelly*, a PCR applicant attempted to rely on United States Supreme Court precedent establishing a narrow exception within federal habeas corpus litigation as announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to avoid the state successiveness bar. Our Supreme Court rejected the argument, noting a great agreement among the States in similarly interpreting the exception:

> Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013) (collecting cases). The South Carolina Supreme Court reaffirmed its holding in *Kelly* in *Robertson,* supra. Thus, the

applicability of *Martinez* is limited to federal habeas corpus actions. Any reliance Mahdi should make on same to avoid the state successiveness and time bars is misplaced. *Robertson v. State.*

Again, it has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. Our Supreme Court has noted the dangers of a contrary position, specifically in capital cases:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Mahdi fails to argue any valid basis for exercise of a "rare exception" of allowing a successive application. *See e.g. Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)(permitting successive PCR application where applicant did not receive an appeal from the dismissal of his 1st PCR Application or any appellate counsel assistance in seeking an appeal); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996)(permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987)(authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982)(allowing successive PCR

application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing). Successive capital PCR applications filed in an attempt to exhaust previously unexhausted claims are no exception to the rule barring successive applications. *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Furthermore, in the present case, Mahdi was represented at PCR before this Court by Teresa Norris and Robert Lominack, Esquires. See *S.C. Code Ann. § 17-27-160(B)* (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). Both of these attorneys were **statutorily qualified** to represent Mr. Mahdi in his 1st PCR action. Mahdi does not even contend in his 2nd PCR Application that his 1st PCR attorneys were not statutorily qualified. Compare *Robertson,* 418 S.C. 505, 795 S.E.2d 29. As a result, there is no merit to this successive PCR application. *Id.* All of Mahdi's allegations in his 2nd PCR Application, including those alleging ineffective assistance of counsel, are improperly successive.

South Carolina's bar to raising direct appeal issues on PCR does not provide exception to either the successiveness bar or the time bar. *Cf. Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

1.

In his successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, because it requires judge sentencing after a guilty plea. Again, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in **2006** or during the prior PCR action in **2009**. In fact, this Court decided this issue and found there was no merit to it. (Amended Order of Dismissal, **pp. 123-33**).[12] Nor has Mahdi established a new rule of constitutional law to be retroactively applied and applicable to him.

***Hurst v. Florida* does not overcome the successiveness bar**

Again, Mahdi relies upon the recently decided case of *Hurst v. Florida*, 136 S.Ct. 616, decided January 12, 2016, which dealt with Florida's capital sentencing scheme, in an attempt to overcome the successiveness bar, but his position fares no better for essentially the same reason. The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22. See *Downs*, 361 S.C. at 146, 604 S.E.2d at 380. *Hurst* found Florida's capital sentencing scheme

[12] This Court decided this issue under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. § 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata, judicial estoppel* and *collateral estoppel. See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

violated the holdings of *Ring*, 536 U.S. 584, 122 S.Ct. 2428 and *Apprendi,* 530 U.S. 466, 120 S.Ct. 2348, when the defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.[13]

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

> During the pendency of Mullen's appeal, the United States Supreme Court issued Its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.
>
> We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment .....fails.

***Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016)**(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), **cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017.** *Accord Brandt v. State,* 197

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[13] *See Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring,* since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(*Unpublished*); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016 W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State,* 209 So.3d 1248 (Fla. 2016).

Similarly, our Supreme Court held in *Downs*:

> The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).
>
> In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See e.g. Leone* v. *Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380. As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States,* ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively

to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Order, the United States Supreme Court has not found S.C. Code Ann. Section 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, it found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; *see Nunley*, 784 F.3d at 472 (*citing Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *Inman*, 395 S.C. at 555-56, 720 S.E.2d at 40; *Allen*, 386 S.C. 93, 687

S.E.3d at 25-26; *Crisp*, 362 S.C. 412, 608 S.E.2d 429; *Downs*, 361 S.C. at 146, 604 S.E.2d at 380; *Wood*, 362 S.C. 135, 607 S.E.2d 57. Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis*, 609 F.3d at 309; *Nunley*, 784 F.3d at 472; *State v. Nunley*, 341 S.W.3d at 620; *Steele*, 341 S.W.2d at 646-49; *Leon*, 797 N.E.2d at 750; *Byrom*, 927 So.2d at 728; *Mack*, 75 P.3d at 806; *Colwell*, 59 P.3d at 474; *Altom*, 788 N.E.2d at 60-61; *Ketterer*, 855 N.E.2 at 69; *Thacker*, 100 P.3d 1052; *Moore*, 771 N.E.2d 46. In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as raised in the above cited cases. He chose not to.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a jury and alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing on Mahdi's competency to plead guilty. (R. 1336-43). Dr. Cross testified Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible

consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified he understood if he pled guilty in front of Judge Newman the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath he understood he had the right to a jury sentencing, and in order to sentence him to death all twelve (12) jurors would have to unanimously agree he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath he understood if he pled guilty, Judge Newman would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin*, 395 U.S. 238; *Rayford*, 314 S.C. 46, 443 S.E.2d 805 (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled.

(PCR Tr. 682-84). At his 1st PCR, Mahdi offered no testimony on this issue and offered no evidence contradicting counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea. This Court found Mahdi made a strategic decision, after selecting a jury, he wanted Judge Newman to sentence him, **not** the jury he had selected and impaneled. (Amended Order of Dismissal, **pp. 131-32**). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is barred by the doctrines of *res judicata, judicial estoppel* and *collateral estoppel*. *See generally Lifshultz Fast Frieight, Inc.*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415.

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, that this issue had no merit, is **the law of the case**, and Mahdi waived and abandoned this issue. *Bailes*, 315 S.C. 166, 432 S.E.2d 482 (discussing "law of the case"); *Lindsay*, 328 S.C. 329, 491 S.E.2 583; *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp.*, 310 S.C. 473 427 S.E.2d 646 (trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson*, 323 S.C. 522, 476 S.E.2d 475 (unappealed ground becomes the law of the case); *Ross*, 328 S.C.

51, 492 S.E.2d 62 (the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson*, 231 S.C. 351, 98 S.E.2d 798; *See Lifshultz Fast Frieight, Inc.*, supra (discussing the difference between law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law **or** material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a successive PCR application. *See S.C. Code § 17-27-90.* *Ring* was decided in **2002** and *Apprendi* was decided in **2000** long before Mahdi's guilty plea/sentencing and his 1st PCR Application and PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Furthermore, Mahdi may not raise this issue because he made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred and improperly successive. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim. Further, this Ground is barred by the doctrines of *res judicata, judicial estoppel, collateral estoppel, and the law of the case.*

2.

Mahdi also relies on *Lafler*, 132 S.Ct. 1376 and *Frye*, 132 S.Ct. 1399 in an attempt to overcome the successiveness bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law to be retroactively applied

to Mahdi. *Waters*, 2015 WL 5317516, at *2. **Every federal appellate Court to consider the issue has held *Lafler* and *Frye* did not establish a "new rule of constitutional law."** See *Wert*, 596 Fed.Appx. at 917–18 ("As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively."); *Crisp*, 573 Fed.Appx. at 708–09 ("No reasonable jurist would debate the district court's determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3)."); *Navar*, 569 Fed.Appx. at 140 n.1 ("[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion."); *Gallagher*, 711 F.3d at 316 ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*."); *In re Liddell*, 722 F.3d at 738; *Pagan San Miguel*, 736 F.3d at 45; *In re King*, 697 F.3d 1189; *Hare*, 688 F.3d at 878–80; *Buenrostro*, 697 F.3d at 1140 ("[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law."); *Williams*, 705 F.3d at 294; *In re Graham*, 714 F.3d at 1183; *Lawton*, 2012 WL 6604576; *In re Perez*, 682 F.3d at 932–34; *Miller*, 714 F.3d at 902 (*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 ("...*Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely. See also *Hough*, 177 F. Supp. 3d at 785; *Hestle*, 2013 WL 1147712; *Stewart*, 2015 WL 6522828, at *2; *Alvarado*, 2015 WL 3775416, at *3; *Etheridge*, 2015 WL 4041707, at *5, adopted, 2015 WL 4042152; *Brown*, 2014 WL 892170, at *3; *Johnson*, 2014 WL 198165, at *5; *Suitt*, 2016 WL 5395843, at *5, report and recommendation adopted, *2016 WL 5390396; Williams*, 2016

WL 4063863, at *1; *Cruz*, 2016 WL 4083326, at *2; *Landron-Class*, 86 F. Supp. 3d at 75 (collecting cases); *Hough*, 2016 WL 3820562, at *6; *Nechovski*, 2016 WL 3552196, at *6; *Shawley*, 2016 WL 1643460, at *3, report and recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; *Armour*, 2016 WL 1259113, at *3, appeal dismissed; *Leon*, 2015 WL 6769146, at *2, report and recommendation adopted, 2015 WL 6749743. Other states considering this same issue have agreed. See *Feliciano*, 69 A.3d 1270 (*Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment); *Hernandez*, 79 A.3d 649 (neither *Lafler* nor *Frye* created new constitutional right); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]" Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Norris*, 2016 WL 1064472, at *6 (Defendant's reliance on *Lafler* and *Frye* is misplaced. Contrary to his claims, neither case announced a new constitutional right); *Black*, 2016 WL 763163, at *1, cert. denied, 2017 WL 69340; *Young*, 2013 Ark. 513, 2, n. 1.

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher*, 2013 WL 1235668 [,711 F.3d at 315]; *Baker*, 497 Fed.Appx. at 773 (the cases of *Frye* and *Lafler* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *Ocampo*, 919 F. Supp. 2d at 915; *Armour*, 2016 WL 1259113, at *3; *Shawley*, 2016 WL 1643460, at *3, report and

recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; See *Tyler*, 533 U.S. at 663 ("[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.").

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *Cruz*, 2016 WL 4083326, at *2; *Hough*, 2016 WL 3820562, at *6. As a result, Mahdi has not shown new material facts not previously presented because those facts were within his knowledge at the time of his plea and sentencing and prior to his 1st PCR hearing. *S.C. Code Ann. § 17-27-45(C)*(If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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). As *Lafler* and *Frye* did not announce new rules of constitutional law, but were applications of *Strickland*, Mahdi could have brought a *Strickland* claim on pre-plea advice at his 1st PCR. As a result, this claim is improperly successive and must be dismissed with prejudice.

3.

In his successive PCR application, Mahdi also alleges he is entitled to an *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), appeal because PCR appellate counsel did not raise certain issues on appeal from the denial of his 1st PCR that he now wishes to raise. Mahdi is not entitled to an *Austin* appeal under these circumstances. *Austin*, 305 S.C. 453, 409 S.E.2d 395. Mahdi's 1st PCR counsel filed an appeal from the denial of his 1st PCR application and collateral appellate counsel chose to raise only one (1) issue from the denial of his PCR application. (Petition for

Writ of Certiorari [merits petition]). The South Carolina Supreme Court denied certiorari in the PCR appeal. Mahdi then filed a Petition for Writ of Certiorari in the United States Supreme Court raising the same issue and certiorari was denied. However, *Austin* does not entitle Mahdi to another appeal from the denial of his 1st PCR where PCR appellate counsel chose not to raise certain issues in the 1st PCR appeal. *Austin* "is applicable to its particular factual situation..." *Aice*, 305 S.C. at 452, 409 S.E.2d at 394. That is where the applicant wished to appeal from the denial of PCR but was denied **the opportunity** to seek appellate review or the right to appellate review of a previous PCR order **was not knowingly and intelligently waived.** *Austin*, supra; *Aice*, supra; *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. at 348-49, 417 S.E.2d 868. Neither of these occurred in this case.[14] Mahdi is not entitled to an *Austin* appeal under South Carolina law. Thus, he cannot overcome the successiveness bar and this application must be dismissed.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception allowing the filing of a second or successive PCR application or an excuse to avoid the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State.*

C. Applicant's Grounds are barred by the defense of laches

Mahdi's Grounds asserted in his 2nd Application for post-conviction relief are also barred by the defense of laches. Laches is an equitable doctrine, which "arises upon the failure to assert a known right. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005): "Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording the opportunity for

[14] To accept Mahdi's argument would result in every capital *and* non-capital PCR Applicant being entitled to a 2nd PCR appeal when they did not agree or later claimed they did not agree with the issues raised by PCR appellate counsel.

diligence, to do what in law should have been done." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), *citing Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). The claims Mahdi is raising in this 2nd Application for post-conviction relief could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of PCR. Mahdi was represented by death penalty qualified counsel at trial/plea and sentencing. Mahdi was represented at PCR by statutorily qualified counsel. *See Robertson v. State*. And, Mahdi was represented on appeal from the denial of PCR by three (3) competent counsel, including one (1) his PCR attorneys. Mahdi has waited an unreasonable and unexplained length of time to assert the grounds he is now asserting. As a result, all of Mahdi's Grounds asserted in this successive PCR Application are barred by the defense of laches.

D. This Court cannot address grounds abandoned or not addressed in the 1st PCR

In his 2nd or Successive PCR Application, Mahdi also asks this Court to rule on any grounds that were not addressed or that were abandoned *at the 1st PCR*. This Court is not aware of any legal authority or rule that would allow this Court to address any issue that was not addressed at the 1st PCR or was abandoned by prior PCR counsel at the 1st PCR. As a result, this ground is also time barred and improperly successive under South Carolina law in that it seeks this Court to rule on an issue or issues raised at the 1st PCR but not ruled on or abandoned at the 1st PCR. This Court also dismisses this claim as not cognizable before this Court and barred by laches, res judicata, collateral estoppel, judicial estoppel, and/or the law of the case.

CONCLUSION

Consequently, for all the foregoing reasons, this Court dismisses this action as time barred under South Carolina law pursuant to S.C. Code Ann. § 17-27-45. This Court also dismisses this action because it is improperly successive under South Carolina law pursuant to

S.C. Code Ann. § 17-27-90. This Court also finds Mahdi's claims in this successive PCR Application are barred by the doctrines of laches; and, Mahdi's direct appeal ground is not cognizable in PCR and/or is barred by the doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case. Finally, Mahdi is not entitled to an *Austin* appeal under South Carolina law where he has already had one (1) full PCR appeal. As a result, based on all of the foregoing, this 2nd or successive PCR Application is properly dismissed with prejudice pursuant to S.C. Code Ann. § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."). Finally, based on all the foregoing, there is no genuine issue of material fact and this action must be dismissed pursuant to S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRCP* (defining the standard for granting a motion for summary judgment).

IT IS SO ORDERED.

By: _____
The Honorable Doyet A. Early, III.
Presiding Judge

June 29, 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CALHOUN) FIRST JUDICIAL CIRCUIT
)
Mikal Mahdi, SCDC #5238,) C/A No. 2017-CP-09-0004
)
Applicant,) *CAPITAL PCR*
)
vs.)
)
APPLICANT'S MOTION
TO ALTER OR AMEND
State of South Carolina,) **AND FOR RECONSIDERATION**
)
Respondent.)
)

Pursuant to Rules 59(e) of the South Carolina Rules of Civil Procedure, the Applicant, Mikal Mahdi, moves this Court for an order altering or amending and reconsidering the final Order of Dismissal, which was dated June 29, 2017 and filed July 6, 2017.

BACKGROUND AND PROCEDURAL HISTORY

On January 10, 2017, Mr. Mahdi, a death sentenced inmate, filed an Application for Post-Conviction Relief ("PCR") in the Court of Common Pleas for Calhoun County. Mr. Mahdi raised four distinct grounds in this PCR Application. *See* Application for Post-Conviction Relief at 2–4, *Mahdi v. State*, 2017-CP-09-0004 (Calhoun Cnty. Ct. of Com. Pleas Jan. 10, 2017). Essentially, Mr. Mahdi has asked this Court to find that: **(1)** Section 16-3-20 of the South Carolina Code, which requires a judge to sentence a defendant following a guilty plea, is unconstitutional in light of *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016); **(2)** Mr. Mahdi was denied the right to effective assistance of counsel because his trial counsel advised him that his guilty plea would be considered as mitigation; **(3)** Mr. Mahdi is entitled to an appeal on the grounds for relief and supporting facts alleged in his initial PCR Application pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); and **(4)** to the extent the State contends that any of the grounds raised in Mr.

Mahdi's initial PCR Application were not ruled on, Mr. Mahdi is entitled to a ruling on those grounds so that he may appeal.

On January 13, 2017, the State filed a Petition for Reassignment of Original PCR Judge and Request for Order Expediting Review of Successive Application in the Supreme Court of South Carolina. (Mot. to Dismiss, Ex. 2). In this Petition, the State asked the Supreme Court to order expedited review of Mr. Mahdi's PCR Application and to appoint the case to Judge Early, who ruled on Mr. Mahdi's initial PCR Application. Mr. Mahdi filed a Return in Opposition, contending that this case did not warrant special treatment and should be assigned to a judge and ruled upon in the ordinary course of business.

On February 8, 2017, the State filed a lengthy Return and Motion to Dismiss Successive and Time Barred PCR Application. In this Motion, the State contends that: **(1)** Mr. Mahdi's PCR Application should be dismissed as time-barred; **(2)** Mr. Mahdi's PCR Application should be dismissed because it is successive; **(3)** Mr. Mahdi's PCR Application should be dismissed because it fails on the merits; **(4)** several grounds in Mr. Mahdi's PCR Application or not cognizable in PCR and/or are barred by the doctrines of res judicata, collateral estoppel, judicial estoppel, and law of the case; and **(5)** Mr. Mahdi's PCR Application is barred by the doctrine of laches.

On March 24, 2017, the Supreme Court, per Chief Justice Beatty, issued an order vesting Judge Early with exclusive jurisdiction over Mr. Mahdi's PCR Application, directing Mr. Mahdi to file a Return to the State's Motion to Dismiss within ten days, and ordering the Court to rule on the Motion to Dismiss within thirty days. (Mot. to Dismiss, Ex. 3). Additionally, the Order provided instructions for handling the case if the Court denies the Motion to Dismiss.

The Court heard argument on the State's Motion to Dismiss, and later requested a proposed order from the State. The Court adopted that Order on June 29, 2017 and the Order was filed on July 6, 2017. This Motion follows.

ARGUMENTS AND AUTHORITY[1]

I. The Findings of Fact and Conclusions of Law are Those of an Advocate and Not the Court.

The procedure followed by the Court denied Mr. Mahdi an opportunity to have his PCR claims adjudicated by a judicial officer. "S.C. Code Ann. § 17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); This Court did not do that, instead delegating the responsibility of preparing an Order to the Attorney General's Office. To that end, the Court sent an email on June 6, 2017, summarily holding that the PCR Application was barred by the statute of limitations and prohibition on successive applications and finding that summary disposition was required. (*See* Email, attached as Ex. A; *see also* Proposed Order, attached as Ex. B). This email, and the subsequent proposed order, are "insufficient for appellate review." *McCray*, 305 S.C. at 330, 408 S.E.2d at 241. Although the Court instructed the State to use its memos as an outline for the Order, the reasoning in the subsequent Order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. *See* S.C. Const. art. I, § 8. Addressing this issue in the context of capital PCR actions, our Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of

[1] Mr. Mahdi expressly incorporates by reference all arguments made in briefing and arguments in response to the State's Motion to Dismiss.

law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Mr. Mahdi respectfully requests that the Court withdraw this Order and make its own findings of fact and conclusions of law.

II. The Court Overlooked or Misapprehended the Appropriate Standard of Review.

PCR proceedings are governed by the South Carolina Rules of Civil Procedure. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).[2] To that end, Rule 12(b)(6), SCRCP, allows the defendant to move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The inquiry on such a motion is restricted; "the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any theory*, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.* (citing *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999)) (emphasis added).

The Supreme Court of South Carolina has expressly recognized the importance and propriety of applying these basic Rule 12(b)(6) principles in the context of a motion to summarily dismiss a PCR application. In *Leamon v. State*, the Supreme Court noted that "[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent *on the face of the application* that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. §§ 17-27-70(b), (c)) (emphasis added). "When considering the State's motion for summary dismissal of an application,

[2] *See also* S.C. Code Ann. § 17-27-80 ("All rules and statutes applicable in civil proceedings are available to the parties [in a PCR action]"); Rule 71.1, SCRCP ("The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the [Uniform Post-Conviction Procedure] Act.").

where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant." *Id.* Moreover, as a general rule, "novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). Similarly, "an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." *Spence*, 368 S.C. at 123, 628 S.E.2d 869 at 878 (citations omitted).

The Order does not address these well-established legal principles, and instead conducts a review of the type provided by Section 17-27-70(c) of the South Carolina Code. This summary disposition is inappropriate, however, because that statute refers to "pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted" and adopts the summary judgment standard of Rule 56, SCRCP. Here, there has been no discovery. There have been no depositions. And the parties have submitted no affidavits. Therefore, the Court's Order constructively deprives Mr. Mahdi of the right to develop a well-pled a PCR Application—which is fundamentally a civil pleading.

III. The Court Overlooked or Misapprehended the Relevant Law on Successiveness and Statute of Limitations.

A. The Court's Reliance on *Robertson v. State* is Unnecessary and Irrelevant to the State's Motion to Dismiss.

As a threshold matter, the Court's Order extensively discusses *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) in framing the successiveness and statute of limitations inquiry. (*See* Order at 10–13). Essentially, the Applicant in *Robertson* asked the Supreme Court of South Carolina to create a rule that would allow for successive PCR applications in response to the Supreme

Court of the United State's *Martinez v. Ryan*[3] decision. The *Robertson* Court declined to establish such a rule, instead holding that an "allegation that prior PCR counsel were unqualified . . . constitutes a 'sufficient reason' to avoid the prohibition of section 17-27-90 against successive PCR applications." *Id.* at 522, 795 S.E.2d at 37. However, the *Robertson* Court reiterated the axiomatic rule that, "'[w]here an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.'" 418 S.C. at 519, 795 at 36 (quoting *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)).

Here, Mr. Mahdi has made no allegation that his PCR counsel (or any other counsel) were not statutorily qualified. To the contrary, as detailed below, Mr. Mahdi has instead alleged facts that would establish exceptions to the statute of limitations or prohibition against successive PCR applications. The Court's adoption of the holding urged by the State allows the rule created by *Robertson* to swallow the well-established statutory exceptions to successiveness and statute of limitations set forth by Mr. Mahdi.

B. The Court's Order Overlooked or Misapprehended the Well-Established Exceptions to the Statute of Limitations Alleged by Mr. Mahdi.

The Court properly notes that Section 17-27-45(A) of the South Carolina Code requires that a PCR action "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

[3] In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court of the United States held that ineffective assistance of counsel in initial-review PCR proceedings may establish cause to excuse a prisoner's procedural default in presenting a claim of ineffective assistance of trial counsel in federal habeas proceedings.

final decision upon an appeal, whichever is later." However, there are several statutory and common-law exceptions to this one-year statute of limitations, which the Court overlooked or misapprehended in its Order.

Specifically, and relevant to this action, Section 17-27-45 provides that:

> (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
>
> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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.

1. Claim 10(a) of Mr. Mahdi's PCR Application

The Court first held that Claim 10(a) of Mr. Mahdi's PCR Application[4] is time-barred because *Hurst v. Florida*, 136 S. Ct. 616 (2016) did not establish "a new rule of constitutional law to be retroactively applied to [Mr. Mahdi]." To that end, the Court cites a number of cases from other jurisdictions that reach similar conclusions. However, the question of whether *Hurst* is a constitutionally binding decision that imposes a "substantive standard not previously recognized or a right not in existence at the time of the state court trial" that "is intended to be applied retroactively" is a novel question of law in South Carolina. It is axiomatic that "novel questions of law should not ordinarily be resolved on a [motion to dismiss]." *Chestnut*, 413 S.C. at 227, 776 S.E.2d at 84.

[4] "S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution . . . because a judge rather than a jury finds facts required for imposition of a death sentence."

Therefore, in light of the appropriate standard of review here—that of a Rule 12(b)(6) motion—dismissal is inappropriate here. Moreover, the Court overlooked and misapprehended the substantive arguments that Mr. Mahdi made at Pages 7–11 of his Response to the State's Motion to Dismiss, which Mr. Mahdi expressly incorporates by reference into this Motion.

The Court also held that this ground was "barred by the doctrines of *res judicata, judicial estoppel* and *collateral estoppel* as this issue was previously decided by this Court in the 1st PCR action." (Order at 22). To be clear, *Hurst* was not decided until 2016—well after Mr. Mahdi's first PCR action was decided. Therefore, *Hurst* the issue could not have been decided in that proceeding.

As a threshold matter, these grounds are typically considered affirmative defenses.[5] *See generally*, Rule 8(c), SCRCP (outlining a non-exclusive list of affirmative defenses); *S.C. Dep't of Soc. Servs.*, 271 S.C. 109, 110, 245 S.E.2d 423, 423 (1978) (res judicata); *Duckett v. Goforth*, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007) (collateral estoppel). "[A]n affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." *Spence*, 368 S.C. at 123, 628 S.E.2d at 878 (citations omitted). "This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint." *Id.* "Therefore, because the factual analysis of

[5] There is no South Carolina authority that explicitly states that judicial estoppel is an affirmative defense. However, based on its description as an equitable concept that is used defensively to "prevent a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding," it appears to be treated as an affirmative defense by courts. *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004).

Similarly, "law of the case" is a defensive mechanism that "prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial." *Id.* (citation omitted).

Thus, the Court overlooked or misapprehended the impropriety of relying on these affirmative defenses to justify dismissal of Mr. Mahdi's PCR Application. However, on the merits, the Court provides no substantive analysis of its invocation of *res judicata, judicial estoppel* and *collateral estoppel*. The Court's Order appears to simply hold that, because Mr. Mahdi's plea of guilty and waiver of jury sentencing were purportedly valid, he cannot raise a constitutional challenge to the sentencing statute in PCR. There is no support in law or fact for such a proposition.

Finally, the Order holds that Mr. Mahdi "waived and abandoned this issue on appeal from the denial of PCR." (Order at 22). Thus, the Order holds that Mr. Mahdi is barred from raising it now based on the "law of the case" doctrine. As stated above, this issue is tantamount to an affirmative defense and is inappropriate for summary dismissal. Moreover, the issue was not raised, and indeed could not be raised, in the first PCR proceeding as *Hurst* did not exist.

2. Claim 10(b) of Mr. Mahdi's PCR Application

The Court next held that Claim 10(b) of Mr. Mahdi's PCR Application[6] is time-barred as *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012) "did not issue new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi." (Order at 24). The Court focuses its analysis on the exception of Section 17-27-45(B), essentially holding that these cases did not invoke a new rule of constitutional law that is retroactive. However, this holding completely misapprehends Mr. Mahdi's argument, which primarily

[6] Essentially, Mr. Mahdi contends that he "was denied the right to effective assistance of counsel . . . because his trial counsel advised him that the guilty plea would be considered as mitigation," but the trial court judge did not consider the guilty plea to be mitigating."

invokes Section 17-27-45(C)—evidence of material facts not previously presented. Indeed, this claim, which involves allegations of affirmative *misadvise*, is predicated on material facts not previously considered that, if true, would require vacation of Mr. Mahdi's guilty plea. While the Court briefly mentions Section 17-27-45(C), it rejects its application because "Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a *Strickland* claim in this regard at his 1st PCR hearing." (Order at 29).

That is not the standard by which the Court must abide in ruling on the State's Motion to Dismiss. The Court overlooked and misapprehended the well-established rule that "[t]he statute of limitations is not a defense listed under Rule 12(b) which may be raised by pre-answer motion. It also is not listed under any other subdivision of Rule 12 and, therefore, is not a defense or objection which Rule 12 permits to be raised by pre-answer motion." *Glenn v. Sch. Dist. No. Five of Anderson Cnty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 49–50 (Ct. App. 1988). Moreover, "the determination of the date the statute [of limitations] began to run in a particular case" is a "question of fact." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000). Indeed, "when conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a [factfinder] to decide." *Graham v. Welch, Roberts, & Amburn, LLP*, 404 S.C. 235, 239–40, 743 S.E.2d 860, 863 (Ct. App. 2013).

Here, Mr. Mahdi has pled facts sufficient to state a cause of action on this claim and has not even had *the opportunity* to present any evidence on the issue of what advice his counsel gave him on the issue of his guilty plea and its potential effect on mitigation, much less any evidence about when, if at all, his counsel discussed *Frye* and *Lafler* with him. (*See generally* PCR Application ¶ 11 (stating facts that form the basis of this claim)). Therefore, applying these basic civil procedure principles, dismissal would be wholly inappropriate. This Court, therefore, should deny the State's

motions to dismiss and convene a hearing and consider the merits of the claim. *See McCoy*, 401 S.C. at 370, 737 S.E.2d at 626 ("Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.").

3. Claim 10(c) of Mr. Mahdi's PCR Application

The Court addresses Mr. Mahdi's *Austin* claim in the statute of limitations section of its Order. However, the Supreme Court of South Carolina has held that the one-year statute of limitations does not apply where an applicant was denied an appeal from denial of post-conviction relief. *See, e.g., Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999) (holding that "Odom's *Austin*[7] appeal is attaching the PCR *procedure* used in his case, not the *merits* of his sentence so the one-year statute of limitations, S.C. Code Ann. § 17-27-45(A), is not applicable. In this case, Odom claims that he was denied his right to appeal which was a procedural error preventing his fair 'bite' at the apple."). Here, Mr. Mahdi has alleged that he was denied an appeal from the denial of relief in the first PCR proceeding. While his counsel did raise one issue on appeal, there is a clear factual dispute as to why Mr. Mahdi was denied the right to a full appeal of the denial of PCR.[8]

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[7] *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

[8] The Order essentially holds that if PCR counsel appeal *any* issues from the denial of PCR, then an *Austin* claim is never appropriate. That is not an accurate representation of *Austin*'s holding. In fact, the Court in *Austin* remanded "for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review" and held that "[i]f the circuit court [found] this to be true, this Court shall review whether the petitioner was prejudiced by the failure to obtain review of a meritorious issue." 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). Therefore, *Austin*, by its own terms, speaks in terms of issues and requires an analysis of the failure to appeal specific issues.

The very point relevant to the Motion to Dismiss is that we do not yet know *what the circumstances are*. Mr. Mahdi has not had the opportunity to present any evidence on what advice his attorneys provided related to his right to appeal. Instead, the State assumes that Mr. Mahdi's appellate counsel simply "chose not to raise certain issues in the 1st PCR appeal." It is worth noting that the Supreme Court has held PCR appellate attorneys to high standards, noting that "PCR actions are the only type of case which [the Supreme Court] mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous."[9] *Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002). (Mot. to Dismiss at 49). Therefore, the Court overlooked and misapprehended the import of the statute of limitations on the *Austin* claim and improperly rejected this claim on the merits.

C. The Court's Order Overlooked or Misapprehended the Well-Established Exceptions to the Prohibition on Successive PCR Applications Alleged by Mr. Mahdi.

The Court next held that Mr. Mahdi's Application is barred as improperly successive. However, the bar on successive PCR Applications is not implicated given the unique factual allegations in Mr. Mahdi's PCR Application.[10]

Section 17-27-90 of the South Carolina Code states that:

> 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

---

[9] This is precisely the reason why the Court's concern in Footnote 14 of the Order is misplaced. PCR counsel have an obligation to raise all arguable reasons. By doing so, every *Austin* claim could be avoided. Here, Mr. Mahdi's PCR counsel shirked that professional obligation, and he should be entitled to a hearing on that claim.

[10] Again, the Order's references to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), and *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013), is misplaced and mixes concepts not relevant to this proceeding. (Order at 31–32). Mr. Mahdi has not sought an exception to the bar on successive PCR applications simply in light of prior counsel's ineffectiveness. Instead, Mr. Mahdi has relied on well-established and existing exceptions to the bar on successive applications.

> 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.

Specifically, Mr. Mahdi's Claim 10(a) is based on *Hurst v. Florida*, which was not decided until January 12, 2016. Thus, it plainly could not have been raised in his prior application.

Mr. Mahdi's Claim 10(b) is based on *Frye* and *Lafler*, which were decided in 2012. There is a question of fact, detailed above, about when (or if) Mr. Mahdi knew about these cases and whether his counsel advised him or misadvised him about this issue. Thus, Mr. Mahdi has raised a question about whether there was "sufficient reason" for not asserting this issue and whether his PCR counsel "inadequately raised" the issues in the initial PCR Application. *See* S.C. Code Ann. § 17-27-90.

Similarly, Mr. Mahdi's Claim 10(c) is based on the fundamental assertion that his PCR counsel did not adequately provide him with the opportunity to appeal the issues that were raised in his initial PCR Application. In light of that, Mr. Mahdi has raised an *Austin* claim, which, by its very nature, cannot be barred as successive.

Finally, Mr. Mahdi's Claim 10(d) asks for a ruling on those issues that were not adequately presented or decided in the initial PCR Application. This *Austin* claim raises a question of fact and states a claim for relief that his initial PCR counsel "inadequately raised" the issues in his initial PCR Application.

In sum and substance, "[w]here an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing." *See McCoy*, 401 S.C. at 370, 737 S.E.2d at 626. Mr.

Mahdi has satisfied this standard and should be entitled to an evidentiary hearing to resolve the merits of his PCR Application.

IV. The Court's Order Improperly Invokes the Defense of Laches, Res Judicata, Collateral Estoppel, Judicial Estoppel, and Law of the Case Throughout the Order.

As detailed above, "an affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." *Spence*, 368 S.C. at 123, 628 S.E.2d at 878 (citations omitted). "This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint." *Id.* "Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial." *Id.* (citation omitted).

Throughout the Order, the Court invokes the issues of res judicata, collateral estoppel, judicial estoppel, law of the case, and laches. These are all affirmative defenses or defensive mechanisms that limit a plaintiff's ability to pursue causes of action. To that end, each doctrine requires a fact-specific inquiry before application by the finder of fact. Thus, they are inappropriate to invoke in a motion to dismiss, and Mr. Mahdi respectfully requests that the Court remove these findings from the Order.[11]

Specifically, as to laches, the Court holds that "[t]he claims Mahdi is raising in this 2nd Application for post-conviction relief could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of PCR." (Order at 46). This is simply not true as *Hurst* had not yet been

[11] Of course, the State is free to invoke these defenses when the case reaches the merits stage.

decided and there is a question of fact about when or if Mr. Mahdi or his counsel were aware of *Frye* or *Lafler*. The Order is correct, however, that the *Austin* claims could have been raised on appeal from the denial of PCR. But they were not, and Mr. Mahdi is entitled to a hearing to determine *why* they were not.

V. The Court's Order Improperly States that it Cannot Address Grounds Abandoned or Not Addressed in the First PCR.

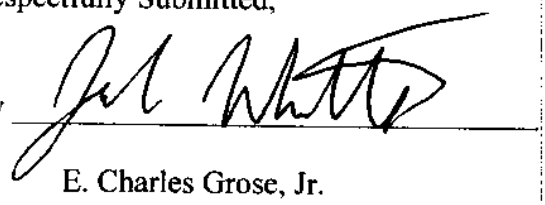
Finally, the Court holds that it cannot rule on any grounds that were not addressed or that were abandoned at the first PCR. As detailed throughout, there are valid exceptions to the statute of limitations and prohibition on successive PCR applications applicable to many of the claims raised in the PCR application. More importantly here, the *Austin* claim is the vehicle by which the Court can provide for potential judicial review of claims in the prior PCR. Mr. Mahdi did not have the opportunity to seek review of those claims (or the Court's holding that some were abandoned), and Mr. Mahdi should be entitled to a hearing about why he was deprived of that opportunity.

CONCLUSION

As detailed above, Mr. Mahdi respectfully requests that this Court alter or amend and reconsider its Order dismissing his PCR Application.

(Signature Page Follows)

Respectfully Submitted,

By 

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Attorneys for Applicant Mikal Mahdi

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
FILED
COUNTY OF CALHOUN) FIRST JUDICIAL CIRCUIT
2017 JUL 12 P 1:49
Mikal Mahdi, SCDC #5238,) C/A No. 2017-CP-09-0004
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC
Applicant,
vs.
CERTIFICATE OF SERVICE
State of South Carolina,
Respondent.

The undersigned employee of Simmons Law Firm, attorneys for Applicant Mikal Mahdi, does hereby certify that service of Applicant's Motion to Alter and Amend and for Reconsideration in the above-captioned action was made upon all counsel of record by hand delivery (to: J. Anthony Mabry, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201) and placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this 12th day of July, 2017, addressed as follows:[12]

J. Anthony Mabry
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

By: _____
John L. Warren III

[12] A filed copy of the Order will be emailed to Mr. Mabry and Judge Early after it is returned by the Calhoun County Clerk of Court's Office.

EXHIBIT A

John Warren

From: Early, Doyet A. Law Clerk (Scottie Hendrix) <dearlylc@sccourts.org>
Sent: Tuesday, June 6, 2017 10:54 AM
To: Anthony Mabry
Cc: Charles Grose (chasgrose@gmail.com); Zelenka, Don; John Warren
Subject: Mahdi v. State of SC

Good morning,

Pease see below from Judge Early:

Pursuant to S.C. Code Ann. § 17-27-45, I find the application is outside the statute of limitations.

Pursuant to S.C. Code Ann. § 17-27-90, I find the application successive.

Pursuant to S.C. Code Ann. § 17-27-70, I find summary disposition is proper and is allowed under the terms of this statute.

From a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, I find there is no genuine issue of material fact and the Respondent is entitled to judgment as a matter of law.

Mr. Mabry, please prepare a proposed order using your memos as an outline for the order.

Thanks,
DAE

H.L. Scottie Hendrix II
Law Clerk to the Honorable D.A. Early III The Circuit Court of the 2nd Judicial Circuit P.O. Box 90 Bamberg, SC 29003
Telephone: 803-245-4004
Fax: 803-245-2983
dearlylc@sccourts.org

EXHIBIT B

ALAN WILSON
ATTORNEY GENERAL

June 7, 2017

Honorable Doyet A. Early, III
Post Office Box 90
Bamberg, SC 29003

Re: Mikal D. Mahdi, #5238
Capital Case: C/A No. 2017-CP-09-0004

Dear Judge Early:

Enclosed please find the Proposed Order of Dismissal in the above-captioned capital matter. If this Order meets with your approval, please sign and return to me in the enclosed envelope and I will file with the Clerk of Court's Office. By copy of this letter, I am serving opposing counsel with same.

Thank you for your assistance in this matter.

Sincerely,

Anthony Mabry
Senior Assistant Attorney General

JAM/lbb

cc: E. Charles Grose, Jr., Esquire
John L. Warren, III, Esquire

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	C/A No. 2017-CP-09-00004
Mikal Mahdi, SCDC #5238, Applicant, vs.	)	*CAPITAL PCR*
	)	**(PROPOSED) ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

On January 10, 2017, Applicant, Mikal Mahdi ("Mahdi"), a death sentenced inmate, filed the above captioned second (2nd) or successive PCR action in the Court of Common Pleas for Calhoun County, again collaterally challenging his guilty plea convictions and sentence of death previously imposed by the Honorable Clifton Newman, Circuit Court Judge. Mahdi first (1st) collaterally challenged his guilty plea convictions and death sentence in a 2009 PCR application **(2009-CP-09-00164)** that was denied and dismissed by this Court, after a PCR evidentiary merits hearing, in an Amended Order of Dismissal. Mahdi's appeal from the denial of his 2009 PCR application was denied by both the South Carolina Supreme Court and the United States Supreme Court. By Order, the South Carolina Supreme Court has re-appointed this Court to preside over this current action and hear all motions.

Respondent's Motion

On February 10, 2017, Respondent filed a "Return and Motion to Dismiss" this 2nd or successive PCR action for the following reasons: (1) the action is time barred and improperly successive under South Carolina law; (2) the action is barred by the doctrine of laches; (3) several of Mahdi's grounds are barred by the doctrines of res judicata, collateral estoppel, judicial estoppel, and the principle of "the law of the case;" (4) Mahdi's direct appeal grounds

are not cognizable on post-conviction relief; and (5) there is no merit to any of Mahdi's direct appeal grounds because of extant case law and the record in this case. For all of these reasons, Respondent asserted the application must be denied and dismissed with prejudice pursuant to: (1) S.C. Code Ann. § 17-27-45 (the PCR statute of limitations); (2) S.C. Code Ann. Section 17-27-90 (the successiveness bar); (3) S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); and, (4) S.C. Code Ann. § 17-27-70 **(c)** (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRCP* (defining the standard for granting a motion for summary judgment).[1] Mahdi filed a Response opposing Respondent's Motion. Respondent filed a detailed Reply to that Response. On April 13, 2017, this Court notified counsel for both Mahdi and the State that a hearing would be held on the State's motion on May 1, 2017 at 10:30 a.m. at the Bamberg County Courthouse.

The Hearing on the Motion to Dismiss

On May 1, 2017, at the Bamberg County Courthouse, this Court held a hearing on Respondent's motion to dismiss this current action for the above stated reasons. Present were Mahdi's federal habeas counsel E. Charles Grose Jr. and John L. Warren, III., Esquires.

[1] Mahdi contends the State moved to dismiss this 2nd or successive application pursuant to Rule 12(b)(6), SCRCP; however, Respondent moved to dismiss this application pursuant to S.C. Code Ann. Sections 17-27-45 (the PCR statute of limitations); 17-27-90 (the successiveness bar) and 17-27-70(b) **&** (c). Section 17-27-70(c) provides the same standard for dismissal of a PCR application as a motion for summary judgment under Rule 56, SCRCP. Further, Mahdi admits the SCRCP are applicable to PCR actions. As a result, Rule 56, SCRCP would be just as applicable as Rule 12(b)(6). Further, Rule 71.1(a), SCRCP provides where there is an applicable PCR statute, the statute controls over the Rule of Procedure.

Respondent was represented by Assistant Attorney General J. Anthony Mabry who filed the motion on behalf of Respondent. Mahdi waived his presence at the hearing.[2] No evidence or affidavits were submitted by either party at the motion hearing. This Court heard argument from both Respondent and the Applicant and considered the legal authority submitted at the hearing on the motion. On June 6, 2017, this Court notified counsel for both parties that: (1) pursuant to S.C. Code Ann. § 17-25-45, this Court found the current 2nd or successive PCR application to be outside the statute of limitations for PCR actions; (2) pursuant to S.C. Code Ann. § 17-27-90, this Court found the current application was improperly successive under South Carolina law; (3) pursuant to S.C. Code Ann. § 17-27-70(b) summary disposition was proper and is allowed under the terms of the statute; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, this Court found there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law pursuant to S.C. Code Ann. § 17-27-70(c) and Rule 56, S.C.R.C.P. This Court directed Mr. Mabry to submit a proposed Order of Dismissal consistent with these findings using his previous briefs submitted to the Court as an outline for the Order. This Order of Dismissal follows.

This Court's Ruling on the Motion

After consideration of Respondent's Motion, Mahdi's response, Respondent's Reply, and the arguments of counsel at the hearing on the motion and the legal authority submitted, this Court finds and concludes this application must be denied and dismissed with prejudice for the following reasons: (1) the application is time barred under the South Carolina statute of limitations for PCR actions (*S.C. Code Ann. § 17-27-45*); (2) the application is improperly

[2] On April 12, 2017, counsel for Mahdi notified this Court by e-mail that after conferring with Mr. Mahdi, Mr. Mahdi waived his presence at the hearing on the State's motion and the motion hearing could proceed in his absence. Counsel for Mahdi also agreed the hearing on the State's motion could proceed in Mahdi's absence and notified this Court of the same by e-mail.

successive under South Carolina law (*S.C. Code Ann. § 17-27-90*); (3) based on the pleadings and the record Respondent is entitled to judgment as a matter of law (*S.C. Code Ann. § 17-27-70(b)*; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there is no genuine issue of material fact and Respondent is entitled judgment as a matter of law (*S.C. Code Ann. § 17-27-70(c)* and/or *Rule 56, SCRCP*).

I.

PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and formally charged with Myers' murder, the theft of his truck, and the burglary of his shed/cabin.[3] Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > $5,000, and burglary 2nd degree (violent) (Ind. #s *2004-GS-09-243 - 44*). The State sought the death penalty for the murder. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi.[4] The South Carolina Supreme Court assigned the Honorable Clifton Newman, Circuit Court Judge, to preside over the capital trial. From November 26-29, 2006, individual juror *voir dire* and capital jury selection was completed with a jury and 4 alternates impaneled.

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[3] The building referred to in the record as "the shed" is more like a cabin. It is located on victim James Myers' farm, and contains furniture and a television. Myers' and his wife were married there. Myers' wife had an office in the "shed"/cabin.

[4] Mr. Grant suffered a serious injury the early summer of 2006 and was relieved as counsel. Glenn Walters was substituted as 1st chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2nd chair counsel.

The Guilty Pleas

Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury determination of guilt and sentencing, and entered pleas of guilty to all charges. (R 123-1336). Judge Newman accepted Mahdi's pleas of guilty and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed. (R 1259-84).

The Sentencing Proceeding

After the required 24 hour waiting period, the sentencing proceeding was conducted December 1-6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed the same date. (R 1726-42, 1810-26, 1842-53). Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed in the commission of a grand larceny; and (2) the murder was committed in the commission of a burglary. (R 1730-31, 1814-15, 1845). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

The Direct Appeal

Mahdi directly appealed only his death sentence to the South Carolina Supreme Court. On June 15, 2009, the Court affirmed. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, the South Carolina Supreme Court granted the stay assigning this Court to hear the PCR action.

The 1st PCR Action

Mahdi filed a PCR application on August 18, 2009 **(C/A # 2009-CP-09-00164)** and several subsequent amended applications raising numerous grounds. Mahdi was appointed two (2) statutorily qualified capital PCR attorneys pursuant to S.C. Code Ann. § 17-27-160(B) (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant), to represent him in the PCR action, Teresa Norris and Robert Lominack, Esquires. See *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The State filed a Return to each PCR application and amendment.

On March 9, 2011, an evidentiary (PCR) merits hearing was held before this Court. Present were Mahdi, his PCR attorneys, along with the Attorney General's Office. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Lawanda Burwell, Doctors Craig Haney, DeRossett Myers, Nicholas Cooper-Lewter, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James Woodley, Dora Wynn, Doug Pond, and Sandra Burwell and introduced documentary exhibits. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, James Gordan, Doctors Thomas Martin and Geoffrey McKee. Additionally, exhibits were introduced by Respondent. At the evidentiary hearing, this Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in the case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses

and evidence introduced, this Court found the application to be without merit and denied and dismissed the application and all grounds with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRCP, Motion to Alter or Amend one (1) of the findings in the Order.[5] On February 11, 2013, this Court heard argument on the Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, this Court granted the State's Rule 59 Motion as to that one (1) portion of the Order and entered an Amended Order of Dismissal denying and dismissing all grounds as the final Order of Dismissal. Mahdi filed a Rule 59 Motion, which was denied by this Court.

The Appeal from the Denial of PCR

Mahdi appealed the denial of his PCR application (**2009-CP-09-00164**) by way of a Petition for Writ of Certiorari [a merits petition] in the South Carolina Supreme Court. Mahdi was represented by Seth Farber, Brandon Duke, and Teresa Norris, Esquires. Those three (3) PCR appellate attorneys, including one (1) of Mahdi's PCR attorneys, chose to raise only one (1) issue from the denial of PCR. The State filed a Return to the Petition. Mahdi filed a Reply to the State's Return. On September 8, 2016, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on September 26, 2016.

The Petition for Writ of Certiorari in the U.S. Supreme Court

Mahdi appealed from the South Carolina Supreme Court's denial of certiorari from PCR to the United States Supreme Court by way of a Petition for Writ of Certiorari. Respondent filed its Brief in Opposition to the same. Mahdi filed a Reply to Respondent's Brief in Opposition.

[5] In its Rule 59 Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding Mahdi had not established prejudice under the same ground.

On February 21, 2017, the Petition for Writ of Certiorari was denied by the United States Supreme Court.

The Federal Habeas Petition

Mahdi previously filed an application for a stay of execution in the United States District Court for South Carolina to file a federal habeas petition (*Mahdi v. Stirling*, C/A No 16-mc-402, D.S.C. filed Oct. 5, 2016). The stay request was granted Oct. 5, 2016. Counsel was appointed on October 13, 2016. When the stay expired, Mahdi filed a place-holder petition and was granted a further stay of execution. Mahdi has not yet filed his final amended federal habeas petition. It is anticipated, in the federal habeas petition, Mahdi will allege grounds he previously raised in state court but which were denied *and* attempt to raise pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) the unexhausted, but technically exhausted, claims he raises in this 2nd or successive PCR application.[6]

The 2nd Successive PCR Action

After filing his federal habeas stay request and while that stay was still pending, Mahdi filed this 2nd or successive PCR application, through federal habeas counsel, in this Court on January 10, 2017. In this 2nd PCR application, Mahdi raises the following grounds:

10(a)/11(a) S.C. Code Ann. Section 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution , which is applicable to the states through the Fourteenth Amendment, because a judge rather that a jury

[6] *Martinez* held, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial, and (2) where appointed PCR counsel in the initial-review collateral proceeding, should have raised the claim, i.e. counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Martinez*. at 1318-19.

finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___U.S. ___, 136 S.Ct. 616 (2016). S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigation circumstances, and determine whether a death sentence should be imposed.

10(b)/11(b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the guilt or innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation. Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

10(c)/11(c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E. 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in the initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

> Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> - Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived Petitioner of the right to effective assistance of counsel.
>
> - Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
>
> - Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
>
> - Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
>
> - Counsel failed to assert that S.C. Code Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eight, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2001). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence namely that he has accepted responsibility for the crime. While this issue has been rejected by state

courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

- At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. See *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

10(d)/11(d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled upon by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal. In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

(See C.A. # 2017-CP-09-00004, pp. 2-4).

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mahdi has already had a full round of PCR remedies (**C/A No. 2009-CP-09-00164).** Mahdi's 2009 PCR action challenging his guilty plea convictions and sentence of death [raising numerous grounds] was denied and dismissed with prejudice after a full evidentiary (PCR) merits hearing by this Court ("the PCR Court"). (Amended Order of Dismissal, C.A. # 2009-CP-09-164). Mahdi's Rule 59, SCRCP, Motion to Alter or Amend was also denied by this Court.

During the pendency of his 2009 PCR action and at the evidentiary PCR merits hearing, Mahdi was represented by **two (2) statutorily qualified PCR counsel**, Teresa Norris and Robert Lominack, Esquires. *S.C. Code Ann. § 17-27-160(B)* (identifying requisite qualifications for

counsel appointed to represent an indigent, capital PCR applicant). Compare *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Mahdi conceded at the hearing on the present motion that Ms. Norris and Mr. Lominack were statutorily qualified PCR counsel pursuant to Section 17-27-160(B). This Court would also note that Mahdi has never alleged as a ground for relief in this 2nd or successive PCR Application that his 1st PCR counsel were not statutorily qualified.[7] Mahdi has not submitted the affidavit of either PCR counsel asserting they were not statutorily qualified to represent him in his 1st PCR action. Compare *Robertson, supra.*

Mahdi appealed the denial of his 1st PCR action to the South Carolina Supreme Court by way of a Petition for Writ of Certiorari [a merits petition]. On appeal from the denial of PCR, Mahdi was represented by three (3) PCR appellate attorneys, and Mahdi raised the following issue to the South Carolina Supreme Court:

> Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsels' decision to rely entirely on a single expert witness to present mitigating evidence about Petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

(Petition for Writ of Certiorari, p. 2). Respondent filed a responsive brief. The South Carolina Supreme Court denied certiorari. The Remittitur was issued.

Mahdi filed a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a Brief in Opposition. Mahdi filed a Reply. The United States Supreme Court denied the Petition for Writ of Certiorari. As a result, Mahdi has had one (1) complete round of PCR remedies.

[7] (See Successive Application for PCR, Amended Successive Application for PCR).

On December 14, 2016, the South Carolina Supreme Court decided *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The Court ruled *Martinez v. Ryan*, 132 S.Ct. 1309, was not a reason to allow the filing of a 2nd or successive PCR application in a capital case. The Court also ruled the fact that a capital PCR applicant was not represented by statutorily qualified PCR counsel at his first (1st) PCR was a sufficient reason to allow the filing of a 2nd or successive PCR application. The Court remanded the case to the Circuit Court solely to determine: (1) if Robertson's 1st PCR counsel were statutorily qualified or not; and, (2) if not statutorily qualified, whether Robertson was prejudiced by the fact that his 1st PCR attorneys were not statutorily qualified. *Id.* Subsequent to the Court's opinion in *Robertson*, Mahdi filed this 2nd or successive PCR action. Mahdi does not assert in this 2nd or successive PCR application that his 1st PCR attorneys were not statutorily qualified. Respondent filed its Motion to Dismiss relying on *Robertson* and other South Carolina case law asserting this application is time barred and improperly successive.

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code Ann. § 17-27-45 (A) provides a PCR action "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." S.C. Code Ann. § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." As a result, for the reasons set forth herein, Mahdi is not entitled to file this 2nd or successive PCR application. *Robertson v. State,* supra. Mahdi's present application must be dismissed as untimely **and** improperly successive. *Robertson. See Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) ("An individual under PCR effectively is granted one chance to argue for relief and must do so within

a year of his final appeal"). *Accord In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (to receive a stay from the state to pursue "a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court" death-sentenced applicant "must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay") (emphasis added).

A. The Present Action is Time Barred

This present 2nd PCR Application is time barred under the South Carolina Statute of Limitations for PCR actions and must be dismissed with prejudice. South Carolina Code Ann. § 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.

Mahdi was convicted on November 30, 2006 and sentenced to death on December 8, 2006. The final decision in the appeal was issued by the South Carolina Supreme Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on **July 1, 2009**. Mahdi was therefore required to file this application before **July 1, 2010**. The current application was filed on January 10, 2017, which was **more than six (6) years after the statutory filing period expired**.

However, § 17-27-45 also states:

> When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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. § 17-2745(B)&(C). Thus, to overcome the time bar, Mahdi must show he fits under one (1) of the categories of Section 17-27-45 (B) or (C). This Court has carefully reviewed the allegations of Mahdi's 2nd or successive PCR Application and is thoroughly familiar with the Record in this case. Based on the undisputed facts and the law, all of Mahdi's claims raised in this 2nd or successive PCR Application, except his so-called "*Austin*" claim, could have been raised timely **at his plea/sentencing** before Judge Newman or **at his previous 1st PCR hearing before this Court.** (See discussion, infra).

***Hurst v. Florida* does not overcome the time bar**

Mahdi relies first on *Hurst v. Florida,* 136 S.Ct. 616 (2016) in an effort to overcome the statute of limitations time bar. In his 2nd or successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20(B), alleging it is unconstitutional because it requires judge sentencing after a guilty plea. **However, Mahdi has not established a new rule of constitutional law to be retroactively applied and applicable to him.** And, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in **2006** or during the prior PCR action in **2009**. In fact, this Court decided this issue in the 1st PCR proceeding and found there was no merit to it. (Amended Order of Dismissal, **pp. 123-33**).[8]

[8] This Court decided this issue in the 1st PCR action under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. Section 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata, judicial estoppel* and *collateral estoppel. See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

Mahdi argues *Hurst* created a new constitutional rule applicable and retroactive to him. However, *Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New York*, 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing. *Hurst,* 136 S.Ct. 616; *Runyon v. United States,* ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*); *Garza v. Ryan*, 2017 WL 105983 (D. Ariz. 2017)(*Slip Copy*); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016); *Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017; *Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016) *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016) (*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*).

The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22; *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). *Hurst* found Florida's capital sentencing scheme violated the holdings of *Ring* and *Apprendi* when the

defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.[9]

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

> During the pendency of Mullen's appeal, the United States Supreme Court issued Its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.
>
> We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment .....fails.

***Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016)**(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), **cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017.** *Accord Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016

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[9] *See Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring,* since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State,* 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(*Unpublished*); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

Similarly, the South Carolina Supreme Court held in *State v. Downs*:

> The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).
>
> In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See e.g. Leone* v. *Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379

(5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Return, the United States Supreme Court has not found S.C. Code Ann. § 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015)(citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, the Fourth Circuit found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; *see also Nunley*, 784 F.3d at 472 (*citing Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *State v. Inman*, 395 S.C. 539, 555-56, 720 S.E.2d

31, 40 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)(when a defendant pleads guilty in a capital case, statutorily mandated sentencing by the trial judge does not violate the holding in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* did not involve jury trial waivers and is not implicated when a defendant pleads guilty); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004)(finding Section 16-3-20(B) constitutional).[10] Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015); *State v. Nunley*, 341 S.W.3d 611, 620 (Mo. 2011); *State ex rel. Taylor v. Steele*, 341 S.W.2d 634, 646-49 (Mo. 2011); *Leon v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *Byrom v. State*, 927 So.2d 709, 728 (Miss. 2006); *Mack v. State*, 75 P.3d 803, 806 (2003); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002); *People v. Altom*, 788 N.E.2d 55, 60-61 (Ill. 2003); *State v. Ketterer*, 855 N.E.2 48, 69 (Ohio 2006); *Thacker v. State*, 100 P.3d 1052 (OK 2004); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002). In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as was raised in the above cited cases.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and

[10] Additionally, the South Carolina Supreme Court has repeatedly reversed the plea and death sentence in cases where a defendant was allowed to plead guilty and have jury sentencing in contravention of the statute. *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Truesdale*, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (1982).

have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve (12) jurors and four (4) alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve (12) jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge [Judge Newman] would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994)(record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the 1st PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). At the 1st PCR, Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. This Court previously found Mahdi made a strategic decision, after selecting a jury, that he wanted Judge Newman to sentence him, **not** the jury he had selected and was impaneled. (Amended Order of Dismissal, **pp. 131-32**). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been

upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel* as this issue was previously decided by this Court in the 1st PCR action. (Amended Order of Dismissal). *See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of his 1st PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, on this issue, is "**the law of the case**," and Mahdi waived and abandoned this issue. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993)(discussing "law of the case"); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2 583 (Ct. App. 1997); *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473 427 S.E.2d 646 (1993)(the trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996)(unappealed ground becomes the law of the case); *Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997)(the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson v. Charleston & Western Carolina RR Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957); *See Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999)(discussing the difference between the law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law **or** material facts that could not have been raised at his guilty plea/sentencing **in 2006** or his 1st PCR merits hearing **in 2009** entitling him to file a untimely successive PCR application. *See S.C. Code § 17-27-45 (B) & (C).* *Ring* was decided in **2002** and *Apprendi* was decided in **2000** long before Mahdi's guilty plea/sentencing and his 1st PCR Application and 1st PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a *Ring* and/or *Apprendi* challenge to the death penalty statute at the time of his guilty plea/sentencing in **2006** or in his 1st PCR action in **2009**. Furthermore, Mahdi may not raise this issue now because he is bound by this Court's previous determination in the 1st PCR case that he [Mahdi] made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim that could have been raised previously. *Cf. Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Further, this Ground is barred by the doctrines of *res judicata, judicial estoppel, collateral estoppel, and the law of the case.*

***Lafler* and *Frye* do not overcome the time bar**

Mahdi also relies on *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) in an attempt to overcome the statute of limitations time bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him or this claim would present material new facts not previously presented. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015). And, Mahdi has not shown new material facts not previously presented because those facts were known to Mahdi at the time of his guilty plea and sentencing and before his first PCR. See *S.C. Code Ann. Section 17-27-45 (C).*

Every federal appellate Court to consider the issue has held that *Lafler* and *Frye* did not establish a "new rule of constitutional law." See *Wert v. United States*, 596 Fed.Appx. 914, 917–18 (11th Cir.2015) ("As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively."); *United States v. Crisp*, 573 Fed.Appx. 706, 708–09 (10th Cir.2014) ("No reasonable jurist would debate the district court's determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3)."); *Navar v. Warden Fort Dix FCI*, 569 Fed.Appx. 139, 140 n.1 (3d Cir.2014) ("[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion."); *Gallagher v. United States*, 711 F.3d 315, 316 (2d Cir.2013) ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*."); *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Pagan San Miguel v. United States*, 736 F.3d 44, 45 (1st Cir.2013)(per curiam); *In re King*, 697 F.3d 1189 (5th Cir.2012); *Hare v. United States*, 688 F.3d

878, 878–80 (7th Cir.2012); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir.2012) ("[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law."); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir.2013); *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013); *United States v. Lawton*, 2012 WL 6604576 at *3 (10th Cir., Dec. 19, 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012); *Miller v. Thaler*, 714 F.3d 897, 902 (5th Cir. 2013)(The Fifth Circuit has repeatedly held that *Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), to a specific factual context); *In re King*, 697 F.3d 1189 (5th Cir. 2012)("we agree with the Eleventh Circuit's determination in *In re Perez*, 682 F.3d 930, 933–34 (11th Cir.2012), that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."). Most of these cases are compiled in *Hestle v. United States*, 2013 WL 1147712 (E.D.Mich., March 19, 2013). See also *Hough v. United States*, 177 F. Supp. 3d 782, 785 (W.D.N.Y. 2016); *Stewart v. Stephens*, Civ. 2015 WL 6522828, at *2 (N.D. Tex. Oct. 26, 2015); *Alvarado v. Stephens*, 2015 WL 3775416, at *3 (S.D. Tex. June 16, 2015); *Etheridge v. Morgan*, 2015 WL 4041707, at *5 (W.D. La. May 11, 2015), adopted, 2015 WL 4042152 (W.D. La. July 1, 2015); *Brown v. Director, TDCJ-CID*, 2014 WL 892170, at *3 (E.D. Tex. Mar. 3, 2014); *Johnson v. Rader*, 2014 WL 198165, at *5 (E.D. La. Jan. 14, 2014); *Suitt v. McCain*, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, *2016 WL 5390396 (E.D. La. Sept. 27, 2016); Williams v. Cain*, 2016 WL 4063863, at *1 (E.D. La. July 29, 2016); *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); *Landron-Class v. United States*, 86 F. Supp. 3d 64, 75 (D.P.R. 2015) (collecting cases); *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016); *Nechovski v. Snyder-Norris*, 2016 WL

3552196, at *6 (E.D. Ky. June 23, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015)

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher v. United States*, 2013 WL 1235668 [,711 F.3d at 315]; *Baker v. Ryan*, 497 Fed.Appx. 771, 773 (9th Cir. 2012) (the cases of *Missouri v. Frye* and *Lafler v. Cooper* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *United States v. Ocampo*, 919 F. Supp. 2d 898, 915 (E.D. Mich. 2013); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive."). In short, neither *Lafler* nor *Frye* satisfies § 17-23-45. Therefore, the one-year period of limitations began to run when Mahdi's conviction became final. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015); *Villega–Angulo v. United States*, 2016 WL 7030741, at *8 (D.P.R. Sept. 30, 2016). Conclusively, the statute of limitation has well run, as has Mahdi's time limit. *Villega–Angulo v. United States*, 2016 WL

7030741, at *8 (D.P.R. Sept. 30, 2016); *Suitt v. McCain*, No. CV 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016).

Other states considering this same issue have agreed. See *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa.Super. 2013) (explaining *Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment; petitioner's reliance on these decisions to satisfy Section 9545(b)(1)(iii) exception to PCRA's time restrictions is unavailing). See also *Commonwealth v. Hernandez*, 79 A.3d 649 (Pa.Super. 2013) (holding appellant's claim that his petition fits within Section 9545(b)(1)(iii) exception lacks merit because neither *Lafler* nor *Frye* created new constitutional right); *Commonwealth v. Gallman*, 2016 WL 1436489, at *5 (Pa. Super. Ct. Apr. 12, 2016)("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]" Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Commonweath v. Norris*, 2016 WL 1064472, at *6 (Pa. Super. Ct. Mar. 17, 2016)(Defendant's reliance on *Lafler* and *Frye* to avoid the time-bar is misplaced. Contrary to his claims, neither case announced a new constitutional right in Pennsylvania which would allow Defendant to avoid the time-bar); *Black v. State*, 2016 WL 763163, at *1 (Nev. App. Feb. 17, 2016), cert. denied, 2017 WL 69340 (U.S. Jan. 9, 2017); *Young v. State*, 2013 Ark. 513, 2, n. 1 (2013). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely.

This 2nd or successive Application was not brought within one year of a newly recognized right made retroactively applicable to cases on collateral review. Further, this Application was

brought more than one (1) year after *Frye* and *Lafler* were decided. *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016; *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016). As a result, he cannot fit under the time bar exception of Section 17-27-45(C). Mahdi has not shown evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, because in order to fit under this exception the application must be filed under this chapter within one (1) 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 § 17-27-45 (C).* Mahdi cannot meet this test. As stated above, *Lafler* and *Frye* are not new rules of constitutional law, but a simple application of *Strickland*. *Gallagher*, 711 F.3d at 316 ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*."); *Miller*, 714 F.3d at 902 ((*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 ("we agree with the Eleventh Circuit's determination in *In re Perez*, [citation omitted], that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the

Strickland test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]"). Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a *Strickland* claim in this regard at his 1st PCR hearing.

Mahdi is not entitled to an *Austin* appeal

Finally, the *Austin* claim simply must be dismissed because Mahdi is not entitled to an *Austin* appeal under South Carolina law. Mahdi has already had an appeal from the denial of his 1st PCR application to both the South Carolina Supreme Court and the United States Supreme Court, which he lost. *Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991); *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992). Neither of which occurred in this case.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception or an excuse allowing the filing of a second or successive PCR application in violation of the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013)

In addition to the statutory provisions listed, our Supreme Court has made specific exceptions, as well. To ensure one full round of remedies, the Court has found the one year limitations period does not apply; (1) where an applicant was denied a direct appeal due to ineffective assistance, *see Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); and (2) where an applicant was denied an appeal from denial of post-conviction relief, *see Odom*

v. State, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Mahdi cannot claim any of these exceptions. He had both a direct appeal and an appeal from the denial of his 1st PCR action.

Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action.[11] This action, consequently, is not timely filed, and is barred by the South Carolina statute of limitations for PCR actions.

B. The Present Action is Improperly Successive

Further, the application is barred as improperly successive. *Cf. Graham v. State*, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive). Successive applications are historically disfavored, but are not categorically disallowed. See *S.C. Code §17-27-45 (B) and (C)* (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)("belated review of appellate issues," in an *Austin* appeal or "rare procedural circumstances" are reasons to allow successive actions). None of the exceptions, however, can be met with regard to Mahdi's new

[11] Mahdi has not shown the bases for these claims could not have been discovered previously or that such was not discovered. The statute requires:

> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter *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) (emphasis added).

allegations. Mahdi's prior PCR counsel could have discovered the facts and claims asserted in the present application at the time of Mahdi's 1st PCR. And, Mahdi is not entitled to an *Austin* appeal under South Carolina law.

"In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Mahdi cannot do so. As a result, this application must be dismissed with prejudice.

To the extent that Mahdi would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, to the extent Mahdi is seeking to establish cause to excuse the default of previously unexhausted claims in his federal litigation, he has mixed concepts. The Supreme Court of South Carolina so found in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Accord *Robertson v. State*, supra. In *Kelly*, a PCR applicant attempted to rely on United States Supreme Court precedent establishing a narrow exception within federal habeas corpus litigation as announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to avoid the state successiveness bar. Our Supreme Court rejected the argument, noting a great agreement among the States in similarly interpreting the exception:

> Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013) (collecting cases). The South Carolina Supreme Court reaffirmed its holding in *Kelly* in *Robertson*, supra. Thus, the

applicability of *Martinez* is limited to federal habeas corpus actions. Any reliance Mahdi should make on same to avoid the state successiveness and time bars is misplaced. *Robertson v. State.*

Again, it has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. Our Supreme Court has noted the dangers of a contrary position, specifically in capital cases:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Mahdi fails to argue any valid basis for exercise of a "rare exception" of allowing a successive application. *See e.g. Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)(permitting successive PCR application where applicant did not receive an appeal from the dismissal of his 1st PCR Application or any appellate counsel assistance in seeking an appeal); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996)(permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987)(authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982)(allowing successive PCR

application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing). Successive capital PCR applications filed in an attempt to exhaust previously unexhausted claims are no exception to the rule barring successive applications. *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Furthermore, in the present case, Mahdi was represented at PCR before this Court by Teresa Norris and Robert Lominack, Esquires. See *S.C. Code Ann. § 17-27-160(B)* (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). Both of these attorneys were **statutorily qualified** to represent Mr. Mahdi in his 1st PCR action. Mahdi does not even contend in his 2nd PCR Application that his 1st PCR attorneys were not statutorily qualified. Compare *Robertson,* 418 S.C. 505, 795 S.E.2d 29. As a result, there is no merit to this successive PCR application. *Id.* All of Mahdi's allegations in his 2nd PCR Application, including those alleging ineffective assistance of counsel, are improperly successive.

South Carolina's bar to raising direct appeal issues on PCR does not provide exception to either the successiveness bar or the time bar. *Cf. Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

1.

In his successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, because it requires judge sentencing after a guilty plea. Again, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in **2006** or during the prior PCR action in **2009**. In fact, this Court decided this issue and found there was no merit to it. (Amended Order of Dismissal, **pp. 123-33**).[12] Nor has Mahdi established a new rule of constitutional law to be retroactively applied and applicable to him.

***Hurst v. Florida* does not overcome the successiveness bar**

Again, Mahdi relies upon the recently decided case of *Hurst v. Florida*, 136 S.Ct. 616, decided January 12, 2016, which dealt with Florida's capital sentencing scheme. in an attempt to overcome the successiveness bar, but his position fares no better for essentially the same reason. The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22. See *Downs*, 361 S.C. at 146, 604 S.E.2d at 380. *Hurst* found Florida's capital sentencing scheme

[12] This Court decided this issue under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. § 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. *See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

violated the holdings of *Ring*, 536 U.S. 584, 122 S.Ct. 2428 and *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348, when the defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.[13]

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

> During the pendency of Mullen's appeal, the United States Supreme Court issued Its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.
>
> We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment .....fails.

***Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016)**(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), **cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017.** *Accord Brandt v. State*, 197

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[13] *See Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(*Unpublished*); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

So.3d 1051, 1079 (Fla. 2016); *Knight v. State,* 211 So.3d 1 (Fla. 2016); *Robertson v. State,* 2016 W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State,* 209 So.3d 1248 (Fla. 2016).

Similarly, our Supreme Court held in *Downs*:

> The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).
>
> In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. *See e.g. Leone* v. *Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380. As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States,* ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively

to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*.). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Order, the United States Supreme Court has not found S.C. Code Ann. Section 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, it found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; *see Nunley*, 784 F.3d at 472 (*citing Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *Inman*, 395 S.C. at 555-56, 720 S.E.2d at 40; *Allen*, 386 S.C. 93, 687

S.E.3d at 25-26; *Crisp*, 362 S.C. 412, 608 S.E.2d 429; *Downs*, 361 S.C. at 146, 604 S.E.2d at 380; *Wood*, 362 S.C. 135, 607 S.E.2d 57. Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis*, 609 F.3d at 309; *Nunley*, 784 F.3d at 472; *State v. Nunley*, 341 S.W.3d at 620; *Steele*, 341 S.W.2d at 646-49; *Leon*, 797 N.E.2d at 750; *Byrom*, 927 So.2d at 728; *Mack*, 75 P.3d at 806; *Colwell*, 59 P.3d at 474; *Altom*, 788 N.E.2d at 60-61; *Ketterer*, 855 N.E.2 at 69; *Thacker*, 100 P.3d 1052; *Moore*, 771 N.E.2d 46. In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as raised in the above cited cases. He chose not to.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a jury and alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing on Mahdi's competency to plead guilty. (R. 1336-43). Dr. Cross testified Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible

consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified he understood if he pled guilty in front of Judge Newman the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath he understood he had the right to a jury sentencing, and in order to sentence him to death all twelve (12) jurors would have to unanimously agree he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath he understood if he pled guilty, Judge Newman would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin*, 395 U.S. 238; *Rayford*, 314 S.C. 46, 443 S.E.2d 805 (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled.

(PCR Tr. 682-84). At his 1st PCR, Mahdi offered no testimony on this issue and offered no evidence contradicting counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea. This Court found Mahdi made a strategic decision, after selecting a jury, he wanted Judge Newman to sentence him, **not** the jury he had selected and impaneled. (Amended Order of Dismissal, **pp. 131-32**). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. *See generally Lifshultz Fast Frieight, Inc.*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415.

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, that this issue had no merit, is **the law of the case**, and Mahdi waived and abandoned this issue. *Bailes*, 315 S.C. 166, 432 S.E.2d 482 (discussing "law of the case"); *Lindsay*, 328 S.C. 329, 491 S.E.2 583; *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp.*, 310 S.C. 473 427 S.E.2d 646 (trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson*, 323 S.C. 522, 476 S.E.2d 475 (unappealed ground becomes the law of the case); *Ross*, 328 S.C.

51, 492 S.E.2d 62 (the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson*, 231 S.C. 351, 98 S.E.2d 798; *See Lifshultz Fast Frieight, Inc.*, supra (discussing the difference between law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law **or** material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a successive PCR application. *See S.C. Code § 17-27-90.* *Ring* was decided in **2002** and *Apprendi* was decided in **2000** long before Mahdi's guilty plea/sentencing and his 1st PCR Application and PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Furthermore, Mahdi may not raise this issue because he made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred and improperly successive. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim. Further, this Ground is barred by the doctrines of *res judicata, judicial estoppel, collateral estoppel, and the law of the case.*

2.

Mahdi also relies on *Lafler*, 132 S.Ct. 1376 and *Frye*, 132 S.Ct. 1399 in an attempt to overcome the successiveness bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law to be retroactively applied

to Mahdi. *Waters*, 2015 WL 5317516, at *2. **Every federal appellate Court to consider the issue has held *Lafler* and *Frye* did not establish a "new rule of constitutional law."** See *Wert*, 596 Fed.Appx. at 917–18 ("As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively."); *Crisp*, 573 Fed.Appx. at 708–09 ("No reasonable jurist would debate the district court's determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3)."); *Navar*, 569 Fed.Appx. at 140 n.1 ("[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion."); *Gallagher*, 711 F.3d at 316 ("Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*."); *In re Liddell*, 722 F.3d at 738; *Pagan San Miguel*, 736 F.3d at 45; *In re King*, 697 F.3d 1189; *Hare*, 688 F.3d at 878–80; *Buenrostro*, 697 F.3d at 1140 ("[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law."); *Williams*, 705 F.3d at 294; *In re Graham*, 714 F.3d at 1183; *Lawton*, 2012 WL 6604576; *In re Perez*, 682 F.3d at 932–34; *Miller*, 714 F.3d at 902 (*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 ("...*Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context."). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely. See also *Hough*, 177 F. Supp. 3d at 785; *Hestle*, 2013 WL 1147712; *Stewart*, 2015 WL 6522828, at *2; *Alvarado*, 2015 WL 3775416, at *3; *Etheridge*, 2015 WL 4041707, at *5, adopted, 2015 WL 4042152; *Brown*, 2014 WL 892170, at *3; *Johnson*, 2014 WL 198165, at *5; *Suitt*, 2016 WL 5395843, at *5, report and recommendation adopted, *2016 WL 5390396; Williams*, 2016

WL 4063863, at *1; *Cruz*, 2016 WL 4083326, at *2; *Landron-Class*, 86 F. Supp. 3d at 75 (collecting cases); *Hough*, 2016 WL 3820562, at *6; *Nechovski*, 2016 WL 3552196, at *6; *Shawley*, 2016 WL 1643460, at *3, report and recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; *Armour*, 2016 WL 1259113, at *3, appeal dismissed; *Leon*, 2015 WL 6769146, at *2, report and recommendation adopted, 2015 WL 6749743. Other states considering this same issue have agreed. See *Feliciano*, 69 A.3d 1270 (*Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment); *Hernandez*, 79 A.3d 649 (neither *Lafler* nor *Frye* created new constitutional right); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]" Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Norris*, 2016 WL 1064472, at *6 (Defendant's reliance on *Lafler* and *Frye* is misplaced. Contrary to his claims, neither case announced a new constitutional right); *Black*, 2016 WL 763163, at *1, cert. denied, 2017 WL 69340; *Young*, 2013 Ark. 513, 2, n. 1.

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher*, 2013 WL 1235668 [,711 F.3d at 315]; *Baker*, 497 Fed.Appx. at 773 (the cases of *Frye* and *Lafler* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *Ocampo*, 919 F. Supp. 2d at 915; *Armour*, 2016 WL 1259113, at *3; *Shawley*, 2016 WL 1643460, at *3, report and

recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; See *Tyler*, 533 U.S. at 663 ("[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.").

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *Cruz*, 2016 WL 4083326, at *2; *Hough*, 2016 WL 3820562, at *6. As a result, Mahdi has not shown new material facts not previously presented because those facts were within his knowledge at the time of his plea and sentencing and prior to his 1st PCR hearing. *S.C. Code Ann. § 17-27-45(C)*(If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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). As *Lafler* and *Frye* did not announce new rules of constitutional law, but were applications of *Strickland*, Mahdi could have brought a *Strickland* claim on pre-plea advice at his 1st PCR. As a result, this claim is improperly successive and must be dismissed with prejudice.

3.

In his successive PCR application, Mahdi also alleges he is entitled to an *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), appeal because PCR appellate counsel did not raise certain issues on appeal from the denial of his 1st PCR that he now wishes to raise. Mahdi is not entitled to an *Austin* appeal under these circumstances. *Austin*, 305 S.C. 453, 409 S.E.2d 395. Mahdi's 1st PCR counsel filed an appeal from the denial of his 1st PCR application and collateral appellate counsel chose to raise only one (1) issue from the denial of his PCR application. (Petition for

Writ of Certiorari [merits petition]). The South Carolina Supreme Court denied certiorari in the PCR appeal. Mahdi then filed a Petition for Writ of Certiorari in the United States Supreme Court raising the same issue and certiorari was denied. However, *Austin* does not entitle Mahdi to another appeal from the denial of his 1st PCR where PCR appellate counsel chose not to raise certain issues in the 1st PCR appeal. *Austin* "is applicable to its particular factual situation..." *Aice*, 305 S.C. at 452, 409 S.E.2d at 394. That is where the applicant wished to appeal from the denial of PCR but was denied **the opportunity** to seek appellate review or the right to appellate review of a previous PCR order **was not knowingly and intelligently waived.** *Austin*, supra; *Aice*, supra; *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. at 348-49, 417 S.E.2d 868. Neither of these occurred in this case.[14] Mahdi is not entitled to an *Austin* appeal under South Carolina law. Thus, he cannot overcome the successiveness bar and this application must be dismissed.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception allowing the filing of a second or successive PCR application or an excuse to avoid the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State.*

C. Applicant's Grounds are barred by the defense of laches

Mahdi's Grounds asserted in his 2nd Application for post-conviction relief are also barred by the defense of laches. Laches is an equitable doctrine, which "arises upon the failure to assert a known right. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005): "Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording the opportunity for

[14] To accept Mahdi's argument would result in every capital *and* non-capital PCR Applicant being entitled to a 2nd PCR appeal when they did not agree or later claimed they did not agree with the issues raised by PCR appellate counsel.

diligence, to do what in law should have been done." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), *citing Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). The claims Mahdi is raising in this 2nd Application for post-conviction relief could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of PCR. Mahdi was represented by death penalty qualified counsel at trial/plea and sentencing. Mahdi was represented at PCR by statutorily qualified counsel. *See Robertson v. State*. And, Mahdi was represented on appeal from the denial of PCR by three (3) competent counsel, including one (1) his PCR attorneys. Mahdi has waited an unreasonable and unexplained length of time to assert the grounds he is now asserting. As a result, all of Mahdi's Grounds asserted in this successive PCR Application are barred by the defense of laches.

D. This Court cannot address grounds abandoned or not addressed in the 1st PCR

In his 2nd or Successive PCR Application, Mahdi also asks this Court to rule on any grounds that were not addressed or that were abandoned *at the 1st PCR*. This Court is not aware of any legal authority or rule that would allow this Court to address any issue that was not addressed at the 1st PCR or was abandoned by prior PCR counsel at the 1st PCR. As a result, this ground is also time barred and improperly successive under South Carolina law in that it seeks this Court to rule on an issue or issues raised at the 1st PCR but not ruled on or abandoned at the 1st PCR. This Court also dismisses this claim as not cognizable before this Court and barred by laches, res judicata, collateral estoppel, judicial estoppel, and/or the law of the case.

CONCLUSION

Consequently, for all the foregoing reasons, this Court dismisses this action as time barred under South Carolina law pursuant to S.C. Code Ann. § 17-27-45. This Court also dismisses this action because it is improperly successive under South Carolina law pursuant to

S.C. Code Ann. § 17-27-90. This Court also finds Mahdi's claims in this successive PCR Application are barred by the doctrines of laches; and, Mahdi's direct appeal ground is not cognizable in PCR and/or is barred by the doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case. Finally, Mahdi is not entitled to an *Austin* appeal under South Carolina law where he has already had one (1) full PCR appeal. As a result, based on all of the foregoing, this 2nd or successive PCR Application is properly dismissed with prejudice pursuant to S.C. Code Ann. § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings…."). Finally, based on all the foregoing, there is no genuine issue of material fact and this action must be dismissed pursuant to S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRCP* (defining the standard for granting a motion for summary judgment).

IT IS SO ORDERED.

By: _____
The Honorable Doyet A. Early, III.
Presiding Judge

June , 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	C/A No. 2017-CP-09-00004
	)	
Mikal Mahdi, SCDC #5238,	)	*CAPITAL PCR*
	)	
Applicant,	)	
vs.	)	**ORDER DENYING APPLICANT'S RULE 59, SCRCP, MOTION TO ALTER OR AMEND OR RECONSIDER THE ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter is before this Court on Applicant, Mikal Mahdi's Rule 59, SCRCP, Motion to Alter or Amend or Reconsider this Court's previous Order of Dismissal, denying and dismissing this 2nd or successive PCR Application, issued on June 29, 2017 and filed July 6, 2017. Madhi filed the Rule 59, Motion on July 12, 2017. The State filed a Response to the Rule 59, Motion.

On August 15, 2017, at the Aiken County Courthouse, this Court held a hearing and heard argument on the Rule 59, Motion by both parties. Applicant was represented by E. Charles Grose, Esquire. Respondent was represented by Assistant Attorney General Anthony Mabry.

This Court has carefully reviewed the Record in this case and considered the arguments presented in the Rule 59 Motion to Alter or Amend or Reconsider and those made at the hearing on the Motion, and finds no cause to alter or amend or reconsider the prior Order of Dismissal of this Court. Therefore, based on complete review of the Record, the Motion and the Response, the arguments presented, and the legal authority submitted, this Court denies the Rule 59, SCRCP, Motion to Alter of Amend or to Reconsider the Court's Order of Dismissal in this matter. For the reasons fully set forth in this Court's Order of Dismissal, this 2nd or successive PCR application is denied and dismissed with prejudice.

By: _____
The Honorable Doyet A. Early, III.
Presiding Judge

October 10, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-09-00004

Mikal Mahdi,.....Petitioner,

v.

State of South Carolina, ...Respondent.

Rule 243(c), SCACR Explanation

Rule 243(c), SCACR does not require an explanation because the post-conviction relief ("PCR") court did not dismiss Mikal Mahdi's PCR application solely because the PCR "action is barred as successive or being untimely under the statute of limitations," but out of an abundance of caution, counsel will provide one.

This appeal raises two novel questions of law that should be addressed by this Court and which were ruled upon *on the merits* by the PCR. The first issue is whether *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, intended to apply retroactively, that can be addressed pursuant to S.C. Code Ann. § 17-27-45(B). If Mr. Mahdi is correct, then *Hurst* invalidates the portion of S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution because a judge rather than a jury finds facts required for imposition of

a death sentence. The second issue is whether prior PCR counsel's failure to brief "all arguable issues," as mandated by *Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002), entitles Mr. Mahdi to an appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a long-recognized exception to the bar against successive PCR applications and the statute of limitations. Mr. Mahdi also raises a third issue, which is whether the PCR Judge applied to correct standard of review in evaluating the merits of each of Mahdi's claims.

These issues will likely arise in numerous other PCRs across this State, and this case provides an ideal vehicle for this Court intervene. Particularly, a decision on the *Austin* issue is critical to state postconviction practitioners. This Court often states that PCR applicants should not get more than one bite at the apple, but that first bite at the apple has always been construed as including appellate review of a PCR court's decision. This case raises the important question of what happens when PCR counsel ignores their statutory mandate and selectively appeals certain issues, while leaving unappealed issues as law of the case. This Court, in deciding *Austin*, *Wade*, and their progeny, has always placed a special importance on the duty of PCR counsel to file an appeal of "all arguable issues"—a duty which was ignored in this case. This appeal provides the Court with an opportunity to clarify for the bench and the bar what the consequences are for applicants whose counsel abandons them at the appellate stage. Similarly, this Court has the opportunity to review the all important question that governs every PCR case—what standard of review applies

at the initial motion to dismiss stage?[1] Finally, this Court can clarify the application of *Hurst* on South Carolina's capital sentencing scheme.

Mr. Mahdi respectfully requests that this Court accept the Rule 243 application provided and allow the appeal to proceed in its ordinary course.

I. *Hurst v. Florida.*

Mr. Madhi's PCR Application alleges:

> S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution . . . because a judge rather than a jury finds facts required for imposition of a death sentence.

PCR Application, ¶ 10(a). Mr. Mahdi further alleges our state's capital sentencing procedure denied him his Sixth Amendment "right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed." PCR Application, ¶ 11(a). Mr. Mahdi relies on *Hurst*, "which is a constitutionally binding decision from the Supreme Court of the United States that can be raised pursuant to S.C. Code § 17-27-45(B)." (PCR Application ¶ 16).[2]

The PCR court reached the merits and ruled, "*Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied

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[1] This issue is addressed in the Rule 243 explanation, *infra* Section III, in the context of Mr. Mahdi's claims pursuant to *Missouri v. Frye*, 132 S. Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). However, the issue of the proper standard of review was thoroughly briefed in relation to all issues pled in Mr. Mahdi's PCR application, and will likely be raised as a standalone issue in the appeal.

[2] The State argues this issue was decided adversely to Mr. Mahdi in his initial PCR case. (Mot. to Dismiss at 30). The Amended Order of Dismissal, signed on August 14, 2014, did not consider *Hurst*, which was decided on January 12, 2016. (A. 189–91).

Ring v. Arizona, 536 U.S. 584 (2002) and *Apprendi v. New York* [sic],[3] 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing." Order of Dismissal at 15. *Hurst,* however, established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty. Understanding the new rule requires reviewing *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Ring* considered the application of *Apprendi* to Arizona's capital sentencing scheme. *Apprendi* held that the Sixth Amendment does not permit a defendant to be

> expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . even if the State characterizes the additional findings made by the judge as sentencing factor[s].

Ring 536 U.S. at 588-89 (internal citations and quotations omitted; emphasis supplied by Court). *Ring*, however, was expressly limited to whether "the Sixth Amendment required jury findings on the aggravating circumstances." *Id.* at 597 (fn. 4). *Ring* did not address whether a jury must consider mitigation and "make the ultimate determination whether to *impose* the death penalty." *Id.* (emphasis added). *Ring*, accordingly, was limited to a jury

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[3] The correct cite is *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Attorney General's Office, not the PCR judge, drafted the order of dismissal. In his Rule 59(e), SCRCP motion, at 3-4, Mr. Mahdi argued, "The findings of fact and conclusions of law are those of an advocate and the [PCR] court." "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court below did not do that, but rather delegated that responsibility to the Attorney General's Office. Although the Attorney General addressed the merits of each issue presented in the PCR application, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. In capital PCR cases, this Court "strongly encourages PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004)

determination regarding *eligibility* for the death penalty. *Hurst*, however, involved a challenge to Florida's capital sentencing procedure where the jurors render an "advisory sentence" but "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 136 S.Ct. at 620. *Hurst* held the Sixth Amendment requires jurors make the "critical findings necessary to *impose* the death penalty." 136 S.Ct. at 622 (emphasis added). *Ring*, accordingly, addressed only *eligibility* for the death penalty. *Hurst* addressed *imposition* of the death penalty. *Hurst*, therefore, decided constitutional issues not considered in *Ring*.

Because Mr. Mahdi pleaded guilty to murder, S.C. Code Ann. § 16-3-20(B) mandated his "sentencing proceeding must be conducted before the judge." The guilty plea to murder did not make him eligible for the death penalty. Under South Carolina's capital sentencing scheme, a "statutory aggravating circumstance [must be] found beyond a reasonable doubt" before someone convicted of murder is eligible for the death penalty. S.C. Code Ann. § 16-3-20(A)-(C). The statutory aggravating circumstances are set forth in § 16-3-20(C). Although Mr. Mahdi also pleaded guilty to burglary and larceny, the prosecution had the burden of proving beyond a reasonable doubt that "[t]he murder was committed while in the commission of" a burglary and/or larceny with the use of a deadly weapon. S.C. Code Ann. § 16-3-20(C)(a)(1)(d) and (f). Although the prosecution had a "head start," based on Mr. Mahdi's guilty plea, towards persuading the judge to find these statutory aggravating circumstances, the statute still required the additional findings of fact.

A finding that a statutory aggravating circumstance exists beyond a reasonable doubt does not require imposition of the death penalty. The sentencing authority must consider statutory mitigating circumstances, S.C. Code Ann. § 16-3-20(C)(b), and non-

statutory mitigating circumstances, *see, e.g., State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The sentencing authority is "authorized to impose a life sentence even if it did not find any mitigating circumstances." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). The sentencing authority must consider "the specific circumstances of the crime and the characteristics of the person who committed the crime." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990). Pursuant to *Payne v. Tennessee,* 501 U.S. 808, (1991), South Carolina allows consideration of victim impact evidence. *See, e.g., State v. Bixby*, 388 S.C. 528, 555, 698 S.E.2d 572, 586 (2010). Even after all of these considerations, a life sentence may be imposed "for any reason or no reason at all, including as an act of mercy." *Rosemond,* 383 S.C. at 330, 680 S.E.2d at 10.

The PCR court additionally ruled *Hurst* "does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme." Order of Dismissal at 15. Mr. Mahdi's guilty plea, however, does not preclude application of *Hurst*. The Supreme Court of the United States applied *Apprendi* "to instances involving plea bargains" in *Blakely v. Washington,* 542 U.S. 296 (2004). *Hurst v. Florida*, 136 S. Ct. at 621. Blakely "was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that Blakely had acted with 'deliberate cruelty.' The facts supporting that finding were neither admitted by [Blakeley] nor found by a jury." *Id.* The Court held, "[T]he State's sentencing procedure did not comply with the Sixth Amendment" and Blakeley's "sentence [was] invalid." *Id.* at 305.

This Court, therefore, must consider whether the trial court judge found any fact to support imposing the death sentence beyond Mr. Mahdi's admissions during his guilty plea. When announcing the sentence, the trial court judge addressed whether the murder was committed during a burglary or larceny while armed with a deadly weapon:

> The State presented *additional evidence* during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the defendant was committing these crimes. *Further evidence* was presented indicating that the defendant stole from the victim his police issued vehicle and two rifles, one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

A. 3691 (emphasis added). The trial court additionally considered "nonstatutory aggravating circumstances" including "prior and subsequent bad acts of the defendant, which are relevant to show his bad character, evil nature and malignant heart." Although some of these bad acts were supported by juvenile adjudications or criminal convictions, the trial court considered other facts. For example, the trial judge found Mr. "Mahdi's behavior was maladaptive, assaultive and demonstrated utter disrespect for authority" during periods of incarceration. Also, the trial judge expressly stated:

> I find that the State has established by clear and convincing evidence the defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the defendant's characteristics, but not as proof of any alleged statutory aggravating circumstances.

A. 3692-95.

Indeed, there is no question that the trial court made findings of fact necessary to impose the death penalty. The sentencing order demonstrates that the trial court considered, but assigned little weight to, statutory and non-statutory mitigating circumstance, including Mr. Mahdi's young age, childhood and family life, adaptability to incarceration, and decision to plead guilty. The trial judge also considered victim impact evidence, the

prosecution's plea for "justice" and Mr. Mahdi's plea for "mercy." The trial court judge expressly found, "[i]n extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved and consciousless manner, the defendant, Mikal Deen Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court." And, "I find, as an affirmative fact, that the evidence in this case warrants imposition of the death penalty. A. 3695-3701.

The PCR court recognized this Court's holding in *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) requires the trial court judge to conduct a sentencing hearing following a guilty plea. Order of Dismissal at 15, 36.[4] *Downs* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, supra.* Once *Hurst* and *Blakeley* are considered together, our state's capital sentencing procedure following a guilty plea cannot withstand Sixth Amendment scrutiny.

Finally, the PCR court ruled, "[T]he record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence." Order of Dismissal at 38. The record does not support this conclusion. The guilty plea colloquy merely establishes that Mr. Mahdi was giving up his right to have the jurors determine his sentence. The record does not establish that Mr. Mahdi understood his Sixth Amendment right to have the jurors make additional findings regarding aggravating circumstances, consider statutory and non-statutory

[4] This Court also addressed this issue in *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005); and *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004). *Crisp*, and *Wood* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, infra.* All of these cases predated and, therefore, could not have considered *Hurst*. Appellate counsel abandoned this issue in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011).

mitigating circumstances, and make the additional factual findings necessary to impose the death penalty. A. 3219-44. Once Mr. Mahdi entered his guilty plea, life imprisonment without the possibility of parole was the maximum possible sentence that could be imposed for murder without any additional findings of fact. *Hurst* requires jurors, rather than a judge, make these findings of fact. This Court should allow Mr. Mahdi to present this issue in a petition for writ of *certiorari.*

II. *Wade v. State & Austin v. State.*

Pursuant to *Austin,* Mr. Mahdi seeks an appeal on all of the issues raised in his initial PCR Application. PCR Application ¶ 10(c). Here, the record before the Court unequivocally demonstrates that PCR counsel alleged numerous causes of action in Mr. Mahdi's initial PCR Application. A. 000059–133 (Amended Order of Dismissal). The PCR court ruled, "*Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Order of Dismissal at 39.

The PCR court misunderstood the obligations of counsel in litigating PCR cases. S.C. Code Ann. § 17-27-160 sets forth procedures for appointment of counsel in capital PCR cases. Once appointed, "[c]ounsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary." Rule 71.1, SCRCP. Following an evidentiary hearing, the PCR "court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80. This Court holds PCR appellate attorneys to high standards, noting that "PCR actions are the only type of case which [this Court] mandates appellate counsel must

brief all arguable issues, despite counsel's belief the appeal is frivolous." *Wade* 348 S.C. at 263, 559 S.E.2d at 847. *Austin* is the recognized remedy when PCR counsel fails to perfect an appeal.

In his direct appeal, Mr. Mahdi alleged the trial "judge improperly punished [him] for initially exercising his right to a jury trial" by assigning "no significant weight" to his guilty plea. *Mahdi v. State*, 383 S.C. 135, 137-38, 678 S.E.2d 807, 808 (2009). This Court held, because "there was no objection to this passage at trial, no issue has been preserved for this Court's review." *Id.* In his prior PCR application, Mr. Mahdi alleged his trial counsel was ineffective by not objecting to this improper basis for imposing a death sentence, and the PCR judge denied the issue on the merits. A. 80-82. This Court consistently holds it is impermissible for a trial judge to consider the defendant's exercise of the right to a jury trial during sentencing. *See, e.g., Castro v. State*, 417 S.C. 77, 789 S.E.2d 44 (2016); *State v. Hazel,* 317 S.C. 368, 453 S.E.2d 879 (1995). Yet, Mr. Mahdi has not had the opportunity for this Court to consider this issue in his case.

In his prior PCR application, Mr. Mahdi alleged his trial counsel failed to investigate, develop, and present mitigation evidence about his family, social, institutional, and mental health history. At the evidentiary hearing, Mr. Mahdi presented testimony or affidavits from family members, teachers, community leaders, Nicholas Cooper-Lewter (a social historian), Dr. deRossett Myers (a clinical psychologist), Dr. Craig Haney (a psychologist with experience studying the effects of institutional environments), and Dr. Donna Schwartz-Watts (a forensic psychiatrist). Mr. Mahdi presented his school records, Virginia Department of Juvenile Justice records, mental health records from the Walter Carter Center, and the Virginia Department of Corrections. The PCR court addressed the

merits of all of this evidence. A. 85-181. In the petition for writ of *certiorari*, prior counsel asked this Court to consider only trial counsel's failure to call "available lay witnesses who could have provided detailed and specific testimony in mitigation." Trial counsel is ineffective in capital cases for failing to present "readily available mitigating evidence." *Weik v. State*, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014). *See also Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (failure to adequately investigate and present mitigation evidence prejudiced defendant). Yet, Mr. Mahdi has not had the opportunity for this Court to fully consider this issue in his case.

In his prior PCR application, relying on *Ring*, Mr. Mahdi challenged the constitutionality of S.C. Code Ann. § 16-3-20 requirement of judge sentencing following a guilty plea. The PCR court addressed the merits of this issue. A. 189-90. Prior counsel did not include this issue in the petition for writ of *certiorari*. As noted in Section I, *supra*, this Court has never addressed the application of *Blakeley* to an *Apprendi-Ring* challenge to § 16-3-20. If the PCR Court is correct that *Hurst* is not a new constitutional rule, then Mr. Mahdi has been prejudiced by his prior counsel's failure to raise this issue in the petition for writ of *certiorari*.

Finally, in his prior PCR application, Mr. Mahdi alleged his trial counsel failed to adequately advise him about the advantages of jury sentencing, which led him to plead guilty and purport to waive his right to jury sentencing. The PCR court addressed the merits of this issue. A. 82-85. Prior counsel did not include this issue in the petition for writ of *certiorari*.

Austin is the recognized remedy when PCR counsel fails to perfect an appeal, and this Court should allow Mr. Mahdi a belated appeal.

III. *Guilty Plea Advice.*

Mr. Mahdi's current PCR application alleges he "was denied the right to effective assistance of counsel . . . because his trial counsel advised him that the guilty plea would be considered as mitigation," but the trial court judge did not consider the guilty plea to be mitigating. PCR Application ¶¶ 10(b) and 11(b). This claim is based on *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012), which were decided after the evidentiary hearing in Mahdi's initial PCR case.[5] Mahdi alleges *Frye* and *Lafler* are "are constitutionally binding decisions." PCR Application ¶ 16. This claim also involves consideration of "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." S.C. Code Ann. § 17-27-45(C). As seen, in Section I, *supra*, the trial court record does not establish that Mahdi was aware of his Sixth Amendment right for the jurors to determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and make the additional findings of fact required to impose the death penalty.

The PCR court purported to address this issue on the merits, focusing mostly on an analysis of whether *Fyre* and *Lafler* apply retroactively. Order of Dismissal at 24-29. As set forth in his Rule 59(e) motion, Mahdi pled facts sufficient to state a cause of action on this claim and has not even had *the opportunity* to present any evidence on the issue of what advice his counsel gave him on the issue of his guilty plea and its potential effect on mitigation, much less any evidence about when, if at all, his counsel discussed *Frye* and

[5] The initial PCR court convened Mahdi's evidentiary hearing on March 9, 2011, issued the order of dismissal in December 8, 2013, and issued the amended order of dismissal on August 18, 2014. The Supreme Court of the United States decided *Frye* and *Lafler* on March 21, 2012.

Lafler with him. Pursuant to the appropriate standard of review—that of a Rule 12(b)(6), SCRCP motion[6]—Mr. Mahdi should have been allowed to develop and present evidence on this claim. Thus, in light of South Carolina Code Section 17-27-45(C), the PCR court erred in dismissing Mahdi's claim as successive and time barred, and this Court should permit the appeal to proceed.

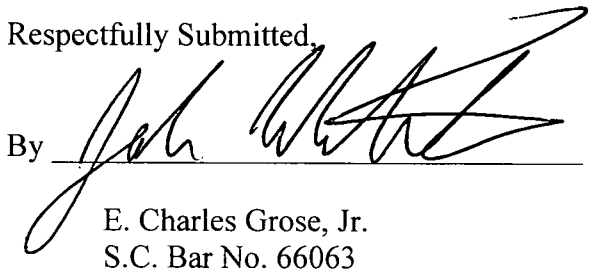
CONCLUSION

Regarding Sections I & II, Rule 243(c), SCACR does not require an explanation because the post-conviction relief ("PCR") court did not dismiss Mikal Mahdi's PCR application solely because the PCR "action is barred as successive or being untimely under the statute of limitations." Sections I & II present purely issues, and the PCR court reached the merits of these issues. Regarding Section III, summary dismissal was not appropriate because Mr. Mahdi's well-pled PCR application required the PCR court to convene a hearing to determine whether the discovery rule applied, thereby allowing the court below to reach the merits.

(Signature Page Follows)

[6] "When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (quoting *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)). "Similarly, when reviewing the propriety of a dismissal, this Court must view the facts in the same fashion." *Id.* (quoting *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005)).

Respectfully Submitted,

By 

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Attorneys for Applicant Mikal Mahdi

October 24, 2017

The Supreme Court of South Carolina

Mikal Mahdi, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002212

ORDER

In the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, this matter is dismissed. The motion to order the transcripts out of time is denied as moot. The remittitur will be sent as provided by Rule 221(b), SCACR.

C.J.
FOR THE COURT

Columbia, South Carolina

April 19, 2018

cc:
Robert Michael Dudek, Esquire
J. Anthony Mabry, Esquire
E. Charles Grose, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-09-00004

Mikal Mahdi, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Petition for Rehearing

Pursuant to Rule 221, SCACR, Mikal Mahdi petitions this Court for rehearing to reconsider its order dated April 19, 2018 declining to accept Mr. Mahdi's Rule 243(c), SCACR explanation and dismissing the appeal of the denial of his application for post-conviction relief. This petition is based on the following grounds.

1) As a threshold matter, this Court has never articulated the standard for reviewing a Rule 243(c), SCACR explanation. Mr. Mahdi contends the standard of review should be akin to a Rule 12(b)(6), SCRCP motion to dismiss a complaint in a civil case. It should be sufficient to articulate an "arguable basis for asserting that the determination by the lower court was improper" when it dismissed an application for post-conviction relief as being successive or barred by the statute of limitations. The standard should not be whether the explanation establishes the litigant will prevail on the merits. The former allows the litigant to file a petition for writ of *certiorari* and the Court to determine whether

that petition has enough merit to warrant consideration by the Court. The latter denies the litigant the opportunity to file a petition for writ of *certiorari* and develop the record for the Court to determine whether the petition has enough merit to warrant consideration by the Court, in effect skipping the cert stage and issuing a ruling on the merits. This consideration is particularly important in cases, like this one, where the court below addressed the issues on the merits and did not merely dismiss the application as successive or time barred.

2) This Court additionally has not articulated the procedure it follows for reviewing a Rule 243(c), SCACR explanation. Is it akin to an ordinary petition, where one justice can grant or deny the explanation for the Court pursuant to Rule 240(j), SCACR? Can two justices concur that the explanation is satisfactory and allow the appeal to proceed, which is akin to the procedure for granting a petition for writ of *certiorari* pursuant to Rule 243(j), SCACR. Do three members of the Court have to concur, which would be akin to deciding the case on the merits, which would have the effect of denying a litigant the opportunity to file a petition for writ of *certiorari* before the Court considers the issue on the merits?

3) The procedural considerations raised in paragraphs 2 and 3 above are not without consequence to the process. Here, Mr. Mahdi filed a 14-page Rule 243(c), SCACR explanation, which is well within the 25-page limit for a petition for writ of *certiorari*, Rule 243(f)(3), SCACR. Over four months after Mr. Mahdi filed his explanation, the State filed a 40-page response that exceeds the length allowed for a response to a petition for writ of *certiorari* without obtaining the permission of the Court.

4) Mr. Mahdi's Rule 243(c), SCACR explanation raised two issues that are recognized exceptions the procedural bars. Although purporting to apply the procedural bars, the court below addressed the merits of these two issues.

5) The first issue is whether *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016) is a new substantive standard of constitutional law, binding on state court criminal procedures, intended to apply retroactively, that can be addressed pursuant to S.C. Code Ann. § 17-27-45(B). This issue is set forth more fully in Section I of Mr. Mahdi's Rule 243(c), SCACR explanation. Because this explanation sets forth a *prima facie* showing entitling Mr. Mahdi to relief, this Court should allow Mr. Mahdi to file a petition for writ of *certiorari* to fully present this issue.

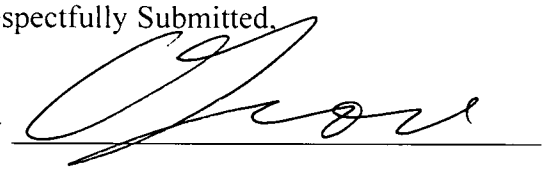
6) The second issue is whether prior PCR counsel's failure to brief "all arguable issues," as mandated by *Wade v. State*, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002), entitles Mr. Mahdi to an appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), a long-recognized exception to the bar against successive PCR applications and the statute of limitations. At a minimum, the broader issue set forth in Section II of the Rule 243(c), SCACR explanation seeks this Court's guidance regarding post-conviction appellate counsel's obligations pursuant to *Wade*. Again, the court below addressed the merits of these issues.

Therefore, this Court should rehear this matter and re-consider its order dated April 19, 2018. The Court below addressed these issues on the merits and did not merely dismiss Mr. Mahdi's PCR application a successive or time barred. As set forth in Mr. Mahdi's Rule 243(C), SCACR explanation, this appeal raises two novel questions of law. Both issues invoke already recognized exceptions to the bar against successive PCR

applications. This Court's guidance on these issues would be a benefit to the bench and bar.

IT IS SO MOVED.

Respectfully Submitted,

By 

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Attorney for Applicant Mikal Mahdi

May 3, 2018.

RECEIVED
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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No. 2017-CP-09-00004

Mikal Mahdi, ... Petitioner,

v.

State of South Carolina, ... Respondent.

Petition for Rehearing

I certify that I have served this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed to:

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May 3, 2018.

The Supreme Court of South Carolina

Mikal Mahdi, Petitioner,

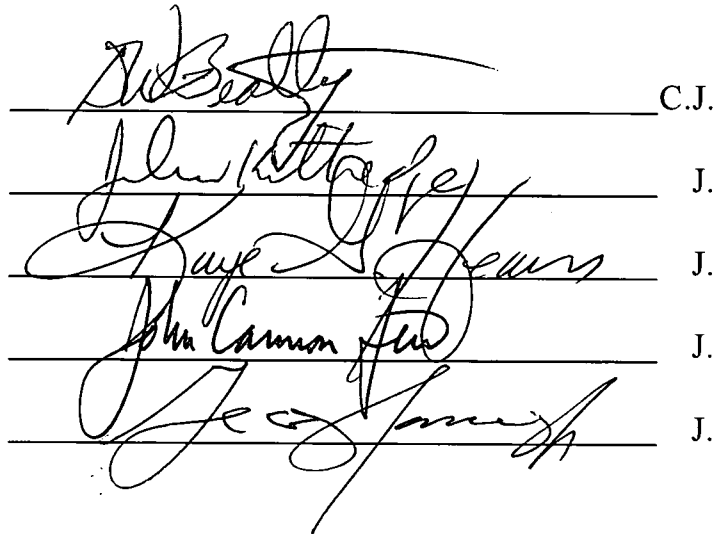
v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002212

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

J.

J.

Columbia, South Carolina

June 27, 2018

cc:

Robert Michael Dudek, Esquire
J. Anthony Mabry, Esquire
E. Charles Grose, Jr., Esquire
Kenneth Hasty