

FORM 4

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

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2020CP1100489**

Jay Walter Tate Jr.		State Of South Carolina	
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/ Grace Knie	2760	6/8/2022
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on 06/08/2022, and a copy mailed first class or placed in the appropriate attorney's box on 06/08/2022, to attorneys of record or to parties (when appearing pro se) as follows:

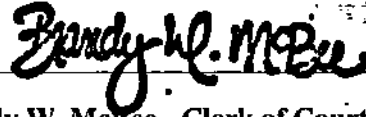
FILED IN OFFICE OF
 CLERK OF COURT
 CHEROKEE COUNTY
 S.C.
 2022 JUN -8 AM 9:53
 BRANDY W. MOORE

Jay Walter Tate Jr. Lee Ci 990 Wisacky Hwy Bishopville,
SC 29010

Alan McCrory Wilson S.C. Attorney General's Office PO
Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter

Brandy W. McBee - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

20, 1995.

First PCR Action: (1995-CP-11-382)

Applicant subsequently filed his first PCR application on December 4, 1995, alleging:

1. Ineffective assistance of counsel; and
2. Ineffective assistance of Counsel for failure to file an appeal.

Respondent made its return on March 5, 1996. An evidentiary hearing into the matter was convened on November 13, 1997, at the Cherokee County Courthouse. Applicant was present at the hearing and was represented by R. Keith Kelly, Esquire.¹ Chris Samellas, Esquire, represented Respondent. On July 31, 1998, the Honorable J. Derham Cole issued the order of dismissal denying Applicant's PCR application. The State conceded he was entitled to a direct appeal and Judge Cole permitted Applicant to refile his *Anders* brief.

On June 22, 2000, Applicant, through Counsel, filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant in the South Carolina Supreme Court on the issue of whether counsel was ineffective for failing to challenge the fact that the indictments were not dated or, alternatively, that jurisdiction was not shown by the indictment. Oral arguments occurred on May 22, 2001. On June 25, 2001, by written order the South Carolina Supreme Court affirmed the ruling of the lower court in denying PCR relief. The remittitur was issued on August 8, 2001.

First Habeas Corpus Action: (2001-CP-11-604)

Applicant subsequently filed his first habeas corpus action with the Cherokee Clerk of Court on November 2, 2001, alleging the circuit court did not have jurisdiction to entertain the

¹ Judge Kelly is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, but because he represented Applicant in his first PCR action, the motion to dismiss and proposed conditional order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.

case and sentence him. Respondent made its return and motion to dismiss on August 1, 2002. The Court summarily dismissed the petition and granted the State's motion to dismiss for lack of subject matter jurisdiction and, to the extent the petition was construed as a PCR application, the matter was summarily dismissed for untimeliness, successiveness, and because the claim that the trial court lacked subject matter jurisdiction was without merit.

Applicant filed a *pro se* notice of appeal, dated October 23, 2003. Following the submission of an *Anders* brief and a *pro se* brief, both of which argued the circuit court lacked subject matter jurisdiction, the South Carolina Court of Appeals dismissed the appeal on May 23, 2005. The remittitur was issued on June 8, 2005.

Writ of Mandamus Action: (2005-CP-11-392)

Applicant subsequently filed a writ of mandamus in the circuit court on November 14, 2005. Respondent made its return and motion to dismiss on April 8, 2006. A motion hearing into the matter was convened on September 19, 2006, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Rodney Richey, Esquire. S. Prentiss Counts, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On April 6, 2007, the Honorable Doye A. Early, III, issued the order of dismissal denying Applicant's PCR application, dismissing the writ for successiveness, untimeliness, and lack of subject matter jurisdiction.

A notice of appeal was filed April 24, 2007, and perfected by Counsel Richey, who made the brief of petitioner on February 11, 2008. Applicant made his *pro se* brief on March 10, 2008. The brief of respondent was made December 15, 2008. An unpublished order affirming the decision of the circuit court was filed. *Tate v. State*, Up. Op. No. 2009-UP-413 (S.C. Ct. App. filed Sept. 2, 2009). The remittitur was issued on September 18, 2009.

Second Habeas Corpus Action: (9:05-cv-02269-GRA-GCK)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 25, 2005. Applicant set forth the following grounds for relief:

1. "Conviction obtained by action of the Cherokee County Grand Jury; unconstitutional process of indictment."
2. "Conviction obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to the defendant."
3. "Judicial Misconduct of Trial Judge."
4. "Ineffective assistance of trial counsel."

Respondent made its return and motion for summary judgment on March 9, 2006. On May 10, 2006, Applicant filed a motion to dismiss without prejudice, which was not opposed by Respondent and, subsequently, was granted by written order on May 15, 2006, by Magistrate Judge George C. Kosko, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Second PCR Action: (2008-CP-11-0681)

Applicant subsequently filed his second PCR application on August 8, 2008, alleging:

1. Newly Discovered Evidence.
2. Constitutional Violation.

Respondent made its return on May 1, 2009. The Honorable J. Mark Hayes, II, signed the conditional order of dismissal on May 16, 2009, finding the matter should be summarily dismissed for successiveness, untimeliness, and failure to establish a *prima facie* case of newly discovered evidence. The final order of dismissal was signed by Judge Hayes on November 20, 2009.

A notice of appeal was made on October 7, 2010. The matter was dismissed by the Supreme Court of South Carolina for failure to provide a sufficient explanation pursuant to Rule 243(c), SCACR, by written order on November 18, 2010. The remittitur was issued on December 6, 2010.

Third Habeas Corpus Action: (0:11-cv-00332-TMC)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on April 4, 2011. Applicant set forth the following grounds for relief:

1. "The State Court decision denying me relief on my claim of ineffective assistance of counsel was objectively unreasonable to clearly establish federal law as determine by the United States Supreme Court."
2. "The State Court decision denying me relief on my claim of an unconstitutional burden shifting reasonable doubt jury instruction was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
3. "The State Court decision denying me relief on my claim of lack of subject matter jurisdiction, or lack of jurisdiction for my indictments not being filed with the clerk of court was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."
4. "The State Court decision denying me relief for a violation of the 180 day rule, was objectively unreasonable to clearly established federal law as determine by the United States Supreme Court."
5. "The State Court decision denying me relief on my writ of mandamus was objectively unreasonable to clearly establish federal law as determined by the United States Supreme Court."

Respondent made its return and motion for summary judgment on September 2, 2011. On March 26, 2012, Magistrate Judge Paige J. Gossett issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Mar. 26, 2012). Applicant's objection to the Report and Recommendation was made on November 14, 2011.

On August 1, 2012, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Tate v. Warden Eagleton*, 0:11-cv-00332-TMC (D.S.C. filed Aug. 1, 2012). Applicant appealed this matter to the United States Court of Appeals for the Fourth Circuit on August 12, 2012, which was denied. Applicant filed a petition for rehearing, which was denied on December 11, 2012. The court issued its mandate on December 18, 2012.

II. Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. After discovered evidence.
 - a. “[O]n September 16, 2019, Applicant made a discovery of after discovered evidence collected by Officer Duncan. Evidence collected at the crime scene, a set of house keys. Whereby, Officer Duncan took the keys and unlocked the door, opened the door, entered and searched Applicant’s dwelling without a search warrant or inventory search, verifying proof of persons handling evidence seized at a crime scene.”

Before this Court are the Cherokee County Clerk of Court records, Applicant’s South Carolina Department of Corrections records, prior PCR, direct appeal, and habeas corpus records, and the records for this PCR action.

III. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application for failure to establish a *prima facie* case of newly discovered evidence.

This Court finds Applicant’s claim of newly discovered evidence must be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. A person may institute a PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C.

Code Ann. §17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant claims he is entitled to relief based on newly discovered evidence that no search warrant existed when his home was searched. However, the only document he attached to the application that supports this believe is a letter from the Cherokee County Sheriff, stating that they did not have a search warrant in their possession, but that they originated with the Magistrate's Office and that he should make the request of that office instead. That one institution does not possess documents originating within another institution does not mean that the search warrants do not exist at all. Additionally, this evidence could have been discovered through exercising due diligence before trial.

Further, the trial transcript reflects that officers entered the residence, not because they wanted to search the home, but because the witnesses accused Applicant of committing the stabbing and pointed in the direction of the trailer when asked what direction he took off in. (Tr. 182-83). Thus, officers seemingly entered the home in hot pursuit of Applicant, which is an exception to the search warrant requirement. *See e.g. State v. Key*, 431 S.C. 336, 344-45, 848 S.E.2d 315, 319 (2020) (quoting *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016) (exigent circumstances permit warrantless searches and entries into private property when "police are in hot pursuit of a fleeing suspect, and when police fear the imminent destruction of evidence.")). Accordingly, even if Applicant is correct in there being no search warrant in the

case, one was seemingly not needed because of an applicable exception, leaving the results of the proceeding unchanged because of the immateriality of this discovery. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court dismisses this claim for failure to make a *prima facie* case of Newly Discovered Evidence.

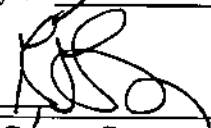
IV. Conclusion

Pursuant to South Carolina Code Annotated Section 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Cherokee County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Chelsey F. Marto, Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Cherokee County Clerk of Court and opposing counsel within twenty days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 1 day of June, 2022.



GRACE GILCHRIST KNIE
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina



ALAN WILSON
ATTORNEY GENERAL

May 26, 2022

^{7th} The Honorable Grace Gilchrist Knie
~~1st~~ Circuit General Sessions Chief Administrative Judge
180 Magnolia Street
Spartanburg, SC 29306

FILED IN THE OFFICE
CLERK OF COURT
2022 JUN -6 P 1:19
RANDY W. ROBBEE
CHEROKEE COUNTY, SC

Re: Jay Tate, #131879 v. State of South Carolina
2020-CP-11-0489

✓ Dear Judge Knie:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned PCR case. The State's Return and Motion to Dismiss has also been sent to your chambers. Judge Kelly, the current chief administrative judge, has a conflict because he represented Applicant in his first PCR action. Therefore, if this proposed order meets your approval, please sign and forward to the Cherokee County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/geh
Enclosure(s)

cc: Jay Tate, #131879