

STATE OF SOUTH CAROLINA
COUNTY OF LAURENS
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Samuel A. Lary, # 296099,

CASE NO. 2012 -CP- 30 - 649
State of South Carolina,

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), 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 _____.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Return to Motion for Rehearing and/or Alter or Amend the Order of Dismissal

Dated at _____, South Carolina, this _____ day of _____, 20_____.

PRESIDING JUDGE

This judgment was entered on the 18th day of April, 2013, and a copy mailed first class this 18th day of April, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Samuel A. Lary (Pro Se)

J. Rutledge Johnson, Esq.
Assistant Atty. General

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn M. Lancaster
CLERK OF COURT

STATE OF SOUTH CAROLINA) AND IN THE COURT OF COMMON PLEAS
COUNTY OF LAURENS) EIGHTH JUDICIAL CIRCUIT

2013 APR 18 P 4: 18

Samuel T. Gary, #296099,

2012-CP-30-0649

Applicant,

LAURENS COUNTY
CLERK OF COURT

v.

RETURN TO MOTION FOR REHEARING
AND/OR TO ALTER OR AMEND THE
ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCF, in which the Applicant asks the Court to direct the entry of a new judgment and/or to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

I.

This PCR matter came before the Court by way of a PCR application filed on August 16, 2012. Thereafter, this Court issued a Final Order of Dismissal following a Conditional Order of Dismissal filed on January 15, 2013. The Applicant filed a "Notice of motion for 59(e) Reconsider of Final Order of Dismissal" on February 13, 2013. The Respondent received a copy of this motion on April 11, 2013

II.

The State submits this Motion should be denied.

The Applicant is requesting this Court alter or amend the findings of fact and conclusions of law. The State submits this Court has properly addressed the issues about which the Applicant complains:

1. In the Final Order of Dismissal, the Court found the Applicant failed to prove when he received his alleged “newly discovered evidence,” which was a report from SLED concerning Latent fingerprints. Only now, for the first time does the Applicant allege he ‘discovered’ this evidence on January 24, 2012. This report was generated on August 18, 2008, nearly four years before the Applicant filed this untimely, successive PCR application. Second, under S.C. Code Ann. § 17-27-45(c), this evidence must be presented to the Court within one year of when it was discovered or, by due diligence, should have been discovered by the Applicant. The Applicant alleges the SLED report was forwarded to him on January 24, 2012, however, this report would have been available as soon as it was generated. Therefore, the Applicant should have discovered this evidence by August 18, 2009. Additionally, the Applicant pled guilty pursuant to negotiations on January 25, 2010. Certainly by the time of his guilty plea, he should have discovered this information. Nevertheless, the Applicant failed to show how this evidence would have changed the outcome of his negotiated guilty plea.

III.

The State therefore requests that the relief requested by the Applicant be denied and asserts a hearing on this matter would be unnecessary.

Respectfully submitted,

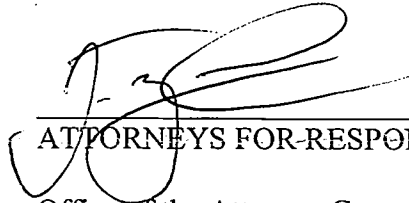
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

BY:

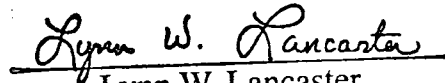


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

_____, 2013
Columbia, South Carolina

A TRUE COPY OF ORIGINAL


Lynn W. Lancaster
Laurens County CCCP & GS

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

Samuel T. Gary, #296099)

Plaintiff)

v.)

State Of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-30-0649

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Samuel T. Gary, 296099, Bar No.
Address:
386 Redemption Way McCormick, SC 29899
phone: fax:
e-mail: other:

Defendant's Attorney:
J. Rutledge Johnson, Bar No. 78871
Address:
PO Box 11549 Columbia, SC 29211-1549
phone: 803-734-3737 fax: 803-734-4113
e-mail: other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for Plaintiff / Defendant

October 18, 2012
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT: Rule to Show Cause in Child or Spousal Support (check reason) Domestic Abuse or Abuse and Neglect
- Indigent Status State Agency v. Indigent Party
- Sexually Violent Predator Act Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication Motion for Execution (Rule 69, SCRCP)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: Other:

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

MOTION FEE COLLECTED: _____

CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)
)
)
Samuel T. Gary, #296099,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

2012-CP-30-0649

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief application filed August 16, 2012, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. The Applicant was indicted at the October 2008 term of the Laurens County Grand Jury for two counts of Armed Robbery (2008-GS-30-1427, 1430), two counts of Possession of a Weapon During the Commission of a Violent Crime (2008-GS-30-1428, 1431), and Malicious Injury to a Jail (2009-GS-30-1824). Rodney W. Richey, Esquire, represented him. On January 25, 2010, the Applicant pled guilty as indicted to the aforementioned charges. The Honorable D. Garrison Hill sentenced the Applicant, pursuant to the parties' negotiated plea, to confinement for a period of eighteen (18) years for the two armed robbery charges, five (5) years, concurrent, for the weapons charges, and three (3) years, concurrent for the malicious injury charge. At the time of his plea the Applicant was on probation for other unrelated charges, and his probation was revoked at the time of this plea. As a result of the plea negotiations, the State also dismissed additional charges against the

matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

Was not Raised or Ruled upon

The Applicant alleges in this application that he is being held unlawfully on the ground that the court lacked subject matter jurisdiction. However, this issue was raised and ruled upon in Applicant's first PCR application. The Respondent submits that the doctrine of *res judicata* bars the Petitioner's claims. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.

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The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in his first PCR application. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court should summarily dismiss these claims as barred by *res judicata*.

VI.

The Applicant also alleges he is in possession of newly discovered evidence. A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). The Respondent submits the Applicant cannot satisfy the

requirements of the Lanier test. The Applicant has failed to produce this alleged newly discovered evidence. The Respondent respectfully requests this Court summarily dismiss this application unless the Applicant can properly allege newly-discovered evidence, which would entitle him to a belated, successive PCR application.

VII.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VIII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

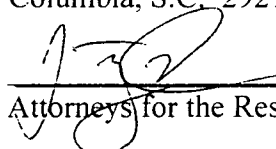
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina
October 18, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

2012-CP-30-0649

SAMUEL T. GARY, 296099,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

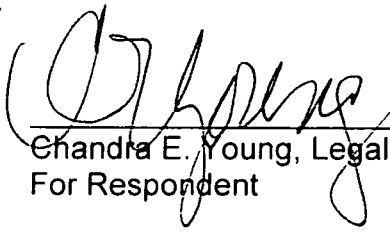
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Samuel T. Gary, 296099
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

DATED this 18th day of October, 2012.



Chandra E. Young, Legal Assistant
For Respondent