

**RECEIVED**

**Dec 18 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

---

Case No. 2017-CP-10-3273

---

**RECEIVED**

**Dec 20 2023**

**S.C. SUPREME COURT**

Herbert Palmer, Jr. #260691

Appellant,

v.

The State of South Carolina,

Respondent.

---

EXPLANATION PURSUANT TO RULE 243(c), SCACR

---

**As to Successive**

“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” *Odom v State*, 337 S.C. 256, 261 (1999), citing *Carter v State*, 293 S.C. 528, 362 (1987). Petitioner’s was unable to previously raise these grounds for application. To summarize, the evidence was simply not known or available to Petitioner prior to the filing of these most recent applications. Petitioner was not aware of every witness in the crowd at or near the incident location at the time. Further, in the case of Carl Judge in Tara Spann, the very nature

of these recanting statements precludes any ability to know their existence until they are actually made by the affiants.

### **As to the Statute of Limitations/Equitable Tolling**

Petitioner obtained affidavits from three witnesses which constituted newly discovered evidence on September 9, 2014, May 5, 2015, and May 13, 2015. Petitioner testified at the hearing that he submitted his Application for Post-Conviction Relief to the prison mail room for delivery on September 3, 2015, well-prior to the expiration of the statute of limitations. As such, Petitioner's filing was timely pursuant to S.C. Code Ann. §17-25-45(C). An error in delivery to the proper location resulted in the Application not being filed. As such, upon discovery that the application was not appropriately filed, the Applicant was forced to re-file the action on June 27, 2017.

This exact type of scenario has been contemplated by the United States Supreme Court and the South Carolina Supreme Court on several occasions. The "prison mailbox rule", stating that an incarcerated individual's application is deemed "filed" at the time submission to the mailroom or mailbox at a detention facility was set forth in *Houston v. Lack*, 487 U.S. 286 (1988). The concept of equitably tolling the statute of limitations when the circumstances which prevented a timely filing were "both beyond the petitioner's control and unavoidable despite due diligence" was addressed in *Ferguson v. State* 677 S.E.2d 600, 602 (2009). "[E]quitable tolling is doctrine that should be used...when the interests of justice compel its use".

*Hooper v Ebenezer Senior Services and Rehabilitation Center*, 687 S.E.2d 29, 33 (2009). More recently, the Supreme Court of South Carolina held that inmates


should not be “adversely affected by delays other litigants might readily overcome” *Mose v. State*, 420 S.C. 500, 509 (2017), citing *Lewis v Richmond City Police Dep’t*, 947 F.2d 733 735 (4<sup>th</sup> Cir. 1991). In oral argument, counsel for Petitioner emphasized that an attorney has the opportunity and ability to be informed in person of any issues or problems when filing documents with the clerk of court and can correct these problems immediately, but an incarcerated individual does not enjoy these same opportunities. As such, attention must also be given to the fact that Petitioner filed his initial application for newly discovered evidence *pro se*. Courts have recognized the additional burdens placed upon *pro se* litigants who did not have the benefit of the advice of learned counsel, as evidenced by the decision to reverse summary judgment in a Post-Conviction Relief Action in *Odom v. State* 337 S.C. 256. (1999).

Analogously, the Federal Rules also state that “a local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a non-willful failure to comply.” FRCP (83)(a)(2).

This Court recognizes that Petitioner made a good faith effort to appropriately and timely file his application. Despite his procedural due diligence, Petitioner encountered circumstances which could have been easily managed by free individuals but were considerably more difficult as a result of Petitioner’s incarceration.

Further, the prior affidavit of Tara Spann was obtained on March 23, 2022, and an Application for Post Conviction Relief on the basis of newly discovered evidence regarding her statements was filed on June 29, 2022. Though subsequently

merged with the prior action in the interests of judicial economy, this application was timely filed with the assistance of counsel, and therefore equitable tolling need not be applied to this particular filing.



---

Brian M. Byrd  
The Byrd Law Firm, LLC  
147 Wappoo Creek Drive, Suite 303  
Charleston, South Carolina 29412  
(843) 762-2107  
Attorney for Appellant

December 18, 2023  
Charleston, SC