

The State of South Carolina  
In the Supreme Court

Appeal from Spartanburg County  
Court of Common Pleas  
J Derham Cole Circuit Court Judge

case No: 2015-CP-42-4338

**RECEIVED**

APR 25 2017

**S.C. SUPREME COURT**

Tyrone Perry . . . . . petitioner  
v

State of South Carolina . . . . . Respondent

NOTICE OF APPEAL

Tyrone Perry appeals the order [judgment] of the Honorable J Derham Cole dated March 30<sup>th</sup> 2017. Petitioner received written notice of entry of this order [judgment] on April 19<sup>th</sup> 2017

sx Tyrone Perry  
Tyrone Perry 307793  
4344 Broad River Rd  
Columbia S.C. 29210

This 19<sup>th</sup> day of April 2017

The State of South Carolina  
In the Supreme Court

Appeal from Spartanburg County  
Court of Common Pleas  
J Derham Cole Circuit Court Judge

case No: 2015-CP-42-4338

Tyrone Perry . . . . . Petitioner  
v  
State of South Carolina . . . . . Respondent

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of it in the United States mail postage prepaid on April 19<sup>th</sup> 2017 to the following:

This 19<sup>th</sup> day of April 2017

s/ Tyrone Perry  
Tyrone Perry 307793  
4344 BroadRiver Rd D-28  
Columbia S.C 29210



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

APR 11 2017

April 5, 2017

GENERAL COUNSEL

Barton J. Vincent, General Counsel  
Attn: Jonathan Eckstrom  
South Carolina Department of Corrections  
4444 Broad River Road  
Columbia, South Carolina 29221-1787

**Re: Tyrone Perry v. State of South Carolina**  
**2015-CP-42-4338**

Dear Mr. Eckstrom:

Enclosed please find the **Conditional Order** dismissing the above-captioned inmate's post-conviction relief application. Please serve the inmate, **Tyrone Perry, #307793**, with the order and provide me with an affidavit of service (enclosed).

If you have any questions, please feel free to call: (803) 734-3737.

Sincerely,

Valerie Garcia Giovanoli  
Assistant Attorney General

VGG/ah  
Enclosures

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FOR THE SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG

Tyrone Perry,  
S.C.D.C. No. 307793,

) Case No.: 2015-CP-42-04338

Applicant,

) **CONDITIONAL ORDER OF DISMISSAL**

v.

State of South Carolina

Respondent.

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M. HOPE LAGLEY

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Tyrone Perry ("Applicant") on October 19, 2015 ("the Application"). Respondent made its Return, requesting the Application be summarily dismissed.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the February 2005 term of the Spartanburg County Grand Jury for murder (2005-GS-42-00836). James Edward Hatcher, Esquire, represented Applicant. On February 1, 2006, Applicant pleaded guilty as indicted. The Honorable J. Cordell Maddox, Jr. sentenced Applicant to imprisonment for a term of 50 years.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, filed an Anders brief<sup>1</sup> on Applicant's behalf and petitioned to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Perry, Op. No. 2008-UP-217 (S.C. Ct. App. Order filed April 7, 2008). The Remittitur was returned to the circuit court on April 24, 2008.

<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

**First PCR Application: 2008-CP-42-00898**

Applicant filed his first application for post-conviction relief on February 19, 2008 (2008-CP-42-00898). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel
  - a. Failure to investigate witnesses
  - b. Failure to investigate medical records
  - c. Failure to suppress coerced statements
2. Involuntary Guilty Plea

Respondent made its return on May 13, 2008, and an evidentiary hearing into the matter was convened on July 28, 2009, before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and represented by Kenneth P. Shabel, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and James E. Hatcher, Esquire, also testified. Applicant's mother, Sara Dunn, and aunt, Brenda Miller, also testified at the PCR hearing. By written Order dated and filed October 13, 2009, Judge Hayes denied and dismissed the application.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, filed a Petition for Writ of Certiorari pursuant to Johnson v. State<sup>2</sup> on Applicant's behalf. The South Carolina Supreme Court denied Applicant's petition by unpublished opinion. Perry v. State, S.C. Sup. Ct. Order dated July 21, 2011. The Remittitur was sent to the circuit court on August 8, 2011.

**First Petition for Habeas Corpus: 1:11-2334-MBS-SVH**

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on August 25, 2011 (C.A. No. 1:11-2334-MBS-SVH). In his Petition, Applicant set forth the following grounds for relief:

1. Failure to call witnesses (investigate).

<sup>2</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

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M. HOPE BACHMEYER

- a. Crime scene witnesses, alibi witnesses. Failure to investigate witnesses before advising to plea.
2. Failure to investigate medical records
  - a. Ineffective for failing to investigate medical records (mental health records) and psychiatrists of petitioner.
3. Failure to suppress statements.
  - a. Failed to file motion to suppress coerced statements made by police.
4. Government breached plea agreement.
  - a. Plea counsel coerced petitioner by telling him he would receive 25 years with two witnesses present. Petitioner actually got 50 years.

Respondent filed its Return and Motion for Summary Judgment on December 19, 2011. On May 17, 2012, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued a Report and Recommendation ordering that Respondent's motion for summary judgment be granted. Perry v. McCall, 1:11-2334-MBS-SVH, 2012 WL 3749484 (D.S.C. 2012). The Honorable Margaret B. Seymour, United States District Judge, accepted the Report and Recommendation for summary judgment and denied Applicant's petition on August 28, 2012. Perry v. McCall, 1:11-2334-MBS-SVH, 2012 WL 3751568 (D.S.C. 2012).

Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals on September 12, 2012. The Fourth Circuit Court of Appeals dismissed Applicant's appeal on March 12, 2013 for want of a certificate of appealability. Perry v. McCall, 513 Fed.Appx. 363 (4th Cir. 2013). Applicant thereafter filed a petition for writ of certiorari to the United States Supreme Court on July 16, 2013. Respondent made its brief in opposition on January 21, 2014. The Supreme Court denied the petition on February 24, 2014. Perry v. McCall, 134 S.Ct. 1276 (2014).

#### Second PCR Application: 2014-CP-42-2164

Applicant filed his second application for post-conviction relief on May 30, 2014 (2014-CP-42-02164). He alleged the following grounds for relief in his application:

1. "Austin violation pursuant to Austin v. State 409 S.E.2d 395 (1992)"
2. "Unkept plea agreement"

3. "Marlar violation pursuant to Marlar v. State 653 SE2d 266 (S.C. 2007)"

Respondent made its return and motion to dismiss on April 9, 2015, arguing the application was successive, untimely filed, and barred by the doctrine of *res judicata*. On April 16, 2015, the Honorable R. Keith Kelly issued a Conditional Order of Dismissal, and then a Final Order on January 29, 2016 dismissing the matter with prejudice. Applicant did not appeal.

### Current PCR Application

In his *third and current* post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Involuntary guilty plea; in that:
  - a. Applicant was incompetent at the time of the guilty plea
2. Ineffective assistance of counsel; in that:
  - a. Counsel failed to get a second opinion as to Applicant's mental health

Also before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions, Applicant's appellate records, Applicant's prior PCR and federal habeas corpus records, and the records of this current PCR action.

H. HOPE PLAMMER  
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Spartanburg County Clerk of Court

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Statute of Limitations

This Court finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Section §17-27-45(A) provides:

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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant pleaded guilty to the challenges in this application on February 1, 2006. The Remittitur was returned April 24, 2008. Therefore, Applicant was required to file this PCR application no later than April 24, 2009. This application was filed on October 19, 2015, which was *more than six years beyond* the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Court shall summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

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**Successiveness**

This Court finds it must also summarily dismiss the current application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

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 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, the Court shall summarily dismiss the application because it is successive.

**The Doctrine of Res Judicata**

The doctrine of *res judicata* also bars Applicant's claims of ineffective assistance of counsel and involuntary guilty plea. *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.; Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his previous post-conviction relief applications. The public interest in finality of judgments requires that litigation

must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCPP, the Court shall also dismiss these claims as barred by the doctrine of *res judicata*.

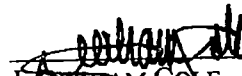
**CONCLUSION**

Pursuant to S.C. Code Ann. § 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 (20) 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Johnny E. James, Jr., Esquire  
Post-Conviction Relief Division  
P.O. Box 11549  
Columbia, SC 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty (20) 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 30 day of March, 2017.

  
\_\_\_\_\_  
J. DERHAM COLE  
Chief Administrative Judge  
Seventh Judicial Circuit

\_\_\_\_\_, South Carolina

2017 APR -3 PM 4:14  
M. HOPE BLACKBERRY

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483

Phone (864) 596-2591  
Fax (864) 596-2239



**M. Hope Blackley**  
Clerk of Court

April 4, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Tyhone Perry  
Applicant # 307193

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2015-CP-42-4338

VS  
Shill  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Conditional ad. dismissal  
In this action dated 3-30, 2017 on 4-4-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

- Orley Hawthorth
- Debra Delee
- Tyhone Perry

4-4-17  
(Date)

Carolee Spivey  
(Signature)



Tyrone Perry # 307793

Kirkland Corr Institute

4344 Broad River Rd D-28

Columbia S.C. 29210

KIRKLAND R&E CENTER  
MAILROOM

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