

# Melisa W. Gay, LLC

Attorney and Counselor at Law

Melisa W. Gay

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July 21, 2017

The Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, SC 29201

RE: Thomas R. Osborne, SCDC# 323164, v. State of South Carolina  
PCR Appeal from Spartanburg County  
The Honorable J. Durham Cole  
Case No: 2014-CP-42-4604  
Attorney for Respondent: Valerie Garcia Giovanoli

Dear Clerk:

Enclosed please find the original Notice of Intent to Appeal and six (6) copies regarding the above referenced matter. On June 26, 2017, there was a hearing in front of The Honorable Judge J. Durham Cole regarding The Order of Dismissal. A Pre-existing Conditional Order of Dismissal on this case is included for the Court's record.

I am filing a Certificate of Service on Appellant's behalf indicating that I served Valerie Garcia Giovanoli of the Attorney General's office on this date with a copy of this Notice.

Thank you for your assistance with this matter. In the event that you need to talk with me directly, please contact me on my mobile phone number (843) 345-5472. It is the fastest way to contact me.

Please return filed copies of Notice and Proof of Service in the enclosed self-addressed stamped envelope.

Sincerely,



Melisa W. Gay

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JUL 24 2017

S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Durham Cole, Circuit Court Judge

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Case No. 2014-CP-42-4604

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The State of South Carolina,

Respondent,

v.

Thomas R. Osborne, SCDC# 323164,

Appellant.

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**NOTICE OF INTENT TO APPEAL**

Thomas R. Osborne, SCDC # 323164, appeals the denial of his application for Post-Conviction Relief as to Indictments 2009-GS-42-3438, 2009-GS-42-3439, 2009-GS-42-3442. The Order of Dismissal was imposed by the Honorable J. Durham Cole, Presiding Judge of the Seventh Judicial Circuit, on June 26, 2017. Appellant received notice of the same on that date.

July 21, 2017



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MELISA W. GAY  
P.O. Box 2144  
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(843) 345-5472  
ATTORNEY FOR APPELLANT

Other Counsel of Record:  
Valerie Garcia Giovanoli  
Assistant Attorney General  
SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737

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**S.C. SUPREME COURT**

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**S.C. SUPREME COURT**

**FORM 7  
PROOF OF SERVICE OF A NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Durham Cole, Circuit Court Judge

---

Case No. 2014-CP-42-4604

STATE OF  
SOUTH CAROLINA,

Respondent,

v.

THOMAS R. OSBORNE,  
SCDC# 323164

Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on Assistant Attorney General, Valerie Garcia Giovanoli, by placing a copy of this Notice in the United States Postal Service. The Notice of Intent to Appeal was sent on July 21, 2017 to:

Valerie Garcia Giovanoli  
Assistant Attorney General  
SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211



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MELISA W. GAY  
ATTORNEY FOR APPELLANT  
P.O. BOX 2144  
MT. PLEASANT, SC 29465  
ATTORNEY FOR  
THOMAS R. OSBORNE

Other Counsel of Record are:  
Valerie Garcia Giovanoli  
Assistant Attorney General  
SC Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SPARTANBURG )  
 )  
Thomas Ray Osborne, )  
S.C.D.C. No. 323164, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
OF THE SEVENTH JUDICIAL CIRCUIT

2014-CP-42-4604

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Thomas Ray Osborne (Applicant) on November 5, 2014. Respondent made its Return, requesting the application be summarily dismissed.

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**I. 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 July 2009 term of the Spartanburg County Grand Jury for armed robbery (09-GS-42-3438), assault of a high and aggravated nature (09-GS-42-3439), escape (09-GS-42-3440), possession of stolen vehicle (09-GS-42-3441), and failure to stop for blue light (09-GS-42-3442). He was represented by Robert B. Hall, Esquire. On January 16, 2010, Applicant pled guilty as indicted to all charges except possession of a stolen vehicle, which was *nolle prossed*. Applicant was sentenced by the Honorable Roger L. Couch to confinement for a period of twenty (20) years armed robbery, fifteen (15) years for escape, ten (10) years for assault of a high and aggravated nature, and three (3) years for failure to stop for blue light. Judge Couch ordered the escape sentence to run concurrent with the SCDC sentence that Applicant was presently serving, while

ordering all other sentences to run consecutive to Applicant's current SCDC sentence. In addition, Judge Couch ordered Applicant's sentence for escape to run consecutive to the sentence he received for armed robbery.

A timely notice of appeal was filed on Applicant's behalf, but was dismissed by the South Carolina Court of Appeals on March 3, 2010, for failure to identify any issue proper for appeal. The Remittitur was sent on March 24, 2010.

**2010-CP-42-1722**

On March 30, 2010, Applicant filed his first application for post-conviction relief, alleging he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
2. Due Process violation
3. Error in sentence, mental health

Respondent made its Return. A hearing was convened at the Spartanburg County Courthouse on September 20, 2011. Applicant was present in court and was represented by Attorney Christopher D. Brough. At the hearing, Applicant proceeded on grounds of ineffective assistance of counsel due to trial counsel's failure to procure a mental health evaluation of Applicant. By Order dated February 3, 2012, the Honorable J. Mark Hayes, II, granted the application for post-conviction relief as to indictment 2009-GS-42-3440 only, which he ordered to be returned to the Court of General Sessions for a new trial. The Court denied the application for post-conviction relief as to indictments 2009-GS-42-3438, 2009-GS-42-3439, 2009-GS-42-3442.

Applicant subsequently filed a notice of appeal, appealing the denial of his application for post-conviction relief as to indictments 2009-GS-42-3438, 2009-GS-42-3439, 2009-GS-42-3442. Applicant's appellate counsel is Deputy Chief Appellate Defender Wanda H. Carter. The State also filed a notice of appeal and a Petition for Writ of Certiorari was submitted. By Order filed June 17, 2014, the South Carolina Court of Appeals granted the State's petition for certiorari and

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denied Applicant's petition for writ of certiorari. The State followed by filing a Brief of Petitioner arguing that the PCR court erred in granting PCR relief on the escape conviction. Applicant subsequently filed a Brief of Respondent.

This PCR Appeal is still pending as of the writing of this Return.

## II.

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

1. "Attorney/Client communication"
2. Ineffective Assistance of Counsel
3. Violation of Sixth Amendment
4. Newly Discovered Evidence

Before this Court are the records of the Spartanburg County Clerk of Court regarding Applicant's convictions, Applicant's prior PCR records, Applicant's current PCR Application, and amendments, and Respondent's Return and Motion to Dismiss.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Successiveness

The Court finds that the current Application for post-conviction relief must be summarily dismissed because it is successive to the previous applications for post-conviction relief. 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a

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SPARTANBURG COUNTY  
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previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations could have been raised in prior proceedings based on Applicant's prior application for post-conviction relief, and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

#### Statute of Limitations

The Court finds that this Application for post-conviction relief must also be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). S.C. Code Ann. §17-27-15(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.

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). The Remittitur from Applicant's unsuccessful direct appeal was issued March 24, 2010. This application was filed on November 5, 2014, after the statutory filing period had expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In addition,

S.C. Code Ann. § 17-27-70(c) (1985) 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, Applicant failed to file within the time mandated by the Post-Conviction Procedure Act and Applicant's post-conviction relief application must be summarily dismissed.

#### **Newly Discovered Evidence**

This Court finds that Applicant's claim of alleged "newly-discovered evidence" is vague and fails to make a prima facie showing that he is in actual possession of such evidence or how that evidence likely would have changed the outcome at trial. Under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence ~~could have been~~ ascertained. Applicant has failed to set forth precisely what the evidence is or why such alleged evidence was not readily discoverable at the time of his plea or previous PCR action. Upon review of his application and attached documents, Applicant's "newly discovered evidence" appears to be simply his version of what took place leading up to his plea, all of which could have been ascertained at the time of his plea and his previous PCR action. Before the Court will hold an evidentiary hearing, Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has entirely failed to make such a prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter should be summarily dismissed with prejudice.

***Res Judicata***

This Court finds that Applicant's allegations of ineffective assistance of trial counsel must be dismissed as barred by the doctrine of *res judicata*. *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.

Applicant had a full opportunity to litigate all claims regarding ineffective assistance of counsel in his prior PCR action. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, these claims must be summarily dismissed as barred by *res judicata*.

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H. JOSEPH AUMLEY

**CONCLUSION**

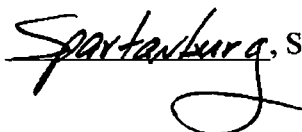
Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order 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:

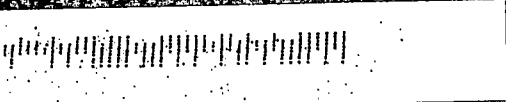
Office of the Attorney General  
Justin J. Hunter, Esquire  
PCR Division – 7th Circuit  
P.O. Box 11549  
Columbia, SC 29211

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M. HOFFMAN  
CLERK

AND IT IS SO ORDERED this 13 day of May, 2015.

  
R. KEITH KELLY  
Chief Judge for Administrative Purposes  
Seventh Judicial Circuit

, South Carolina



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