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C. Anthony Harris, Jr.  
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November 13, 2017

Telephone (843) 537-5204  
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The Honorable Jenny Abbott Kitchings  
Clerk of Court  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: Dameion Jermiah Rivers vs. The State of South Carolina  
Case #: 2011-CP-13-0210  
PCR Application/Notice of Appeal  
Our File #: 7731

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NOV 14 2017  
SC Court of Appeals

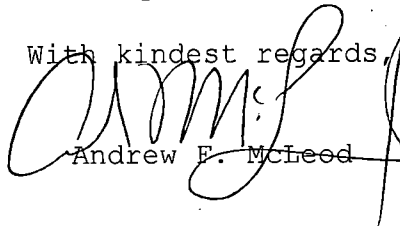
Dear Ms. Kitchings:

Enclosed please find a Notice of Appeal for filing. A duplicate original has been filed in the lower Court. Also enclosed please find the following documents:

- 1) Proof of Service showing that this Notice has been served on the Respondent's attorney (certificate of mailing);
- 2) A copy of the Order which is being challenged on Appeal;
- 3) This is an appeal by a prisoner of a PCR hearing;

If you have any questions please do not hesitate to call.

With kindest regards,



Andrew F. McLeod

Enclosure  
AFM/tb

Cc: Mr. Dameion Jermiah Rivers, 342549  
Perry Correctional Institution DY6  
430 Oaklawn Road  
Pelzer, SC 29669

Jessica E. Kinard  
Assistant Attorney General  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

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S.C. SUPREME COURT

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

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NOV 14 2017

SC Court of Appeals

Case No. 2011-C-13-0210

State of South  
Carolina

Respondent,

v.

Dameion Jermiah Rivers  
# 342549

Appellant.

NOTICE OF APPEAL

Dameion Jermiah Rivers appeals the Order of Dismissal of the Honorable Roger E. Henderson dated July 1, 2016 and filed July 8, 2016. Appellant never received written notice of entry of this order but discovered it online on or about 08-18-2016. Subsequently, Plaintiff filed a Motion to Reconsider pursuant to Rule 59(e). This Motion was denied by order of the court dated October 27, 2017 and recorded November 2, 2017.

*Andrew F. McLeod*, 11-13-2017

Andrew F. McLeod  
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Attorney for Appellant

Other Counsel of Record:

Jessica E. Kinard, Esquire  
Post Office Box 11549  
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Attorney for Respondent  
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S.C. SUPREME COURT

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY  
Court of Common Pleas

RECEIVED

Roger E. Henderson, Circuit Court Judge

NOV 14 2017

SC Court of Appeals

Case No. 2002-CP-13-458

State of South  
Carolina

Respondent,

v.


Dameion Jermiah Rivers  
# 342549

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2017, addressed to attorney of record, Jessica Kinard, Post Office Box 11549, Columbia, South Carolina 29211-1549.

November 13, 2017



Tonie T. Brock, Legal Assistant to  
Andrew F. McLeod  
Post Office Drawer 1449  
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(843) 537-5204  
Attorney for Appellant

STATE OF SOUTH CAROLINA  
COUNTY OF CHESTERFIELD

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

Dameion Jermiah Rivers, #342549,

) Case No. 2011-CP-13-0210  
)

) Applicant,  
)

v.

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AMENDED ORDER DENYING  
MOTION PURUSANT TO

State of South Carolina,

NOV 14 2017

) Respondent,  
)

SC Court of Appeals

Blanda C. Miles  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.

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This matter came before the Court by way of a motion to alter or amend judgment pursuant to Rule 59(e), SCRCF that Applicant filed on September 9, 2016 by and through his attorney, Andrew F. McLeod, Esquire. This motion was served upon this court and opposing counsel, Jessica E. Kinard, Assistant Attorney General. A hearing was convened at the Chesterfield County Courthouse on July 24, 2017. Applicant was not present at the hearing, when this court heard argument from both attorneys.

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Chesterfield County Clerk of Court's orders of commitment. The Chesterfield County Grand Jury indicted the Applicant at the November 2007 term of General Sessions for murder (2007-GS-13-0814) and at the December 2007 term for possession of a weapon during commission of a violent crime (2007-GS- 13-0897). Paul V. Cannarella, Esquire represented the Applicant.

Upon information and belief, the State called the case to trial before the Honorable Paul M. Burch on August 30, 2010 and a jury was selected. Upon information and belief, a suppression hearing was held that day and the motion to suppress was denied. On August 31, 2010, the Applicant pled guilty to the lesser included charge of voluntary manslaughter and the

weapons possession charge as indicted. Judge Burch sentenced the Applicant to concurrent terms of nineteen (19) years for voluntary manslaughter and five (5) years for possession of a weapon during commission of a violent crime, with credit for time served. The Applicant did not appeal.

## II.

In his original Application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Failure to investigate.
  - b. Convinced the Applicant to plead guilty after a "new turn in the case."
2. Involuntary guilty plea.

On or about January 11, 2013, Amendment filed an amendment to his application, adding the following allegations:

1. Ineffective assistance of counsel.
  - a. Failure to quash the indictment for murder.
    1. "The indictment was invalid based on the fact that it states that the victim died in Chesterfield County when in fact the record clearly indicates that the victim was airlifted to Charlotte, north Carolina where surgery was performed and that ultimately the victim expired in Charlotte, North Carolina at the hospital and not in Chesterfield County. There are several cases that indicate that he place of death is absolutely necessary in an indictment for murder. These include:
      - State v. Platt, 154 S.C. 1
      - State v. Shoemaker, 276 S.C. 86
      - State v. Coleman, 17 S.C. 473
      - State v. Blakeney, 33 S.C. 111
  - b. Failing to advise the Applicant of the mandatory minimum penalty of the guilty plea involved.

A second amendment to the post-conviction relief application was filed by the Applicant on or about May 29, 2013. This added the following allegations:

1. Failure to discover exculpatory evidence;
2. Failure to advise the plea court to give applicant all of his time served;
3. Failure to clarify plea court's erroneous language pertaining to the murder indictment;
4. Failure to advise the applicant of the mandatory minimum penalty based on the plea;
5. Failure to quash indictment for murder.



Applicant filed a second amended PCR application on or about December 22, 2015, which added the following allegations:

1. Trial counsel was ineffective in not obtaining a continuance due to the fact that the State did not comply with the Brady request in it did not provide the recorded statement of Kenneth Louallen. Said statement was clearly referenced in the incident report and was not produced.
2. Trial counsel was ineffective in not advising the PCR applicant concerning the fact that he would have to serve 85% of any sentence and the trial counsel advised that PCR application would only have to serve 65% of any sentence. Had PCR Applicant known this then, he would not have pled guilty and would have gone to trial.
3. Trial counsel was ineffective in failing to raise all the issues possible concerning the validity of the indictment. The incident [sic] was not signed by the grand jury foreman, and it incorrectly stated the location where the victim died.
4. The police officer who was investigating this case for the Town of Pageland is currently on administrative leave and being investigated for improper conduct, and the PCR applicant believes that the police office intentionally withheld evidence and did not investigate this case.
5. There is a witness, Billy Lee Lisenby, Jr., who is prepared to testify that he informed Chief Brown, the investigating officer, after the shooting that her saw the victim with a gun prior to the shooting at the scene, but the investigating officer did not get a statement from Billy Lee Lisenby, Jr. or bring this information to light during the investigation.

Applicant filed a supplement to this amendment on or about January 4, 2016, which alleged the testimony Billy Lee Lisenby, Jr. was expected to present constituted newly-discovered evidence. It further provided Kory Little was prepared to recant his statement and provide testimony that would be helpful to the Applicant.

An evidentiary hearing was held on January 11, 2016 at the Darlington County Courthouse. Applicant; his trial counsel, Paul V. Cannarella, Esquire; Kory Little; and Billy Lee Lisenby, Jr. testified at the hearing. The Court had before it a copy of the trial transcript, the records of the Chesterfield County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings. After consideration of all facts and testimony, this court denied Applicant's request for post-conviction



relief in an order signed July 1, 2016 and filed July 8, 2016. This court further understands there was a delay in the attorneys of record receiving this filed order and, as a result, both parties have stipulated that the instant motion was timely filed.

### III.

At the argument of this motion, Applicant presented further argument that his application should be granted on the basis of newly-discovered evidence, which was the testimony of Kory Little and Billy Lee Lisenby, Jr., both of whom testified in support of this claim at Applicant's post-conviction relief evidentiary hearing. In support of this, he argued the Court was in error when it cited Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983), and its five factor test in evaluating alleged new evidence, as that standard applies only to cases that go to trial and receive a verdict. Because Applicant pled guilty, he cites instead to Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) and its two factor test in determining the relevance of alleged new evidence. Applicant further argued he was entitled to a new trial by a jury of his peers to question the alleged new witnesses into why they had not or could not have come forward at the time of his trial. He lastly argued he should receive the benefit of the doubt, and his conviction should be vacated to allow him a new trial with the inclusion of this testimony.

The State conceded that Jamison was the appropriate standard, but argued it was a distinction without a difference. This court agrees. Initially, both tests require the new evidence to be discovered after the trial or plea, and that it be of a nature that it could not have been discovered beforehand with due diligence. As both witnesses were at the scene of the incident, this prong is not satisfied. In fact, Mr. Lisenby testified he told law enforcement of his presence at the scene prior to Applicant entering his plea. Further, the second prong of Jamison, which is similar to the fourth prong of Hayden, requires the evidence be of a weight and quality that requires vacation of the sentence in the interest of justice. In this case, both witnesses are



convicted felons and are currently incarcerated. One of them, Mr. Little, recanted<sup>1</sup> a prior statement given to law enforcement, and Mr. Lisenby told law enforcement he could not be certain whether it was the Applicant or another person that committed the act. These facts weigh very heavily against placing credibility on the statements of these men.

This court previously held in the order of dismissal "the information presented by these witnesses does not rise to the level of probably changing the outcome of a new trial" as "this court does not believe this information is so material to the issue of guilt or innocence that it would have reasonably led to an acquittal by a jury." OOD, p.9 - 10. Ultimately, Applicant desires vacation of his sentence for the opportunity to be potentially acquitted by a jury. However, that is in contravention of state law, as the grant of a new trial is not favored, and requires an abuse of discretion on the part of the trial or plea court, as it has the ability and opportunity to weigh the evidence. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011).

Lastly, the courts of this state place a heavy burden on those who plead guilty, as evidence by the different standard espoused by Jamison. In reaching its decision to create a different standard for newly discovered evidence after a guilty plea, the South Carolina Supreme Court considered the fact that pleas are sworn oaths made to the court, stating the following:

In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions. In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt.

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<sup>1</sup> Recantation of a statement is "unreliable and should be objected to the closest scrutiny when offered as a ground for a new trial." State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977).

Id., 410 S.C. at 470, 765 S.E.2d at 130. When considering this caution against the evidence and argument presented by Applicant, this court finds he has not satisfied his burden, his motion is denied, and his application remains denied.

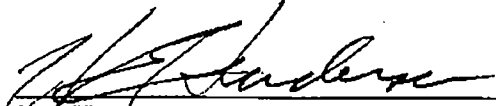
#### IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not presented any evidence or argument that would warrant an alteration or amendment of this court's prior order.

#### **IT IS THEREFORE ORDERED THAT:**

1. The motion for alteration or amendment pursuant to Rule 59(e) is denied; and
2. Applicant shall be remanded to the custody of the South Carolina Department of Corrections for service of the remainder of his term of imprisonment.

AND IT IS SO ORDERED this 27<sup>th</sup> day of October, 2017.

  
THE HONORABLE ROGER E. HENDERSON  
Presiding Judge  
Fourth Judicial Circuit

Chesterfield, South Carolina

2017 NOV -2 AM 10:24  
Wanda C. Miles  
CLERK OF COURT  
CHESTERFIELD COUNTY, S.C.

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The Honorable Jenny Abbott Kitchings  
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