

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

Malcolm Lonnie Green, #241530

Plaintiff

v.

State Of South Carolina

Defendant.

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)  
) FILED  
) BAMBERG COUNTY  
)  
) 2013 JUL 10 PM 3:26  
)  
) JAMES D. HIERS  
) CLERK OF COURT  
) BAMBERG, SC  
)  
)

IN THE COURT OF COMMON PLEAS

CASE NO.  
2013-CP-05-0034

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: Malcolm Lonnie Green, #241530, Bar No. Address: Lee Correctional Institution Bishopville, SC 29010 phone: fax: e-mail: other:	Defendant's Attorney: Daniel Gourley, Bar No. Address: P.O. Box 11549 Columbia, SC 29211 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
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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**

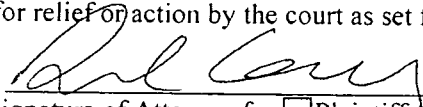
Nature of Motion:

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

June 27, 2013  
 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: \_\_\_\_\_

FILED  
BAMBERG COUNTY

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BAMBERG ) 2013 JUL 10 PM 8:06 FOR THE SECOND JUDICIAL CIRCUIT

Malcolm Lonnie Green, #241530 )  
) JAMES L. HIERS  
) CLERK OF COURT  
) BAMBERG, SC ) Case No. 2013-CP-05-0034

Applicant, )  
) )  
v. )  
) ) **CONDITIONAL ORDER**  
) ) **OF DISMISSAL**  
) )  
State of South Carolina, )  
) )  
Respondent. )  
\_\_\_\_\_ )

This matter comes before this Court by way of an application for post-conviction relief filed March 4, 2013. In its return, the Respondent requested the application be summarily dismissed.

**PROCEDURAL HISTORY**

Before this Court are the records of the Bamberg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, appellate records, and records from Applicant's previous application for post-conviction relief. The records before this Court reflect that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Bamberg County Clerk of Court. On February 13, 1997, the Denmark Police Department arrested the applicant for murder (Warrant No. F-159549). The charge was referred to the Bamberg County Family Court because applicant was a minor. Juvenile petitions were issued charging him with murder (1996-JU-05-135) and giving false information to a police officer (1996-JU-05-136). David G. Pagliarini, Esquire, represented the applicant. On September 16, 1996, the Honorable Peter R.

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Nuessle heard the State's motion to waive jurisdiction to General Sessions and issued an order waving jurisdiction on both charges to the Court of General Sessions.

The Applicant was true bill indicted by the March 1997 term of the Bamberg County Grand Jury for Murder (1997-GS-05-019). He was represented on the charge by Joshua Koger, Esquire, and William Rhoad, Esquire. On March 19, 1997, the applicant pled guilty to the lesser included offense of voluntary manslaughter. The Honorable Luke N. Brown sentenced the applicant on March 20, 1997 to thirty years imprisonment.

A timely Notice of Appeal was filed and an appeal perfected. Following the submission of an Anders brief, the South Carolina Supreme Court dismissed the appeal. State v. Green, Op. No. 1999-MO-025 (S.C. Sup. Ct. filed March 10, 1999). The Remittitur was sent on April 1, 1999.

Applicant filed his first post-conviction relief application on November 20, 2000 (2000-CP-05-0213). Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel;
2. Fifth amendment violation;
3. Fourteenth amendment violation;
4. Procedural due process of the substantive due process;
5. Guilty plea was not knowingly, intelligently, and voluntarily entered;
6. Illegal seizure of statement self incrimination;
7. Miranda violation;
8. Violation of due process; and
9. Due process violation of life, liberty, and property interest.

The State made its Return and Motion for Summary Judgment on or about January 29, 2001. An evidentiary hearing was held on April 9, 2001, before the Honorable Rodney A. Peeples. Applicant was present and represented by Michael C. Tanner, Esquire. In an order dated May 16, 2001, and filed May 18, 2001, Judge Peeples denied and dismissed the application with prejudice. A timely notice of appeal was filed with the South Carolina Supreme Court. The

Supreme Court denied the petition for writ of certiorari and affirmed the post-conviction relief court's denial of his post-conviction relief application. Green v. State of South Carolina, Op. No. 25588 (S.C. Sup. Ct. filed January 27, 2003). The Remittitur was sent on February 12, 2003.

The Applicant subsequently filed an application for post-conviction relief on March 10, 2005 (2005-CP-05-044). The Applicant raised the following issue:

1. Flawed indictment/Subject matter jurisdiction.
  - a. "The crime of murder is a composite one. It involves the time and place of assault and the time and place of death. This indictment does."

The State made its Return and Motion to Dismiss on or about October 11, 2005 based on the statute of limitations and successiveness. In a Conditional Order dated October 31, 2005, and filed November 2, 2005, the Honorable Doyet A. Early, III, found that the application should be dismissed based on the statute of limitations and successiveness; Applicant was given twenty days in which to respond. After receiving no response to the Conditional Order, Judge Early signed a Final Order dismissing the application on May 15, 2006 and filed on May 17, 2006. Applicant appealed, and the appeal was dismissed by written Order on May 15, 2008. The Remittitur was sent on June 2, 2008.

Applicant next filed a third post-conviction relief application on May 19, 2009 (2009-CP-05-0097). Applicant set forth the following grounds for relief:

1. Lack of Subject Matter Jurisdiction; and
  - a. "The court of General Sessions never had jurisdiction to hear my particular case, because my case was never properly waived and adjudicated from the family court to the court of General Sessions. The reviewing trial court judge 'did not' ascertain that 'All' pertinent documentation was included with the Family Court's waiver order. The family court judge Peter R. Nuessle failed to include a 'statement of reason's motivating waiver' and the reviewing trial court judge Luke N. Brown overlooked this fact by making the waiver order part of the record (T.Tr. pg. 23, lines 22-25) instead of thoroughly reviewing it. This deprived the applicant of due process twice because the waiver hearing did not measure up to essentials of due process and

fair treatment and again because the trial court did not undertake a meaningful review of transfer from the family court, required by due process. Infants 68.7 (2)(4), 68.8. Applicants due process rights as a minor were violated and the applicant contends that his case is of a class over which the circuit court could not preside. U.S.C.A. Const. Amend. 14.”

2. Ineffective assistance of counsel.
  - a. “Guardian ad litem counsel was ineffective and his performance was deficient and fail below professional norms, because he did not file an appeal to the family court judge’s waiver decision which left applicant abandoned at a critical stage of the proceeding and prejudice the applicant at later proceeding. Miller vs. South Carolina, 309 F.Supp. 1287; Moore vs. South Carolina, 244 S.C. 102; Sigler vs. Bird, 354 F.2d 694. If guardian ad litem counsel had appealed the family court judge’s decision to transfer jurisdiction, applicant believes with certainty that his sentence and conviction would have been very different. Applicant’s two trial counsel’s were ineffective and their performance were deficient and fail below professional norms because they never objected to or challenged the trial court’s acceptance of the family court waiver of jurisdiction order without properly reviewing it first. They were also ineffective and deficient for failing to inform applicant that he had the right to challenge and appeal both the family and trial court’s decision regarding the waiver order before the start of trial. If not for trial counsel’s incompetence and ineffectiveness in informing applicant and challenging these issues applicant believes that the outcome of his conviction and sentence would have been different.”

On September 23, 2009, the Respondent made its Return and Motion to Dismiss based on the statute of limitations, successiveness, and *laches*. In a Conditional Order dated September 29, 2009, and filed October 8, 2009, the Honorable Doyet A. Early, III, found that the application should be dismissed based on the statute of limitations and successiveness; Applicant was given twenty days in which to respond. After receiving no response from Applicant, Judge Early signed a Final Order dismissing the application on April 5, 2013.

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Involuntary guilty plea;

- a. "The trial judge held a Blair hearing and found that Applicant was competent to stand trial. He based his decision on a report from a clinical interview that was held more than six months earlier wherein the interviewer in the report state, she found no identifiable mental illness. The error was that there were (5) five other psychologist, who were independent to the State, who found that Applicant did have substantial mental illnesses. Therefore, the psychologist report from the clinical interview is unreliable and should not have been considered without the trial judge having the (5) five other favorable report's before him."
2. Ineffective assistance of counsel;
  - a. "...failing to object to the trial judge relying on a single report from the clinical interview when there were in fact, (5) five other reports which were conclusively contrary and favorable to the defense."
  - b. "...failing to subpoena the (5) five favorable psychologist to the Blair hearing to testify on our behalf of their findings of mental illnesses, which said testimony would have conclusively supported the necessity of my needing a current psychological evaluation to determine my competency or incompetency to stand trial or take plea.
3. Ineffective assistance of appellate counsel; and
  - a. "After applicant's direct appeal was denied (conviction affirmed) Applicant's appellate counsel informed me that I had one year to file PCR and Federal Habeas Corpus without explaining to me that I was suppose [sic] to file the PCR first. I believed that I could file either so I filed a Habeas Corpus which was later dismissed because I failed to exhaust all of my state remedies. When I filed my first PCR application the State objected, stating I had exceeded my one year statute of limitation."
4. Ineffective assistance of post-conviction relief counsel.
  - a. "...initial PCR counsel failed to adequately and properly raise grounds and properly develope [sic] the record for review of my case by higher reviewing courts."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other

proceeding 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 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 were or could have been raised in the proceedings based on Applicant's prior applications 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).

This Court finds, further, that this Application for Post-Conviction Relief should 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 (2007). S.C. Code Ann. §17-27-45(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

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all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on March 20, 1997. The Remittitur was sent following the Applicant's unsuccessful appeal on April 1, 1999. The Applicant was therefore required to file his application on or before April 2, 2000. This Application was filed on March 1, 2013, which was almost thirteen years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) 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."

Additionally, this Court finds that Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior post-conviction relief counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive post-conviction relief application under ' 17-27-90.'" Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation. . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Here, Applicant was afforded appellate review of his both his initial and subsequent post-conviction relief applications. Therefore, this Court finds this application should be summarily dismissed for failure to state a claim upon which relief can be granted.

Additionally, this Court finds this application is barred under the doctrine of *laches*. The Applicant has filed this application sixteen years after he was convicted. The doctrine of *laches* bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to

respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. It is questionable whether the attorneys will remember the case and whether their files will be available. If the Applicant had sought post-conviction relief within a reasonable time after his trial, neither of these problems would exist. Therefore, the Court intends to summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

Further, this Court finds this application is barred under 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.

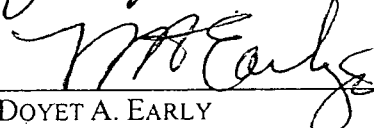
The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in prior post-conviction relief proceedings. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court intends to summarily dismiss these claims as barred by *res judicata*. Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, failure to state a claim, and for being successive.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application

with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Bamberg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Daniel Gourley, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 2<sup>nd</sup> day of July, 2013.

  
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DOYET A. EARLY  
Chief Judge for Administrative Purposes  
Second Judicial Circuit

Bamberg, South Carolina