

EXHIBIT

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July 31, 2013
Received

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

Frederick L. Howell, #310890,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Case No. 2013-CP-38-0201
0183

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed February 3, 2013. In its return, the Respondent requested the application be summarily dismissed.

PROCEDURAL HISTORY

This Court has before it a copy of the records of the Orangeburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, appellate records and prior PCR records. Applicant was true bill indicted at the June 2005 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2005-GS-38-0710). Applicant was represented by Richard Gustafson, Esquire. On August 18, 2005, the Applicant appeared before the Honorable James C. Williams, Jr., where he pled guilty as indicted. Judge Williams sentenced Applicant to confinement for twenty-two years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. (State v. Howell, Op. No. 07-UP-102 (S.C. Ct. App. filed March 6, 2007.) Applicant's Petition for Rehearing was denied on April 24, 2007. Applicant filed a Petition for Writ of Certiorari in the

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Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

South Carolina Supreme Court. The Petition was withdrawn and dismissed by an Order dated July 19, 2007. The Remittitur was sent on July 24, 2007.

The Applicant filed his first application for post-conviction relief on May 31, 2007 (C.A. No. 2007-CP-38-0690). In his application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel
 - a. "Failure to challenge the burglary first indictment"
 - b. "Defense counsel failed to procure alibi witnesses."
 - c. "Failed to adequately investigate and introduce evidence."
2. Subject-matter jurisdiction.
 - a. "Failure to challenge the burglary first indictment."

An evidentiary hearing into the matter was convened on June 8, 2009 at the Orangeburg County Courthouse. The Applicant was present and represented by Clarissa W. Joyner, Esquire. By written Order filed January 5, 2010, the Honorable Diane S. Goodstein denied and dismissed the application with prejudice.

The Applicant filed a second application for post-conviction relief on January 28, 2010 (C.A. No. 2010-CP-38-0147). In this application, Applicant alleged that he was being held in custody unlawfully based on claims of:

1. Ineffective assistance of post-conviction relief counsel;
2. Newly Discovered Evidence (Finger Print Analysis); and
3. Fraud upon the court (Falsified and fabricated evidence).

By written Order filed on August 17, 2012 the Honorable Edgar W. Dickson dismissed the application as it was successive, beyond the statute of limitations, and for failure to state a claim of which relief could be granted. Applicant appealed the dismissal of this second application, which was dismissed by the South Carolina Supreme Court on January 25, 2013. The Remittitur was sent on February 13, 2013.

On November 20, 2012, Applicant filed a federal Petition for Habeas Corpus. Howell v. Warden of Liber Corr. Inst., C.A. No. 4:12-2808-JFA-TER. Respondent filed its Return on April 15, 2013. This action is currently pending.

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

1. "PCR counsel failed to file and serve notice of appeal"
2. "Appeal was not knowingly and intelligently waived"
3. "Ineffective assistance of PCR counsel."

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 two applications 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 a sufficient reason why he could not have raised his current allegation regarding a lack of appeal of the denial of his first application for post-conviction relief in his second application; 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, 305 S.C. 448, 409 S.E.2d 392.

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. 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 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 he challenges in this Application on August 18, 2005. This Application was filed on February 3, 2013, which was more than seven 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) (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, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

Additionally, this Court finds this application is barred under the doctrine of *laches*. The Applicant has filed this application over seven 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 plea, 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.

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 (20) 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, factual or legal, with the Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Megan E. Harrigan, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17th day of June, 2013.



EDGAR W. DICKSON
Chief Judge for Administrative Purposes
First Judicial Circuit

Orangeburg, South Carolina.