



crack cocaine, all sentences concurrent. Applicant did not appeal his plea or sentence. He was released from custody on these charges in November 2002.

**B. First Application**

Applicant subsequently filed his first PCR regarding these charges on May 26, 1996 (1996-CP-13-132). In his first application, Applicant alleged the following grounds for relief:

1. Ineffective assistance of counsel.
2. Never given a preliminary hearing.
3. Denied due process.

Respondent filed its return on September 18, 1996. On June 12, 1998, an evidentiary hearing was held before the Honorable Henry F. Floyd, at which Applicant was present and represented by C. Anthony Harris. Applicant voluntarily withdrew his application. By order served July 17, 1998, Judge Floyd dismissed Applicant's PCR with prejudice. Applicant did not appeal the dismissal of his first application.

**C. Second Application**

Applicant filed a second PCR regarding these charges on February 11, 1999 (1999-CP-13-45). In his second PCR application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
2. Never given a preliminary hearing.
3. Denied due process.
4. Involuntary guilty plea.
5. Prosecutorial misconduct.
6. Excessive bail.
7. Failure to inform of right to appeal.
8. Illegal search and seizure.
9. Failure to call psychiatrist.
10. Failure to observe that he was under impairment of medication.
11. Counsel refused to speak to witnesses.

12. Conflict of interest.

This Court convened a hearing into the application on September 11, 2001 at the Darlington County Courthouse. Applicant was present at the hearing and represented by Thomas Ingram, Esquire. The Court denied the second PCR by order filed November 2, 2001. Applicant appealed the denial of this PCR, but the Supreme Court dismissed the appeal as premature because it was filed before the Court issued his written order. Applicant did not file a new appeal once the final order was issued.

**D. Third Application**

Applicant filed his third PCR regarding these charges on December 3, 2001 (2001-CP-13-402). In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
  - a. "My attorney Thomas Ingram Jr. did not bring up any of my allegations listed in my Newly Discovered Evidence .... Then he refuse to help me appeal the hearing.

The Honorable John M. Milling convened an evidentiary hearing into the third PCR on September 9, 2002, at the Darlington County Courthouse. Applicant was present at the hearing and represented by Kenneth Martin, Esquire. By order dated November 12, 2002, Judge Milling dismissed Applicant's third PCR as successive and untimely. Applicant filed a notice of appeal in the circuit court on September 13, 2002. However, no notice of appeal was filed with the appellate courts.

**II. CURRENT APPLICATION**

In his current application for post-conviction relief, Applicant alleges he is entitled to PCR because:

1. "Petitioner was denied his right to appeal his P.C.R. denial."

Applicant alleges his counsel on the third PCR indicated an appeal would be filed, but Applicant only learned in 2013 that no appeal was filed. Respondent made a Return and Motion to Dismiss on December 30, 2013, asking this Court to dismiss the Application as barred by the doctrine of laches, untimely, and successive.

### **III. FINDINGS OF FACT AND CONCLUSION OF LAW**

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." The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent's motion to dismiss:

#### **A. Laches**

The Court finds this application should be dismissed based on the doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). 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." *Id.* (citing Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979)).

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

Supreme Court has found the doctrine of laches may be raised as a defense to an Austin claim. *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002).

Applicant filed this current application over ten (10) years after the time for filing an appeal from his PCR had expired. Applicant's delay has resulted in prejudice to both Applicant and Respondent: Records and exhibits from the hearing may no longer be available. The court reporter's recording of the hearing would have been destroyed five (5) years ago. See Rule 607, SCACR (court reporters only required to retain tapes for five years after proceeding). Furthermore, the Court agrees with Respondent's contention that Applicant's current challenge is, at least in part, attributable to his having been barred from filing any further collateral attacks on the convictions for which he is currently incarcerated.<sup>2</sup> See In re: Billy Lee Lisenby, S.C. Sup. Ct. Order dated July 16, 2012. Therefore, the Court finds summary dismissal is appropriate.

**B. Failure to Timely File**

The Court further finds this application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-45(a) provides that:

“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.”

This statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996).

---

<sup>2</sup> The Court notes Applicant filed five (5) state actions and six (6) federal actions challenging his present incarceration.

Applicant pled to the offenses he challenges in this application on November 29, 1995. He was therefore required to file this application before November 29, 1996. This application was filed on June 24, 2013, which was well beyond the time that the statutory filing period had expired. Therefore, the Court finds summary dismissal is appropriate.

### **C. Successive Application**

The Court further finds this application should be dismissed 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, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires that:

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, 450, 409 S.E.2d 392, 394 (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. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. The applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Applicant alleges he is entitled to an appeal of his third PCR which alleged ineffective assistance of PCR counsel. However, there is no right to effective assistance of collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Furthermore, Applicant voluntarily withdrew his first PCR regarding these charges. His voluntary withdrawal knowingly and intelligently waived his right to mount a further collateral attack on this conviction. Therefore, Applicant has failed to meet his burden of showing he should be allowed to proceed with a successive application. Accordingly, Court finds summary dismissal is appropriate.

#### **IV. CONCLUSION**


The Court finds that the record before it creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

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 it should not become final. Applicant shall file any reasons he may have with the Chesterfield County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Joshua L. Thomas, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211

*[signature page follows]*

AND IT IS SO ORDERED this 2nd day of January, 2013.

  
\_\_\_\_\_  
THE HONORABLE PAUL M. BURCH  
Chief Judge for Administrative Purposes  
Fourth Judicial Circuit

Chestnut, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Billy Lee Lisenby, Jr., 200273

Plaintiff

v.

State Of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.  
2013-CP-13-0334

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

1. The Cop...  
 Judge of S...  
 CLERK OF COURT  
 CHESTERFIELD CO

Plaintiff's Attorney: Billy Lee Lisenby, Jr., 200273, Bar No. Address: Lee CI 990 Wisacky Hwy Bishopville SC 29010 phone: fax: e-mail: other:	Defendant's Attorney: Joshua L. Thomas, Bar No. 100777 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
--	--

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**

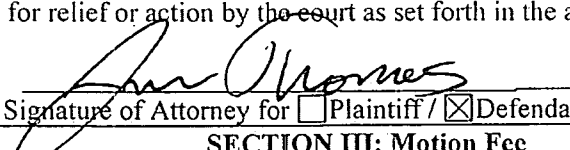
Nature of Motion: \_\_\_\_\_

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

December 30, 2013  
 Date submitted

**SECTION III: Motion Fee**


PAID - AMOUNT: \_\_\_\_\_  
 EXEMPT:

(check reason)

Rule to Show Cause in Child or Spousal Support  
 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, SCRCF)  
 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: *Exempt*

  
 JUDGE

CODE: *2048* Date: *1/2/14*

**CLERK'S VERIFICATION**

Date Filed: \_\_\_\_\_

Collected by: \_\_\_\_\_

MOTION FEE COLLECTED: \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \_\_\_\_\_

2014 JAN 9 AM 11 12  
 FAYE L. SCILENS  
 CLERK OF COURT  
 CHESTERFIELD COUNTY, SC