

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS)
NINTH JUDICIAL CIRCUIT)

Stephen J. Green,)
S.C.D.C. No. 259765,)

2011-CP-08-1841

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CLERK OF COURT
BERKELEY COUNTY, SC

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 (PCR) application filed by Stephen J. Green (Applicant) on July 1, 2011. The State (Respondent) made its return, requesting the application be summarily dismissed.

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Applicant was indicted during the December 1998 and March 1999 terms of the Berkeley County Grand Jury for assault and battery of a high and aggravated nature (1998-GS-08-1854), armed robbery (1998-GS-08-1855), burglary in the first degree (1998-GS-08-1861), kidnapping (1998-GS-08-1857), and criminal sexual conduct in the first degree (1999-GS-08-0391).¹ Applicant proceeded to trial, and a jury found him guilty as indicted. J. Mitchell Lanier, Esquire, represented Applicant. On July 14, 1999, the Honorable Daniel F. Pieper sentenced Applicant to life imprisonment. Applicant

¹ Applicant was also indicted during the December 1998 term of the Berkeley County Grand Jury for burglary in the first degree (1998-GS-08-1859) and assault and battery with intent to kill (1998-GS-08-1860). Applicant proceeded to trial and a jury found him guilty of burglary in the first degree and the lesser-included offense of assault and battery of a high and aggravated nature. On November 16, 1999, the Honorable R. Markley Dennis, Jr. sentenced him to life imprisonment.

appealed, and following an *Anders*² brief, the South Carolina Court of Appeals dismissed his appeal. *State v. Green*, Op. No. 2000-UP-740 (S.C. Ct. App. filed Dec. 5, 2000). The remittitur was issued on February 28, 2001.

First PCR Application: 2001-CP-08-2537

Applicant filed his first PCR application on December 3, 2001, alleging the following grounds for relief:

1. Ineffective assistance of counsel for counsel's failure to argue mercy.
2. Lack of subject matter jurisdiction.

Respondent filed its return on May 8, 2002. Edward Brown, Esquire, represented Applicant. An evidentiary hearing was held on June 3, 2002, where Applicant amended his application to include the following ground for relief:

1. Ineffective assistance of counsel for counsel's failure to call or contact certain alibi witnesses.

By order filed July 10, 2002, the Honorable R. Markley Dennis, Jr. denied and dismissed the application.

Second PCR Application: 2004-CP-08-2262

Applicant filed his second PCR application on October 20, 2004, challenging all of his convictions. *See also* Footnote 1. He alleged the following grounds for relief:

1. Lack of subject-matter jurisdiction.

Respondent filed its return on February 18, 2005, and supplemental return on October 3, 2005. An evidentiary hearing was held on October 25, 2005. Andrew S. Halio, Esquire, represented Applicant. On November 29, 2005, the Honorable Deadra L. Jefferson denied and dismissed the application.

² *Anders v. California*, 386 U.S. 738 (1967).

proof 2

Applicant appealed, and the South Carolina Court of Appeals denied the petition for a writ of certiorari on August 3, 2007. The remittitur was issued on August 21, 2007.

First Federal Habeas Corpus Petition: 95-cv-1666

Applicant filed a pro se federal petition for a writ of habeas corpus on July 28, 2008, challenging the dismissal of his 2004 PCR application and alleging:

1. The post-conviction relief court erred by relying on S.C. Code § 17-25-45 in dismissing his application with regard to the October 1999 convictions.
2. The October 2004 application was not successive to the 2001 PCR challenging the July 1999 convictions. All issues raised are subject matter jurisdiction issues and can be raised at any time.
3. The post-conviction relief court erred by ruling Applicant's Rule 3 challenge was barred by *res judicata*.

Respondent filed its return and motion for summary judgment on December 5, 2008. The Honorable Paige J. Gossett, United States Magistrate Judge, issued a report on August 5, 2009 recommending Respondent's motion for summary judgment be granted. The Honorable Henry F. Floyd, United States District Judge, granted Respondent's motion for summary judgment and dismissed the petition with prejudice on August 25, 2009.

II.

Applicant filed his current application on July 1, 2011, and amended application on November 7, 2012, alleging the following grounds for relief:

1. The Applicant seeks resentencing on all counts on the ground that the sentences he received on these judgments may have been influenced by the fact that the Applicant had additional most serious charges pending for trial on which it was widely accepted at the time he would face a mandatory life sentence and further, that the sentencing judge may not have given the Applicant the sentences he imposed had they not been run concurrent with a life sentence.
2. The Applicant should be re-sentenced on his judgments and sentences entered on July 14, 1999, where a recent decision by

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the United States Supreme Court found it unconstitutional to sentence a minor to life without the possibility of parole.

3. The Applicant filed a Post-Conviction Relief on the judgments addressed herein for which sentence was imposed on July 14, 1999. That application was denied by Order dated July 10, 2002, however the Applicant's right to appeal from said order was not preserved by his PCR counsel.

Before this Court are the Berkeley County Clerk of Court's records regarding the subject convictions, South Carolina Department of Corrections records, appellate records, and Applicant's previous and current PCR records.

III.

This Court finds this current PCR application must be summarily dismissed because it is successive to his previous applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code (2014) 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.

Under this statute, successive post-conviction relief applications are prohibited unless an applicant can present 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.* at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing that he could not have previously raised the allegations. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

This Court finds Applicant failed to establish any sufficient reason why he did not raise his current grounds for relief in a previous application. This Court must summarily dismiss Applicant’s current application because it is successive to his previous applications.

IV.

This Court also finds this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014). Section 17-27-45(a) states:

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 held the one-year 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). Applicant was convicted of the offenses he challenges on July 14, 1999. The remittitur from his appeal was issued on February 28, 2001. Therefore, Applicant was required to file his PCR application on or before February 28, 2002. Applicant filed this application on July 1, 2011, **more than nine years** after the statutory filing period expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period ends. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2003).

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Section 17-27-70(c) authorizes this 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 this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

Applicant claims he is entitled to re-sentencing due to the recent United States Supreme Court opinion, *Graham v. Florida*, 560 U.S. 48 (2010), which forbids the imposition of a life imprisonment without the possibility of parole (LWOP) sentence for a non-homicide crime committed by a juvenile. This Court finds Applicant's claim lacks any merit because Applicant was not a juvenile when he committed the underlying offense. This Court finds this claim must be summarily dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. *See Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (stating that when deciding a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief).

Graham does not apply to Applicant. Applicant states in his application that on the date of the underlying offense, March 9, 1998, he was eighteen years, four months, and ten days old. PCR App. p. 3. Applicant further states, "While the Applicant was over 18 years of age at the time of his crimes, he was *barely so*." *Id.* at 4. According to his SCDC records and sentencing sheets, Applicant's birthday is November 19, 1979. Applicant was eighteen years old and not a juvenile when he committed the offenses for which he is now serving life imprisonment. *Graham* is inapplicable to Applicant and this Court must summarily dismiss this claim.

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VI.

Finally, Applicant claims his PCR counsel did not preserve his right to appeal the denial of his first PCR application. This Court finds this claim lacks merit and is barred by the doctrine of laches.

The South Carolina Supreme Court has held that an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). If an applicant wishes to seek appellate review, PCR counsel must file a notice of appeal, continue representation until relieved, and assist an indigent applicant in obtaining representation by the Office of Appellate Defense. See Rule 71.1(g), SCRPC. Even though Applicant is entitled to appellate review, Applicant failed to allege any facts showing that he requested and was denied the opportunity to seek appellate review. Applicant merely states that his right to appellate review was not preserved by his PCR counsel. Applicant's *Austin* claim lacks merit and warrants summary dismissal.

Further, this Court finds this third and current application is successive. Although Applicant did not raise this *Austin* claim in his second PCR action, he could have raised this claim in his second action. See *Bray v. State*, 366 S.C. 137, 141, 620 S.E.2d 743, 745 (2005) (stating that "although petitioner did not raise an allegation that he was denied the right to review his first PCR application in his second PCR action, he could have raised this allegation"). A defendant has the procedural right to one fair bite at the apple, a right that includes the right to file a direct appeal and one PCR application. *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 583 (2002). Applicant was granted the right to file a direct appeal and two PCR applications, including an appeal of his 2004 PCR application. Thus, Applicant's *Austin* claim is impermissibly successive and must be summarily dismissed.

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Further, this Court finds Applicant's *Austin* claim is barred by the doctrine of laches. Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988)).

Applicant filed this application **more than eight years** after the denial of his first PCR application. Applicant offered no explanation for the delay in asserting his *Austin* claim. To ensure finality of litigation, our courts require reasonable diligence in pursuing relief. *Bray*, 366 S.C. at 139, 620 S.E.2d at 745 (finding that even though the PCR court found petitioner did not knowingly and intelligently waive his right to appellate review of the denial of his first PCR application, laches barred his subsequent action, filed seven years after the denial of his first PCR application). 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 v. State*, 276 S.C. 282, 283, 277 S.E.2d 890, 890-91 (1981). Applicant's delay greatly prejudices Respondent. Due to Applicant's neglect in filing his *Austin* claim more than eight years after the order of dismissal from his first application, a full transcript of Applicant's first post-conviction hearing may no longer be available.³ This Court finds Applicant's *Austin* claim is barred by the doctrine of laches and summarily dismisses this claim.

³ Rule 607 of the South Carolina Appellate Court Rules states that transcripts must be retained for a period of five years. If a transcript is not ordered within the five-year period, the records are destroyed.


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VII.

Pursuant to section 17-27-70(b) of the South Carolina Code, this 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 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 Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Elizabeth H. Neyle, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 5th day of January, 2015.


R. MARKLEY DENNIS, JR.
Chief Judge for Administrative Purposes
Ninth Judicial Circuit

Windsor Corner South Carolina

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ALAN WILSON
ATTORNEY GENERAL

December 19, 2014

The Honorable R. Markley Dennis, Jr.
Post Office Box 1800
300 B California Avenue
Moncks Corner, SC 29461

Re: Stephen J. Green, #259765 v. State of South Carolina
2011-CP-08-1841

Dear Judge Dennis:

Enclosed please find a proposed original **Conditional Order of Dismissal** in the above-captioned case. If this Order meets with your approval, please sign it and return it to our office so that I can file it with the Berkeley County Clerk of Court

Sincerely,

Elizabeth W. Neyle
Assistant Attorney General

EHN/sbm
Enclosures

cc: Tara D. Shurling, Esquire