

March 29, 2017

State of South Carolina
Court of Appeals
Attorney Jenny Abbott Kitchings
Post Office Box 11629
Columbia, South Carolina 29211

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APR 04 2017

SC Court of Appeals

Dear Appellate Court:

On the date of March 27, 2017, I received a letter from the courts stating a return and a motion to dismiss on Case #2015CP-37-0558. There was no hearing held on this case and it's the first time we have heard anything concerning this case. Also, a motion to dismiss Appellate Case #2016-001124 asking for it to be dismissed. This case is based on the statutory limitation.

The state case shows there is an active case that voids this case 2016-001124. Clearly the state and sheriff department cannot have it both ways. We are asking the justice department to come in and take a look at this case. Based on the fact the respondent failed to address any of the issues on the original brief.

Clearly there is a conflict of interest between the Sheriff department and Attorney General Office. The records clearly shows that we asked for a hearing on the PCR issues. Also it eliminates the defendant arguement that the statue of limitation was over. Because the case was never heard in the lower Court.

We are asking for this case to be put in abenancy. We are in contact with the justice department to move this case in the public arena based on the failure to turn over all the evidence in this case.

Sincerely
Dan Temple

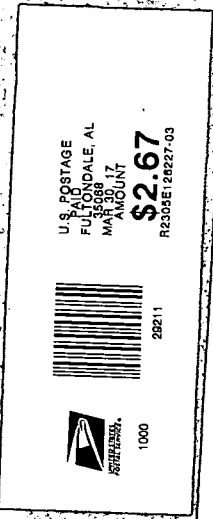
P.S. If there is a fee for the abenancy we will send it.

cc: Doyle, Tate + McDade, PA
Lindsey A. McAllister, AAG

Anna Temple
P.O. Box 901
Fultondale, AL 35068

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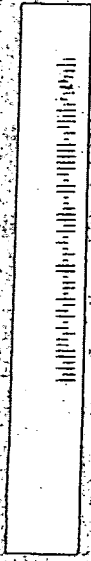
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c.c. The State of South Carolina Court Appeals
Attorney: James Albett Hitchings
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals



STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Dan Temple Jr.,)
S.C.D.C. No. 254316,)
Applicant,)

Case No.: 2015-CP-37-00558

v.)

RETURN AND MOTION TO DISMISS

State of South Carolina,)
Respondent.)

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In response to the application for post-conviction relief filed by Dan Temple Jr. (Applicant) on July 20, 2015, Respondent would show this Court:

I.

Applicant was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the June 1998 term of the Oconee County Grand Jury for distribution of crack cocaine (1998-GS-37-00672), and distribution of crack cocaine within proximity of a school (1998-GS-37-00673).¹ Daniel R. Day Jr., Esquire represented Applicant. Applicant proceeded to trial before the Honorable H. Dean Hall and a jury. The jury found Applicant guilty as indicted on October 29, 1998. Judge Day sentenced Applicant to imprisonment for concurrent terms of 20 years and 15 years, respectively.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esquire filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion. State v.

¹ Applicant also indicates his desire to challenge a second count of distribution of crack cocaine within proximity of a school (1998-GS-37-00671). However, the public index indicates this charge was *nolle prosequi* and Respondent can find no sentence under this indictment number.

Temple, Op. No. 2000-UP-729 (S.C. Ct. App. filed Nov. 29, 2000). Applicant filed a Petition for Rehearing, and the Court of Appeals filed an Order Withdrawing Original Opinion, Substituting a New Opinion, and Denying the Petition for Rehearing on January 17, 2001. On January 25, 2001, the Court of Appeals refiled an opinion in which it dismissed the appeal and granted counsel's motion to be relieved. State v. Temple, Op. No. 2000-UP-729 (S.C. Ct. App. filed Jan. 25, 2001). On February 23, 2001, Applicant filed a *pro se* Petition for Writ of Certiorari in the Supreme Court of South Carolina, which denied it in an unpublished order filed June 7, 2001. The Remittitur was issued on June 8, 2001.

2001-CP-37-00290

Applicant filed his first application for post-conviction relief on June 14, 2001 (2001-CP-37-00290). He alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel;
3. Lack of subject matter jurisdiction;
4. Due process violations; and
5. Conspiracy by the trial and appellate courts.

Respondent made its return on November 7, 2002, and an evidentiary hearing into the matter was convened on October 31, 2005, before the Honorable James C. Williams, Jr. Applicant was present at the hearing and represented by Rodney Richey, Esquire. Salley W. Elliott, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and Daniel R. Day, Esquire, also testified. By written order dated January 18, 2006, and filed January 26, 2006, Judge Williams denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Tara Dawn Shurling, Esquire on Applicant's behalf. Respondent filed its Return on or about

June 11, 2007. On January 10, 2008, the Supreme Court of South Carolina denied Applicant's petition by letter order. The Remittitur was issued on January 28, 2008.

0:02-00458-TLW-BM

Applicant filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on February 25, 2002 (C.A. No. 0:02-458-TLW-BM). In his Petition, Applicant set forth the following grounds for relief (verbatim):

1. "The petitioner was arrested without a valid arrest warrant and kept in confinement 104 days without a preliminary hearing to even establish any probable cause for being held unconstitutionally for 104 days without request preliminary hearing and the arrest was not based upon sufficient evidence, because the chain of physical custody was broken, and the affiants affidavits was defected on it's face, and the trial courts lacked subject matter of jurisdiction by a violation of my 14th and 4th amendment right's along with Federal Statutes and provisions of the constitution through my due process clause of my 14th amendment."
2. "The prosecution violated petitioners right by with holding information that the Lab analysis said 4.32 grams and not 0.28 grams. And this is vindictive prosecution because the petitioner was convicted for a felony of distribution with in a school zone and 0.4 grams is insufficient to charge with distribution, it should have been simple possession which is a [misdemeanor] and a fine, so the trial courts lack subject matter of jurisdiction once again, along with prosecutors miss conduct in his [prosecution] of my case."
3. "Ineffective counsel, petitioners counsel violated his 14 and 6 amendment rights, for failing to investigate and Squash the defective indictment on its face and move for a dismissal because of lack of subject matter jurisdiction along with defective arrest warrants and affidavits not establishing probable cause, and by refusing me my preliminary hearing I signed for, but never received. The tape never showed or said anything about me making no such drug transaction at all."
4. "The State enhanced the charge to second offense S.C. § 44-53-375 and S.C. § 44-53-445 felony. When this was my first charge for distribution. Enhancing to a 2nd offense with no notice of service to appellant informing him of the prior conviction. The State took out the second state charge subsequently to the current conviction and maliciously added that charge to for the purpose of enhancing the present conviction. The law of this state requires the solicitor to give the defendant advanced notice not less than 10 days before trial. In the instant case, the solicitor did not meet this requirement."

Respondent filed its Return and Motion for Summary Judgment on May 10, 2002, arguing that Applicant had not yet exhausted his state court remedies. The Honorable Bristow Marchant, United States Magistrate Judge, issued on June 24, 2002 a Report and Recommendation that Respondent's motion for summary judgment be granted. The Honorable Terry L. Wooten, United States District Judge, denied Applicant's Petition without prejudice on February 24, 2003, and accepted the Report and Recommendation for summary judgment.

9:08-00692-TLW-BM

Applicant subsequently filed his second *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on February 27, 2008 (C.A. No. 9:08-692-TLW-BM). In his Petition, Applicant set forth the following grounds for relief:

1. Ineffective Assistance of Counsel
2. Violation of Due Process
3. Violation of 6th Amendment Rights
4. Subject Matter Jurisdiction
5. Cruel and Unusual Punishment; Actual Innocence

Respondent filed its Return and Motion for Summary Judgment on August 11, 2008. The Honorable Bristow Marchant, United States Magistrate Judge, issued on February 12, 2009 a Report and Recommendation that Respondent's motion for summary judgment be granted. Temple v. SCDC Dept. of Corr., 9:08-692-TLW-BM, 2009 WL 764315 (D.S.C. 2009) (incorporated in district court order). The Honorable Terry L. Wooten, United States District Judge, denied Applicant's Petition on March 19, 2009, and accepted the Report and Recommendation for summary judgment. Id. Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals, which dismissed Applicant's appeal on November 3, 2009, for want of a certificate of appealability. Temple v. SCDC Dept. of Corr., 349 Fed.Appx. 866 (4th Cir.

2009). Applicant thereafter filed a *pro se* Petition for Writ of Certiorari in the Supreme Court of the United States, which was denied June 1, 2010. Temple v. Riley, 130 S.Ct. 3365 (2010).

2010-CP-37-00005

Applicant filed his second application for post-conviction relief on January 5, 2010 (2010-CP-37-00005). He alleged the following grounds for relief in his application:

1. "Subject Matter Jurisdiction, Successive Application"
2. "Ineffective Assistance of Counsel"
3. "Suppression of Evidence"

Respondent made its return and motion to dismiss on March 3, 2010, arguing the application was successive and untimely. On November 21, 2011, the Honorable R. Lawton McIntosh issued a Conditional Order of Dismissal. The Honorable J. Cordell Maddox, Jr. issued a Final Order on February 10, 2012, dismissing the matter with prejudice.

Applicant filed a timely notice of appeal and a *pro se* Petition for Writ of Certiorari in the Supreme Court of South Carolina. The Supreme Court dismissed Applicant's petition for failing to show an arguable basis for appeal in an order filed April 24, 2012.

9:13-02207-TLW-BM

Applicant filed his third *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on September 13, 2013 (C.A. No. 9:13-02207-TLW-BM). The Honorable Bristow Marchant, United States Magistrate Judge, issued that same day a Report and Recommendation that the successive petition be dismissed without requiring Respondent to file a return. Temple v. South Carolina, 9:13-02207-TLW-BM, 2013 WL 5946114 (D.S.C. 2013)(incorporated in district court order). The Honorable Terry L. Wooten, United States District Judge, denied Applicant's Petition on November 6, 2013 and accepted the Report and Recommendation and dismissed the petition. Id. Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals. The

Fourth Circuit dismissed Applicant's appeal on April 1, 2014. Temple v. South Carolina, 564 Fed.Appx. 40 (4th Cir. 2014). Applicant thereafter filed a *pro se* Petition for Writ of Certiorari in the Supreme Court of the United States, which was denied October 6, 2014. Temple v. South Carolina, 135 S.Ct. 310 (2014).

II.

In his third and current post-conviction relief application, Applicant's sixth collateral action, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsels"
2. "Due process. Brady violation, Fraud being Place court."
3. "Subject Matter Jurisdiction"

Applicant requests relief as follows:

- "I am seek to have my case vacate base upon Fraud being place upon the court and the Due process clause of the 4th, 5th, 6th, and Fourteenth Amendment of the South Carolina and U.S. Constitution."

Attached to and incorporated herein are the Oconee County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final orders of Applicant's previous PCR and federal habeas corpus actions, and the records of this current PCR action. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

The application 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. Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

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). 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) 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.”

Applicant was convicted on October 29, 1998, and the remittitur from his direct appeal issued on June 8, 2001. The current application was not filed until July 28, 2015—well after the one-year statutory filing period expired. Therefore, the application should be summarily dismissed as barred by the statute of limitations.

IV.

The application should also be dismissed as barred by the equitable 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). Requiring reasonable diligence “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. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Bray v. State, 366 S.C.

137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “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; delay alone in assertion of right does not constitute laches.” Id.

Applicant seeks post-conviction relief more than 18 years after his conviction. 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 review the applicant’s claims. McElrath, 276 S.C. at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. See, e.g., Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy “would undoubtedly be futile considering the passage of over ten years' time” when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, this application should be summarily dismissed as barred by the equitable doctrine of laches.

V.

The application should be summarily dismissed because it is successive to Applicant’s previous PCR application. 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 earlier 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 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 forbidden unless an applicant can indicate 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, 409 S.E.2d 392 (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 the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any 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, and the Court should dismiss the application as successive to Applicant's previous PCR application.

VI.

The application is similarly barred by 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.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant has repeatedly brought claims of ineffective assistance of counsel, lack of jurisdiction, and conspiracy against him—in no case has he prevailed. The finality of the previous Court rulings should be respected, and the application should be summarily dismissed as barred by the doctrine of *res judicata*.

VII.

Respondent denies each allegation not expressly admitted, qualified, or explained.

{Conclusion and signature on following page}

VIII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is untimely, barred by the equitable doctrine of laches, successive, and barred by the doctrine of *res judicata*.

Respectfully submitted,

ALAN WILSON
Attorney General

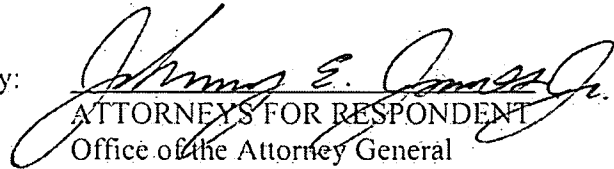
ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

JOHNNY E. JAMES JR.
Staff Attorney

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

27 March 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
)
)
DAN TEMPLE JR., #254316)
)
)
Applicant,)
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vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent,)
_____)

IN THE COURT OF COMMON PLEAS
2015-CP-37-0558

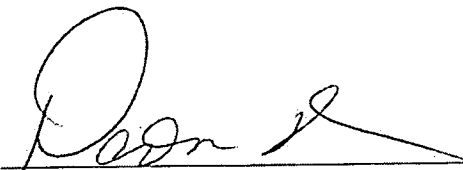
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1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Mr. Dan Temple Jr., #254316
809 Calvary Circle
Fultondale AL 35068**

DATED this the 27th day of March, 2017.


Deonna Rogers, Legal Assistant
For Respondent



ALAN WILSON
ATTORNEY GENERAL

March 27, 2017

The Honorable Beverly H. Whitfield
Clerk of Court, Oconee County
PO Box 678
Walhalla, SC 29691-0678

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APR 04 2017

SC Court of Appeals

Re: Dan Temple Jr., #254316 v. State of South Carolina
2015-CP-37-0558

Dear Mr. Whitfield:

Enclosed please find the original **Return and Motion to Dismiss** of the Respondent, with its accompanying attachments, in the above-captioned case, for filing in your office.

Sincerely,

Johnny E. James Jr.
Staff Attorney

JEJ/dgr
Enclosure

cc: Dan Temple Jr., #254316

*Anna Temple
P.O. Box 901
Sulphur, AL 35068*

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*cc: The State of South Carolina Court Appeals
Attorney: Nancy Abbott Kitchens
Post Office Box 11629
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