ALAN WILSON
ATTORNEY GENERAL

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JUL 05 2017
S.C. SUPREME COURT

June 30, 2017

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: *William Patrick Deaton vs. State of South Carolina*
Appeal from Lexington County
Appellate Case No. 2016-001883

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari and Proof of Service in the above-referenced matter.

Thank you for your assistance in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB:csm
Enclosures
cc: Laura R. Baer, Esq. (w/two copies of encls.)
The Honorable S. Rick Hubbard, III, Solicitor, Eleventh Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)

STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 05 2017

S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)

The Honorable J. Mark Hayes, Post-Conviction Relief Judge

William Patrick Deaton,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2016-001883

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED

I. Whether the PCR court erred in denying Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), where Petitioner did not receive first PCR counsel's letter enclosing the Order of Dismissal and instructing Petitioner to respond if he wanted to appeal such that Petitioner did not knowingly and intelligently waive the right to appeal?

II. Whether the PCR court erred in ruling that Petitioner's request to file a belated appeal of the denial of his prior PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), was barred by the equitable doctrine of laches where the state failed to plead the affirmative defense of laches?

(Petition, p. 1).

RESPONDENT'S COUNTER PRESENTATION OF QUESTIONS PRESENTED

I. Is there probative evidence supporting the PCR judge's determination Petitioner's testimony that he asked for an appeal immediately after his PCR hearing was not credible when counsel testified Petitioner did not ask for an appeal, and Petitioner presented alternate and inconsistent theories in his testimony along with presentation of and reliance upon vague and/or unauthenticated documents?

II. Is Petitioner's challenge to the PCR judge's finding that laches barred the action procedurally available for review when PCR counsel failed to challenge the finding in a Rule 59(e) motion? Even so, is there probative evidence supporting the PCR judge's determination that Petitioner's second PCR action was equitably barred by laches when Petitioner failed to carry his burden of proof to show he was otherwise entitled to relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court in Lexington County. A Lexington County Grand Jury indicted Petitioner in October 2009 for burglary first degree and armed robbery with a deadly weapon. (App. pp. 196-199). Assistant Public Defender Sarah A. Hahn represented Petitioner on the charges. (App. p. 1).[1]

After plea negotiations failed, the State called the armed robbery charge for trial on January 27, 2010. (App. p. 3; p. 51). The Honorable R. Knox McMahon presided. After selection of the jury, Petitioner informed the State that he wished to enter a guilty plea. The parties informed Judge McMahon and the judge held a hearing outside the presence of the jurors. (App. pp. 28-30). The judge, after a series of questions posed and answers received, found Petitioner's plea knowingly and voluntarily offered, with a sound basis of fact for the charge, and accepted the guilty plea to the armed robbery charge. (App. pp. 30-52). After hearing mitigation, Judge McMahon sentenced Petitioner to sixteen (16) years imprisonment. (App. p. 63).

The State called the remaining charge on January 29, 2010, also before Judge McMahon, at which time Petitioner again pleaded guilty as charged. Ms. Hahn similarly represented Petitioner in the plea proceedings. The judge again engaged in a series of questions to Petitioner to ensure the plea was voluntarily and intelligently offered. (App. pp. 68-75). Judge McMahon found the plea was voluntarily and intelligently offered, and also found "substantial factual basis"

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[1] The transcript of the General Sessions proceedings indicates Assistant Public Defender David M. Mauldin also appeared on Petitioner's behalf. However, the State indicated Ms. Hahn represented Petitioner, (App. p. 3), and Ms. Hahn subsequently testified at Petitioner's first PCR proceeding that she was appointed to represent Petition on the charges. (App. p. 112).

for the charge, before he accepted the guilty plea to burglary first degree. (App. p. 75). Judge McMahon withheld sentencing to allow Petitioner the opportunity to attempt to work with law enforcement to recover some of the stolen items. (App. pp. 77-80). The judge imposed a fifteen (15) year sentence in exchange for the assistance. (App. p. 200).

At a later reconsideration proceeding, Judge McMahon reduced the sixteen (16) year sentence for armed robbery to twelve (12) years. (App. p. 100; pp. 119-120). Petitioner did not appeal his pleas or sentences.

On December 14, 2010, Petitioner filed his first PCR action and made the following allegations:

(a) Mitigating facts never presented to court prior to sentencing;

(b) Defendant not competent to enter plea due to psycotropic medication.

(App. p. 84).

Aimee Zmroczek, Esq., represented Petitioner in the action. An evidentiary hearing was held August 15, 2012 before the Honorable Jeffrey Young. (App. p. 96). At the hearing, Petitioner presented only one ground (one which was not originally alleged in the application) – he alleged counsel was ineffective for failing to move to enforce a guilty plea. (App. p. 124). The PCR judge found, consistent with the testimony given, that several offers were extended by the State and conveyed by counsel, but Petitioner had refused acceptance. (App. pp. 125-126; see also pp. 113-119). He concluded Petitioner failed to show ineffective assistance. (App. p. 127). Petitioner made a late *pro se* attempt to appeal that was rejected as untimely by Order dated July 11, 2013. (App. pp. 129 and 144).

On August 2, 2013, Petitioner filed a second PCR application alleging, "PCR counsel failed to serve and file Notice of Appeal." (App. p. 148). He amended the application on January 21, 2014 to add the following claims:

1) PCR attorney failed to notify of dismissal of PCR and failed to file a 59(e) and for appeal as asked to;

2) PCR judge failed to allow Applicant to testify completely and get all issues on record; abuse of discretion; and make specific findings on each allegation to be raised at proceedings; no fair bite at apple;

3) Failure to file appeal, trial attorney failed to file appeal on guilty plea as asked;

4) Failure to inforce unkept plea agreement;

5) unsigned warrant;

6) illegal interrogation;

7) solicitor presented false evidence at guilty plea hearing;

8) unable to properly participate in negotiations due to amount of phycotric [sic] medications; and mental condition a big factor in deciding case.

(App. p. 155).

Anna R. Good, Esq., represented Petitioner in the action. An evidentiary hearing was held January 14, 2016 before the Honorable J. Mark Hayes. Petitioner presented evidence only on the claim he was denied the right to appeal his first PCR action. (See App. pp. 169-175). At the conclusion of the hearing, Judge Hayes took the matter under advisement. (App. p. 182). By Order dated August 29, 2016, filed September 2, 2016, Judge Hayes denied relief and dismissed the action. (App. pp. 189-195). Petitioner appealed the denial of relief and filed his petition for writ of certiorari on February 13, 2017. This return follows.

RELEVANT LAW

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). The reviewing court "will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

Seeking Belated Review of a Prior PCR Action

"An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal." *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002). An allegation that an applicant was "denied an opportunity to seek appellate review," though, is an exception to the bar against successive PCR actions, *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991), and is not barred by the statute of limitations, *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). In order to show he is entitled to relief, an applicant must establish either he requested and was denied the opportunity to appeal or he failed to make a knowing and intelligent waiver of the right. *Odom v. State*, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing *King v. State*, 308 S.C. 348, 348, 417 S.E.2d 868, 868 (1992)).

"The right to seek appellate review of the denial of PCR is expressly authorized by state law." *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C.Code Ann. § 17–27–100 (1985)). Appointed counsel is tasked with advising a PCR client of the client's right to appellate review of the denial of his PCR application, and serving the notice of appeal should the client request an appeal be taken from the denial of relief. *Bray v. State*, 366 S.C. 137, 140,

620 S.E.2d 743, 745 (2005). *See also* Rule 71.1(g), SCRCP ("If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 243, SCACR...."). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP.

As noted above, "[t]he one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to *Austin v. State.*" *Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). However, "laches may be raised as a defense to an Austin PCR." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). "Laches 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.'" *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 198–199, 371 S.E.2d 525, 527 (1988)).

Preservation Rule

An issue must be raised to and ruled upon by the PCR judge to preserve the issue for review in the appellate courts. *See e.g., Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) ("The failure to specifically rule on the issues precludes appellate review of the issues."). "Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP." *Pruitt v. State*, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). Where an alternate ground of relief appears in the written order, and the appellant failed to challenge that alternate ground in a Rule 59(e) motion, he has failed to preserve the issue for appellate review. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993).

ARGUMENT

When the questions presented in the petition are analyzed within the proper legal framework as outlines above, and in light of the record before the PCR court, the record well-supports relief was not warranted. The petition for writ of certiorari should be denied.

I. There is probative evidence supporting the PCR judge's determination Petitioner's testimony he asked for an appeal immediately after his PCR hearing was not credible when counsel testified Petitioner did not ask for an appeal, and Petitioner presented alternate and inconsistent theories in his testimony along with presentation of and reliance upon vague and/or unauthenticated documents.

At the PCR hearing, Petitioner testified in his direct testimony that he spoke to PCR counsel about an appeal and requested an appeal at the conclusion of his PCR hearing in August 2012. (App. pp. 169-170). He then testified he advised counsel by a letter sent "twenty-one days after the hearing," that he wanted PCR counsel "to file a 59(e) and also if that didn't - - if we couldn't do that, then if everything was there to file an appeal if the case got dismissed." (App. p. 171, lines 17-22; see also p. 172). Petitioner had also testified that he never received PCR counsel's letter of January 15, 2013 advising him relief had been denied and that he had thirty (30) days in which to appeal and must notify counsel within that time period of his decision whether to appeal. (App. p. 170; see also p. 134). He presented a document purportedly from SCDC to indicate a member of SCDC personnel checked the mail log and did not see anything for him "from January 2nd through February 2nd of 2013." (App. p. 174; see also p. 187). On cross-examination, however, Petitioner admitted his offered letter referencing a rule 59(e) motion, contrary to his testimony on direct, did not address appeal: "It doesn't say appeal specifically, but it does say (59) e or proper paperwork, which would be - - would be an appeal." (App. p. 175, lines 19-21). Further, Petitioner did not have anyone from SCDC authenticate the offered exhibit or present a witness to support his claim concerning non-receipt of mail.

In contrast, former PCR counsel testified that she did not talk to applicant about an appeal immediately after the prior PCR evidentiary hearing, (App. p. 179), and that she did not generally, as a practice, talk about an appeal immediately after the hearing, (App. p. 180). She testified she has since changed her practice due specifically to the allegations by Petitioner, and does advise of appeal after the hearing. (App. p. 180). She testified that she had reviewed all notes from the PCR evidentiary hearing and saw no indication they discussed appeal, and candidly offered, "... had I written that down I certainly would have agreed that I was ineffective, but in this case I know that it wasn't an issue." (App. p. 180, line 24 – p. 182, line 4). She testified she could not confirm receipt of Petitioner's correspondence as she "filed a fourteen page response with ... sixty-two pages of all of our correspondence" when addressing Petitioner's claim against her lodged in the Office of Disciplinary Counsel. (App. p. 181; see also 177-178). However, her testimony that she had sent a letter in January to Petitioner to advise of his right to appeal and the strict time limit associated with the appeal, (App. pp. 181-182), was consistent with the response counsel had previously given to the Supreme Court of South Carolina. (See App. pp. 133-134). Further, the letter advising of the right to appeal would be inconsistent with having had a conversation with Petitioner in which Petitioner would have directed an appeal be filed.

The PCR judge found:

> After hearing the testimony of both witnesses, this Court simply finds counsel more credible than Applicant. Counsel's testimony directly refutes Applicant's assert that he asked her to file an appeal immediately following the evidentiary hearing. Applicant's contrary testimony is not credible. This Court finds the exhibits submitted by the Applicant equally unpersuasive. The uncorroborated and, frankly, unauthenticated note from "Mrs. Jones" (Applicant's Exhibit 3) – while in evidence – does not assist the Applicant in meeting his burden. In addition to

> unanswered questions this Court has about its authenticity, Applicant has failed to provide any context necessary for a determination that a letter from PCR counsel was never delivered. In light of Applicant's unbelievable testimony and unpersuasive exhibits, this Court finds he has failed to meet his burden. The allegation is therefore denied and dismissed.

(App. p. 193).

"This Court gives great deference to a PCR judge's findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing *Drayton v. Evatt,* 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993); *Lucero v. State*, 414 S.C. 238, 777 S.E.2d 409 (Ct.App. 2015) (review court will "'give great deference to the PCR court's findings of facts and conclusions of law'") (quoting *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006)).

There is admittedly a contest of credibility in the record. The PCR judge reasonably resolved the contest in favor of PCR counsel. This is an especially reasonable conclusion given Petitioner's testimony reflects a shotgun approach to alleging error, any error, on counsel's part. In contrast, counsel presented a consistent recollection supported by the letter advising of the right to appeal and the time limits.

Moreover, in his petition to this Court, Petitioner asserts the PCR judge erred *either* by rejecting Petitioner's testimony that he was advised of his right and requested an appeal; or his testimony that he never received the advice via letter. (See Petition, pp. 8-9). This argument suffers from the same scattered approach that negatively affected credibility at the hearing. Simply, it is logically to reason that one story is incorrect. When Petitioner stands by both, he loses credibility. Particularly here, Petitioner asks this Court to disregard his own clear testimony that he instructed counsel to file an appeal at the conclusion of the August 2012 hearing so that he may rely on a lack of notice of the right to appeal. Further, the fact Petitioner admitted his

testimony about his vague letter to counsel was inaccurate additionally hurt his credibility. Lastly, his reliance on the vague and unauthenticated document concerning receipt of mail in the institution does not raise that credibility or aid in meeting his burden of proof. At any rate, Petitioner's argument does not show an absence of probative evidence supporting the ruling.

In sum, Petitioner initially claimed, and first testified, that counsel failed to file an appeal after he instructed her to do so. (See App. p. 148; p. 170). This allegation was not proven by credible evidence. Given the detailed, and reasonable, credibility ruling by the PCR judge, there is probative evidence supporting his decision. Certiorari review is not warranted.

II. Petitioner's challenge to the PCR judge's finding that laches barred the action procedurally is procedurally barred from review on appeal as PCR counsel failed to challenge the finding in a Rule 59(e) motion? Even so, there is probative evidence supporting the PCR judge's determination that Petitioner's second PCR action was equitably barred by laches when Petitioner failed to carry his burden of proof to show he was otherwise entitled to relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Petitioner filed his application initially with the single allegation that PCR counsel failed to file a notice of appeal. (App. p. 148). He then attempted an amendment with additional issues that could have been raised in the prior PCR action. (See App. pp. 154-156). The action was not subject to dismissal under the statute of limitations when the allegation that Petitioner was denied the right to appeal was pending. *Odom, supra.* When Petitioner failed in his burden of proof, though, the action was logically subject to be barred by laches. *See generally Bray, supra.* The PCR judge's reference to same is summary, but clearly within the Order of Dismissal. (See App. p. 191). Petitioner faces two obstacles in now contesting the finding laches was properly relied upon.

First, Petitioner's assertion that the defense may not be relied upon because the State did not "plead the defense," (Petition, p. 12), misconstrues the posture of the case. This Court has

said the State is barred from asserted laches *on appeal* when the defense was not raised and ruled upon in the PCR court. *Dearybury v. State*, 367 S.C. 34, 41, 625 S.E.2d 212, 216 (2006) (finding "laches is an affirmative defense that must be pleaded" and concluding the State was "barred from asserting it *now*") (emphasis added). In this case, the defense is addressed in the Order of Dismissal. It is not being raised for the first time on appeal. Therefore, Petitioner's argument fails.

Second, if Petitioner considered the defense not properly raised below, the appropriate time to challenge the defense would have been upon receipt of the Order of Dismissal. Yet, PCR counsel failed to challenge the ruling in a motion to alter or amend. Therefore, having failed to properly challenge the finding, the issue is procedurally barred from review. *Pelican Bldg. Centers of Horry-Georgetown, Inc., supra. See also Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) ("The failure to specifically rule on the issues precludes appellate review of the issues."). Certiorari review is not warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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By: 

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SC Bar No. 14244

June 30, 2017.
Columbia, South Carolina.

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)

The Honorable J. Mark Hayes, Post-Conviction Relief Judge

William Patrick Deaton,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2016-001883

PROOF OF SERVICE

I, Melody J. Brown, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Laura R. Baer, Appellate Defender, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2017.

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