

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable J. Mark Hayes, Circuit Court Judge  
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WILLIAM P. DEATON,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001883  
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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI  
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S.C. SUPREME COURT  
PETITIONER

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## ARGUMENT IN REPLY

**Petitioner's assertion that his right to appellate review was not knowingly and intelligently waived is not inconsistent with his testimony at the PCR hearing that he also previously requested, yet was denied, an opportunity to seek appellate review.**

The petition for writ of certiorari raised the following issue related to the failure to file a notice of appeal from Deaton's first PCR action: "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?" Despite this, Respondent's return focuses primarily upon whether there was evidence to support the PCR court's finding that Petitioner Deaton did not ask first PCR counsel, Aimee Zmroczek, to file an appeal on his behalf immediately following the evidentiary hearing. App. 193; Return pp. 7 – 10. As noted in the petition, Petitioner is cognizant of this court's standard of review and appealed only upon the alternative basis that Deaton did not knowingly and intelligently waive his right to appeal. See Cert Petition, p. 7, n. 5.

Whether Zmroczek simply failed to recall Deaton's verbal request after his PCR hearing that she appeal in the event of a loss or feigned ignorance in order to save herself from a finding of ineffectiveness, her subsequent letter to Deaton asking him to advise her if he wanted to appeal was not inconsistent with their having had such a conversation at the hearing. App. 134. The order of dismissal was not filed until January 2013, nearly five months after the first evidentiary hearing, and it was only then that the thirty day time limit for appeal began. If Zmroczek sincerely did not recall

Deaton having requested an appeal, then the content of her letter was logical and not indicative that either Deaton or Zmroczek lied about their recollection of events.<sup>1</sup>

Contrary to Respondent's assertion, Deaton is not asking this Court to disregard his testimony that he instructed Zmroczek to file an appeal at the end of his PCR hearing. See Return, p. 9. Rather, in addition to having specifically requested appellate review, Deaton further maintains that his right to appellate review was not knowingly and intelligently waived. Deaton presented credible evidence through both his own testimony and the SCDC mailroom request and response that he never received a copy of the Order of Dismissal and January letter instructing him that any decision on the right to appeal had to be made within thirty days. App. 171, ll. 5-15; App. 174, l. 8 – 175, l. 1; App. 187. Even Zmroczek admitted that it was possible that her letter never made it to Deaton and that she has had problems with the prison's mail system in the past with other clients. App. 182, ll. 4-12. All of Deaton's subsequent actions were consistent with an applicant who wanted to pursue his right to appellate review. Thus, Deaton met his burden of proving that he did not knowingly and intelligently waive his right to appellate review.

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<sup>1</sup> The portion of Zmroczek's letter that advises Deaton that the matter will be considered closed if she does not hear from him within the time period to appeal is troubling. App. 134. A better practice to ensure that the client's rights are protected would be to file the notice of appeal absent a contrary request from the client, as there is a risk that the client may not actually receive the letter (as was the case here). Further, the letter fails to advise the indigent client that they would ultimately be represented on appeal free of charge by an appellate defender, not by Ms. Zmroczek. See 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, and shall continue to represent the applicant on appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 264, SCACR. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Division of Appellate Defense of the Office of Indigent Defense.")

**Petitioner was not required to challenge the finding that his claim was barred by laches in a motion to alter or amend in order to preserve his challenge for review and there was no probative evidence to support a ruling that Petitioner’s claim was barred by laches.**

Respondent suggests that the State is permitted to at best carelessly, or at worst intentionally, include a defense never pled or argued at the evidentiary hearing in the Order of Dismissal that it prepares and that, absent a Rule 59(e) motion, an applicant is prevented from contesting it. See Return, pp. 10-11. The Uniform Post-Conviction Relief Act requires that the PCR court’s order contain “specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” S.C. Code Ann. § 17-27-80; see also Rule 52(a), SCRPC (“In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.”). Thus, this Court has instructed PCR counsel “to review the [PCR court’s] order and file a Rule 59(e), SCRPC, 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), SCRPC.” Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (quoting Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992)) (emphasis added).

Here, the PCR court ruled on the Austin claim that was raised in Deaton’s application and at the evidentiary hearing, thus it was not incumbent upon PCR counsel to file a motion to alter or amend. Though not properly raised by the State, the PCR court also ruled that laches barred Deaton’s claim. Because the problem with the PCR court’s rulings were that they were not supported by the evidence – not that the court failed to rule – it was necessary only that PCR counsel file a timely notice of appeal, which she did. The issue of whether the PCR court erred in finding that Deaton’s claim was barred by laches is preserved for review.

The PCR court erred as matter of law in ruling: “Applicant alleges that his PCR counsel was ineffective for failing to file an appeal off of the denial of his application for post-conviction relief. This Court finds Applicant’s claim is barred by the equitable doctrine of laches.” App. 191; Gallman v. State, 307 S.C. 273, 414 S.E.2d 780, 782 (1992) (holding a PCR judge’s findings will not be upheld if such findings are not supported by probative evidence). Notably, the State filed its return on May 21, 2014, following Deaton’s filing of his original and amended PCR applications. App. 146 – 153; App. 154 – 159; App. 160 – 164. Laches was not mentioned in the return. In fact, the only mention of “laches” in the entire Appendix is in the Order of Dismissal. App. 191. Thus, the State waived its right to assert the affirmative defense of laches. Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) (“Laches is an affirmative defense that must be pleaded. The failure to plead an affirmative defense is deemed a waiver of the right to assert it.” (internal citations omitted)).

Respondent’s contention that the failure to plead laches only precludes it from being raised for the first time on appeal is inaccurate. The fact that Dearybury v. State, 367 S.C. 34, 41, 625 S.E.2d 212, 216 (2006), involved the State’s attempt to assert the laches defense for the first time on appeal does not mean that the State can assert the defense for the first time in its preparation of the order of dismissal. Cf. Collins Entm’t, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) (finding no error in trial court’s refusal to dismiss claim based upon laches where appellants failed to plead it). In Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002), this Court noted its prior holding that the PCR statute of limitations does not apply to Austin claims, but found that the doctrine of laches may bars such an action where there is no applicable statute of limitations. However, because the State neither raised laches in its return to petitioner’s second PCR application nor in its motion to dismiss that application, the

Whitehead Court held that the State had waived its right to raise the affirmative defense of laches in Whitehead's case. 352 S.C. at 220, 574 S.E.2d at 202.

Respondent's argument that "when Petitioner failed in his burden of proof, though, the action was logically subject to be barred by laches" is illogical. Return, p. 10. Even when an applicant is successful in meeting his burden as to the Austin claim, he may still be barred by laches if properly raised as a defense. See Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005). Though Rule 15(b), SCRCP provides an exception to the waiver rule by permitting a party to amend his or her pleadings to conform to the evidence, no such motion to amend was made in this case. See Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615–16, 703 S.E.2d 221, 225 (2010); Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) ("Because the aim of this pleading requirement is to avoid surprise defenses, see Rule 8(c), SCRCP note, many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense *is timely raised to the trial court without resulting in unfair surprise to the opposing party.*" (emphasis added)).

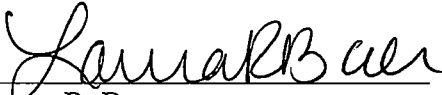
Even had the State properly raised the laches defense in its pleadings or by amendment, there was no probative evidence to support the finding that laches precluded relief in this case, as Deaton acted promptly in filing his second PCR application requesting relief pursuant to Austin. "The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice." Emery v. Smith, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004). The Order of Dismissal from Deaton's first PCR hearing was filed on January 14, 2013. App. 123. Being a layman, Deaton filed a *pro se* notice of appeal in this Court on April 12, 2013, after receiving Zmroczek's March 27, 2013 letter stating that the time to appeal had lapsed. App. 129. This Court dismissed the notice of appeal on May 29, 2013 and denied of the motion to

reconsider without prejudice to Deaton's right to seek Austin relief on July 11, 2013. App. 144; App. 145. Deaton filed his second PCR application less than one month later on August 2, 2013. App. 146. Thus, less than eight months passed between entry of the Order of Dismissal from the first PCR and the filing of the second PCR application. This was not an "unreasonable and unexplained length of time." Whitehead, 352 S.C. at 219, 574 S.E.2d at 202.

Contrast the present case with Bray v. State, 366 S.C. 137, 140-41, 620 S.E.2d 743, 745 (2005), where this Court understandably found that despite the fact that the petitioner did not knowingly and intelligently waive his right to appellate review since counsel failed to advise him of the right, his claim was properly dismissed based upon laches. In Bray, the petitioner's PCR application was filed *seven years* after the denial of his first PCR application. 366 S.C. at 140, 620 S.E.2d at 745. Consequently, the tape of the first PCR hearing had been destroyed, counsel had no notes on the PCR hearing, and none of the attorneys or the petitioner could specifically recall the testimony presented at the PCR hearing. Id. Additionally, even though it could have been raised in his second application, Bray's claim that he was denied appellate review from his first application was not raised until his third PCR application. Id. at 141, 620 S.E.2d at 745. Here, Deaton acted promptly and all of the documents and the transcript from the 2012 PCR hearing are available. See App. 82 – 145. Thus, in addition to the laches defense having been waived, there was no probative evidence to support the PCR court's ruling that Deaton's claim was barred by laches.

**CONCLUSION**

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioner Williams Deaton respectfully requests this Court grant certiorari to allow full briefing on the issues raised in his Petition.

  
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Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Lexington County

Honorable J. Mark Hayes, Circuit Court Judge

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WILLIAM P. DEATON,

PETITIONER

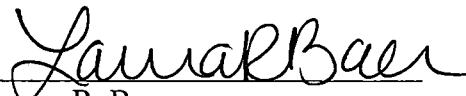
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STATE OF SOUTH CAROLINA,

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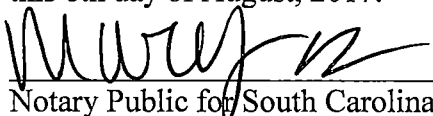
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and William P. Deaton, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 8th day of August, 2017.

  
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Laura R. Baer  
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me  
this 8th day of August, 2017.

 (L.S)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: May 12, 2027 .