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Attorneys At Law

September 5, 2017

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

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SEP 08 2017

S.C. SUPREME COURT

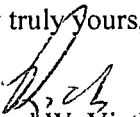
RE: Douglas Turner, Appellant v. State of South Carolina, Respondent
Case Number: 2009-CP-42-6159

Dear Clerk Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- 1) Notice of Intent to Appeal;
- 2) Proof of service of the notice of intent to appeal on the respondent;
- 3) Order of Dismissal.

Very truly yours,


Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh
enclosure

cc: Johanna Valenzuela, Senior Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Paula Murdoch
South Carolina Commission of Indigent Defense
P.O. Box 11589
Columbia, SC 29201-1589

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2009-CP-42-6159

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S.C. SUPREME COURT

Douglas Turner, #194475,

Applicant,

v.

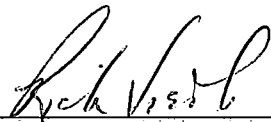
State of South Carolina,

Respondent.

NOTICE OF INTENT TO APPEAL

The applicant, Douglas Turner, hereby appeals from the order of the Circuit Court, Hon. Paul Burch, presiding Judge, entered on April 28, 2017. On August 16, 2017, Appellant's attorney received a filed copy of the Order denying his application for post-conviction relief.

September 5, 2017.


Richard W. Vieth S.C. Bar #5711
HENDERSON, BRANDT & VIETH, P.A.
360 East Henry Street, Suite 101
Spartanburg, South Carolina 29302
(864) 582-2962
Attorney for Appellant

Other Counsel of Record:

Johanna Valenzuela, Senior Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-33970
Attorney for Respondent

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY

Court of Common Pleas

The Honorable Paul Burch

Case No. 2009-CP-42-6159

RECEIVED

SEP 08 2017

S.C. SUPREME COURT

Douglas Turner, #194475,

Applicant,

v.

State of South Carolina,

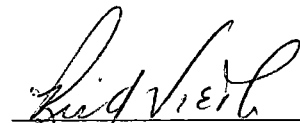
Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Douglas Turner, certify that I have this 5 day of September, 2017, mailed a copy of the NOTICE OF INTENT TO APPEAL in the following manner to the Respondent in a duly franked envelope addressed as follows:

Johanna Valenzuela, Senior Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

September 5, 2017



Richard W. Vieth S.C. Bar #5711
HENDERSON, BRANDT & VIETH, P.A.
360 East Henry Street, Suite 101
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(864) 582-2962
Attorney for Appellant

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley
Clerk of Court

April 28, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Douglas Turner # 194475

CASE # 2009CR042-6159

Applicant

CERTIFICATE OF SERVICE

Steele ^{VS}
Respondent

I certify that, on this date, I served a copy of the Order of Dismissal
In this action dated 2-28 2017 on 4-28-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Oskey Hannah
Alisa Dineen
Rodney Richey

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CLERK OF COURT
SPARTANBURG COUNTY
2017 APR 28 AM 9:09
M. HOPE BLACKLEY

4-28-17
(Date)

Carrie S. [Signature]
(Signature)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Douglas Turner, #194475,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2009-CP-42-6159

ORDER OF DISMISSAL

FILED COURT
 CLERK OF COURT
 SPARTANBURG COUNTY
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 M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief filed November 10, 2009. Respondent filed a Return and Motion to Dismiss the application based on statute of limitations, laches, and it being a successive application on or about June 23, 2010. The Honorable Derham Cole signed a Conditional Order of Dismissal in the case on or about December 10, 2010, after which Applicant responded. The Honorable Mark Hayes signed a Final Order of Dismissal on February 3, 2011. Applicant appealed and, in an order filed July 14, 2015, the Court of Appeals remanded the case for an evidentiary hearing to “determine whether Petitioner knew or should have known he was parole ineligible at the time of his first PGR action and could have raised his current claims—an involuntary guilty plea and ineffective assistance of counsel based upon misinformation regarding parole eligibility—in the first PCR action.”

Pursuant to the Order from the Court of Appeals, an evidentiary hearing was held in the Spartanburg County Courthouse on September 20, 2016. Applicant was represented by Richard Vieth, Esquire, and Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent. Applicant; Applicant’s first PCR counsel, Patrick Knie; and Applicant’s plea counsel,

Richard Warder testified at the hearing. The Court had before it the transcripts of the original plea and the first PCR hearing; the documents from Applicant's first PCR; Applicant's clerk records; Applicant's SCDC records; the Order from the Court of Appeals remanding this matter to the Court; and a letter to Applicant from DPPP dated April 2009.

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SPARTANBURG COUNTY
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N. HOPE BLACKLEY

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted Applicant at the June 1997 term of General Sessions for assault and battery with intent to kill and possession of a firearm or knife during the commission of or attempt to commit a violent crime (97-GS-42-2398, counts one and two), criminal conspiracy (97-GS-42-2399), and armed robbery (97-GS-42-2400). Richard Warder, Esquire, represented Applicant. On February 10, 1998, Applicant pleaded guilty as indicted, with the exception of pleading guilty to the lesser-included offense of assault and battery of a high and aggravated nature (97-GS-42-2398, count one). The Honorable C. Victor Pyle sentenced Applicant to twenty-eight years for armed robbery, ten years for assault and battery of a high and aggravated nature and possession of a firearm or knife during the commission of or attempt to commit a violent crime, and five years for criminal conspiracy. Applicant did not appeal his conviction or sentence.

Applicant filed his first PCR Application on September 10, 1998, which was assigned docket number 1998-CP-42-1997. Respondent submitted its Return and Motion to Dismiss and Conditional Order of Dismissal on March 10, 1999. On April 14, 1999, Applicant made his Response to the Conditional Order to Dismissal, which was filed and assigned a new docket number, 1999-CP-42-0493.

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Applicant then filed a second PCR Application on December 18, 2000. On February 15, 2002, Respondent then submitted a Return and Order of Merger to merge PCR Application 1998-CP-42-1997 and 1999-CP-42-0493 into 2000-CP-42-3411.

In his initial applications for post conviction relief and Objections to the Conditional Order of Dismissal, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Newly discovered evidence; and
3. Involuntary guilty plea.

An evidentiary hearing was convened at the Spartanburg County Courthouse on July 29, 2002. Applicant was present and represented by Patrick Knie, Esquire. Douglas E. Leadbitter of the South Carolina Office of Attorney General represented Respondent. Judge Donald W. Beatty denied the application and signed an Order of Dismissal following the hearing.

A timely notice of Appeal was filed and a Johnson Petition for Writ of Certiorari was filed on Applicant's behalf. The South Carolina Supreme Court dismissed Applicant's Petition on November 6, 2003, and a Remittitur was filed on November 25, 2003.

Applicant then filed a Federal Petition for Writ of Habeas Corpus in the United States District Court on January 5, 2004. Applicant's Petition was dismissed on June 1, 2004. This current application followed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, hear Applicant's testimony, and closely pass upon their

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credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

This Court denies this application for several reasons. For one, the application is successive, it was untimely, and the doctrine of laches bars it from proceeding. Applicant's conviction of armed robbery has been ineligible for parole since before he made the decision to enter his plea and since before he had a hearing on his first PCR. Applicant was in possession of his Department of Corrections records at the time of his first PCR hearing and was therefore aware that he was not being given a parole eligibility date. Additionally, the law requires that Applicant through *due diligence* could not have known of an issue before it can be considered "newly discovered evidence." In this instance, Applicant testified at the hearing that he was the one who—approximately ten years after he brought his first PCR application—took steps to determine his parole eligibility. Had he taken those same steps in 1998, the Department of Probation, Pardon, and Parole (DPPP) would have given him the same information: he was not eligible for parole. Lastly, even in looking at the merits of this case, Applicant bears the burden of showing his plea counsel was ineffective, and he cannot do so. Applicant's plea counsel testified at the hearing that although he cannot remember specifics as to the advice he gave Applicant about eighteen years ago, he knows he was aware of armed robbery not being parole eligible and feels confident he advised Applicant of this fact prior to the plea. As such, this Court denies and dismisses this application.

Successiveness

This Court finds the current application for post-conviction relief must be dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

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All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

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Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

In the present application, Applicant claims evidence exists that has not previously been presented; however, this evidence does not meet the qualifications for newly discovered evidence elaborated by Jamison v. State, 410 S.C. 456, 469, 765 S.E.2d 123, 129 (S.C. 2014). In Jamison, the Court found that while “a guilty plea does not preclude [PCR] relief following a guilty plea in all circumstances, we nonetheless conclude . . . the traditional, five-factor newly discovered evidence test¹ is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea.” Jamison, 410 S.C. at 469, 765 S.E.2d at 129.

“[W]hen a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is

¹ Pursuant to Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)), to obtain a new trial based on newly discovered evidence, the party must show that the evidence: (1) would probably change the result of a new trial; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.

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of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated.”

Jamison, 410 S.C. at 470, 765 S.E.2d at 130 (emphasis added).

And, in the context of analyzing newly-discovered evidence for a PCR hearing, “[a]n element of ‘newly-discovered evidence’ is that the evidence could not have been discovered before trial.”

Ramirez v. State, 413 S.C. 351, 373, 776 S.E.2d 101, 113 (Ct. App. 2015).

As an initial matter, Applicant entered his plea of guilt approximately three years ^{after} S.C. Code Ann. Section 24-13-100 was enacted in 1995. Section 24-13-100 states Class A felonies are not eligible for parole offenses. Class A felonies are outlined in Section 16-1-90, which states that Section 16-1-330(A), robbery while armed with a deadly weapon—one of the charges Applicant pleaded guilty to in February of 1998—is a Class A felony. Therefore, at the time Applicant pleaded guilty, armed robbery was classified as a Class A felony that was not eligible for parole.

When Applicant brought his first PCR application in 1998, the status of the law was *still* that armed robbery was a class A felony that was not eligible for parole. Respondent argues Applicant was provided with a copy of his SCDC report showing zeros beside the parole eligibility date prior to his first PCR hearing. Applicant testified that he may have seen the report but that the zero dates would not have meant anything to him because he was under the impression that he was not parole eligible until seven years passed and, at the time of his PCR hearing, seven years had not yet passed. Applicant’s PCR counsel, Patrick Knie, Esquire, also testified that he reviewed all documents provided to him by Respondent with Applicant, but he has no specific recollection of the SCDC printout or discussing the zeros listed beside parole eligibility. It is undisputed that Applicant’s parole eligibility was not raised in the first PCR.

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Applicant testified that his current application came about because he, *himself*, initiated research into his parole eligibility by hiring Tommy Thomas, Esquire, prior to April 2009. Applicant actively pursued information as to his parole eligibility; he chose to do so years after the statute of limitations for bringing a post-conviction relief challenge. Applicant admits that the letter from the DPPP was sent to him as a result of his own actions in having Tommy Thomas look into the matter. Applicant showed the capability of taking the necessary actions to investigate his parole eligibility, and had he done so through due diligence when he brought his first application, he would have received the same information from the DPPP.

This Court finds the current allegations could have been raised in the proceedings based on the status of the law as it existed both at the time of the plea and at the time of the first PCR application and hearing, based on Applicant's knowledge that SCDC was not identifying a parole eligibility date for him, and based on Applicant's actions in hiring Tommy Thomas, Esquire, before April 2009. Therefore, the current application is successive and barred under S.C. Code § 17-27-90.

Applicant bears the burden in this case and has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 23, 281 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 420 S.E.2d 834.

Statute of Limitations

This Court further finds this application for post-conviction relief 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. S.C. Code Ann. §17-27-45(a) reads as follows:

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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 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). Applicant was convicted of the offense(s) he challenges in this application on February 10, 1998. This application was filed on November 10, 2009, more than a decade after the one-year statutory filing period had expired.

Laches

Additionally, Applicant has filed this application almost over ten years after he was convicted. This Court also finds the doctrine of *laches* bars Applicant from raising these allegations in a post-conviction relief application. 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 refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. 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, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an

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officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. § 17-27-45(a). Testimony at the hearing exemplified why Respondent has been prejudiced by the delay. Applicant's plea counsel, Richard Warder, testified to the best of his recollection, but he agreed that he did not have any specific recollection because this plea occurred *about eighteen years ago*. Applicant admits the April 2009 letter from the DPPP was sent to him as a result of his own actions in having Tommy Thomas, Esquire, look into the matter. Applicant showed the capability of taking the necessary actions to investigate his parole eligibility, had he done so through due diligence when he brought his first application he would have received the same information from the DPPP. This Court finds Applicant's delay and the prejudicial effect of that delay on Respondent also requires dismissal of this application.

Merits

Finally, turning to the merits of the allegation, Applicant's testimony is that had he known his sentence would not be parole eligible, he would not have pleaded guilty. Applicant's plea counsel said that due to the amount of time that had passed since this plea—approximately 18 years—he could not remember specifically what he told Applicant; however, it was his general practice to advise on parole eligibility, he was aware that armed robbery was a felony that was not parole eligible, and he is very confident he would have told Applicant that fact prior to the plea.

Unless counsel gives erroneous parole advice, parole information is not a ground for collateral attack of a guilty plea. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). Counsel is

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not ineffective for failing to advise a defendant regarding parole eligibility because it is a collateral consequence of sentencing. Id. Accordingly, counsel is not required to notify a defendant that his offenses are “no parole” offenses, requiring service of 85% of the sentence imposed and making him ineligible for parole. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000).

Applicant bears the burden of establishing his plea counsel misinformed him of his parole eligibility. This Court finds Applicant has not met his burden. Plea counsel’s testimony is that he would have advised that armed robbery was parole ineligible. As such, this Court finds that this application is untimely, successive, and barred by the doctrine of laches and, furthermore, that Applicant has failed to establish his plea counsel was ineffective in the advice he gave as to parole eligibility.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR.

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Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 28th day of February, 2017.



Paul M. Burch
Presiding Judge
Seventh Judicial Circuit

Chestnutfield, South Carolina.

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M. HOPE BLACKLEY

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Spartanburg County

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M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Douglas Turner # 194475
Applicant

009-CP-42-6159

VS
Attie
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Confidential Dec. Dismissal
In this action dated 12-10-2010 on 12-13-10

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Suzanne White
Tommy Turner
Douglas Turner

12-13-10
(Date)

Conie Gray
(Signature)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Douglas Turner #194475,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2009-CP-42-6159

CONDITIONAL ORDER OF
 DISMISSAL

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 SPARTANBURG COUNTY
 2010 DEC 13 AM 9:34
 M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief filed November 10, 2009.

I. PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the June 1997 term of General Sessions for assault and battery with intent to kill and possession of a firearm or knife during the commission of or attempt to commit a violent crime (97-GS-42-2398, counts one and two), criminal conspiracy (97-GS-42-2399), and armed robbery (97-GS-42-2400). Richard Warder, Esquire, represented the Applicant. On February 10, 1998, the Applicant pled guilty as indicted, with the exception of pleading guilty to the lesser-included offense of assault and battery of a high and aggravated nature (97-GS-42-2398, count one). The Honorable C. Victor Pyle sentenced the Applicant to twenty-eight (28) years for armed robbery, ten (10) years for assault and battery of a high and aggravated nature and possession of a firearm or knife during the commission of or attempt to commit a violent crime, and five (5) years for criminal

conspiracy. The Applicant did not appeal his conviction or sentence.

Applicant filed his first PCR Application on September 10, 1998, which was assigned docket number 1998-CP-42-1997. Respondent submitted its Return and Motion to Dismiss and Conditional Order of Dismissal on March 10, 1999. On April 14, 1999, Applicant made his Response to Conditional Order to Dismissal, which was filed and assigned a new docket number, 1999-CP-42-0493.

Applicant then filed a second PCR Application on December 18, 2000. On February 15, 2002, Respondent then submitted a Return and Order of Merger to merge PCR Application 1998-CP-42-1997 and 1999-CP-42-0493 into 2000-CP-42-3411.

In his initial applications for post conviction relief and Objections to the Conditional Order of Dismissal, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Newly discovered evidence; and
3. Involuntary guilty plea.

An evidentiary hearing was convened at the Spartanburg County Courthouse on July 29, 2002. The Applicant was present and represented by Patrick Knie, Esquire. Douglas E. Leadbitter, of the South Carolina Office of Attorney General, represented the State. Judge Donald W. Beatty denied the Application and signed an Order of Dismissal following the hearing.



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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

A timely notice of Appeal was filed and a Johnson Petition for Writ of Certiorari was filed on Applicant's behalf. The South Carolina Supreme Court dismissed Applicant's Petition on November 6, 2003, and a Remittitur was filed on November 25, 2003.

Applicant then filed a Federal Petition for Writ of Habeas Corpus in the United States District Court on January 5, 2004. Applicant's Petition was dismissed on June 1, 2004.

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, and the records from the Applicant's prior PCRs.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
2. Involuntary Guilty Plea; and
3. Newly Discovered Evidence, in that;
 - a. "I was unaware that I was never eligible for parole."

2010 DEC 13 AM 9:34
M. HORN BLACKBERRY

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). In the present Application, the Applicant claims that evidence exists that has not previously been presented, however, this evidence does not meet the qualifications for newly discovered evidence elaborated by Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence." and would not "change the result if a new trial was had." Hayden, Id. Instead, it is an assertion that Applicant did not realize he was serving time for a violent crime and would be ineligible for parole. Because this evidence does not qualify, as after discovered or newly discovered evidence, this Court finds no new ground that could not have been or have not been raised in a previous application exists.

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This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

Statute of Limitations

This Court finds, further, that this Application for Post-Conviction Relief 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. S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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). The Applicant was convicted of the offense(s) he challenges in this Application on February 10, 1998. This Application was filed on November 10, 2009, more than a decade after the one-year statutory filing period had expired.

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) (1985) authorizes the Court to "grant a motion by

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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."

Laches

The Applicant has filed this application over ten (10) years after he was convicted. This Court further finds that the doctrine of *laches* bars the Applicant from raising these allegations in a post-conviction relief application. 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 refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. 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, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a). Therefore, this Court finds that the

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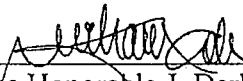
application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, according to the doctrine of *laches*, and for being successive.

Summary

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Suzanne H. White, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 10 day of December, 2010.


The Honorable J. Derham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

_____, South Carolina.

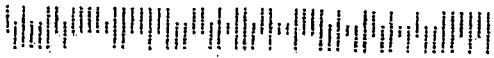
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BY: M. Hope Blackley D.C.
DATED 12/13/10


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TO:

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