



ALAN WILSON
ATTORNEY GENERAL

November 1, 2017

FILED
HONORARY CLERK
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
2017 NOV -6 AM 8:22

The Honorable Renee N. Elvis
Clerk of Court, Horry County
Post Office Box 677
Conway, SC 29528-0677

Re: Michael Cline, #153213 v. State of South Carolina
2014-CP-26-6989

Dear Ms. Elvis:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable Larry B. Hyman, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Johnny Ellis James Jr.
Assistant Attorney General

JEJ/mm

Enclosure

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT
Michael Cline,) Case No.: 2014-CP-26-6989
S.C.D.C. No. 156213,)
Applicant,)
v.) **CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina,)
Respondent.)

FILED
HORRY COUNTY
2014 NOV -6 AM 8:22
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Michael Cline (Applicant) on October 20, 2014, at 8:30 AM. Respondent made its Return, requesting the application be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2003 term of the Horry County Grand Jury for burglary in the first degree (2003-GS-26-01055). Ryan A. Stampfle, Esq. and William Frederick O'Neil, III, Esq. represented Applicant. Robert P. Coler, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On August 11, 2003, Applicant proceeded to trial before the Honorable Roger M. Young and a jury. The jury found Applicant guilty as indicted on August 12, 2003. Judge Young sentenced Applicant to imprisonment for a term of 20 years.

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 The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion.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

Op. No. 2004-UP-025 (S.C. Ct. App. filed June 1, 2004). The Remittitur was issued on June 17, 2004.

First PCR Application: 2004-CP-26-04330

Applicant filed his first application for post-conviction relief on August 5, 2004 (2004-CP-26-04330). He alleged the following grounds for relief in his application:

1. "Counsel was ineffective for having failed to exercise peremptory strikes after having failed to object and have [jurors] removed for cause. Counsel's failure to strike these jurors and still have one peremptory strike remaining prejudiced Petitioner by allowing jurors with a known bias to sit on the jury and caused him to be denied his 6th Amendment [right] to a fair and impartial jury."
2. "Counsel was ineffective for having failed to introduce the newspaper obituary . . . report in Petitioner's possession which announced the death of Petitioner's prospective alibi witness wherein Petitioner had consistently maintained that he was acting of another then consequently did not possess the requisite criminal intent to have committed the burglary."
3. "Counsel was ineffective for having failed to . . . investigate the case and produce a copy of the death certificate of Petitioner's deceased alibi witness, Kevin McCray, and enter said certificate into evidence to substantiate and corroborate Petitioner's testimony at trial."
4. "Counsel was ineffective for having failed to subpoena a witness from the Horry County registrar's office to substantiate the death of Kevin McCray petitioner's prospective alibi witness."
5. "Counsel was ineffective for having failed to object to the Solicitor's pitting of Petitioner's testimony with that of the State's witness, Officer Robert Stevens regarding the death and availability of Petitioner's alibi witness during cross-examination and closing argument in order to preserve it for appellate review."
6. "The trial court lacked subject matter jurisdiction to try this case due to a fatally defective indictment."

Respondent made its return on October 12, 2004. Applicant, through counsel, thereafter amended his application by filing on January 20, 2005, to substitute the following allegations as grounds for relief:

1. Ineffective Assistance of Counsel, in that:

- a. "Applicant's counsel failed to renew his objection and motion to dismiss prior to the charging of the jury for the use of Applicant's prior burglary convictions;"
 - b. "Counsel failed to properly investigate the facts of the case;"
 - c. "Counsel failed to investigate and discuss possible defenses and trial strategies with the defendant; and"
2. "The Court lacked subject matter jurisdiction over the case."

Applicant, again through counsel, amended his application a second time by filing on October 24, 2005, to additionally allege that trial counsel was ineffective because he did not "request jury instructions regarding lesser included offenses" and he "failed to challenge the fatally defective indictment." Applicant, again through counsel, amended his application a third and final time by filing on December 15, 2005, to allege the following grounds for relief:

1. Ineffective Assistance of Counsel, in that:
 - a. "Applicant's counsel failed to renew his objection and motion to dismiss prior to the charging of the jury for the use of Applicant's prior burglary convictions;"
 - b. "Counsel failed to properly investigate the facts of the case;"
 - c. "Counsel failed to investigate and discuss possible defenses and trial strategies with the defendant;"
 - d. "Counsel failed to request jury instructions regarding lesser included offenses;"
 - e. "Counsel failed to challenge the fatally defective indictment;"
 - f. "Counsel was ineffective for failing to properly object to the use of Applicant's prior convictions;"
 - g. "Counsel failed to properly research the exclusion of Applicant's prior convictions; and"
2. "The Court lacked subject matter jurisdiction over the case."

An evidentiary hearing into the matter was convened on May 22, 2006, before the Honorable Paula H. Thomas. Applicant was present at the hearing and represented by J. Wesley Locklair, Esq. Daniel E. Grigg, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf. Frederick O'Neill, Esq., and Ryan Stampfle,

Esq., also testified. By written order dated and filed August 17, 2006, Judge Thomas denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was perfected by Wanda H. Carter, Esq. filing a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). By unpublished order dated December 5, 2007, the Supreme Court of South Carolina denied Applicant's petition and granted counsel's request to withdraw. The Remittitur was issued on December 21, 2007.

Second PCR Application: 2008-CP-26-01677

Applicant filed his second application for post-conviction relief on February 28, 2008 (2008-CP-26-01677). He alleged the following grounds for relief in his application:

1. Due process was violated because of procedural defects regarding failure to properly file the indictment with the Clerk of Court.
2. The charge was elevated to burglary in the first degree without probable cause.

Respondent made its return and motion to dismiss on November 25, 2008, arguing the matter was successive and untimely. On December 2, 2008, the Honorable J. Michael Baxley issued a Conditional Order of Dismissal, and then a Final Order on January 13, 2009 dismissing the matter with prejudice. Applicant did not appeal.

Federal Habeas Petition: 2:08-2124-HMH-RSC

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on June 6, 2008 (C.A. No. 2:08-2124-HMH-RSC). In his Petition, Applicant set forth the following grounds for relief:

1. "Ineffective Assistance of Counsel"
 - a. "Counsel failed to provide Constitutional effective assistance as guaranteed by the Sixth Amendment when counsel failed to preserve the issue of the trial Judge's failure to charge on the lesser included offense of second degree burglary."

- b. "Counsel failed to provide Constitutional effective assistance of counsel as guaranteed by the Sixth Amendment when counsel failed to investigate Petitioner's prior record before trial. Petitioner had plead guilty to two charges before the same Judge. Therefore, this should have been counted as 'ONE' offense 'NOT' 2 for enhancement purposes."

Applicant further filed an "Amended Original Habeas Corpus, Federal Rule 15" dated September 23, 2008, alleging:

2. Counsel was ineffective by "failing to preserve for review the issue of the judge's failure to charge on a lesser included offense of 2nd degree burglary in this case,"
3. Applicant "was forced to take a trial and was not offered a guilty plea to 2nd degree burglary, non-violent," and
4. Applicant "committed a non-violent offense and was convicted of a most serious violent charge."

Respondent filed its Return and Motion for Summary Judgment on October 2, 2008. The Honorable Robert S. Carr, United States Magistrate Judge, issued on January 5, 2009, a Report and Recommendation that Respondent's motion for summary judgment be granted. Cline v. Bodison, 2:08-2124-HMH-RSC, 2009 WL 160246 (D.S.C. 2009) (incorporated in district court order). The Honorable Henry M. Herlong, Jr., United States District Judge, denied Applicant's Petition on January 22, 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 was dismissed on August 26, 2009, for want of a certificate of appealability. Cline v. Bodison, 332 Fed.Appx. 106 (4th Cir. 2009).

Third PCR Application: 2009-CP-26-10778

Applicant filed his third application for post-conviction relief on November 6, 2009 (2009-CP-26-10778). He alleged the following grounds for relief in his application:

1. "Crime committed was non-violent"
 - a. "new evidence support statutory interpretation/use of priors;"
2. "Prior burglary charges were not violent"
 - a. "14 year old crimes;"

3. "Violation of Constitutional Rights, including double jeopardy and 6th and 14th Amendments."

Respondent made its return and motion to dismiss on December 5, 2009, arguing the application was successive and untimely. On December 18, 2009, the Honorable Steven H. John issued a Conditional Order of Dismissal, giving Applicant 20 days to give a sufficient reason why it should not become final. The Honorable Benjamin H. Culbertson issued a Final Order of Dismissal on March 15, 2010, dismissing the matter with prejudice. Applicant filed a timely notice of appeal, but the Supreme Court of South Carolina dismissed the appeal by order dated September 21, 2010, finding that Applicant failed to respond to the Conditional Order of Dismissal. The remittitur was issued October 7, 2010.

Fourth PCR Application: 2010-CP-26-10752

Applicant filed his fourth application for post-conviction relief on November 15, 2010 (2010-CP-26-10752). He alleged the following grounds for relief in his application:

1. "Failure of Court to Rule on All Issues Presented"
2. "Lack of Subject Matter Jurisdiction"
3. "Unconstitutional Enhancement in Violation of § 17-25-50 and § 17-25-45(A)"

Respondent made its return and motion to dismiss on December 14, 2010, arguing the application was successive and untimely. On March 20, 2011, the Honorable Larry B. Hyman, Jr. issued a Conditional Order of Dismissal, giving Applicant 20 days to give a sufficient reason why it should not become final. The Honorable Steven H. John issued a Final Order of Dismissal on July 24, 2012, dismissing the matter with prejudice. Applicant did not appeal Court's dismissal.

Sixth PCR Application: 2014-CP-26-7019

Applicant filed his sixth¹ application for post-conviction relief on October 20, 2014, at 3:29 PM (2014-CP-26-7019). He alleged the following grounds for relief in his application:

1. "lawyer failed to show old Burglary was Vacated 1996"
 - a. "Brief, signed by Judge Oct 1996"

Respondent made its return and motion to dismiss on July 13, 2015, arguing the application was successive and untimely. On July 24, 2015, the Honorable William H. Seals, Jr. issued a Conditional Order of Dismissal, giving Applicant 20 days to give a sufficient reason why it should not become final. The Honorable Benjamin H. Culbertson issued a Final Order of Dismissal on June 5, 2017, dismissing the matter with prejudice.

II. CURRENT APPLICATION

In his fifth and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "lawyer failed to show old Burglary was Vacated 1996"
 - a. "Brief, signed by Judge Oct 1996"

Applicant requests relief as follows:

- "1st Degree Burglary Conviction put back to 2nd degree Burglary. Since the priors were run concurrent with a sentence that was vacated."

Before this Court are the Horry County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the conditional and final orders of Applicant's previous PCR and federal habeas, and the records of this current PCR action.

¹ The application was docketed shortly after the matter at issue in this filing, which chronologically represents his fifth application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successive

The Court finds the application must 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 shall dismiss the application as successive to Applicant's previous PCR application.

Res Judicata

The Court finds 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. The allegations raised in this action are word-for-word identical to those raised to and dismissed by the Court in the PCR docketed at 2014-CP-26-7019. The finality of the previous Court rulings should be respected, and the Court shall dismiss the application as barred by the doctrine of *res judicata*.

Statute of Limitations

The Court finds the application must also 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 August 12, 2003, and the remittitur from his direct appeal issued on June 17, 2004. The current application was not filed until October 20, 2014—well after the one-year statutory filing period expired. Therefore, the Court shall dismiss the application as barred by the statute of limitations.

Laches

The Court finds the application must 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 11 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, the Court shall dismiss the application as barred by the equitable doctrine of laches.

[Conclusion and signature on following page]

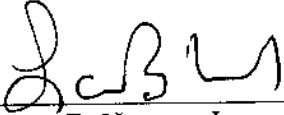
CONCLUSION

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

Office of the Attorney General
Johnny E. James, Jr., Esquire
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 30 day of Oct, 2017.



LARRY B. HYMAN JR.
Chief Judge for Common Pleas
Fifteenth Judicial Circuit

Cowley, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Michael Cline, #156213)

Plaintiff)

v.)

State Of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.

2014-CP-26-6989

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
NOV - 6 AM 8:22
CLERK OF COURT
HORRY COUNTY

Plaintiff's Attorney: Michael Cline, Bar No. Address: Turbeville CI 1578 Clarence Coker Hwy Turbeville, SC 29162 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-9549 phone: (803) 734-3737 fax: (803) 734-3737 e-mail: other:
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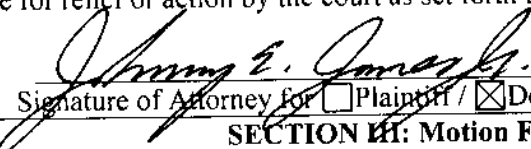
- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
 - Form Motion/Order
- I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff / Defendant

October 18, 2017
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support
 - (check reason) Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
- Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE: _____
CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

- MOTION FEE COLLECTED: _____



ALAN WILSON
ATTORNEY GENERAL

October 18, 2017

The Honorable Larry B. Hyman, Jr.
Chief Administrative Judge, 15th Circuit
1301 Second Avenue, Ste. 3B76
Conway, SC 29526

FILED
2017 NOV -6 AM 8:22
CLERK OF COURT
HORRY COUNTY, SC

Re: Michael Cline, #156213 v. State of South Carolina
2014-CP-26-6989

Dear Judge Hyman:

Enclosed please find the proposed **Conditional Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and return to me in the enclosed envelope, and I will forward to the Horry County Clerk of Court to be filed and served. If you have any questions, please do not hesitate to contact me.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General

JFJ/mm
Enclosure(s)

cc: Michael Cline, #156213