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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2018-CP-34-00121

Weldon Stewart #295095, Appellant

v.

State of South Carolina, Respondent

NOTICE OF APPEAL

Weldon Stewart #295095 appeals the order of the Honorable Brooks P. Goldsmith dated January 6, 2020. Appellant received written notice of entry of this order on May 14, 2020.

June 08, 2020

Weldon W. Stewart, Jr. #295095
Kershaw Correctional Institution
4848 Goldmine Highway
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Pro Se Appellant

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF MARLBORO	)	
Weldon W. Stewart, Jr., S.C.D.C. No. 295095,	)	Case No.: 2018-CP-34-00121
Applicant,	)	
v.	)	**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS APPLICATION**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Weldon W. Stewart, Jr. ("Applicant") on June 5, 2018. Applicant, by and through retained counsel, moved for discovery by filing on February 26, 2019. Respondent made its return and motion to dismiss on or about July 9, 2019. The Court convened a hearing into the matter on Thursday, August 22, 2019, at the Chesterfield County Courthouse in Chesterfield, South Carolina. Applicant was present at the hearing and represented by Tommy A. Thomas, Esq. Johnny Ellis James Jr. and Donald J. Zelenka, Esqs., of the South Carolina Attorney General's Office, represented Respondent.

No testimony was taken at the hearing, but attorneys for both parties argued the motions before the Court. The Court had before it Applicant's records from the South Carolina Department of Corrections, the records of the Marlboro County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the appendix from the appeal of Applicant's prior PCR action (including the original trial transcript and the prior PCR transcript), the transcript of the hearing on Applicant's motion in General Sessions for a new trial taking place on May 26, 2016, and the filings in this present action. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marlboro County Clerk of Court. Applicant was indicted at the October 2002 term of the Marlboro County Grand Jury for murder (2002-GS-34-01919), and destruction, desecration or removal of human remains (2002-GS-34-01918). Wade R. Crow, Esq. appeared as stand-by counsel for Applicant, who proceeded *pro se*. Daniel L. Blake, Esq. of the Fourth Circuit Solicitor's Office, prosecuted the case. On July 28, 2003, Applicant proceeded to trial on the murder charge[1] before the Honorable Paul M. Burch and a jury. The jury found Applicant guilty of the lesser-included offense of voluntary manslaughter on August 1, 2003. Judge Burch sentenced Applicant to imprisonment for consecutive terms of 30 years for voluntary manslaughter, and 9 years for desecration of human remains.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, III 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. Stewart, Op. No. 2005-UP-284 (S.C. Ct. App. filed April 20, 2005). The Remittitur was issued on May 23, 2005.

First PCR Application: 2006-CP-34-00125

Applicant filed his first application for post-conviction relief on April 18, 2006 (2006-CP-34-00125). He alleged the following grounds for relief in his application, as summarized by the State:

1. Ineffective assistance of appellate counsel, in that appellate counsel:
   a. Failed to argue the trial judge erred in charging voluntary manslaughter when there was no evidence to support the charge.

[1] Applicant pled guilty to the desecration charge and sentencing was deferred until after trial.

b. Failed to argue the trial judge admitted two documents where the authenticity of the documents had not been established and the documents were not relevant to the issues at trial.
c. Failed to argue the trial judge admitted photographs that were not relevant to the issues at trial and were graphic in nature.
d. Failed to argue the trial judge allowed hearsay testimony.

Respondent made its return on July 28, 2006, and an evidentiary hearing into the matter was convened on November 15, 2006, before the Honorable John M. Milling. Applicant was present at the hearing and represented by Delton W. Powers, Jr., Esq. Karen C. Ratigan, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and was the only witness to testify. By written order dated January 8, 2007, Judge Milling denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was perfected by Kathrine H. Hudgins, Esq. filing a brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Applicant thereafter timely filed a *pro se* response to the Johnson petition, which raised the following issues:

1. "Did the PCR court err in failing to find Appellate Counsel ineffective for failing to argue the trial judge erred in giving a jury instruction on voluntary manslaughter?"
2. "Did the PCR court err in failing to find Appellate Counsel ineffective for failing to argue that the trial judge erred in admitting a photograph of the decedent's body into evidence?"
3. "Did the PCR court err in failing to find Appellate Counsel ineffective for failing to argue that the trial judge err in allowing Staton Wright to provide hearsay testimony?"

The Supreme Court of South Carolina denied Applicant's petition by unpublished order. Stewart v. State, S.C. Sup. Ct. Order field March 18, 2009. The Remittitur was issued on April 3, 2009.

Federal Habeas Petition: 8:09-842-SB-BHH

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on March 31, 2009 (C.A. No. 8:09-842-SB-BHH). In his Petition, Applicant set forth the following grounds for relief:

1. "Did the trial court deprive me of my constitutional right to due process by failing to instruct the jury on involuntary manslaughter?"
    a. "The trial court failed to instruct the jury on the requested jury instruction on voluntary manslaughter. There was evidence presented during the trial which supported the jury instruction and the trial court's failure to instruct the jury on this instruction deprived me of a fair trial."
2. "Did appellate counsel deprive me of my constitutional right to effective assistance of counsel?"
    a. "Appellate counsel was ineffective for failing to argue on my appeal: 1) the trial judge erred by charging the jury on voluntary manslaughter when there was no evidence to support the charge, 2) the trial judge admitted two documents that were not authenticated, 3) the trial judge admitted photographs that were irrelevant and prejudicial, and 4) the trial judge allowed hearsay testimony."

Respondent filed its Return and Motion for Summary Judgment on July 13, 2009. The Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued on December 10, 2009, a Report and Recommendation that Respondent's motion for summary judgment be granted. Stewart v. Warden of Lieber Corr. Inst., 8:09-842-SB-BHH, 2009 WL 6322405 (D.S.C. 2009). The Honorable Sol Blatt, Jr., United States District Judge, denied Applicant's Petition on March 29, 2010, and accepted the Report and Recommendation for summary judgment. Stewart v. Warden of Lieber Corr. Inst., 701 F.Supp.2d 785 (D.S.C. 2010). Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals; the Fourth Circuit dismissed Applicant's appeal on February 17, 2011, for want of a certificate of appealability. Stewart v. Bodison, 412 Fed.Appx. 633 (4th Cir. 2011).

2015 General Sessions Motion for New Trial

Applicant filed motions for a new trial in or about April 2015 and proceeded to a hearing before the Honorable Paul M. Burch on that motion on May 26, 2016. Applicant was present at the hearing and represented by Jamie Scruggs, Esq. Elizabeth R. Munnerlyn, Esq., of the Fourth Circuit Solicitor's Office, represented the State. Counsel Scruggs summarized three grounds for new trials:

> The first one was alleging juror misconduct. The second one has to do with qualifications for the forensic pathologist that testified in the trial of this matter. And the third dealt with, just simply put, a version of events by the Defendant which he claims was repressed at the time he gave his statements and at the time he testified at trial.

(Motion Tr. 4, ll. 15-21). Applicant thereafter abandoned the third ground and proceeded only on the first two. (Motion Tr. 4-5; Tr. 36, ll. 15-20). Peggy Alford, Lori Stewart, and Applicant testified at the hearing. After hearing the testimony, Judge Burch orally denied Applicant's motions from the bench. (Motion Tr. 40-43).

2018 General Sessions Motion for New Trial

Applicant filed another motion for a new trial on or about May 7, 2018. In that motion, Applicant alleges grounds substantively identical[2] to those raised in the present application for relief. The 2018 motion appears to remain pending on the Marlboro County Public Index

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (as excerpted verbatim in the State's Return):

1. "Petitioner is entitled to a new trial because the solicitor's office committed a Brady violation when it suppressed the exculpatory nature of pretrial statements

[2] The motion's text is, as best as the undersigned can compare, perfectly identical through the first 19 pages to the brief submitted with the present application for post-conviction relief.

made by the pathologist, and the suppressed evidence could have been used to impeach the testimony of the pathologist."

a. "Between the months of September and December 2014, Ms. [Loretta] Stewart discovered evidence which added credibility to Petitioner's claims. She conducted professional background checks on the pathologists who performed the 'forensic autopsy' on Victim. She discovered that the lead pathologist, Russell Harley (Pathologist), lacked certification in forensic pathology and that the second pathologist was a mere student in training who followed the guidance of Pathologist in conducting the autopsy on Victim. Ms. Stewart also reviewed court documents revealing that Pathologist made pretrial statements to Daniel Blake (Solicitor) expressing Pathologist's uncertainty about the accuracy of his conclusions in reference to Victim's cause of death."

b. "The trial testimony of Pathologist established that his conclusions were based on the presence of a skull fracture and brain hemorrhage. Ms. Stewart's search to comprehend the significance of Pathologist's pretrial statements led to her finding publications from forensic experts on thermal injuries. Through the information found in these publications, she discovered that the pretrial statements of Pathologist revealed that Pathologist could not rule out the possibility that the skull fracture and brain hemorrhage occurred after Victim's death as a result of the fire."

c. "[T]hough Solicitor did mention Pathologist's statements during a pretrial hearing, Solicitor never disclosed to Petitioner any information in reference to the possibility that the skull fracture and brain hemorrhage were thermal injuries. Ms. Stewart confirmed, by reviewing Court documents, that Solicitor concealed the exculpatory nature of Pathologist's pretrial statements by claiming that these statements established the possibility that victim died as a result of burning. She further noted that Solicitor failed to correct the misstatements made by Pathologist at trial indicating that the skull facture and brain hemorrhage conclusively established that Victim died as a result of blunt force trauma."

2. "Petitioner is entitled to a new trial because the solicitor's office violated Petitioner's due process rights when it failed to correct misstatements made by the pathologist while testifying against Petitioner at trial."

a. "Ms. Stewart hired a forensic pathologist to review the autopsy conducted on Victim. The pathologist made a preliminary finding that it was possible the skull fracture and brain hemorrhage were thermal injuries based upon the location of the injuries, the parietal region, which is a common location for thermal injuries. The pathologist further explained

that the location of the injuries is not common for blunt force trauma injuries. However, the forensic pathologist informed Ms. Stewart that he would not be able to complete his independent evaluation until he examined the autopsy photographs."

b. Applicant thereafter details a series of *ex parte* motions to attempt to obtain photographs and records, each of which were denied.

3. "Petitioner is entitled to new trial because the solicitor's office committed a Brady violation when it suppressed SLED files that were favorable to Petitioner, and the suppressed evidence could have been used to impeach the testimony of witnesses for the State."

a. "In June of 2017, the South Carolina Law Enforcement Division (SLED) provided Ms. Stewart with a CD containing the SLED investigative files for Petitioner's case. While reviewing these files, Ms. Stewart noticed that crime scene notes, written by SLED forensic investigator Al Stuckey (Investigator), contained evidence which was favorable to Petitioner. Ms. Stewart further noticed that other SLED investigative files were also favorable to Petitioner. Ms. Stewart shared her findings with Petitioner, who informed her that none of this evidence had been disclosed to him."

Applicant requests relief as follows:

- "Vacation of conviction for voluntary manslaughter and immediate release from South Carolina Department of Corrections"

The substance of the arguments before this Court primarily addressed the allegedly after-discovered evidence that certain injuries to the victim relied upon by the prosecution to show the victim perished from blunt force trauma were more likely the result of a thermal injury.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. This Court has considered the arguments presented by the attorneys at the hearing. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court shall dismiss the application based upon the following findings:

Newly-Discovered Evidence and the Motion for Discovery

First, the Court finds that Applicant's assertion that each of his allegations constitute newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction 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, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

As to discovery in a post-conviction relief proceeding, South Carolina law provides that a party:

> . . . shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion *and for good cause shown* grants leave to do so, but not otherwise.

S.C. Code Ann. § 17-27-150(A) (emphasis added).

The Court finds that Applicant has failed to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, *or could have been*, discovered before his trial, and are founded in part upon speculation as to what further investigation might produce. Concordantly, Applicant's motion or discovery must be denied.

As to the pathologist's findings, Applicant himself concedes that *more than a year* prior to trial, the State moved to amend the indictment on the basis that the autopsy report included some conjecture and could not definitively conclude whether Candice Allen was killed by a blow to the head or by the burning of the body. As the State *explicitly stated* the potential grounds for impeachment of the autopsy in a pre-trial hearing with Applicant present, Applicant needed only exercise the barest minimum of diligence to discover that issue: he only had to listen. Applicant did listen, as he indicates again in his own application that he pled guilty to desecration of human remains by burning Allen's body, then sought to quash the amended murder indictment on the basis that the autopsy report stated Allen was killed by blunt force trauma, not burning, at which time the State *again* stated in no uncertain terms that Victim could have died from blunt force trauma *or* burning.

Applicant moved for funding prior to trial to have an independent pathologist review the autopsy photographs, and potentially challenge the findings of the State's pathologist at trial, and was denied by Judge Burch, a denial which could have thereafter been raised on appeal. See State v. Matthews, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) ("Authorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion."). Applicant contends any attempt to appeal that denial would be subject to the same deficiency of which the State now complains:

that the denial forecloses any realistic possibility of proffering the evidence necessary to prevail on appeal. No doubt the standard of review to challenge the trial court's ruling would have presented a high bar on appeal, but Applicant misapprehends the question immediately before the Court. This Court, in determining the applicability of procedural bars and the *prima facie* validity of a claim of after-discovered evidence, is first concerned with whether the "evidence" relied upon for the claim was known or knowable at the time of trial. The answer in the present matter is indisputably that the potential ambiguity in the pathologist's findings was known to Applicant at the time of trial, and he attempted to pursue it. That the trial court denied him the funding is a direct appeal issue, and Applicant cannot circumvent the direct appeal process and the challenge it may present through an application for post-conviction relief nearly two decades later. See S.C. Code Ann. § 17-27-20(B) (Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

Furthermore, Applicant concedes he does not actually possess at this time the evidence relied upon for the after-discovered evidence claim. Rather, Applicant speculates as to the conclusions that a different pathologist might reach, and asserts that discovery is necessary to ascertain the nature of the evidence. Applicant explained to this Court that a private pathologist had already indicated his availability and willingness to review the evidence, a Dr. J.C. Upshaw Downs, and that he only needed authorization from the Court to access the easily accessible autopsy records still housed at the Medical University of South Carolina in order to conduct a

complete evaluation. Applicant further noted that he filed his motion before Respondent's motion to dismiss, that dismissing the action was premature without first granting the discovery motion, and that Applicant should be permitted to explore further investigation of the evidence as a matter of fundamental fairness. Applicant argues that denial of the motion for discovery and dismissal of the action would be fundamentally unfair without conclusively determining if the original pathologist erred.

While Applicant's argument in support of his motion for discovery is understandable—that a grant of discovery is now necessary to obtain the evidentiary review he would rely upon to support his claim of after-discovered evidence that is the heart of his application—it also betrays that the claim is ultimately a fishing expedition. Applicant could have sought this relief long ago, prior to trial, by the exercise of diligence. The current application is not supported by actual new evidence, but is predicated upon speculation as to what conclusions a different expert might reach if permitted to review evidence long known to have existed. Further, the Court disagrees with Applicant's contentions that denying him discovery is fundamentally unfair when Applicant enjoyed innumerable opportunities prior to the filing of the present action, and prior to trial, to pursue the relief he now seeks. To the contrary, it would be fundamentally unfair to the State and victims, and contrary to the interests of justice and finality to permit Applicant, or any other convicted person, to file any number of applications for post-conviction relief at any time in order to then avail themselves of discovery tools which *may* be available in such matters. The availability of PCR discovery is limited to the availability of PCR at all, and the mechanisms of PCR discovery cannot be relied upon to circumvent the procedural bars which serve to foreclose the action in the first place.

Further, the Court finds the purportedly new evidence would not change the outcome of trial. Assuming *ad arguendo* that another pathologist would rule the factures to the side of the skull were thermal injuries and not the result of blunt force trauma, other substantial evidence existed in the record to show that Allen perished from such trauma. Indeed, Applicant's own testimony at trial insisted that her passing was the result of accidental blunt force trauma. A pathological finding to the contrary would arguably impeach *Applicant* as much as the State's case against him. That Applicant now seeks to change his story and assert that Allen perished from suicide,[3] and not in the fashion testified to at trial, is inconsequential. Whether newly-discovered evidence is material, and whether it would change the outcome at trial, is considered in the context of the other evidence presented *at trial*, and not in the context of the self-serving, unsupported, and vague "alternative facts" presented by the convicted individual long after trial. Given Applicant's conspicuous lack of detail, it is evident to this Court that he seeks to secure a different pathological finding, and amend his memory to fit it, so many years beyond the original killing that the State would struggle to disprove him.

As to the pathologist's testimony, the testimony was known to Applicant when it was given, and as set forth above, the question of whether Allen's injuries were the result of blunt force trauma or the burning was known to Applicant more than a year before trial. Any issues Applicant may have had with the accuracy or credibility of the pathologist's testimony could have and should have been raised at trial. Furthermore, there is no indication of deception in the pathologist's testimony: he observed epidermal hemorrhage and subdural hemorrhage; those observations contributed to a finding of blunt force trauma. That the same observations could support an alternative theory as to how Allen died does not cast the pall of deception upon the

[3] Curiously and importantly, Applicant does not appear to indicate *how* Allen allegedly killed herself, and did not offer any further detail at the hearing.

pathologist's testimony, such that the State had any obligation to "correct" it. Furthermore, Applicant's "discovery" of other instances where the pathologist misdiagnosed the cause of death of a person is merely impeaching.

As to the purported notes of SLED investigators, Applicant asserts without basis that the notes were wrongfully withheld from him. To the contrary, correspondence from Assistant Solicitor Dan Blake to Applicant shows he was provided the officer's notes in 2003. Additionally, the notes do not reveal anything which would either change the result if a new trial were conducted, nor anything material to the question of guilt or innocence, nor anything beyond the thinnest possible basis for impeachment. Applicant protests the notes show certain articles and refuse identified at the crime scene were not collected. Such protest is merely impeaching *at best*, and Applicant primarily emphasizes the value of the evidence for its possible use to damage "the credibility of Agent Elvington[.]" (Applicant's PCR Brief at 19). Put another way, Applicant presents only purported evidence of lack of evidence, which has *never* been sufficient to secure so much as a hearing, let alone a new trial. Furthermore, Applicant *did* argue and argumentatively question the inadequacy of the investigation in his lengthy closing argument at trial. (See, e.g. Appx. 135-36; Appx. 390-91; Appx. 708, ll. 1-3). Applicant can hardly contend he was not aware, or could not have been aware, of what the State's case against him lacked. Consequently, the State argued any deficiencies in the investigation were the consequence of Applicant's own efforts to destroy evidence and mess up the crime scene. (Appx. 718, ll. 3-15). Given Allen's corpse was *immolated*, the argument was well enough made.

Before the Court will hold a full evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make

such a *prima facie* showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter or relief from the procedural bars set forth below.

Statute of Limitations

The Court finds the application must 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 1, 2003, and the remittitur from his direct appeal issued on May 23, 2005. The current application was not filed until June 5, 2013 – well after the one-year statutory filing period expired. Therefore, the Court dismisses 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 nearly 15 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 dismisses the application as barred by the equitable doctrine of laches.

Successive

The Court finds the application must also 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 application 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 application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court dismisses the application as successive to Applicant's previous PCR application.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any reasons that would require this Court to grant his motion for discovery, or deny or delay in ruling upon the State's motion to dismiss. This Court **DENIES** Applicant's motion for discovery, **GRANTS** Respondent's motion to dismiss. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the 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, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Applicant's motion for discovery is denied;

2. The application for Post-Conviction Relief must be denied and dismissed with prejudice; and

3. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 **day of** October, **2019.**

BROOKS P. GOLDSMITH
Presiding Judge
Fourth Judicial Circuit

Marlboro, South Carolina

FILED
2019 OCT 17 A 11:44
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COUNTY, S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO	)	DOCKET NO.: 2018-CP-34-00121
Weldon Stewart # 295095,	)	
Applicant,	)	
v.	)	ORDER DENYING MOTION
State of South Carolina,	)	
Respondent.	)	
----------	)	

This matter comes before the court upon Applicant's Motion For Reconsideration of the Order dated and filed on October 17, 2019.

Both parties submitted briefs in support of their respective positions. After Considering both briefs I can find no substantial reason to alter the Order of October 17, 2019.

ACCORDINGLY, Applicant's Motion To Reconsider IS HEREBY DENIED.

January 6, 2020

BROOKS P GOLDSMITH

Circuit Judge

FILED
2020 JAN -9 A 11:42
ANITA M. WILLIAMS
CLERK OF COURT
MARLBORO COURT

Jackie Miller

From: Goldsmith, Brooks
Sent: Friday, May 15, 2020 12:47 PM
To: Jackie Miller; Johnny James
Subject: RE: Weldon Stewart v State

I just spoke with someone at the Clerk's Office who advised that they were normally responsible for "clocking" orders when received but in this case the Order was just placed in the file. She was on maternity leave. The Order has now been clocked and copies mailed to the attorneys.

Brooks P. Goldsmith
Circuit Judge
Active/Retired

From: Jackie Miller <jackie@paroleme.com>
Sent: Thursday, May 14, 2020 2:57 PM
To: Goldsmith, Brooks
Subject: RE: Weldon Stewart v State

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Thank you.

Jackie Miller
Paralegal to Tommy Thomas, Esq.

THOMAS LAW

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Mailing Post Office Box 88 | Irmo SC 29063
Physical 7588 Woodrow St | Irmo SC 29063
Website

From: Goldsmith, Brooks
Sent: Thursday, May 14, 2020 2:44 PM
To: Jackie Miller <jackie@paroleme.com>; Johnny James <
Subject: Weldon Stewart v State

Attached is a copy of an order dated January 6, 2010 and apparently mailed to the Clerk on January 10, 2010. I have left a message for the Clerk to contact me regarding this Order.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARLBORO	)	DOCKET NO.: 2018-CP-34-00121
Weldon Stewart # 295095,	)	
Applicant,	)	
v.	)	ORDER DENYING MOTION
State of South Carolina,	)	
Respondent.	)	
----------	)	

This matter comes before the court upon Applicant's Motion For Reconsideration of the Order dated and filed on October 17, 2019.

Both parties submitted briefs in support of their respective positions. After Considering both briefs I can find no substantial reason to alter the Order of October 17, 2019.

ACCORDINGLY, Applicant's Motion To Reconsider IS HEREBY DENIED.

January 6, 2020

BROOKS P. GOLDSMITH

Circuit Judge

Mailed 1/10/2020