

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) FOR THE SEVENTH JUDICIAL CIRCUIT

Lonnie Geter,) Case No.: 2019-CP-42-01727
S.C.D.C. No. 288401,)

Applicant,)

CONDITIONAL ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of an application for post-conviction relief filed by Lonnie Geter (Applicant) on May 14, 2019. 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 Spartanburg County Clerk of Court. Applicant was indicted at the October 2002 term of the Spartanburg County Grand Jury for common law robbery (2002-GS-42-04633), burglary, first degree (2002-GS-42-04634), and assault and battery of a high and aggravated nature (2002-GS-42-04635). Jennifer L. Johnson, Esq. represented Applicant, and Robert Coler, Esq., of the Seventh Circuit Solicitor's Office, prosecuted the case. On December 4, 2002, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted on December 6, 2002. Judge Cole sentenced Applicant to imprisonment for concurrent terms of fifteen years for the robbery, life for the burglary, and ten years for ABHAN.

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Applicant filed a timely notice of appeal and a direct appeal was perfected by Daniel T. Stacey, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which raised the following issue:

“Whether the court erred when it refused appellant’s request to submit the lesser included offense of second degree burglary to the jury?”

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Getex, Op. No. 2004-UP-413 (S.C. Ct. App. filed June 24, 2004). The Remittitur was issued on July 28, 2004.

First PCR Application: 2004-CP-42-02852

Applicant filed his first application for post-conviction relief on August 29, 2004 (CP-42-02852). He alleged the following grounds for relief in his application:

1. “Ineffective Assistance of Counsel”
 - a. “[. . .] when my trial counsel failed to object to the arraignment and charging of Burglary 1st Degree, when the elements did not meet the crime originally charged.”
 - b. “[. . .] when my trial counsel failed to make an oral objection to proceed to trial, when my due process rights had been violated by not allowing my constitutional right of a Preliminary Hearing.”
 - c. “[. . .] when trial counsel failed to object to trial benches unconstitutional, burden shifting jury charge instructions concerning the definition of Burglary 1st Degree.”
 - d. “[. . .] when my trial counsel failed to call witnesses that would provide a better defense nor did trial counsel allow sufficient time to prepare a competitive defense on my behalf.”
2. “Subject Matter of Jurisdiction”
 - a. “That on October 21, 2002, the Applicant completed and filed with the Magistrate Court sufficient Notice of Right to Preliminary Hearing, form 512 of the SCCA. This notice was disregarded, although a hearing date and time had been set and Applicant was transferred from the County Jail to the Magistrate Court only to be turned back around by the Trial Solicitor, stating to Applicant, “That there is no need.” This violation of due process denied Trial Court jurisdiction and was a complete disregard for the Constitution.”
3. “Due Process Violation”

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Respondent made its return on February 1, 2005, and an evidentiary hearing into the matter was initiated on March 24, 2006, and completed on May 21, 2007, before the Honorable J. Mark Hayes. Applicant was present at the hearings and represented by David L. Walsh, Esq. Colleen E. Dixon, Esq., of the South Carolina Attorney General's Office, represented Respondent at the first hearing, and S. Prentiss Counts, Esq., of the same, represented Respondent at the second hearing. Applicant testified on his own behalf, and Jennifer L. Johnson, Esq., also testified. By written order dated September 7, 2007, and filed September 11, 2007, Judge Hayes denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Elizabeth A. Franklin, Esq., on Applicant's behalf, who raised the following issue:

Did the PCR judge err when he held that trial counsel was not ineffective, when trial counsel's "strategy" was not a legally cognizable strategy at all?

Respondent filed its Return on June 6, 2008. On November 19, 2008, the Supreme Court of South Carolina denied the petition by letter order. The Remittitur was issued on December 5, 2008.

Federal Habeas Petition: 8:09-1589-PMD-BHH

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on June 9, 2009 (C.A. No. 8:09-1589-PMD-BHH). In his Petition, Applicant set forth the following grounds for relief:

1. "Petitioner was denied due process of law at trial when the Court refused to submit the lesser included offense of 2nd degree burglary because of prior burglary convictions."
2. "The Court of General Sessions lacked subject-matter jurisdiction to try Petitioner on the Amended burglary-first degree indictment &/or his defense counsel was ineffective for failing to object to the amended burglary-first degree indictment and for failing to inform him that the indictment had been amended to materially change the aggravating circumstances."

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3. "Petitioner was denied effective assistance of Counsel. Counsel admitted Petitioner's guilty in her closing argument, counsel failed to subject the state's case to a meaningful adversarial testing."

Respondent filed its Return and Motion for Summary Judgment on October 16, 2009. The Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued on February 9, 2010, a Report and Recommendation that Respondent's motion for summary judgment be granted. Geter v. McCall, 8:09-1589-PMD-BHH, 2010 WL 2640216 (D.S.C. 2010). The Honorable Patrick Michael Duffy, United States District Judge, denied Applicant's Petition on June 29, 2010, and accepted the Report and Recommendation for summary judgment. Geter v. McCall, 8:09-1589-PMD-BHH, 2010 WL 2640221 (D.S.C. 2010). Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals, which dismissed Applicant's appeal on February 15, 2011. Geter v. McCall, 412 Fed.Appx. 564 (4th Cir. 2011). Applicant filed a petition for writ of certiorari in the Supreme Court of the United States, which was denied on October 3, 2011. Geter v. McCall, 565 U.S. 840 (2011).

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Second PCR Application: 2015-CP-42-03424

Applicant filed his second application for post-conviction relief on August 10, 2015 (2015-CP-42-03424). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel, in that:
 - a. "Failure of trial counsel to request competency hearing to determine Applicant['s] fitness to stand trial constituted ineffective assistance by failing to preserve the issues for direct review;"
2. "Brady Violation;"
3. "Sham Process"
 - a. "two (2) documents or any document claiming authority over an individual that does not [truly] exist or is just for show makes a sentence void. See S.C. Code Ann. 16-17-735"
4. "After Discovered Evidence"
5. Ineffective assistance of PCR counsel, in that:
 - a. "Counsel failed to investigate, develop, and present all available, relevant, admissible, and mitigating evidence. [See letter] dated September 11, 2007. Counsel admitted that he failed to object on all possible grounds to inflammatory and irrelevant evidence."

Respondent made its return and motion to dismiss on October 25, 2016, arguing the application raised claims not cognizable in a PCR action, failed to make a *prima facie* case of newly-discovered evidence, and was untimely and successive. On October 31, 2016, the Honorable J. Mark Hayes, II issued a Conditional Order of Dismissal. On May 19, 2017, the Honorable J. Derham Cole issued a Final Order dismissing the matter with prejudice. Applicant did not appeal the order dismissing his application

II. CURRENT APPLICATION

In his third and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (as summarized by the State):

1. Newly discovered evidence, in the form of:
 - a. E-mails between original defense counsel Jennifer L. Johnson, Esq. and Assistant Solicitor Robert Coler regarding a "plea offer" which were never conveyed to applicant.
2. Ineffective assistance of counsel, in that:
 - a. Counsel Johnson failed to convey a "plea offer" to Applicant.

Applicant requests relief as follows:

- "Vacate Conviction and sentence, Remand for Resentencing"

Before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the opinions of the Court from each of Applicant's prior appeals, the final orders of Applicant's previous PCR actions, and the records of this current PCR action.

III. 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. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

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Newly-Discovered Evidence

The Court finds that Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence and immunity, is without merit. The Uniform Post-Conviction Procedure 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 date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

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Applicant has failed to allege facts sufficient to support his claim. Applicant alleges that a plea offer was made by the solicitor and not conveyed to him by his trial counsel. However, review of the e-mails filed by Applicant alongside his application refute the claim, and it appears Applicant misunderstands them. The November 25, 2002, e-mail from Counsel to the State reflects that *Counsel* initiated negotiations by proposing a potential deal. The November 26, 2002, response from the State is initially favorable. However, the December 2, 2002, e-mail indicates Applicant "didn't seem very interested in the original offer" and implies a new proposal was provided to the State, which the State rejected. Taken together, the e-mails (1) do not reflect any firm plea offer from the State and (2) that Applicant was appraised of Counsel's negotiation efforts and was disinterested. Furthermore, the August 1, 2018, letter by which the e-mails were provided to Applicant reflect that copies were provided to him *at least* as early as July 11, 2017, nearly two years before the Application was filed, and that the e-mails provided with the August

1, 2018, were duplicates. Accordingly, Applicant has both failed to provide any reason why these allegations could not by the exercise of due diligence have been discovered before the filing of his previous PCR applications, and failed to show that he filed the application within one year of “discovering” the e-mails.

Before the Court will hold an 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 a 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. Accordingly, the Court shall summarily dismiss the application.

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).

Applicant was convicted on December 6, 2002, and the remittitur from his direct appeal issued on July 28, 2004. The most generous conceivable date upon which Applicant could prevail is July 11, 2017. The current application was not filed until May 14, 2019—well after

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the one-year statutory filing period expired under any subsection of the statute. Therefore, the Court shall dismiss the application as barred by the statute of limitations.

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).

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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.

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, when records and witnesses are no longer available." Id. (quoting Honeycutt v. Ward, 612 F.2d 86, 47 (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.

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Applicant seeks post-conviction relief more than 16 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 summarily dismiss the application as barred by the equitable doctrine of laches.

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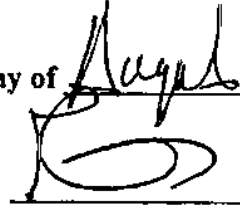
IV. CONCLUSION

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 Spartanburg 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 - 7th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

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

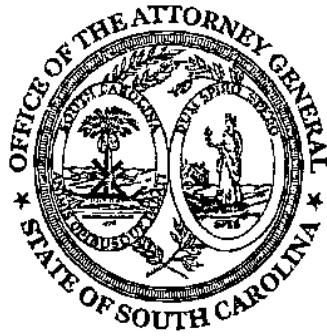
AND IT IS SO ORDERED this 19 day of August, 2019.



GRACE G. KNIE
Chief Judge for Common Pleas
Seventh Judicial Circuit

Spartanburg, South Carolina

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SPARTANBURG COUNTY
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ALAN WILSON
ATTORNEY GENERAL

August 16, 2019

The Honorable Grace Gilchrist Knie
Chief Administrative Judge
180 Magnolia Street
Spartanburg, SC 29306

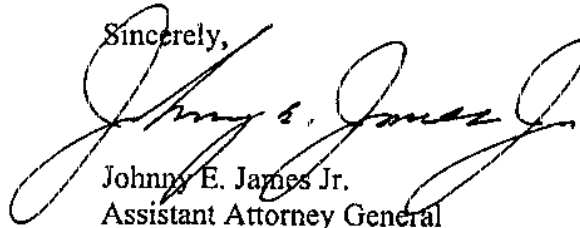
RE: Lonnie Geter, #288401 v. State of South Carolina
2019-CP-42-01727

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Dear Judge Knie:

Enclosed please find a proposed **Conditional Order of Dismissal** in the above case. If this order meets with your approval, please sign it and return to me in the self-addressed envelope provided. I will file with the Spartanburg County Clerk of Court.

Sincerely,



Johnny E. James Jr.
Assistant Attorney General

JEJ/my
Enclosure

cc: Lonnie Geter, #288401

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
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IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

CASE NO: 2019-CP-42-01727

LONNIE GETER, #288401

MOTION AND ORDER INFORMATION

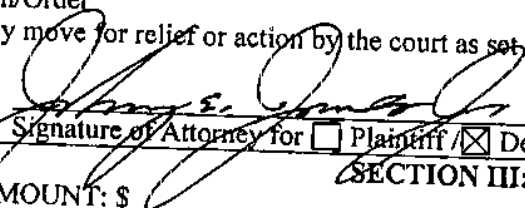
Plaintiff,)
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FORM AND COVERSHEET

vs.)
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STATE OF SOUTH CAROLINA

Defendant.)
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Lonnie Geter, #288401 Q4B-0116-B Perry Correctional Institution 430 Oaklawn Road Pelzer, SC 29669 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Johnny E. James Jr., Esquire. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____	FILED CLERK OF COURT SPARTANBURG COUNTY 2019 AUG 20 AM 8:44
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)		
SECTION I: Hearing Information Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO		
SECTION II: Motion/Order Type <input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> 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 <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant August 16, 2019 Date submitted		
SECTION III: Motion Fee <input type="checkbox"/> PAID - AMOUNT: \$ _____ EXEMPT: (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> 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: _____ <input type="checkbox"/> Other: _____		
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____		