

summarily dismissed with prejudice.

Applicant has not adequately shown why he is entitled to relief based upon newly discovered evidence. Beyond implying that newly discovered evidence was recently discovered after Applicant's review of "law books" and that counsel failed to conduct a mental health evaluation independent to the one conducted by the State, Applicant has offered nothing else to substantiate this claim. Specifically, he has not identified what the evidence is, why it entitles him to a vacated plea, when it was discovered, or why he could not have discovered it through due diligence before entering the plea. Accordingly, this Court finds the application dismissed for failure to establish a *prima facie* case of newly discovered evidence.

Applicant was pled guilty on August 14, 1995. The application was therefore filed on August 15, 1996. This application was filed on March 26, 2018. Applicant has failed to sufficiently explain the twenty-three year delay between the guilty plea and this pursuit of remedy through the PCR process. Thus, the Court shall dismiss the matter as barred by the statute of limitations.

Further, Applicant's application is barred on successiveness grounds. Applicant's current allegations were or could have been raised in earlier proceedings based upon Applicant's prior PCR applications and Applicant has not sufficiently proven why these issues could not have been raised earlier. Thus, the current application is successive and barred.

Before this 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). Applicant has failed to make such a showing based on the information set forth in his response, and, consequently, is not entitled to an evidentiary hearing. Thus, the Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed for

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untimeliness, as barred by the doctrine of *laches*, and for failure to establish a *prima facie* case of newly discovered evidence. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons in this Court's conditional order of dismissal, the PCR application is hereby denied and dismissed with prejudice. This court hereby advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 1st day of June, 2021.

Spartanburg, South Carolina

J. MARK HAYES, II¹
Chief Administrative Judge
Seventh Judicial Circuit

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¹ The Honorable J. Derham Cole is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, but because he heard Applicant's initial plea proceedings, the proposed final order of dismissal is being sent to the Honorable J. Mark Hayes, II, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARATANBURG)
)
)
 Robert D. Thomas, #221038,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-42-1046

**CONDITIONAL ORDER OF DISMISSAL;
 ORDER GRANTING MOTION TO FILE
 RETURN OUT OF TIME AND DENYING
 MOTION FOR DEFAULT JUDGMENT**

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This matter comes before the Court by way of a post-conviction relief (hereafter "PCR") application filed by Applicant Robert D. Thomas on March 26, 2018. Respondent made its return, requesting the application be summarily dismissed.

I. Procedural History¹

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During the March 1995 term, the Spartanburg County Grand Jury indicted Applicant for kidnapping (1995-GS-42-1091), armed robbery (1995-GS-42-1092), assault and battery of a high and aggravated nature (1995-GS-42-1093), larceny (1995-GS-42-1095), and second degree burglary (1995-GS-42-1096). J. Michael Bartosh and Charles E. Sanders, Esquires, represented Applicant. On August 14, 1995, Applicant pled guilty before the Honorable J. Derham Cole, circuit court judge. Applicant was sentenced to six years imprisonment on the -1091, -1092, and -1093 charges, to five years suspended on -1095, and fifteen years imprisonment for -1096. Applicant did not appeal the conviction or sentence.

¹ Applicant pursued two prior PCR actions based upon unrelated charges in Spartanburg County: (2002-CP-42-1929) and (2007-CP-42-0522). Both of these applications were denied and the matters dismissed accordingly.

II. Current Action before this Court

In his current PCR application, Applicant alleges he is unlawfully detained on the following grounds:

1. "Fourteenth Amendment, U.S. Const. Due Process Rule (5) *Brady v. Maryland.*"
2. "Sex Offender Registry of Kidnapping."
3. "Ineffective Assistance of Counsel."
4. "Subject Matter Jurisdiction."
5. "Involuntary Guilty Plea."
6. "When I learned to read the law books, I suffered from a learning disorder all my life. This is why this is new, because I learned it myself."²

In the first amendment, filed on April 17, 2018, Applicant alleged:

1. 5th Amendment violation to the United States Constitution.
 - a. Prosecution either disregarded or attempted to get Applicant to waive a discovery request under Rule 5 SCRCrimP.
2. Prosecutorial Misconduct/Malicious prosecution.

In his second additional filing, filed May 3, 2018, Applicant alleged:

7. Police coercion.
8. Applicant was held in prison, without bail, until his plea hearing.
9. Applicant reasserts his allegation concerning the noncompliance with the Rule 5 and *Brady* motion.

Regarding relief, Applicant requested a default judgment and all charges be removed. He also attached a *pro se* Rule Five SCRCrimP and *Brady* motion, filed March 28, 2018.

On April 5, 2019, Applicant submitted a document entitled "request of review of case", stating that at the time of the plea he was not competent or was placed at the county jail. He stated the State conducted the mental health evaluation and that Counsel should have contacted an "outside" doctor to conduct one instead of letting the State "have the last word." Applicant, hedging this allegation as a newly discovered evidence claim, alleges Counsel was ineffective on this ground, so that it entitles him to relief.

² Respondent interprets this as a newly discovered evidence claim.



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Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, and this PCR action's record.

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 South Carolina Code Annotated Sections 17-27-70 and 17-27-71, this Court informs the parties of its intent to dismiss the application based upon the following findings:

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Newly Discovered Evidence

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 Relief Act states that a person may institute a PCR 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 PCR 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).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show 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 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. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Beyond implying that newly discovered evidence was recently discovered and Applicant's review of "law books" and that counsel failed to conduct a mental health evaluation independent to the one conducted by the State, Applicant has offered nothing else to substantiate this claim. Specifically, he has not identified what the evidence is, why it entitles him to a vacated plea, when it was discovered, or why he could not have discovered it through due diligence before entering the plea. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court dismisses this claim for failure to make a *prima facie* case of newly discovered evidence.

Statute of Limitations

The Court finds that this 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 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.



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McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994).

Additionally, South Carolina Code Annotated Section 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 pled guilty on August 14, 1995. The application was therefore filed on August 15, 1996. This application was filed on March 26, 2018, well beyond the statute of limitations period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

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Laches

The Court finds the application must be dismissed based on the doctrine of *laches*. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. *See McElrath v. State*, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). 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." *Id.* Thus, the doctrine of laches bars any an action where the applicant has failed to exercise his rights for an unreasonable period. *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 371 S.E. 525 (1988)); *see also RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) (“Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner.”). Recognizing the importance of finality in litigation, 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.

The South Carolina General Assembly has likewise recognized this problem and instituted a one year statute of limitations. *See* S.C. Code Ann. § 17-27-45(a). Applicant filed this current application approximately twenty-three years after he pleaded guilty. Applicant's delay has greatly prejudiced the State (and Applicant). Records of the guilty plea may no longer be available. *See, e.g.* Rule 607(i), SCACR (court reporter only required to retain records for five years). Additionally, both of Applicant's attorneys are now deceased, rendering them unavailable to testify at an evidentiary hearing. The State should not be called upon to defend the constitutionality of convictions after such a long delay. *See Aice v. State*, 305 S.C. 441, 409 S.E.2d 392, 394 (1991) ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice."). Accordingly, this Court shall summarily dismiss the PCR application based on Applicant's lack of diligence in pursuing his claim for relief.

IV. Timeliness of Return

Respondent has moved the Court accept this return for filing out of time. In light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent moves the Court accept the return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extent the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Concordantly, the Court denies Applicant's motion seeking default judgement. The grant



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of post-conviction relief due to the State's failure to reply or lateness of reply is not appropriate. See Rule 55(e), SCRCP ("No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof unless the claimant establishes his claim to relief by evidence satisfactory to the Court[.]"). A colorable claim for relief must be supported by evidence and testimony on the record and a meritless application cannot be saved by inaction by the State. Accordingly, the Court denies Applicant's motion for default judgment.

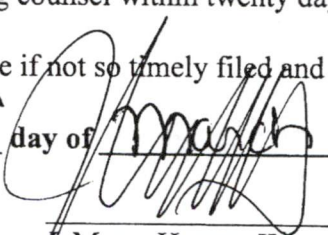
V. Conclusion

Pursuant to South Carolina Code Annotated Section 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, legal, why the application should not be dismissed in its entirety. Applicant is granted twenty 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
Attn: Chelsey F. Marto, Esquire
PCR Division – Seventh 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 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 18th day of March, 2021.



J. MARK HAYES, II
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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