

ALAN WILSON
ATTORNEY GENERAL

November 18, 2021

The Honorable James C. Campbell
Clerk of Court, Sumter County
215 North Harvin Street
Sumter, South Carolina 29150

Re: David A. Duren, #181965 v. State of South Carolina
2019-CP-43-1328

Dear Mr. Campbell:

Enclosed please find the original Conditional Order of Dismissal, signed by the Honorable George M. McFaddin, Jr., in the above-captioned case for filing in your office. Please forward a time stamped copy back to our office for our file.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/ks
Enclosure(s)

cc: David A. Duren, #181965

RECORDED
STATE OF SOUTH CAROLINA
COUNTY OF SUMTER 2021 NOV 22 PM 2:28

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

David A. Duren, #181965,)
JAMES C. CAMPBELL)
CLERK OF COURT)
SUMTER COUNTY, S.C.)
Applicant,)

2019-CP-43-1328

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)
_____)

This matter comes before this Court by way of a post-conviction relief (PCR) action filed by David Duren (Applicant) on June 21, 2019. The State made its return and motion to dismiss, requesting the application be summarily dismissed because of Applicant's failure to comply with the statute of limitations, because it is successive, and as partially barred by the doctrine of laches, entitling Respondent to judgment as a matter of law.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. In February 2002, the Sumter County Grand Jury indicted Applicant for three counts of second-degree burglary (2002-GS-43-107) and one count of second-degree arson (2002-GS-43-109).¹ Jack Howle, Esquire, represented Applicant. On April 4, 2002, Applicant pleaded guilty as indicted before the Honorable Clifton Newman. Judge Newman sentenced Applicant to seven years' imprisonment for two counts of second-degree burglary and six years' imprisonment for second-degree arson, with the sentences to be served concurrently. Applicant did not appeal his guilty pleas or sentences.



¹ Applicant lists both sets of charges/indictments on his current PCR application.

Additionally, in September 2012, the Sumter County Grand Jury indicted Applicant for second-degree burglary (2012-GS-43-1149), which was amended by the Grand Jury in May 2015.² On May 20, 2015, Applicant proceeded *pro se* to a jury trial before the Honorable George C. James, Jr. The jury convicted Applicant as indicted. Judge James sentenced Applicant to life imprisonment without parole pursuant to the recidivist offender sentencing structure set forth in section 17-25-45 of the South Carolina Code. Applicant did not appeal his conviction or sentence.

First PCR Application and Appeal (2015-CP-43-2134)

Applicant filed his first application for post-conviction relief on September 14, 2015. In this application, Applicant alleged he is being held in custody unlawfully on both his 2002 and 2015 charges for the following reasons:

1. "4th, 5th, 6th, 8th, 13th, 14th, amend. Violation."
2. Due Process Violation
3. Fraud Upon the Court
4. Subject Matter Jurisdiction
5. Ineffective Assistance of Counsel

Respondent filed its Return and Partial Motion to Dismiss on December 3, 2015. An evidentiary hearing into the matter was convened on July 25, 2016, at the Sumter County Courthouse before the Honorable Jocelyn Newman. Applicant was present at the hearing and represented by Timothy Griffith, Esquire. Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office represented the State.

At the evidentiary hearing, Respondent moved to dismiss any allegations pertaining to Applicant's 2002 burglary and arson convictions as untimely. The PCR court granted Respondent's motion

² The records provided to Respondent by the Sumter County Clerk of Court do not include the original indictment. However, Respondent requests this Court take judicial notice of the public index, which lists the original indictment date as September 27, 2012.



and dismissed those allegations. Applicant then proceeded only on allegations regarding his 2015 convictions.

Applicant filed a notice of appeal on November 21, 2016, after the PCR court issued a Form 4 Order denying relief that same day. On December 1, 2016, the Supreme Court of South Carolina dismissed the notice of appeal without prejudice and directed the PCR court to enter an order continuing the required findings of fact and conclusions of law. The remittitur returned to the circuit court on December 19, 2016.

The PCR court denied relief and dismissed the allegations with prejudice by written Order filed February 28, 2017. On March 6, 2017, Applicant filed a timely notice of appeal. On January 18, 2018, appellate counsel Laura M. Caudy filed a Johnson³ petition for writ of certiorari on Applicant's behalf. In this petition, Applicant asserted the following issue:

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to investigate the constitutionality of Petitioner's prior convictions, which were used by the state to seek a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45, where these convictions were obtained in violation of Petitioner's Sixth Amendment right to counsel since Petitioner pled guilty with counsel who was appointed immediately before his plea merely as a formality to stand by Petitioner during the proceeding.

On September 24, 2018, the Supreme Court of South Carolina denied Applicant's petition and granted appellate counsel's motion to be relieved. The remittitur issued October 12, 2018.

³ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).



2017 Federal Habeas Action – 1:16-cv-03756-MBS-SVH

In the meantime, Applicant filed a petition for writ of habeas corpus in the federal district court on February 28, 2017.⁴ In this petition, Applicant attacked the district court's decision in eight civil actions. Applicant also requested the following: "the court to reinstate Lawrence L. Crawford's cases; consolidate the instant case with others; remove state cases into the instant action; disqualify several state and federal court judges; transfer the instant action and other cases in this court to New Jersey; and transfer Plaintiff and his property to a prerelease camp."

The United States Magistrate Judge issued a Report and Recommendation on February 28, 2017, determining the claims contained in the petition were vague and conclusory, in violation of Rule 2(c) of the section 2254 Rules, and a number of the allegations had previously already been decided. On May 9, 2017, the United States District Court for the District of South Carolina adopted the recommendation, summarily dismissed the application without prejudice, and denied a certificate of appealability.

CURRENT APPLICATION

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

1. Fraud Upon the Court
2. "Null and Void Indictment"
3. *Brady* Violation
4. Error of Law
5. Discovery Violation
6. "Prior Conviction Violation."
7. "6th Amend. Right to Counsel."

⁴ Applicant marked through portions of the form section 2254 petition, replacing "§ 2254" with "writ of error," and adding section 1983. Applicant also crossed out "Petitioner" in the caption and added "parties listed in case 8:16-cv-3328 et al," and replaced "Respondent" with "defendants Judge Robert E. Hood et al in expanded cases." Because Applicant sought to have his sentence and conviction vacated, the United States District Court for the District of South Carolina continued to analyze his petition under section 2254.



Applicant requests the following form of relief: "Sentence and conviction set aside."

Attached hereto and incorporated by reference are the records of the Sumter County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR and appellate records, the records of Applicant's federal habeas action, the current PCR application and Respondent's return.

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 section 17-27-70 and -80 of the South Carolina Code, this Court informs the parties of its intent to dismiss the application this application is procedurally barred and no purpose would be served by further proceedings. See S.C. Code Ann. § 17-27-70(b) (establishing the procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (holding that summary disposition is appropriate when there is no need to develop facts and the applicant is not entitled to relief); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the Court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Statute of Limitations

This PCR 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, *et. seq.* Section 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.



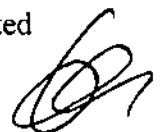
The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of and sentenced for the offenses he challenges in this application on April 4, 2002, and May 20, 2015. Applicant did not appeal his convictions or sentences. Therefore, any application for post-conviction relief must have been filed on or before April 4, 2003, for the first set of charges, and May 20, 2016, for the second set of charges in order to comply with the statute of limitations. This Application was filed on June 21, 2019, *sixteen years and three years*, respectively, after the statutory filing periods had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, 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.” Therefore, this Court finds it must summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Successive Applications

Second, this Court finds the application must be summarily dismissed because it is successive to Applicant’s previous collateral actions. 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 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 could have raised, and did raise at least some of, the grounds for relief he now alleges in his prior collateral actions; thus, the current application is successive and barred under section 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 this Court finds the application must be summarily dismissed as successive to Applicant’s previous collateral actions.

Laches

Finally, all allegations related to Applicant’s 2002 charges should be summarily dismissed pursuant to 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.

Here, Applicant seeks review of his convictions more than *sixteen years* after he pleaded guilty. Absent some explanation or justification for the delay in seeking relief, laches will prevent Applicant from seeking collateral review of his conviction, especially because the delay affects the availability of evidence to review Applicant’s claims. 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). Moreover, because of Petitioner’s failure to timely challenge his conviction, the tape recordings of his guilty plea hearing have almost assuredly been destroyed. See Rule 607, SCACR (“[A] court reporter shall retain the primary and backup tapes of a proceeding for a period of at least five years . . . and the court reporter may reuse or destroy the tapes after the expiration of that period.”); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for

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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 and prejudices Respondent in defending against them. Therefore, the Court finds Applicant’s allegations regarding his 2002 convictions should be summarily dismissed as barred by the equitable doctrine of laches.

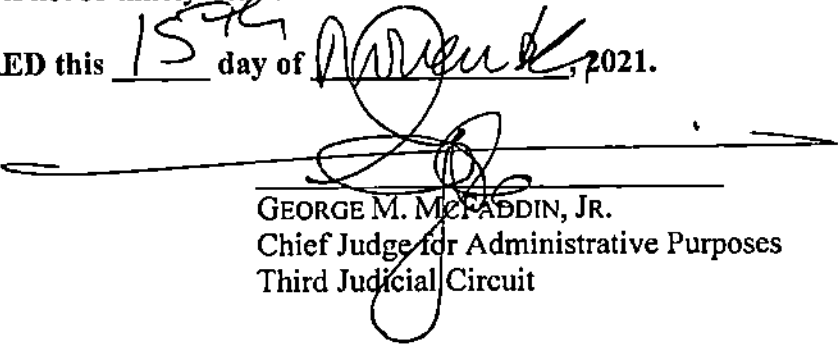
CONCLUSION

Pursuant to section 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 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 Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Lindsey A. McCallister, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

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

AND IT IS SO ORDERED this 15th day of November, 2021.



GEORGE M. MCPADDIN, JR.
Chief Judge for Administrative Purposes
Third Judicial Circuit