ALAN WILSON
ATTORNEY GENERAL

December 13, 2021

The Honorable Christy M. Gray
Marion County Clerk of Court
Post Office Box 295
Marion, SC 29571

Re: **Jerry Lee Franklin, Jr., #132862 v. State of South Carolina**
2021-CP-33-0216

Dear Ms. Gray:

Enclosed please find the original Conditional Order of Dismissal signed by the Honorable Michael G. Nettles, in the above-captioned case, for filing in your office.

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

Sincerely,

Michael D. Davidson

Michael D. Davidson
Assistant Attorney General

MDD/kw
Enclosure

cc: Jerry Lee Franklin, Jr., #132862

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS FOR THE TWELFTH JUDICIAL CIRCUIT
Jerry Lee Franklin, Jr., #132862, Applicant	)	Case No.: 2021-CP-33-0216
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Jerry Lee Franklin, Jr. (Applicant) on May 12, 2021. The State made its return and moved to summarily dismiss the action because: it was filed after the statute of limitations had expired; it was successive; it is barred by the doctrine of *res judicata*; Applicant's indictment allegation is not proper for PCR; it fails to make a *prima facie* showing the trial court lacked subject matter jurisdiction; and Applicant has failed to make a *prima facie* showing he is entitled to relief based on his claim that his fourteenth amendment due process rights were violated because he denied appointment of parole revocation counsel. For the reasons discussed below, this Court grants the State's motion to summarily dismiss the PCR action.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the February 1986 term of the Marion County Grand Jury for murder and assault and battery with intent to kill (1986-GS-33-0019). Represented by Marvin C. Tyndall, Esquire, Applicant appeared for a plea before the Honorable Julius H. Baggett on March 10, 1986. Applicant pleaded guilty as indicted. Judge

Bagett accepted Applicant's Plea and sentenced him to a term of twenty years' imprisonment for assault and battery and a life term for murder. Applicant did not appeal.

i. First PCR[1]

On October 19, 1989, Applicant filed his first post-conviction relief application. On September 13, 1990, an evidentiary hearing was held before the Honorable Judge James E. Lockemy, at which time Applicant was present and was represented by William S. Derrick, Esquire. By Order dated November 15, 1990, Judge Lockemy denied and dismissed the application for post-conviction relief. A timely Notice of Intent to Appeal was filed on Applicant's behalf, and an appeal was perfected by the Office of Appellate Defense. The South Carolina Supreme Court denied certiorari on September 5, 1991. Applicant filed a Petition for Writ of Habeas Corpus in U.S. District Court, District of South Carolina which was denied March 11, 1994. Applicant also filed an appeal in the Fourth Circuit Court of Appeals, and same was denied July 22, 1994.

ii. Second PCR (1994-CP- 33-217)

Applicant subsequently filed another application for PCR on October 13, 1994. The State filed its return on October 17, 1996. On October 5, 1998, an evidentiary hearing was held before the Honorable James Brogdon, Jr., at which the Applicant was present and was represented by Harry Devoe, Esquire. By Order dated November 8, 1998, Judge Brogdon denied and dismissed the Applicant's application.

iii. Second PCR (2003-CP-33-086)

On February 28, 2003, Applicant filed his third PCR action. According to the public index,

[1] Due to the age of the case, the State was unable to provide the case number for this case as it is not listed on the public index and the State's file has been destroyed.

the case was dismissed on July 6, 2005 by the Honorable John L. Breeden, Jr.

II. CURRENT APPLICATION

Applicant *untimely* commenced this PCR action on May 12, 2021. In his application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Due process rights violated under fourteenth Amendment
   a. Applicant had a parole revocation hearing on April 22, 2021 and Applicant contends this hearing was unlawful and his due process rights was violated when he was denied counsel to represent him at his revocation hearing. See Morrissey v. Brewer, 8812, 5103, 408 U.S. 471, 92 S.CT 2593, 33 L.ED.2d 484 (1972).
2. Trial court lacked subject matter jurisdiction
   a. Insufficient and defective indictment
3. Ineffective assistance of counsel
   a. Failure to file a motion of discovery and/or a Brady motion
   b. Failure to make a motion to have Applicant's murder indictment quashed
4. Due process rights violated under fourteenth amendment
   a. Insufficient indictment

As relief, Applicant requests a new trial. Before the Court and incorporated herein are the Marion County Clerk of Court records, Applicant's SCDC records, the records of Applicant's prior PCR actions, and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant material

III. DISCUSSION

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requests the Court issue a conditional order of dismissal indicating the Court's intent to

dismiss the application and its reasons for so doing.[2] *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). The State moves for summary dismissal for the following reasons:

i. Statute of Limitations

This Court finds Applicant's allegations, except for subject matter jurisdiction, shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act[3] (the Act). Specifically, the Act requires:

> An application for relief filed pursuant to this chapter ***must*** be filed within ***one year after the entry of a judgment*** . . . or within ***one year after the sending of the remittitur*** . . . .

S.C. Code Ann. § 17-27-45(A) (emphasis added).

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, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this Court to "grant a motion by either party for

[2] A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.
[3] S.C. Code Ann. § 17-27-10 to -160.

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."

In the present case, Applicant pleaded guilty on March 10, 1986, and he did not appeal. The application was, therefore, due on or before March 11, 1987. This application was filed on May 12, 2021, *well after* the requisite filing period expired. Accordingly, Applicant's allegations, except for subject matter jurisdiction, shall be summarily dismissed because the action is untimely.

ii. Successive

This Court finds Applicant's allegations, except for subject matter jurisdiction, shall be summarily dismissed because this action is successive to Applicant's prior PCR actions. Courts disfavor successive applications and place the burden on applicants to establish any new ground raised in a subsequent application could not have been raised in a prior PCR action. *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 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.

Pursuant to section 17-27-90, successive PCR actions are barred 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 raise . . . 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).

In the present case, Applicant's allegations were or could have been raised in Applicant's prior PCR actions; thus, these allegations are successive. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations, except for subject matter jurisdiction, in his previous PCR actions. Therefore, he has failed to meet his burden, and the allegations, except for subject matter jurisdiction, shall be summarily dismissed as successive.

iii. *Res Judicata*

Additionally, this Court finds the application, except for the allegation of subject matter jurisdiction, barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior applications for post-conviction relief. The prior PCR Court issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application, except for the allegation of subject matter jurisdiction, shall be summarily dismissed as barred by the doctrine of *res judicata*.

iv. Subject Matter Jurisdiction

This Court finds Applicant's allegation that the trial court lacked subject matter jurisdiction because his indictments were insufficient shall be summarily dismissed. "[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). With respect to Applicant's claims concerning the sufficiency of the indictment, Applicant was required to raise such a challenge prior to the swearing of the jury. S.C. Code Ann. §17-19-90 (2003). Regardless, "[a]n indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500. Whether or not the indictment could be made more definite and certain is irrelevant. *Baker*, 390 S.C. at 62, 700 S.E.2d at 442. The court in *Baker* noted the following:

> [T]he court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id. (citing *Gentry*, 363 S.C. at 102-103, 610 S.E.2d at 500).

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* 390 S.C. at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007)); S.C. Code Ann. § 17-19-20. When the indictment references the statute the elements of the charge are thereby incorporated into the indictment. *See State v. Owens*, 346 S.C. 637, 649, 552 S.E.2d 745, 751 (2001) (murder statute)

overruled on other grounds by Gentry, 363 S.C. 93, 610 S.E.2d 494; see *also State v. Beam*, 336 S.C. 45, 50-51, 518 S.E.2d 297, 300 (Ct. App. 1999) (video piracy statute); *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) (bribery statute).

Applicant's indictment allegation is not proper for PCR. Applicant's failure to raise this challenge before the jury was sworn prevents him from raising this allegation in this action. Additionally, the indictments charged Applicant substantially in the language of the statute prohibiting the crime, and thus pass legal muster. As such, Applicant's allegation as it pertains to the indictments shall be dismissed.

Furthermore, Applicant has failed to sufficiently present facts to support his claim that the trial court lacked subject matter jurisdiction. An Applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. *See also* S.C. Const. Art. V, § 11. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in the Court of General Sessions. Accordingly, the circuit court had subject matter jurisdiction. Applicant has failed to sufficiently present facts or evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide. Therefore, Applicant's allegation as it pertains to subject-matter jurisdiction shall be dismissed.

v. Failure to State a Claim

Applicant's allegation that he was denied his due process right to probation revocation counsel is without merit, and the allegation shall be summarily dismissed for failure to state a cognizable claim for relief. *See* Rule 12(b)(6), SCRCP (stating a defending party may move for summary judgement based on the plaintiff's failure to "state facts sufficient to constitute a cause of action"). "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is *not* rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." *Brown v. State*, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991) (emphasis in original). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. *Id.*; *see also Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1365-66 (4th Cir. 1973) ("[B]efore pleading, the defendant need not be advised of all collateral consequences of his plea . . . ."). "[A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence* . . . ." *Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (emphasis in original). The only exceptions are that a PCR action may be brought to assert a claim that the applicant's sentence has expired, or that his probation, parole, or conditional release has been unlawfully revoked. *Id.*, citing S.C.Code Ann. § 17-27-20(a)(5). Parole eligibility is a collateral consequence of sentencing and is a matter that falls within the province of the Board of Probation, Parole, and Pardon Services. *Brown v. State,* 306 S.C. 381, 382, 412 S.E.2d 399, 400 (1991); S.C. Code Ann. § 24–21–13 (Supp.2006).

Applicant argues his fourteenth amendment due process rights were violated because he was denied the appointment of counsel. Because a parole revocation hearing is an administrative

rather than a criminal proceeding, no such Sixth Amendment right to counsel exists. *See In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (Sixth Amendment right to the effective assistance of counsel limited to criminal actions). However, as Applicant argues, a constitutional right to counsel may arise in a parole revocation proceeding by virtue of the Due Process clause. *See Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). "[D]ue process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. *Morrissey v. Brewer*, 408 U.S. 471, 485, 92 S. Ct. 2593, 2602, 33 L. Ed. 2d 484 (1972).

Morrissey outlined the minimum requirements of due process in the context of parole revocation as follows:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.

408 U.S. at 489, 92 S. Ct. at 2604 (1972). In South Carolina, a state statute permits counsel to appear at such a hearing. S.C. Code Ann. § 24-21-50 (Supp. 2002). For indigent defendants, "counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons

are complex or otherwise difficult to develop or present." *Gagnon*, 411 U.S. at 790, 93 S. Ct. at 1764 (1973).

In the present case, the records establish applicant was notified of the violations he committed as recorded on the "Acknowledgement of Notice" form that he signed on March 19, 2021. He was notified of the time and location of the final hearing, and he indicated that he wished to be present for the hearing. Further, he was informed that he was permitted to have an attorney at his own expense, and have witnesses appear on his behalf if he desired. While not expressly stated, if Applicant did actually request appointment of counsel, it can be inferred that the allegations Applicant was facing were not the type that would be triggered by *Morrisey* or *Gagnon*, which would require the appointment of counsel. Had the allegations triggered the due process clause, counsel would have been appointed for his April 22, 2021, parole revocation hearing.

Applicant has failed to allege facts sufficient to support his claim that he was denied appointment of counsel under the fourteenth amendment. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing 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 showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this allegation shall be summarily dismissed.

IV. CONCLUSION

Pursuant to subsection 17-27-70(b), this 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, factual or legal, with the Marion County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Michael D. Davidson, Esquire
PCR Division – Twelfth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Marion 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 8 day of Dec, 2021.

Florence, South Carolina

MICHAEL G. NETTLES
Chief Administrative Judge
Twelfth Judicial Circuit