STATE OF SOUTH CAROLINA COUNTY OF HAMPTON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Shawn L. Davis, SCDC #342092, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2022-CP-25-00127 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of post-conviction relief (PCR) filed by Applicant Shawn L. Davis on May 9, 2022. In response, Respondent the State of South Carolina moved to summarily dismiss the application as untimely and successive to Applicant's previous application pursuant to Section 17-27-45, Section 17-27-70, and Section 17-27-90 of the South Carolina Code and because Applicant has failed to make a *prima facie* case of newly discovered evidence.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2008 term, the Hampton County Grand Jury indicted Applicant for murder (2008-GS-25-00585) and armed robbery (2008-GS-25-00587). From August 2-4, 2010, Applicant proceeded to a jury trial before the Honorable D. Craig Brown. Dudley Bradstreet Ruffalo, Esquire, represented Applicant. Isaac McDuffie Stone, III, and John Thornton of the Fourteenth Circuit Solicitor's Office prosecuted the case. On August 4, 2010, the jury found Applicant not guilty of murder charge and found Applicant guilty of the armed robbery charge. Judge Brown sentenced Applicant to a term of thirty years' imprisonment for armed robbery. Applicant did not appeal his conviction or sentence.

A. Initial PCR Action (2011-CP-25-00320) and Subsequent Appeal

On August 8, 2011, Applicant filed his first PCR action, alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
   a. "Allowed improper evidence to be introduced into the record and failed to object;"
2. Prosecutorial misconduct
   a. "Prosecutors presented false evidence to the jury, counsel failed to object."

Respondent made its return on December 14, 2012. Subsequently, on March 26, 2013, Applicant amended his application to allege he is being held in custody unlawfully for the following reason:

1. Trial counsel should have requested the Court charge the jury on the lesser-included offenses of armed robbery, which are attempted armed robbery and larceny.

An evidentiary hearing into the matter was convened on August 28, 2013, before the Honorable Deadra L. Jefferson, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Winston A. Lawon, III, Esquire. At the evidentiary hearing, Applicant raised the following allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel;
   a. Counsel failed to request that the Applicant be evaluated for mental competency.
   b. Counsel failed to file an appeal for the Applicant.
   c. Counsel failed to request the jury be charged on the lesser included offenses of attempted armed robbery and larceny.

On November 7, 2013, Judge Jefferson issued an Order of Dismissal denying and dismissing the application for post-conviction relief with prejudice.

Applicant filed a timely notice of appeal from the PCR court's denial of his action.

Appellate Defender Robert M. Pachak perfected Applicant's appeal by filing a *Johnson*[1] petition for writ of certiorari with the Supreme Court, raising the following issue:

> Whether defense counsel was ineffective in failing to request jury instructions on the lesser included offenses of attempted armed robbery and larceny?

Applicant filed a *pro se* petition in response. On August 7, 2014, the Supreme Court of South Carolina issued an order denying Applicant's petition and granting appellate counsel's request to withdraw. The case was remitted back to the circuit court on August 25, 2014.

B. Federal Habeas Corpus Action: 2:14-cv-3850-DCN-MGB

On November 19, 2014, Applicant filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *Davis v. Warden M. McCall*, No. 2:14-cv-3850-DCN-WWD.[2] Applicant raised the following allegations in his *pro se* petition (quoted substantially verbatim):

1. Trial counsel was contrary to the Sixth Amendment to guarantee [Applicant] effective assistance of counsel during trial;
2. Trial judge abused his discretion in failing to render directed verdict to the charge of armed robbery; and
3. PCR Judge abused his discretion in failure to grant relief.

Respondent filed a Return and Memorandum of Law in Support of Motion for Summary Judgment, signed February 1, 2015. By Order filed February 11, 2015, and pursuant to *Roseboro*[3],

---

[1] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988) (approving of the withdrawal of counsel in meritless post-conviction appeals in accordance with the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967). *Anders* requires that appointed counsel seeking to withdraw after finding the "case to be wholly frivolous" following a "conscientious examination" must submit a brief referencing anything in the record that arguably could support an appeal, furnish a copy of that brief to the defendant, and after providing the defendant with an opportunity to respond, the reviewing court must conduct a full examination of the proceedings to determine if further review is merited. 386 U.S. at 744.

[2] In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a United States Magistrate Judge.

[3] *See Roseboro* v. *Garrison*, 528 F.2d 309 (4th Cir. 1975) and *Webb* v. *Garrison*, No. 77-1855 (4th Cir. July 6, 1977) (requiring courts to provide explanation of dismissal/summary judgment procedures in federal habeas corpus cases).

the Magistrate Judge advised Applicant he had thirty-four days to file any material in opposition to the motion for summary judgment. Applicant did not file his response to the Motion for Summary Judgment.

On April 20, 2015, the Honorable Mary Gordon Baker, United States Magistrate Judge, issued a Report and Recommendation of Magistrate Judge recommending the action be dismissed with prejudice for lack of prosecution and for failure to comply with the Court's orders pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. No objections were filed to Judge Baker's report and recommendation.

On May 15, 2015, the Honorable David C. Norton, United States District Judge, after conducting a *de novo* review of the record, affirmed the report and recommendation and dismissed the action with prejudice for lack of prosecution and for failure to comply with the court's orders. Judge Norton additionally ordered the certificate of appealability be denied. *Davis v. Warden M. McCall*, No. 2:14-cv-3850-DCN.

C. Second Federal Habeas Corpus Action: 2:21-cv-00717-JD-MGB

Applicant filed a second *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on September 17, 2021. In his Petition, Applicant raised one ground, contending he was "denied [the] right to self-representation" after requesting to "be relieved of counsel." Applicant asserted that the alleged "constitutional" violation resulted in a "fundamental miscarriage of justice" and requested "vacation of the lower court ruling." A report and recommendation was issued on September 17, 2021, finding the United States District Court lacked jurisdiction over Applicant and recommended the case be summarily dismissed without prejudice and without requiring a return from Respondent. Thereafter, on December 10, 2021, an Opinion and Order was issued by United States District Judge Joseph Dawson, III, which adopted the report and recommendation;

dismissed Applicant's petition for writ of habeas corpus without prejudice and without required Respondent to file a return; and denied a certificate of appealability as Applicant failed to make "a substantial showing of the denial of a constitution right".

II. Allegations Raised and Relief Sought in Second & Current Post-Conviction Relief Action

In his *second* and *current* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following[4]:

1. Newly-discovered evidence
    a. Solicitor unlawfully impaneled Grand Jury
        i. Denial of due process rights resulting from Grand Jury term being held outside of terms enumerated in section 14-5-800.

Before this Court are the Hampton County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a copy of the trial transcript; Applicant's prior post-conviction relief records challenging this conviction and the appeal therefrom; Applicant's federal habeas records; and the records of the current PCR action, including Respondent's return and motion to dismiss.

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. This Court finds there is no genuine issue of material fact which would necessitate an evidentiary hearing. *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). Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this

[4] Applicant's allegations have been summarized for brevity and clarity after review of Applicant's largely handwritten application.

Court informs the parties of its intent to dismiss the application based upon the following findings:

A. Summary Dismissal Based on Statute of Limitations S.C. Code Ann. § 17-27-45(A)–(B)

This Court finds this action must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act (Act). S.C. Code Ann. §§ 17-27-10 to -160. Specifically, the Act requires as follows:

> (A) 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.
>
> (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
>
> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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(A)–(C).

Our 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. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to "grant a motion by either party for summary disposition of [an]

application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Leamon*, 363 S.C. at 435, 611 S.E.2d at 49 ("Ignorance of the statute of limitations is not an excuse for late filing . . ."); *Sutton*, 361 S.C. at 648, 606 S.E.2d at 781 (declining "to impose a duty on trial or appellate counsel to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application").

In the present case, Applicant was sentenced on August 4, 2010. Applicant did not appeal from his conviction or sentence. This application was filed on May 9, 2022, — over *ten years* after the requisite filing period expired. Accordingly, this action must be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619–20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim). Applicant failed to comply with the filing requirements under Section 17-27-45(A). Moreover, Applicant has not alleged any claims based on a change of law or statute. Therefore, Applicant has failed to comply with the filing requirements under Section 17-27-45(B).

B. Summary Dismissal Based on Statute of Limitations S.C. Code Ann. § 17-27-45(C)

Applicant asserts he is being held in custody unlawfully as a result of newly discovered evidence, such that he is entitled to an evidentiary hearing. This Court finds Applicant's allegation

of newly discovered evidence is without merit. The Act states 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).

Newly-Discovered Evidence

"If the applicant contends there is evidence of a 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) (emphasis added). An applicant requesting a new trial based on after-discovered evidence following 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)).

Allegation Grand Jury was Impaneled "Unlawfully"

In this instance, Applicant alleges the State "unlawfully" impaneled a Grand Jury outside of the "color of law." Applicant asserts that because the Hampton County Grand Jury was convened on December 5, 2008, outside of a scheduled term of court as enumerated in § 14-5-800, the Solicitor's Office "obstructed and impeded the administration of justice."

This Court finds a grand jury may meet at any time ordered by a circuit judge. *See* S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet during a term of court

as provided for in sections 14-5-620 to -820. *See State v. Jeffcoat*, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal."). Furthermore, a presumption of regularity attaches to proceedings in the Court of General Sessions. *Pringle v. State*, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986). Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. *State v. James*, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (*citing Weathers v. State*, 319 S.C. 59, 459 S.E.2d 838 (1995)); *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Because Applicant has failed to present this Court with any *prima facie* evidence suggesting the returned indictment is invalid or irregular and because it is not unlawful for a grand jury to meet outside of a term of court, this Court dismisses Applicant's allegation of newly discovered evidence as it pertains to the date the Grand Jury was impaneled.

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.* 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)); *see also* 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), *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); *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

This Court finds Applicant's indictment is valid on its face because it states all the necessary elements of the crime, the date of the offense, and the name of the accused. *Id.* at 75, 472 S.E.2d at 40. Likewise, the indictment is stamped "True Billed" and signed by the Grand Jury foreperson. *See Pringle*, 287 S.C. at 410, 339 S.E.2d at 128. The indictment charged Applicant substantially

on the language of the statute prohibiting the crime, and thus passes legal muster. As such, Applicant's allegation, to the extent it pertains to the validity of the indictment, is dismissed. Therefore, Applicant has also failed to meet his burden under sections 17-27-20(A)(4) and 17-27-45(C).

C. Summary Dismissal Based on Successiveness

This Court further finds this action 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.

Section 17-27-90 is clear—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 or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) ("[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules."). 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).

Here, Applicant failed to show that a successive application is appropriate; thus, these allegations are successive and barred under section 17-27-90. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were" (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and this Court must summarily dismiss the application as successive to Applicant's previous PCR application.

IV. Conclusion

Pursuant to S.C. Code Ann. § 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 with the Hampton County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Samantha J. Weidauer
Post-Conviction Relief Division – 14th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 20th **day of** September, **2022.**

Hampton, South Carolina

BENTLEY PRICE
Chief Administrative Judge
Fourteenth Judicial Circuit

ALAN WILSON
ATTORNEY GENERAL

September 14, 2022

The Honorable Bentley D. Price
Fourteenth Circuit Chief Administrative Judge
100 Broad Street, Suite 432
Charleston, SC 29401

Re: Shawn Davis, #242092 v. State of South Carolina
Case No.: 2022-CP-25-00127

Dear Judge Price:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned case. Respondent's return and motion to dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Hampton County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Samantha J. Weidauer
Assistant Attorney General

SJW/jaj
Enclosure(s)

cc: Shawn Davis, #242092

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283