STATE OF SOUTH CAROLINA
COUNTY OF MARION

Jerry L. Franklin, Jr., #132862,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

CASE NO. 2023–CP–33–0380

CONDITIONAL ORDER OF DISMISSAL

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This matter is before the Court based on a successive application for post-conviction relief (PCR) filed by Jerry L. Franklin, Jr. (Applicant) commenced on July 14, 2023. In response, Respondent, the State of South Carolina, made its return and moves to summarily dismiss this application as untimely, barred by the statute of limitations, successive to Applicant's previous PCR action, barred by the doctrine of *res judicata*, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Marion County Clerk of Court. In February 1986, the Marion County Grand Jury indicted Applicant for Murder and Assault and Battery with Intent to Kill (1986–GS–33–0019). Applicant was represented by Marvin C. Tyndall, Esquire. On March 10, 1986, Applicant appeared before the Honorable Julius H. Baggett and pleaded guilty as indicted. Judge Baggett sentenced Applicant to twenty years imprisonment for Assault and Battery with Intent to Kill and life imprisonment for Murder.

Applicant did not appeal his convictions or sentences.

INITIAL PCR ACTION

Applicant filed his *first* PCR action on October 19, 1989. On September 13, 1990, an evidentiary hearing was held before the Honorable Judge James E. Lockemy. Applicant was present and 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.

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FEDERAL HABEAS ACTION AND SUBSEQUENT APPEAL

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 filed an appeal in the Fourth Circuit Court of Appeals, and the same was denied on July 22, 1994.

SECOND PCR ACTION AND SUBSEQUENT APPEAL: 1994–CP–33–217

Applicant filed a *second* PCR application 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 L. Brogdon, Jr. Applicant was present and represented by Harry DeVoe, Esquire. By Order dated November 8, 1998, Judge Brogdon denied and dismissed the Applicant's application.

STATE HABEAS ACTION: 2002–CP–33–492

Applicant filed his *first* state *habeas* action on November 5, 2002. The State made its Return and Motion to Dismiss on March 24, 2004. On October 11, 2004, Judge Brogdon issued a Form 4 Order granting the State's Motion to Dismiss. On November 1, 2004, Judge Brogdon filed the Order of Dismissal with Prejudice.

THIRD PCR ACTION AND SUBSEQUENT APPEAL: 2003–CP–33–086

Applicant filed a *third* PCR application on February 28, 2003. The State filed its Return

and Motion to Dismiss on November 20, 2003. On February 16, 2004, an evidentiary hearing was held before the Honorable James L. Brogdon, Jr. Applicant was present at the hearing and represented by John R. Richardson, Esquire. The State was represented by Julie M. Thames of the South Carolina Attorney General's Office. Judge Brogdon issued an Order of Dismissal with Prejudice denying and dismissing Applicant's PCR application dated June 23, 2004. An Amended Order was filed on September 21, 2005, to correctly reflect the Order's date of June 23, 2005. On July 19, 2005, Applicant filed a Rule 59(e) Motion to Alter/Amend Judgment. On July 22, 2005, the State filed its Return to the 59(e), SCRCP. On July 14, 2006, Judge Brogden denied Applicant's 59(e) Motion to Alter/Amend Judgment by Order.

Applicant timely filed a Notice of Appeal. By Order of Dismissal dated November 14, 2006, the Supreme Court of South Carolina dismissed the appeal pursuant to Rule 227(c), SCACR. The Remittitur was returned to the lower court on November 30, 2006.

Fourth PCR Action and Subsequent Appeal: 2021–CP–33–0216

Applicant filed a *fourth* PCR application on May 12, 2021, alleging the following:

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

The State filed its Return and Motion to Dismiss on October 22, 2021. The Honorable

Michael G. Nettles issued a Conditional Order of Dismissal filed December 15, 2021, provisionally denying and dismissing the action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. On February 14, 2022, Judge Nettles filed the Final Order of Dismissal, denying and dismissing Applicant's PCR application with prejudice. On February 25, 2022, Applicant filed a Rule 59(e) Motion to Alter/Amend Judgment. The State made its Return to the 59(e) on January 19, 2023. On March 6, 2023, Judge Nettles denied Applicant's 59(e) Motion to Alter/Amend Judgment by Order.

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Applicant timely filed a Notice of Appeal. By Order dated April 21, 2023, the Supreme Court of South Carolina dismissed Applicant's appeal pursuant to Rule 243(c), SCACR. The Remittitur was returned to the lower court on May 9, 2023.

CURRENT ACTION BEFORE THIS COURT

On July 14, 2023, Applicant *untimely* filed his *fifth* application for PCR in which he alleges the following:[1]

1. Ineffective Assistance of Counsel
2. Circuit Court Lacked Subject Matter Jurisdiction
3. Prosecutorial Misconduct

Applicant seeks relief from the Court in the form of a new trial.

Before this Court are the Marion County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's guilty plea transcript; Applicant's records from his state habeas action; Applicant's records from his 2003 PCR and appeal actions; Applicant's records from his 2021 PCR and appeal actions; and

[1] Attachments were provided that enumerated Applicant's allegations. The above allegations are not verbatim.

the records of the current PCR action.[2]

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FINDINGS OF FACT AND CONCLUSIONS OF LAWS

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application as 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); 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:

SUMMARY DISMISSAL BASED ON STATUTE OF LIMITATIONS

Respondent moved to summarily dismiss the application because it failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.[3] 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

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[2] Respondent indicated to the Court that some records may not be complete with Applicant's older cases.

[3] S.C. Code Ann. § 17-27-10 to -160.

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.

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S.C. Code Ann. § 17-27-45.

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). A motion for summary judgment may properly be used to raise the defense of the statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 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."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on numerous allegations. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant had pled guilty on March 10, 1986. Applicant did not pursue a direct appeal. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before March 11, 1987. Applicant did not file this PCR application until July 14, 2023, *thirty-six years, four months, and three days* beyond the statute of limitations.

Accordingly, this application is *untimely* pursuant to S.C. Code Ann. § 17-27-45 and shall be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

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Summary Dismissal Based on Successiveness

Respondent moved to summarily dismiss the application because it is successive to the previous application(s) for post-conviction relief. 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). Importantly, S.C. Code Ann. § 17-27-90 provides:

> 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 S.C. Code Ann. § 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). In Aice, the South Carolina Supreme Court held that PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Id. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 394.

Expressly, 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. Notably, the 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's current allegations *were or could have been* raised in Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. See Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.' A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application."). This Court finds Applicant is unable to show that these claims could not have been raised in his initial application, as his claims were known and easily could have and should have been raised in his initial post-conviction relief action.

Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application(s).

Summary Dismissal Based on the Doctrine of Res Judicata

Additionally, this Court finds the application, except for the allegation of subject matter jurisdiction, is 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 of 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 any and all his allegations in his prior *four* PCR actions. The prior PCR Courts issued final judgments on the merits of the same or similar issues Applicant raises in this successive 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.*

SUMMARY DISMISSAL BASED ON 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).

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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 he pled guilty 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 should 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, 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.

Accordingly, Applicant's allegation as it pertains to subject-matter jurisdiction shall be dismissed

Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in Aice explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. . . . [Here], Aice seeks to have more than one procedural "bite" at the apple. Aice 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.

305 S.C. at 451–52, 409 S.E.2d at 394–95 (citations omitted).

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.'" United States v. Fugit, 703

F.3d 248, 252 (4th Cir. 2012) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring)). In his concurring and dissenting opinion in Mackey v. United States, Justice Harlan wrote:

> Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). Seven years after Mackey, the South Carolina Supreme Court quoted Justice Harlan's opinion with approval in Anderson v. Leeke, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to relitigate his convictions and sentences through this successive and time-barred application is contrary to the recognized need for finality of litigation.

[CONCLUSION PAGE FOLLOWS]

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CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific factual or legal reasons 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 Marion County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 12th 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 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 1 day of Sept, 2023.

THE HONORABLE MICHAEL G. NETTLES
Chief Administrative Judge
Twelfth Judicial Circuit

Florence, South Carolina

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