

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 06 -CP-40- 7502

Pernell Riley

State of SC

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____

RICHLAND COUNTY
FILED
2007 MAY 24 PM 3:15
BARBARA A. SCOTT
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at _____, South Carolina, this _____ day of _____, 20____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of May, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

Riley

Brown

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

s/BARBARA A. SCOTT
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Pernell Riley, 164169,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2006-CP-40-7502

BOOK **RG** PAGE **134**

CONDITIONAL ORDER OF DISMISSAL

2007 MAY 24 AM 10:26
 BARBARA A. SCOTT
 C.C.C. & G.S.
 RICHLAND COUNTY
 FILED

This matter comes before this Court by way of an application for post-conviction relief filed December 18, 2006. Respondent made its return and motion to dismiss on March 26, 2007.

I. PROCEDURAL HISTORY

The records before this Court reflect that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was indicted at the February 1989 term of the Richland County Grand Jury for murder (89-GS-40-0784), armed robbery (89-GS-40-0785) and possession of a stolen vehicle (89-GS-40-0787). On November 29, 1989, Applicant was sentenced by the Honorable Sidney Floyd to confinement for life for murder, twenty-five (25) years for armed robbery and five (5) years for possession of a stolen vehicle, all sentences to run concurrent. Applicant did not appeal his conviction or sentence.

The Applicant subsequently filed an application for post-conviction relief (PCR) on December 18, 1995 (95-CP-40-4301). The State filed its Return on January 26, 1996. An

evidentiary hearing was convened on September 11, 1998, at the Richland County Courthouse, at which the Applicant was present and represented by Tara Dawn Shurling, Esquire. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel; and
2. Subject-matter jurisdiction.

The Honorable James R. Barber, III, denied and dismissed Applicant's application by written Order on January 6, 2000. The Applicant filed a timely Notice of Appeal. In his Petition, Applicant raised issues of subject-matter jurisdiction and improper closing argument. The South Carolina Supreme Court denied the Petition for Writ of Certiorari on August 8, 2001.

The Applicant subsequently filed a Federal Petition for Writ of Habeas Corpus on July 17, 2002. The Respondent moved for summary judgment on September 26, 2002. The Petition was dismissed on May 21, 2004.

Before this Court are the records of the Richland County Clerk of Court regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; and Applicant's prior post-conviction relief records.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Subject-matter jurisdiction;
2. "fatal variance";
3. "constructive amendment of indictment";
4. "Sixth, Fifth and Fourteen Amendment violations";

5. "Brady violations"; and
6. "prejudicial voir dire and state's final argument."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State,

274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

This Court finds, further, that this Application for Post-Conviction Relief should 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. S.C. Code Ann. §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). The Applicant was convicted of the offenses he challenges in this Application on November 29, 1989. The Applicant was therefore required to file his application before July 1, 1996. This Application was filed on December 18, 2006, which was ten (10) years after the statutory filing period 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, S.C. Code Ann. §17-27-70(c) (1985) 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 that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

The Applicant's claim that the trial court lacked subject matter jurisdiction due to defects in

his indictment is without merit. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45 and -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 610 S.E.2d 494; See also S.C. Const. Art. V, § 7. 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. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Accordingly, this allegation is denied.

Further, this Court finds that the doctrine of *res judicata* bars the Petitioner's claims. *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.

The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in both the state and federal courts. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his convictions. The other grounds present allegations that could have been raised in those prior proceedings. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court intends to summarily dismiss these claims as barred by *res judicata*.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The 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. The Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Robert L. Brown, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17th day of May, 2007.

Alison R. Lee
Alison R. Lee
Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

2006-CP-40-7502

Pernell Riley, 164169,)
Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

2007 JUN 17 11:11:19 AM
CLERK OF COURT
RICHLAND COUNTY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 18, 2006. Respondent made its return and motion to dismiss on March 26, 2007, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated May 17, 2007, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.


In a document captioned "Reply to Conditional Order of Dismissal" and dated June 5, 2007, the Applicant argues that "to retroactively apply the new Statute of Limitations to this action for which the limitations period has already expired would violate the due process rights of the petitioner." Additionally, Petitioner relies on the constitutional arguments set forth in his application.

This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 227, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 24th day of July, 2007.



Alison R. Lee
Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina.