

FORM 4

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

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP4600620

16

Willie E Gordon Jr 103101

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: J. Rutledge Johnson

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (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. See Page 2 for additional information.
- ACTION DISMISSED (**CHECK REASON**): Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (**CHECK REASON**): Rule 40(j) SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (**CHECK APPLICABLE BOX**):
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:
ORDER INFORMATION

CONDITIONAL ORDER OF DISMISSAL

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

ATTORNEY GENERAL'S OFFICE

RECEIVED 10/29/14

ADMINISTRATIVE INSTRUCTIONS

J02
10/30/14

FILE OPEN END

HAVE COPIES MADE

ROUTE TO _____

ORDER: TRANSCRIPT

PEN RECORDS CLERK RECORDS

OTHER: LB; scan;

send copy to Sene for service

s/ Lee B. Alford

Circuit Court Judge

2113

Judge Code

10/8/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **October 24, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **October 24, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Willie E Gordon Jr Tyger Correctional Institution Smu #44
200 Prison Road Enoree, SC 29335

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED-RECEIVED

2014 OCT 24 PM 4:16

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Willie E. Gordon, Jr., #103101, YORK COUNTY, SC
C.C.P. & O.S.

2014-CP-46-0620

Applicant,

v.

State of South Carolina,

Respondent.

CONDITIONAL ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed March 5, 2014. The Respondent made its return and motion to dismiss on September 24, 2014.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. On April 17, 1997, a seven-count indictment was handed down against Applicant York County in September of 1996. After his indictment, Applicant and his co-defendant, Spencer Gordon, were jointly tried before the Honorable Don S. Rushing and a jury on May 5-6, 1997. Applicant was represented by Leland Greeley, Esquire. During the trial, Judge Rushing declared a mistrial when a State's witness mistakenly testified about an unrelated and uncharged drug transaction.

Following the mistrial, the grand jury issued an amended indictment again charging Applicant with seven (7) counts of trafficking in crack cocaine. Thereafter, on June 9-12, 1997, Applicant was tried alone before the Honorable H. Dean Hall and a jury on count five of the

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indictment, trafficking in crack cocaine on or about September 21st through September 23rd. Applicant continued to be represented by Leland Greeley, Esquire. On June 10, 1997, Applicant was found guilty of trafficking crack cocaine 10-28 grams and on June 12, 1997, received a thirty year sentence and a \$50,000 fine

In October 2000, Applicant was indicted for trafficking crack cocaine on September 27th 1996 (2000-GS-46-3180) and the State sought a sentence of life without parole ("LWOP"). According to the Supreme Court of South Carolina, the indictment was "substantially the same as count seven of the 1997 indictment" which was *not proessed* with the right to restore. Gordon, 356 S.C. at 148 n.2, 588 S.E.2d at 107 n.2. From February 26 through March 2, 2001, Applicant stood trial on the aforementioned charge before the Honorable Paul E. Short in York County where he was represented by Michael Hitchcock, Esquire and Lisa Collins, Esquire. At the conclusion of trial, Applicant was found guilty and received a thirty year sentence to be served concurrent with his 1997 conviction.¹

After the conclusion of the 2001 trial, both parties appealed. Specifically, Applicant, who was represented by Elanor Duffy Cleary of the South Carolina Office of Appellate Defense, argued "the trial court erred in refusing to grant appellant's motion to quash the indictment for drug trafficking on September 27, 1996, where appellant had previously been convicted of drug trafficking on September 23, 1996, and the evidence showed the two transactions were part of a continuing course of conduct that constituted one criminal act and prosecution on this indictment constituted double jeopardy in violation of the United States and South Carolina constitutions." Meanwhile, the State raised three issues related to whether the trial court erred in declining to

¹ This Application only concerns the 2000 conviction.

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sentence Applicant to LWOP. Following briefing, the case was certified to the Supreme Court of South Carolina pursuant to Rule 204(b), SCACR. On October 20, 2003, the Supreme Court of South Carolina affirmed Applicant's conviction and his sentence in a published opinion. State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003); (App. 442-50). Rehearing was denied on November 20, 2003, and the remittitur was issued the same day.

2003-CP-46-3304

The Applicant subsequently filed an application for post-conviction relief (PCR) on December 12, 2003 and amended on May 9, 2006 and March 12, 2007. The State made its Return on January 5, 2005 and amended on March 28, 2007. The Applicant alleged ineffective assistance of trial counsel for, *inter alia*, failure to move to quash the indictment because it didn't allege an overt act in regards to Judge Rushing's order for the State to put the defense on notice of at least one substantive act. An evidentiary hearing was convened on October 22-23, 2007.² The Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire and Tricia A. Blanchette, Esquire. The Honorable Larry R. Patterson denied and dismissed with prejudice the Applicant's application by written Order dated April 16, 2008.

A notice of appeal was filed on Applicant's behalf and an appeal perfected on June 8, 2009. The State filed its Return to the Petition for Writ of Certiorari on December 29, 2009. The South Carolina Supreme Court denied the Petition for Writ of Certiorari on December 2, 2010. The Remittitur was issued on December 21, 2010.

8-11-3399-RBH-JDA

² Judge Patterson denied Applicant's motion and the State's consent to sever the applications for the 1997 and 2000 convictions. Judge Patterson denied Applicant's application concerning his 1997 convictions as successive and untimely.

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The Applicant then filed a Petition for Writ of Habeas Corpus in the Federal District Court for the District of South Carolina on December 14, 2011. The Applicant argued, *inter alia*, that “[t]he re-indictment of 1997-GS-46-1286 did not fix the constitutional notice issue that resulted in Judge Rushing’s order quashing the indictment.” The State filed its Return and Memorandum of Law in Support of Motion for Summary Judgment on May 11, 2012. On September 19, 2012, the Honorable Jacquelyn A. Austin issued a Report and Recommendation, recommending the State’s Motion for Summary Judgment be granted. On January 17, 2013, the Honorable David C. Norton issued an order, adopting the Report and Recommendation and dismissing the petition with prejudice. Judge Norton’s order also denied a certificate of appealability.

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

1. “The court is without legal jurisdiction to impose sentence on indictment number 2000-GS-46-3180 because of the standing order of the Honorable Judge Rushing to quash indictment 97-GS-46-1886. The court lost jurisdiction over the indictment when the Honorable Judge Rushing narrow indictment number 97-GS-46-0266 down from 400 grams to 10 to 28 grams and sworn on indictment number 97-GS-46-0266.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because the doctrine of *res judicata* bars the Applicant'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.

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The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel and any jurisdiction issues in his 2003 PCR action and 2011 Federal Habeas Corpus action. Specifically, Applicant alleged “[t]he re-indictment of 1997-GS-46-1286 did not fix the constitutional notice issue that resulted in Judge Rushing’s order quashing the indictment.” The Honorable David C. Norton granted summary judgment for Respondent and denied Applicant’s Federal Habeas Corpus petition. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, the Court summarily dismisses these claims as barred by *res judicata*.

This Court also 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

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application is successive and barred under S.C. Code § 17-27-90. The 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court additionally finds 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 judgement 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 offense(s) he challenges in this Application on March 2, 2001. The Remittitur after the Applicant's unsuccessful appeal was issued on October 20, 2003. Therefore, the Applicant had to file his application by October 21, 2004. This Application was filed on March 5, 2014, which was well 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

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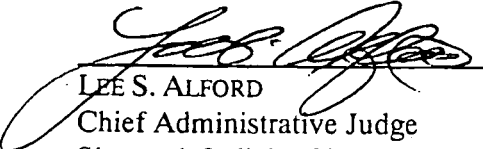
law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, for being successive and for being barred by *res judicata*.

CONCLUSION

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 York County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 8th day of October, 2014.


LEE S. ALFORD
Chief Administrative Judge
Sixteenth Judicial Circuit

 _____, South Carolina