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STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Bobby Jenkins, #271240,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2014-CP-26-4986

**CONDITIONAL ORDER
 OF DISMISSAL**

HORRY COUNTY
 2015 JUL 27 PM 2:01
 MELANIE P. GIBSON
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed July 25, 2014. Respondent filed a Return requesting summary dismissal contemporaneous with a draft of this order. This Court also has before it the records of the Clerk of Court regarding the subject convictions. The Court finds as follows:

I. PROCEDURAL HISTORY

Underlying Conviction

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the April 2000 term of the Horry County Grand Jury for kidnapping; criminal sexual conduct, first degree; armed robbery; and possession of a weapon during the commission of a violent crime (2000-GS-26-0849). Orrie West, Esquire and James Galmore, Esquire represented Applicant. On December 6, 2000, the Applicant pleaded guilty to kidnapping, criminal sexual conduct 1st, and armed robbery. He was sentenced by the Honorable Sidney T. Floyd to confinement for an aggregate term of fifty (50) years.

Applicant filed a timely notice of appeal and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Jenkins, Op. No. 2002-UP-346 (S.C. Ct. App. Filed May 16, 2002).

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First Post-Conviction Relief Action (2008-CP-26-489)

Applicant filed his first PCR application June 4, 2002. A PCR hearing was held before the Honorable Hicks Harwell, who entered an order granting PCR on November 24, 2004. On appeal, the South Carolina Supreme Court granted the State's Petition, vacated Judge Harwell's grant of relief, and remanded the matter for a second evidentiary hearing. On October 8, 2007, a second PCR hearing was convened at the Horry County Courthouse before the Honorable James E. Lockemy. On March 13, 2007, Judge Lockemy denied PCR and dismissed the matter. Applicant Petitioned for a writ of Certiorari, but the South Carolina Supreme Court denied his petition, and the remittitur was sent September 9, 2009.

Second Post-Conviction Relief Action (2012-CP-26-3026)

Applicant filed a second PCR action on October 22, 2012. In the second application, Applicant alleged that he should be relieved from his sentence due to the existence of after discovered evidence. This application was denied by the Honorable Benjamin H. Culbertson via an order dated January 10, 2013.

Federal Habeas Corpus Action

Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina on January 10, 2012. On August 28, 2012, the Honorable Joseph R. McCrory, United States Magistrate Judge, issued a report and recommendation to dismiss the petition. Applicant responded to the report and recommendation on September 17, 2012. On September 21, 2012, the Honorable Richard M. Gergel issued an order denying and dismissing the petition.

Current Application

In his third and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Due process violation
2. Ineffective assistance of counsel
3. Court was not in session when he was indicted (found in first amendment to application)

4. Violations of *Brady*, mishandling of evidence, insufficiency of indictment (found in second amendment to application)

Respondent made a timely Return and Motion to Dismiss, asking this Court to dismiss the application as successive and untimely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.” See also Rule 56(c), SCRPC.

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent’s motion to dismiss:

This Court finds that the application must be summarily dismissed for two reasons. First, the allegation must be summarily dismissed because it is impermissibly successive. The Uniform Post Conviction Procedure Act provides that:

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.

S.C. Code Ann. § 17-27-90 (2003). Under this statute, successive post-conviction relief applications are forbidden unless an applicant, who bears the burden of proof, can point to 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 398 (1991). This applicant could have raised these allegations in his previous applications for PCR; therefore, he cannot raise them now in a successive application. Land v. State, 274

S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, *supra*. Therefore, this application must be dismissed as impermissibly successive.

Further, this application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. 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, 470, 469 S.E.2d 606, 607 (1996).

The Applicant was convicted on August 12, 2003, and his direct appeal concluded in June of 2004. This application was not filed until October 20, 2014; accordingly, it must be dismissed as barred by the statute of limitations.

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) 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 must be summarily dismissed for the reasons discussed above.

Therefore, the Court finds summary dismissal is appropriate.

IV. CONCLUSION


The Court finds that the record before it creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 thirty (30) days from the date of service of this order upon him to show why this ruling should not become final. Applicant shall file any reasons he may have with the Horry County Clerk of Court (PO Box 677, Conway, SC 29528) and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Jessica E. Kinard, Esquire
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Horry County Clerk of Court and opposing counsel within twenty (20) days, and his failure to timely file and serve any response will result in the Court not considering any issues raised therein.

IT IS SO ORDERED THIS 15 DAY OF July, 2015.


THE HONORABLE WILLIAM H. SEALS, JR.
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

In Chamber, South Carolina

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SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRPC, the Director of the South Carolina Department of Corrections has designated E. Mcrae (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF Marlboro)

On this 13 day of August, 2015, I served the signed Conditional Order of Dismissal on Inmate Bobby Jenkins, #271240 by delivering personally and leaving a copy of the same at Evans Correctional Institution, Bennettsville, South Carolina. Deponent is not a party to this action.

s/ E. Mcrae
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 13 day of August, 2015
Don D. Thomas (L.S.)
Notary Public for South Carolina

My Commission Expires Sept 23 2015

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Evans Correctional Institution, Bennettsville, Marlboro County, South Carolina, this 13 day of August, 2015.

s/ Bobby Jenkins
Inmate Signature
SCDC No. 271240

2014-CP-26-4986

RECEIVED
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
COLUMBIA, SOUTH CAROLINA
AUG 20 2015
COMMUNITY SUPERVISION & PROBATION

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Bobby Jenkins, #271240,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-26-4986

FINAL ORDER OF DISMISSAL

2016 MAY 23 PM 3:25
HORRY COUNTY
COURT

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed July 25, 2014. The Respondent made its return on or about July 10, 2015, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.

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 signed July 15, 2015 and filed July 27, 2015, provisionally denying and dismissing this action, while giving the Applicant thirty (30) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated August 13, 2015, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document titled "Objection to the Conditional order of Dismissal and Memorandum in support of motion For Summary Judgment," filed on August 27, 2015, in which Applicant argues the following:

1. Trial court violated his due process rights when Applicant was allowed to plead guilty without ordering a mental competency test;
2. Trial counsel was ineffective for failing to ask for a continuance to order a mental competency test;

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3. Trial counsel failed to disclose a plea agreement to Applicant;
4. Ineffective assistance of PCR counsel for failing to amend application;
5. Invalid indictments because Grand Jury was not in session when Applicant was indicted;
6. Perjury and gross prosecutorial misconduct;
7. Newly discovered evidence;
 - a. Contradicted statement of victim;
8. Brady violation;
9. Judge for 1st PCR should have excused himself for a conflict of interest.

Applicant filed an amendment on October 27, 2014 that reiterated the allegations listed in his original application. Applicant filed a *pro se* motion clocked July 22, 2015 and captioned "59(e) Motion" in which argues "the State has not placed the applicant PCR issues he raised in his initial filing back in July 25th, 2014 along with exhibits." Because this matter has not reached its final judgment, a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, is premature. See Rule 54(a), SCRCP. As a result, this Court interprets Applicant's motion pursuant to Rule 59(e) as a response to the Conditional Order of Dismissal. Contemporaneous with the "59(e) Motion," Applicant filed a writ of mandamus. Applicant also filed a Motion for Default Judgement on January 5, 2015, and a motion to reconstruct the record on March 10, 2015..

This Court has reviewed Applicant's response to the Court's Conditional Order of Dismissal 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.

This Court submits that the doctrine of *res judicata* bars the Applicant's claims of ineffective assistance of trial counsel. *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.

Applicant argues that Martinez v. Ryan, supra, entitles him to have the Court examine his 2000 conviction and his prior PCR counsel's conduct regarding his prior conviction. This Court finds that Martinez has no bearing on Applicant's ability to raise ineffective assistance of counsel claims in a subsequent, successive PCR application filed in the circuit courts of this state. Rather, in Martinez, the United States Supreme Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id. at 1320. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) (expressly adopting this holding in South Carolina). Concerning state court, the Supreme Court of South Carolina has recognized that "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Id. Consequently, Applicant's contention that he received ineffective assistance of prior PCR counsel is not a cognizable claim for relief, nor does it raise any genuine issue of material fact for this Court to consider in evaluating the application. See id.

Additionally, this Court finds Applicant has failed to set forth facts sufficient to establish a claim of "newly-discovered evidence." Pursuant to § 17-27-45(c) of the South Carolina Code of Laws, a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year after the date when, by the exercise of reasonable diligence, such evidence could have been ascertained. When an applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant

presents evidence showing (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea, and (2) the newly discovered evidence is of such weight and quality that, under the facts of circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). This Court finds Applicant's situation does not fall under this category. This Court also finds that Applicant has failed to establish that he could not have discovered this alleged evidence before he entered his guilty plea or, in the exercise of reasonable diligence, within the one year statute of limitations for PCR actions. Therefore, this Court finds Applicant has failed to make a prima facie showing that he is entitled to relief.

This Court interprets Applicant's allegation that the Grand Jury did not meet during the time his indictment was true-billed as an allegation that the circuit court lacked subject matter jurisdiction due to the Grand Jury allegedly not meeting. Defects in the indictment do not affect subject matter jurisdiction. However, an Applicant may challenge the subject matter jurisdiction of the trial court and such a claim may be raised at any time. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777. The circuit court's obviously have subject matter jurisdiction to try criminal matters. Therefore, 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.

The Court submits further that a challenge to the legality and sufficiency of the process of the state grand jury does not implicate the subject matter jurisdiction of the circuit court. Evans v. State, 363 S.C. 495, 509-10, 611 S.E.2d 510, 518 (2005). Further, a defendant must challenge

the legality and sufficiency of the process before the jury renders a verdict in order to preserve the issue for appellate review. Id. The regularity of grand jury proceedings is presumed absent clear evidence to the contrary. Id. at 514, 611 S.E.2d at 520.

The chief administrative judge for each circuit schedules terms of the grand jury in each county. The Applicant has failed to sufficiently challenge the legality and sufficiency of the Horry County Grand Jury process. Further, the Applicant has failed to provide any evidence that the Grand Jury did not convene in April 2000 as indicated on his true-billed indictment. Because the Applicant has failed to state with any specificity the evidence supporting his claim, this Court summarily dismiss this allegation with prejudice.

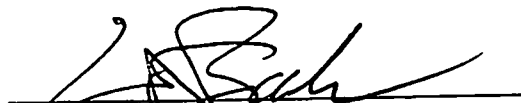
This Court also denies Applicant's motion for default. For an applicant to be granted default judgment in post-conviction relief, he must show prejudice from the State's delay in failing to timely answer his Application. See Kneece v. State, 269 S.C. 177, 236 S.E.2d 745 (1977); Herring v. State, 262 S.C. 597, 206 S.E.2d 885 (1974). To show prejudice, an Applicant must show that his application has merit. Herring, 262 S.C. at 598, 206 S.E.2d at 886. Furthermore, compliance with the statutory time limits is discretionary with the trial court. Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973). This Court finds that Applicant has failed to demonstrate the requisite prejudice or merit to his application. Therefore, the motion for default judgment is denied. Similarly, this Court finds that the issuance of this order moots all remaining other motions and petitions from Applicant upon which judgment has not yet been made. These are, accordingly, denied.

IT IS THEREFORE ORDERED that Applicant's motion for default is hereby **DENIED**, and for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief 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. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 3 day of May, 2016

Mari, South Carolina


WILLIAM H. SEALS, JR.
Chief Judge for Administrative Purposes
Fifteenth Judicial Circuit

