

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

RECORDED

2014 APR -9) PM 1:40 CASE NO.: 2012-CP-43-2007

ROBERT LOUIS GARRETT, JR., #291096) CAMPBELL MOTION AND ORDER INFORMATION
vs.) Plaintiff of COURT FORM AND COVERSHEET
SUMTER COUNTY, S.C.)

STATE OF SOUTH CAROLINA)
Defendant.)

Plaintiff's Attorney: Robert L. Garrett, Jr., #291096, Bar No. _____ Address: Lee Correctional Institution Bishopville, SC 29010 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Daniel Gourley, Bar No. _____ Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
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- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)


SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiff / Defendant

March 21, 2014
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)
- Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRCP)
 - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE CODE 2156
Date: 3/26/14

CLERK'S VERIFICATION

- Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED IN THE COURT OF COMMON PLEAS
2014 APR -9 PM 1:40 FOR THE THIRD JUDICIAL CIRCUIT

Robert Louis Garrett, Jr., #291096,
Applicant,

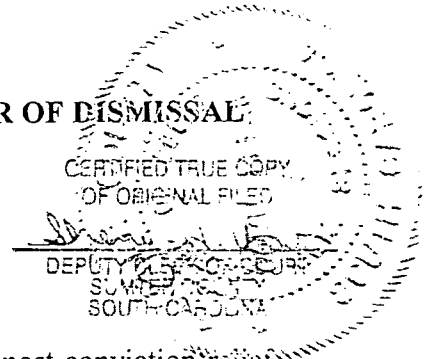
JAMES C. CAMPBELL 2012-CP-43-2007
CLERK OF COURT
SUMTER COUNTY, S.C.

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 October 10, 2012. In its return, the Respondent requested the application be summarily dismissed.

PROCEDURAL HISTORY

Before this Court are the records of the Sumter County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, appellate records, and records from Applicant's previous applications for post-conviction relief. The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Sumter County Clerk of Court's orders of commitment. The Sumter County Grand Jury indicted the Applicant at the December 1997 term of General Sessions for carjacking, two counts of kidnapping, two counts of aggravated assault and battery, conspiracy to kidnap, two counts of attempted murder, two counts of assault and battery with intent to kill, two counts of armed robbery, possession of a weapon during the commission of a violent crime, possession of a pistol by a person under the age of 21 and criminal conspiracy (1997-GS-43-1092). On January 20, 2000, the Applicant was convicted of carjacking, two counts of kidnapping, two counts of aggravated assault and battery, possession of a weapon during the commission of a violent crime

and criminal conspiracy by a jury. The Honorable Marc H. Westbrook granted to Applicant a new trial.

A timely Notice of Appeal was filed on the State's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed the grant of a new trial and remanded for resentencing. State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002). A Petition for Writ of Certiorari was denied by the South Carolina Supreme Court by Order dated January 24, 2003. On February 26, 2003, the Honorable Marc H. Westbrook sentenced the Applicant to confinement for a period of twenty (20) years for carjacking, thirty (30) years for each count of kidnapping, ten (10) years for aggravated assault and battery, five (5) years for possession of a weapon during the commission of a violent crime and five (5) years for criminal conspiracy, all charges to run concurrently.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's sentence and conviction. State v. Garrett, Op. No. 2004-UP-466 (S.C. Ct. of App. filed September 15, 2004). The Remittitur was issued October 1, 2004.

The Applicant subsequently filed an application for post-conviction relief (PCR) on September 12, 2005 (C.A. No.: 2005-CP-43-0979). In his application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of trial counsel;
 - a. Subject-matter jurisdiction; and
 - b. Violation of due process.

An evidentiary hearing was convened at the Sumter County Courthouse on March 20, 2007. In a written order dated February 20, 2008, the Honorable Clifton Newman denied and dismissed the application with prejudice.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Applicant filed a *pro-se* response to the Petition for Writ of Certiorari. The South Carolina Court of Appeals affirmed Applicant's sentence and conviction. State v. Garrett, Robert L., (S.C. Ct. of App. filed September 3, 2009). The Remittitur was issued September 21, 2009.

The Applicant subsequently filed an application for post-conviction relief (PCR) on December 21, 2009 (C.A. No.: 2009-CP-43-2965). In his application, Applicant set forth the following grounds for relief:

1. Due Process Violations/ Speedy Trial Violation.
 - a. Applicant states that he has other criminal cases pending which have not been tried.
2. Ineffective Assistance of Counsel.
 - a. Ineffective assistance of appellate counsel.
 - b. Ineffective assistance of PCR counsel.
 - i. Failure to have witnesses present.
 - c. Co-defendant's were willing to recant their statements or their testimony.
3. Prosecution Misconduct.

The Respondent made its Return and Motion to Dismiss on or about June 10, 2010. In a Conditional Order dated June 24, 2010, and filed June 30, 2010, the Honorable George C. James, Jr., found that the application should be dismissed based on the statute of limitations and successiveness; Applicant was given twenty days in which to respond. In his response to the Conditional Order of Dismissal dated August 7, 2010, Applicant alleged among other things that "he had affidavits from all three of his Co-Defendant's admitting that they'd signed statements back in January 1999 recanting their original statements, because investigators had coerced them to do." After consideration of Applicant's response to the Conditional Order, a Final Order of Dismissal was signed by the Honorable W. Jeffrey Young on September 26, 2011, and filed October 3, 2011. Applicant filed a *pro-se* "Motion for Reconsideration" Pursuant to SCRC

Rule 59(e) on October 17, 2011. By order dated June 27, 2012 and filed July 3, 2012 the Judge Young denied and dismissed the motion for reconsideration.

Applicant filed a timely Notice of Appeal on November 3, 2011. Applicant subsequently filed a motion to withdraw his appeal to pursue his Rule 59(e) filed on October 17, 2011. By Order dated May 2, 2012, the South Carolina Supreme Court granted Applicant's motion to withdraw his appeal and pursue his Rule 59 (e). The Remittitur was issued on May 31, 2012.

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

1. §17-27-45(c)
 - a. Applicant has attached to his memorandum two affidavits from two of his co-defendants, Desmond Cunningham and Arthur Davis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because the Applicant's assertion that he is entitled to a new trial based upon after-discovered and newly-discovered evidence is without merit. A defendant requesting a new trial based on after discovered evidence 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, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. Accordingly, the Application is denied and dismissed.

This Court finds that the current application for post-conviction relief must also be summarily dismissed because it is successive to his prior two applications 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 offense(s) he challenges in this Application on February 26, 2003. The Court of Appeals' remittitur was issued after the Applicant's unsuccessful appeal, on October 1, 2004. The Applicant was therefore required to file his application on or before October 2, 2005. This Application was filed October 10, 2012, nearly eight 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.

Furthermore, 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

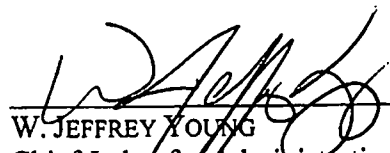
S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*

The Applicant had a full opportunity to litigate all allegations regarding his Co-Defendant's statements in his 2009 PCR action. Applicant has previously raised and the court has ruled upon this issue. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCPP, the Court summarily dismisses 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, factual or legal, with the Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Daniel Gourley, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 26 day of March, 2014.


W. JEFFREY YOUNG
Chief Judge for Administrative Purposes
Third Judicial Circuit

Sumter, South Carolina.