

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
)
)
KEVIN E. HERRIOTT, #313862)
 Plaintiff,)
)
 vs.)
)
STATE OF SOUTH CAROLINA)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO: **2018-CP-10-600**

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Kevin E. Herriott, #313862 Address: Lee Correctional Institution 990 Wisacky Highway Bishopville, SC 29010 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Rasheeda Cleveland, Esquire. Address: South Carolina Attorney General's Office PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<i>Rasheeda Cleveland</i> Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	May 2, 2018 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> 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: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

sentences are to be served concurrently. The Applicant did not appeal his convictions or sentences.

Applicant filed his first application for post-conviction relief on February 25, 2013, (2013-CP-10-1084). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel.

Respondent made its return on March 24, 2015, and an evidentiary hearing into the matter was convened on January 19, 2016, at the Charleston County Courthouse. Applicant was present at the hearing and appeared *pro se*. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and Mary Ford, Esquire, and Arthur DeGiovine also testified. By written order dated March 14, 2016, and filed March 30, 2016, Judge Gravely denied and dismissed the application. The Applicant filed a *pro se* Motion to Reconsider, which was denied by written order dated April 27, 2016, and filed May 2, 2016.

Applicant filed a *pro se* notice of appeal from the order denying his application for post-conviction relief and the order denying his motion to reconsider. By written order dated August 5, 2016, The Supreme Court of South Carolina dismissed the appeal due to Applicant's failure to timely serve the Notice of Appeal. Herriott v. South Carolina, S.C. Sup. Ct. Order filed August 5, 2016. The Remittitur was issued on August 23, 2016.

II. Current Application

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

1. Lack of subject matter jurisdiction

- a. Applicant contends that the indictments to which he plead guilty were invalid due to a timing issue, and therefore are without authority.¹

Applicant requests relief as follows:

- “Sentence vacated.”

Before this Court are the Charleston County Clerk of Court records regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, the records from Applicant’s previous PCR actions, and the records of this current PCR action.

III. Findings of Fact and Conclusions of Law

Statute of Limitations

This Court finds the post-conviction relief application must 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. Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a).

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 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.”

¹ See Application for further detail.

Applicant pled guilty on September 5, 2012; therefore, any application must have been filed on or before September 5, 2013. The current application was filed well beyond the one-year statutory filing period expired. Therefore, the application must be summarily dismissed as barred by the statute of limitations.

Successive

The Court also finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. 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). Section 17-27-90 of the South Carolina Code states:

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.

Under this statute, successive post-conviction relief applications are forbidden 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). 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. An 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).

Applicant's current allegations were or could have been raised during his initial application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, this Court finds Applicant has failed to meet the burden imposed upon him, and the application must be dismissed as successive to Applicant's previous PCR application.

Res Judicata

Because the allegations in this application were or could have been raised in his 2013 post-conviction relief proceeding case, this Court finds that this application is barred by principles 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 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. See also Foxworth, 275 S.C. at 615, 274 S.E.2d at 415.

Applicant had a full opportunity to litigate all his allegations in his prior actions. The finality of the previous Court rulings should be respected. Therefore, the application should be summarily dismissed as barred by the doctrine of *res judicata*. Therefore, this Court must summarily dismiss this application because it is barred by principles of *res judicata*.

Subject Matter Jurisdiction

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003), *citing* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

Respondent submits that Applicant's claim that the circuit court lacked subject matter jurisdiction is meritless. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003), *citing* Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). In this case, Applicant was indicted by the Charleston County grand jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute. A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g.,* Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Applicant here cannot show any irregularity, because the indictments in question are sufficient on their face. Therefore, this Court must dismiss this allegation pursuant to S.C. Code Ann. § 17-27-70 (2003), because there is no issue of material fact relating to this allegation and it should be dismissed as a matter of law.

[Conclusion on following page.]

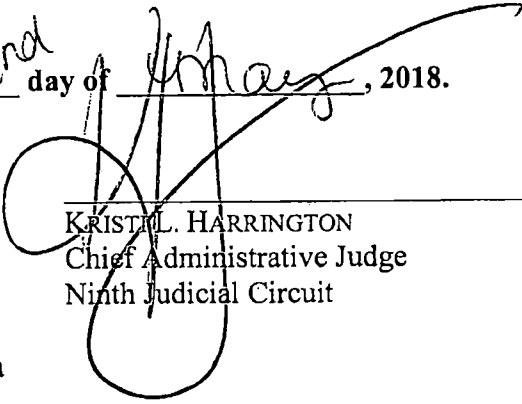
CONCLUSION

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 twenty (20) 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 Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Rasheeda Cleveland, Esquire
PCR Division – Ninth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Charleston County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 22nd day of May, 2018.



KRISTIN L. HARRINGTON
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina