

ALAN WILSON  
ATTORNEY GENERAL

April 23, 2019

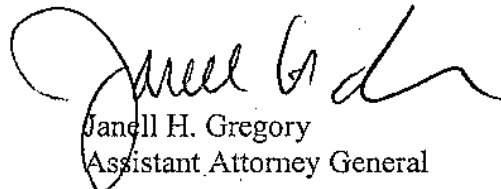
The Honorable James C. Campbell  
Clerk of Court, Sumter County  
215 North Harvin Street  
Sumter, South Carolina 29150

**Re: Herbert Lee Bell, #315885 v. State of South Carolina**  
**2006-CP-43-1241**

Dear Mr. Campbell:

Enclosed please find the original **Conditional Order of Dismissal**, signed by the Honorable George M. McFaddin, Jr., in the above-captioned case for filing in your office. Please forward a **time stamped copy** back to our office for our file.

Sincerely,



Janell H. Gregory  
Assistant Attorney General

JHG/ks  
Enclosure(s)

cc: Herbert Lee Bell, #315885

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS  
OF THE THIRD JUDICIAL CIRCUIT

Herbert Lee Bell, )  
S.C.D.C. No. 315885, )  
Applicant, )

Case No. 2006-CP-43-1241

v. )

State of South Carolina, )  
Respondent. )

CONDITIONAL ORDER OF DISMISSAL

RECORDED  
2006 APR 25 PM 2:12  
JAMES C. PAVAN  
CLERK OF COURT  
SUMTER COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Herbert Lee Bell on August 2, 2006,<sup>1</sup>. Respondent made its Return, requesting the application be summarily dismissed.

#### I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. During its February 2004 term, the Sumter County Grand Jury indicted Applicant for Trafficking in Crack Cocaine (2004-GS-43-0180). Charles T. Brooks, III, Esquire, represented Applicant. The case was prosecuted by Assistant Solicitor W. Jason Corbett of the Third Circuit Solicitor's Office. On March 7-8, 2006, Applicant's case was called to trial before the Honorable Clifton Newman, circuit court judge; Applicant was not present and was tried *in absentia*. The jury convicted him of the charged offense, and Judge Newman entered a sealed sentence. Applicant was subsequently arrested, and on June 7, 2006, the Honorable Steven H. John, circuit court judge held a sentencing proceeding. He unsealed the previously sealed sentence and sentenced Applicant, in accordance with the earlier sentence, to twenty-five years imprisonment and a

<sup>1</sup> Respondent did not receive a copy of this application until June 9, 2017. However, as will be discussed in more detail below, Applicant filed several other post-conviction relief actions that were timely received by Respondent and have been adjudicated on the merits.

\$100,000.00 fine.

Applicant timely served and filed a notice of appeal. Assistant Appellate Defender Lanelle C. Durant represented him on direct appeal before the South Carolina Court of Appeals. On November 13, 2007, Applicant filed his Final Brief of Appellant, in which he presented the following issues for review:

1. Did the trial court err in proceeding with Appellant's trial in his absence when the State failed to prove that appellant had notice that his trial would proceed in his absence?
2. Did the trial court err in not granting a mistrial when the state failed to provide their expert's fingerprint report?

The State filed a Final Brief of Respondent on October 2, 2007. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on May 7, 2008. State v. Bell, Op. No. 2008-UP-249 (S.C. Ct. App. filed May 7, 2008). The Remittitur was sent on May 23, 2008.

***First Post-Conviction Relief Action (2006-CP-43-1902)<sup>2</sup> And Subsequent Appeal***

Applicant filed a *pro se* application for post-conviction relief on November 9, 2006, alleging the following grounds for relief in his Application:

1. Sixth Amendment Violation;
2. "Federal government dismissed the same case for lack of probabl[e] cause;" and
3. Ineffective assistance of trial counsel.

Respondent filed its Return on September 12, 2008, and requested an evidentiary hearing be held. An evidentiary hearing into the matter was convened on October 26, 2009, at the Sumter County Courthouse before the Honorable R. Ferrell Cothran, Jr., circuit court judge. Applicant was present at the hearing and was represented Edgar R. Donald, Jr., Esquire. Assistant

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<sup>2</sup> As mentioned previously, the current application was filed on August 2, 2006, approximately three months prior to this application. However, as this application was the first application to be received by Respondent and was fully adjudicated on the merits, Respondent is classifying this application as Applicant's "first" post-conviction relief action.



Attorney General Mary S. Williams represented Respondent. Applicant testified on his own behalf and he presented the testimony of trial counsel, Mr. Brooks. On December 30, 2009, Judge Cothran filed an Order of Dismissal, in which he denied relief and dismissed the Application with prejudice. The Order of Dismissal addressed Applicant's claims that trial counsel was ineffective because he failed to conduct an independent investigation and additional investigation could have led to a finding that the search warrants were not valid.

Applicant timely served and filed a notice of appeal. After the notice of appeal had been filed, Applicant, through counsel, filed a Motion for Reconsideration on January 21, 2010. In this motion, collateral counsel alleged Judge Cothran's order of dismissal failed to address the following grounds:

1. Violation applicant's U.S. Constitution fourth (4th) amendment.
2. Violation applicant's U.S. Constitution fourteenth (14th) amendment.
3. Trial counsel was ineffective for failing to change (sic) during pretrial applicant[']s invalid arrest.
4. Trial counsel was ineffective for failing to introduce during pretrial witnesses exculpatory testimony to reinforce the fact there was no probable cause established [to] arrest applicant.
5. Trial counsel was ineffective for failing to make an independent investigation of the facts and circumstances specifically regarding applicant[']s invalid arrest.
6. Trial counsel was ineffective for failing to "quash" indictment during pretrial because of violation of applicant's fourth and fourteenth amendments.
7. Trial counsel was ineffective for failing to file a motion "with prejudice" during pretrial due to the violation[] of applicant[']s fourth and fourteenth amendments.

However, a copy of this motion was not served upon Judge Cothran, but instead, was sent in error to another judge, the Honorable George C. James, Jr.. Respondent was also not served with this motion. Judge James, upon whom the motion was served, denied and dismissed the motion.

PCR counsel then filed a "Notice of Motion and Motion for Reconsideration," pursuant to Rules 59(e) and 60(b), SCRCF, on September 13, 2010, including the January 21, 2010



Motion as an exhibit. Respondent filed a Return, taking the position that Applicant's motion was untimely and should be summarily dismissed. The PCR judge denied the Motion in an Order filed on November 30, 2010, in which he found that there was no basis for altering or amending the court's prior ruling.

Applicant then filed a timely notice of appeal challenging the denial of post-conviction relief. On July 14, 2011, Elizabeth A. Franklin-Best, Esquire, filed a Johnson Petition for Writ of Certiorari on Applicant's behalf and petitioned to be relieved as counsel. The only Question Presented in the Johnson Petition was stated as follows:

1. Did the PCR judge err when he found that trial counsel rendered effective assistance of counsel when counsel did not perform additional investigation regarding the validity of the search warrant which, had it been performed, would have resulted in a successful motion to suppress the drugs which petitioner was charged with trafficking?

On September 1, 2011, Applicant filed a *pro se* response, alleging the following additionally issues:

1. Did the pcr judge err in denying relief despite trial counsel's ineffectively failed to make an objection to petitioner's invalid arrest, during pre trial.
2. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to introduce pretrial witness testimony to support petitioner's invalid arrest.
3. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to make an independent investigation of the facts and circumstances surrounding petitioner's invalid arrest.
4. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to file a motion with prejudice against the state to dismiss all charges due to petitioners invalid arrest.
5. Did the pcr judge err in denying relief despite trial counsel['s] ineffectively fail[ing] to file during pretrial a motion to quash indictments due to petitioners invalid arrest.

The South Carolina Supreme Court filed an Order denying certiorari and granting counsel's petition to be relieved on July 30, 2012. It sent the Remittitur to the Sumter County Clerk of



Court on August 17, 2012.

***Initial Federal Habeas Corpus Petition (4:07-4115-RBH)***

On December 27, 2007, Applicant filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the following ground for relief verbatim:

**Ground One:** Six Amendment violation Ineffective Counsel.

**Supporting Facts:** Charles T. Brooks, III did not file any pre-trial motions to dismiss this case "with prejudice" on the grounds that Law Enforcement violated my fourth and fourteenth Amendments when they didn't have probable cause to arrest me or restrained me from my freedom of liberty. Also after the U.S. court dismissed this case with-out prejudice file a motion with prejudice to stop the Double Jeopardy. Showing what the state had used the probable cause to entrap me to the case was suppressed.

Respondent filed a motion for summary judgment on March 26, 2008. On February 25, 2008, the Honorable Thomas E. Rogers, III, issued a Roseboro order. On March 26, 2008, Applicant filed a document entitled Motion for Summary Judgment, which appeared to be a response to respondent's motion for summary judgment. Further, on June 4, 2008, Applicant filed a document entitled "Motion to Vacate the States Case with Prejudice."

On June 17, 2008, United States Magistrate Judge Rogers issued a Report and Recommendation, recommending that Applicant's petition be dismissed without prejudice as Applicant's PCR application raising similar grounds was still pending. On June 20, 2008, the Honorable R. Bryan Harwell, District Court Judge, issued an order adopting the Report and Recommendation, granting Respondent's motion for summary judgment, and dismissing the case without prejudice. Applicant subsequently filed a Motion to Alter or Amend which was denied by the court in an Order dated March 5, 2009.



***Second Federal Habeas Corpus Petition (4:12-2555-RBH-TER)***

On September 5, 2012, Applicant, appearing *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the following grounds for relief:

**Ground One:** Trial counsel was ineffective for failing to challenge/object during pretrial to applicant's invalid arrest.

**Ground Two:** Trial counsel was ineffective for failing to introduce during pretrial witnesses exculpatory testimony to reinforce there was no probable cause to arrest.

**Ground Three:** Trial counsel was ineffective for failing to make an independent investigation of the facts and circumstances of the invalid arrest.

**Ground Four:** Trial counsel was ineffective for failing to file a motion with prejudice during pretrial due to the violations of applicant's 4th and 14th amendments.

**Ground Five:** Trial counsel was ineffective for failing to move during pretrial for the court to "Quash" Petitioner's indictment due to the arresting officers violating his Fourth (4th) and Fourteenth (14th) United States constitution[al] rights.

**Ground Six:** Violation of Petitioner's Sixth (6th) Amendment United States Constitution[al] right to effective assistance of counsel, and his Fourth (4th) AND Fourteenth (14th) amendments.

Respondent filed a motion for summary judgment on February 6, 2013. On February 7, 2013, Respondent filed an amended return and memorandum. On February 25, 2008, Magistrate Judge Rogers issued a Roseboro order. On March 5, 2013, Applicant filed a response in opposition.

On May 14, 2013, Judge Rogers issued a Report and Recommendation, recommending that Applicant's petition be denied, Applicant's default motion be denied, and Respondent's motion for summary judgment be granted. On August 20, 2013, District Court Judge Harwell issued an order adopting the Report and Recommendation, granting Respondent's motion for summary judgment, denying Applicant's motion for default judgment, dismissing Applicant's petition, and denying a certificate of appealability.



On September 9, 2013, Applicant filed a Notice of Appeal with the Fourth Circuit Court of Appeals. On October 1, 2013, Applicant filed his "Informal Opening Brief/Request for Certificate of Appealability." On January 27, 2014, the Fourth Circuit Court of Appeals submitted a per curiam opinion dismissing the appeal. On February 7, 2014, Applicant filed a Petition for Panel Rehearing. On March 11, 2014, the Fourth Circuit Court of Appeals denied the petition for rehearing.

On May 21, 2014, Applicant filed a Petition for Writ of Certiorari Review with the United States Supreme Court, arguing that "lower courts has repeatedly overlooked, misapprehended, or disregarded the basis of the claim he raised." On October 6, 2014, the United States Supreme Court entered an order denying a petition for writ of certiorari.

***Second PCR Action (2014-CP-43-2350) and Subsequent Appeal***

On November 5, 2014, Applicant filed a second application for post-conviction relief, alleging he is being held unlawfully for the following reasons:

1. "Strickland vs. Washington."
2. "Mapps vs. Ohio."
3. "State vs. Moore, 404 S.C. 634-44, 746 S.E.2d 357 (2013)."

On November 26, 2014, Applicant filed an Amended Application, asserting the following additional grounds for relief:

1. "Trial counsel as well as PCR counsel were both ineffective for not properly preparing and raising a Fourth Amendment and Fourteenth Amendment claim with the relevant law of Mapp v. Ohio, 367 U.S. 643, 648 (1961). Any evidence standard that if properly raised would have resulted in suppression of the drug evidence and dismissal of applicant's case as 'fruit' of the poisonous tree."

On February 24, 2015, Respondent made its return to the application, requesting summary dismissal of the application as successive, untimely, and barred by the doctrine of *res judicata*. On February 26, 2014, the Honorable W. Jeffrey Young, acting in his capacity as Chief



Administrative Judge for the Third Circuit, signed a conditional order of dismissal, provisionally dismissing the application but allowing Applicant twenty days to provide sufficient reasons why the dismissal should not become final. Applicant responded to the conditional order of dismissal. On July 24, 2015, the Honorable George C. James, Jr., acting in his capacity as Chief Administrative Judge for the Third Judicial Circuit, issued a final order of dismissal, finding Applicant had failed to establish why his action should not be summarily dismissed.

Applicant filed a notice of appeal on September 21, 2015. On November 2, 2015, the South Carolina Supreme Court dismissed Applicant's appeal, finding Applicant failed to establish the notice of appeal had been served on the State in a timely manner. The Remittitur was issued on November 19, 2015. On November 20, 2015, Applicant then filed a motion to reinstate, which was denied by the Court. Applicant then filed a petition for a writ of certiorari on December 18, 2015. As the remittitur had already been sent, the Court took no action on Applicant's petition.

## II. CURRENT APPLICATION

In Applicant's current application, filed on August 2, 2006, but not received by Respondent until June 9, 2017, Applicant raises the following grounds for relief:

1. "Entrapment"
2. "Unlawful Arrest"
3. "Violation of my 4<sup>th</sup> Amendment Rights to Privacy"
4. "Constructive Denial of Ineffective Assistance of Counsel"

As requested relief, Applicant states he is seeking full vacation of his sentence and immediate release from incarceration.

Before this Court are the Sumter County Clerk of Court, the records from the South Carolina



Department of Corrections, the appellate records, the records from Applicant's prior post-conviction relief actions and subsequent appeals, the records from Applicant's federal habeas corpus actions, and Respondent's Return and Motion to Dismiss.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Successiveness

The Court finds that the current Application for post-conviction relief must be summarily dismissed because it is successive to the previous applications for post-conviction relief. S.C. Code Ann. § 17-27-90 (1985) 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.

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).

In the present case, although this application was filed before his two other post-conviction relief actions, it was not received by Respondent for nearly eleven years, and during the interim, his initial post-conviction relief action was fully adjudicated. Applicant was afforded appellate review of the denial of this initial post-conviction relief action. Subsequently, Applicant then filed another post-conviction relief action that was denied and dismissed. These two prior post-conviction relief actions addressed many of his claims he is currently raising, and



therefore, this application is successive. Accordingly, this Court finds this application and the allegations it raises are successive to the two previously adjudicated post-conviction relief actions, and therefore, 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 v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

### **Res Judicata**

This Court further finds that the doctrine of *res judicata* bars Applicant's claims of ineffective assistance of 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 had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in his two prior post-conviction relief actions. As stated above, the grounds he raises in this current PCR were raised and ruled upon in his prior actions. The public interest in the finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court finds that these claims are barred by res judicata and must be dismissed.

### **CONCLUSION**

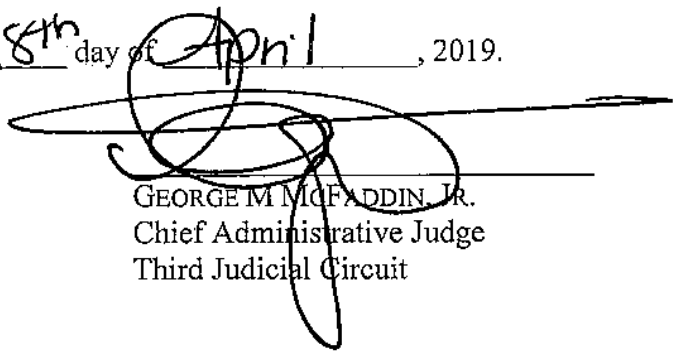
Pursuant to S.C. Code Ann. §17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application



should not be dismissed in its entirety. Applicant is granted twenty 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 Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
PCR Division – 3rd Circuit  
P.O. Box 11549  
Columbia, SC 29211

AND IT IS SO ORDERED this 18<sup>th</sup> day of April, 2019.



GEORGE M. MCFADDIN, JR.  
Chief Administrative Judge  
Third Judicial Circuit

Sumter, South Carolina