THE STATE OF SOUTH CAROLINA

IN THE COURT of Appeals

APPEAL FROM YORK COUNTY

COURT OF GENERAL SESSIONS

William A. McKinnon, Chief Judge

1998-GS-46-2847;2849;2851

Appellate Case No:2021-001280

STATE OF SOUTH CAROLINA, Respondent,

v.

ANTONIO GORDON, Appellant.

Appellant's Reply Brief Under Rule 208(a),(3) SCACR

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STATEMENT OF ISSUES ON APPEAL

Whether the trial court committed error of law and abused it discretion when the trial court made findings of fact and conclusion of law that General Sessions court properly had jurisdiction under section 20-7-6605 of the Children code of Laws Act without making findings of fact and conclusion of law and applying statutory construction and giving legislative intent to all sections related to the same general law ,sections 20-7-7205(a);20-7-6605(1),(2);20-7-400(a),(d);20-7-7605(1),(6) as applied to Appellant being ***"sixteen years of age and found violating a criminal law and taken into family court custody/jurisdiction based on probable cause"*** in its Order of dismissal without a hearing?

Whether the trial court committed error ***of law and abused it discretion when the trial court did not make findings of fact and conclusion of law in it's order summarily dismissing Appellant's claims raised in his motion to vacate conviction and sentence without a hearing that of:***

(1) The Children Code of Laws Act was unconstitutionally vague under the due process clauses of South Carolina Constitution Article one section 3 and the 14th amendment to the United States Constitution as applied to Appellant because the term "who is Charged" or the term "[Charged]" as outlined in section 20-7-6605(1) of the Children Code of Laws Act does not set forth the proper standard for adjudication as applied to him being ***"sixteen years of age found violating a criminal law and taken into family court custody/jurisdiction based on probable cause" under sections 20-7-7205(a);20-7-6605(1),(2);20-7-400(a),(1),(d). Appellant asserted his conviction under it was not merely erroneous, but illegal and void under Ex Parte Siebold 100 U.S. 371-77 (1879) holding.?***

The State Statement of Issues on Appeal

The Circuit Court did not err in denying Appellant's Motion to Vacate Conviction and Sentence because the allegation does not implicate subject matter jurisdiction, so it was not timely raised, and even if properly raised subject matter jurisdiction to accept Appellant's various pleas was proper in the Court of General Sessions....

STATEMENT OF THE CASE

The records, in this case, reflect that on July 23, 1998, the Appellant was sixteen years of age when he was **found violating a criminal law and taken into "Family Court"** custody/jurisdiction based on probable cause. See ROA Volume one Pages 80 Line 16-pg 83 Lone 16- pg 88 Line 24-pg 89 Line 10 (Pre Trial Transcript Detective John Thickens Testimony); ROA Volume One Pg 208 Line 19-24 (Pre Trial Transcript Captain Charles Cabiness Testimony); ROA Volume One Pg 138 Line 11 Pg 139 Line 1 (Pre Trial Transcript, Trial Court denying motion to suppress finding there was probable cause to make a warrantless arrest). See Fn1 The record in this case demonstrate law enforcement did notify the Appellant's parents of him being taking into custody according to the Children Code of Laws Act. See ROA Volume One Pg 144 Line 16- Pg 146 (Pre Trial Transcript, Trial Court finding Appellant parents were notified under S.C. Code Ann 20-7-7205(A) (Supp.1998) Titled "Taking a Child into Custody" statute and denied counsel motion to suppress the Appellant confession).

Fn1 Approximately** 6 to 8 **hours after the Defendant was taken into custody he appeared before a city recorder and signed an arrest warrant for murder. ROA Volume One Pg 89 Line 13- Pg 90 Line 12. On July 27, 1998, the Appellant were served arrest warrants for 2 counts of attempted armed robbery, possession of a weapon during the commission of a violent crime, possession of a pistol by a person under twenty one, criminal conspiracy,. The Appellant was appointed Dan Agostino Esq to represent him in General Sessions court.

On October 19,1998, the York County Grand Jury did during a time ***"Family Court"*** retained jurisdiction, True Billed indictments for murder, 2 counts of attempted armed robbery, 3 counts of possession of a weapon during the commission of a violent crime, possession of a pistol by a person under twenty one , criminal conspiracy and carjacking. See ROA Volume One Pg 225-247 (Indictments).

On July 16,1999, after a Jackson v. Denno hearing the Defendant pled guilty to the true billed indictments in General Sessions Court ***"without Family Court first providing a hearing, notice, counsel and a statement of reason in an order transferring it's first attached jurisdiction"***. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the Appellant to 30 years for murder, 5 years for each possession of a weapon during the commission of a violent crime, 5 years for possession of a pistol by a person under, twenty-one. 5 years for criminal conspiracy, 10 years for each attempted armed robbery with one of the 10 years ran consecutive to the 30-year murder charge and the carjacking was dismissed. See ROA Volume One Pg 225-247 (Warrants, Indictments, and sentencing sheets).

Appellant filed his first post-conviction relief application under section 17-27-20(1). ***(2000-cp-46-1414)***. In the application Gordon asserted as a ground for relief (a) "***Ineffective assistance of counsel pursuant to family court matters***". ROA Volume one pages 248-254.

The Appellant filed a second post-conviction relief application under section 17-27-20(2). ***(2001-cp-46-1866)***. In the application,, Gordon asserted as a ground for relief "***{S}ubject matter jurisdiction"*** (b) "***Family Court never relinquished its first acquired jurisdiction".*** See ROA volume one pages 254-261

Under Rule 15(b) of the SCRCP and section, 17-27-90 Gordon amended his jurisdiction claim and asserted other constitutional challenges to the children's code of laws See ROA Volume one page 262-274.

Appellant was court-appointed Tara D. Shurling, Esq to represent him in the matter as required by Rule 71.1(d) SCRCP.

The State made a Return to the applications as required by section 17-27-70(a) but did not address Gordon's jurisdiction claim. See ROA Volume one pages 275(A)-275(d).

An order changing venue was issued transferring Gordon's case to Richland County in which both of Gordon's applications were consolidated and will be referred to as ***PCR (1414). ROA Volume one pages 276(A)-276-277.***

An evidentiary hearing was convened on July 29, 2003, before the Honorable Earnest Kinard Jr. PCR counsel Shurling, Esq informed the PCR court: ***"Your Honor, my client also alleges that his indictment is faulty in that he was indicted by the Court of General Sessions and tried as an adult without trial counsel having---and this is actually more of a sixth amendment argument, although my client couched it in terms of subject matter jurisdiction".*** See ROA Volume one pages 285 line 15-287 line 16 ***(PCR Transcript).*** Counsel proceeded to inform the Court that Gordon asked her to argue his jurisdiction claim and other constitutional claims and ineffective assistance of counsel claims relating to him being tried as an adult without the family court first relinquishing its jurisdiction in an order with a statement of reason. See ROA Volume one pages 286 line 15-page 287 line 10.

Without no legal argument presented during the PCR hearing on Appellant jurisdictional claims by neither party and at the conclusion of the hearing the court instructed the Respondent to prepare a proposed order. ***(TAKE NOTICE OF PCR TRANSCRIPT IN ITS ENTIRETY) ROA Volume one Pg 278-342.*** As instructed by the court the State prepared the order making specific findings of fact and conclusion of law as required by section 17-27-80. However, At claim 5 of the order the State amended their Return and answered Gordon jurisdiction claim out of time according to Rule 8(c) and 12(b) and 15(b) SCRCP and section 17-27-70(a) when the Respondent injected the language in the order that ***"Pursuant to S.C. Code Ann 20-7-6605, a person sixteen years of age or older who Is charged with a Class A.B, C, or D felony as defined in section 16-1-20 or a felony which provides a maximum term of imprisonment of fifteen years or more maybe remanded to the family court for disposition of the charge at the discretion of the solicitor. The Applicant was sixteen years old when he committed the crimes for which he was indicted and the crimes committed were Class A, B, C, or D felonies. Therefore, the General Sessions Court had jurisdiction".*** See ROA Volume one pages 355 line 2-8 (PCR Order issued August 18th, 2003).

The PCR court signed the order as making specific finding of fact and conclusion of law as required by section 17-27-80 without Gordon first being giving **adequate notice in advance and the opportunity to respond** under section 17-27-70(b) and Rule 12 of the SCRP prior to judgment being issued on the State claim that ***"Pursuant to S.C. Code Ann 20-7-6605, a person sixteen years of age or older is charged with a Class A.B, C, or D felony as defined in section 16-1-20 or a felony which provides a maximum term of imprisonment of*** fifteen ***years or more maybe remanded to the family court for disposition of the charge at the discretion of the solicitor. The Applicant was sixteen years old when he committed the crimes for which he was indicted and the crimes committed were Class A, B, C, or D felonies. Therefore, the General Sessions Court had jurisdiction".***

The record reflects Gordon asked PCR counsel to file a Rule 59(e) motion and a Rule 60(b), SCRCP motion. See ROA volume one pages 366 line 16-page 367 line 2 (***Letter from PCR counsel Tara Shurling, Esq to Ms.Richardson***). Counsel stated in her opinion there was no need for such motions and filed a Notice of Appeal in the case.

The Appellant filed a pro se Motion for reconsideration of facts in attempt to protect his procedural right to one full fair bite at the apple. The Court found that all claims raised in the application were rule on by the court and because Gordon received the order way after the initial appeal in this case, he filed a belated appeal in South Carolina Supreme Court in which the Court vacated the PCR court order denying the pro se motion as well denied Gordon request to file a belated appeal and post-conviction relief application. See ROA Volume one page 365.(Order issued from this Court) not dated).

The Appellant filed three (3) more applications and reasserted the same jurisdictional claims and the State asked each court to deny the application as being time-barred and successive under the uniform post-conviction relief act and each court ruled as such.

In Appellant's last PCR application 2008-cp-46-4951, the State filed a motion with the court to restrict Gordon from filing any future post-conviction relief applications that raised or could have raised claims in previous applications. However, in the State motion, it is alleged Gordon has had more than his fair bite at the apple and showed the court that in every PCR application Gordon asserted his jurisdiction claim. See ROA Volume two pages 17,21-page 25 (***Motion to Restrict Gordon from future filing filed by the state.)*** The Court issued an order restricting Gordon from filing any future PCR applications that raised claims that was raised in previous applications or could have been raised in previous applications and that ineffective assistance of PCR counsel is not a reason to have a second PCR application. See ROA Volume two page 59 **(Order Restricting future filings).**

The Appellant eventually filed a Declaratory Judgment in the South Carolina Supreme Court original jurisdiction asking the court to find the Uniform Post- Conviction Relief Act was unconstitutional because it did not provide a judicial remedy to remedy the ineffective assistance of pcr counsel. The court denied the petition and held that the Court and the lower courts have said no as to his ineffective assistance of pcr counsel claim that PCR counsel inadequately raised his jurisdiction claim as ineffective assistance of counsel. See ROA Volume two pages 74-75 (***Order from this Court issued on June 20,2019) Rehearing Order issued on November 19,2019.*** Appellant have filed other motions in attempt to receive his ***"procedural right to one full fair bite at the apple"***.

On September 9, 2021, Appellant filed a ***Motion To Vacate Conviction and sentence based on Lack of a Subject Matter Jurisdiction.*** See ROA Volume two pgs 77-88. In the Motion Appellant asserted General Sessions court was without jurisdiction to accept his guilty plea and sentence him as an adult offender to a term of year's of imprisonment because

(A) when the Grand Jury True Bill his indictments, the court of General Sessions did not have jurisdiction. ROA Volume Two Pg 82 first paragraph.

(B) When he was found violating a criminal law and taken into custody ***based on probable cause family court acquired the first jurisdiction*** under S.C. Code Ann 20-7-7205(a) (Supp.1998) Title "Taking a Child into custody"; 20-7-6605(1),(2) (Supp. 1998) Title "Definition"; 20-7-400(a),(1),(d) (Supp.1998) Title "Exclusive Original Jurisdiction of Family Court". ROA Volume Two Pg 82 second paragraph.

Appellant asserted that before the York County Grand Jury could true bill his indictments Appellant was :

(1) Entitled to a hearing, counsel and a statement of reason with an order transferring jurisdiction to general sessions under sections 20-7-400(a),(1),(d), supra and S.C. Code Ann 20-7-7605(6) (Supp.1998) Title "Transfer of Jurisdiction"; ***Kent v. The United States, the 86 Sct 1045 (1966).*** ROA Volume Two Pg 82 Third paragraph.

Appellant also asserted that:

(2) The Children Code of Laws Act was unconstitutionally vague under the due process clauses of South Carolina Constitution Article one section 3 and the 14th amendment to the United States Constitution as applied to him because the term "who is Charged" or the term "[Charged]" as outlined in section 20-7-6605(1) of the Children Code of Laws Act does not set forth the proper standard for adjudication as applied to him being ***"sixteen years of age found violating a criminal law and taken into family court custody/jurisdiction based on probable cause" under sections 20-7-7205(a);20-7-6605(1),(2);20-7-400(a),(1),(d). Appellant asserted his conviction under it was not merely erroneous, but illegal and void under Ex Parte Siebold 100 U.S. 371-77 (1879) holding.*** ROA Volume Two Pg 82 Fn2- pg 83

(3) Appellant asserted that even though he faced mandatory bind over under section 20-7-6605(1) of the Children code of laws Act, there should have first been a Petition filed under section 20-7-7605(6) alleging Appellant was found violating a criminal law and taken into family court custody/jurisdiction based on probable cause and that he is charged with a Class A, B, C, or D felony under section 20-7-6605(1).ROA Volume Two Pg 83 Fn3 second paragraph.

For the first time the Appellant asserted that he had been denied his fundamental constitutional rights to due process of law under South Carolina Constitution Article one section 3 and the 14th Amendment to the United States Constitution when the PCR court and the State "did not" provide him with adequate notice in advance and the opportunity to be heard before the signing of the order on the State claim that "***Pursuant to S.C. Code Ann 20-7-6605,a person sixteen years of age or older is charged with a Class A, B, C, or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of***

imprisonment of fifteen years or more maybe remanded to the Family Court for disposition of the charge at the discretion of the solicitor. The Applicant was sixteen years old when he committed the crimes for which he was indicted and the crimes committed were Class A, B, C, or D felonies. Therefore, the General Sessions Court had jurisdiction". . ROA Volume Two Pg 85 6th paragraph- pg 86.

Appellant asked the Court to exercise it's authority and vacate and or reopen the PCR Judgment in PCR (1414) to properly litigate his subject matter jurisdiction claims as those similarly situated. ROA Volume Two Pg 86 Fn4 of Appellant's Motion to Vacate Conviction and Sentence based on ***"Lack of Subject Matter Jurisdiction ".***

The trial court issued an order on October 13,2021 and filed on October 18,2021. In the order the Honorable McKinnon reconsidered and addressed Appellant's jurisdictional issues when the court held:

" The Court received this Handwritten motion request the court reconsider jurisdictional issues which have already been litigated in which the Court has issued orders denying relief. .....As previously ordered by the Court, the General Sessions court had jurisdiction over the Petitioner's guilty plea on July 16,1999. The Petitioner pled guilty to murder, three counts of possession of a weapon during the commission of a violent crime, two counts of attempted armed robbery, possession of a firearm by a person under twenty one and criminal conspiracy. Pursuant to the law at the time of his plea," a person sixteen years of age or older who is charged with a Class A, B, C, or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more "is not a juvenile and may be remanded" to the family court for disposition of the charge at the discretion of the solicitor". See S.C. Code Ann 20-7-6605 (Now section 63-19-20). The Petitioner was sixteen years old and charged with a Class A, B, C, or D felony as defined in section 16-1-20. Consequently, the General Sessions court had jurisdiction, and the sentence and conviction shall not be vacated". The Court summarily dismissed the Appellant's Motion to Vacate Conviction and Sentence without a hearing. See ROA Volume Two Pg 89-90

The Respondent filed their Initial Brief On Appeal dated May 25,2022 and received by Appellant on May 31,2022. The Respondent asserted the Circuit Court did not err in denying Appellant's Motion to Vacate Conviction and Sentence because the allegation does not implicate subject matter jurisdiction, so it was not timely raised, and even if properly raised subject matter jurisdiction to accept Appellant's various plea was proper in the Court of General Sessions....

Arguments

The circuit court did not err in denying Appellant's Motion to Vacate Conviction and Sentence because the allegation does not implicate subject matter jurisdiction so it was not timely raised and, even if properly raised, subject matter jurisdiction to accept Appellant's various pleas was proper on the Court of General Sessions.

Appellant objects to the Respondent's assertion that the circuit court did not err in denying Appellant's Motion to Vacate Conviction and Sentence, arguing Appellant's claims are not jurisdictional in nature and could not be raised at any time. Gordon asserts this argument is without merit, inconsistent and conflict with previous arguments asserted by them in their Motion to Restrict Appellant from future filing. See ROA Volume Two page 21 and judgment issued in PCR (1414) proposed order adopted by the court. ROA Volume one page 355 Line 2-9. Appellant asserts the State is judicial estoppel from adopting this position. See Cothran v. Brown, 592 SE2d 629 where our Supreme Court held "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with or in conflict with one the litigant has previously asserted in the same or related proceeding". See Fn1

FN1 Appellant asserts this is the same or related proceeding because

The trial court exercise it's authority and reopen PCR Judgment

(1414) and reconsidered Gordon Jurisdictional claims.

Secondly, Appellant asserts the State has waived this issue on appeal by failing to object on this ground when this claim was first raised in PCR (1414) and again when the Appellant filed his Motion to Vacate Conviction and Sentence. The Respondent's claim was not ruled upon by the trial court but to the contrary found that Gordon asked the Court to reconsider ***"[J]urisdictional issues"***. ROA Volume Two page 89 first paragraph. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court, issues not raised and ruled upon in the trial court will not be considered for appeal. See State v. Dunbar, 587 SE2d 691 (SC 2003).

Consequently, the Appellant asserts the issues raised in his Motion to Vacate Conviction and Sentence are jurisdictional. In this case, Gordon asserted the trial court was without the authority to exercise its subject matter jurisdiction to accept his guilty plea and that his indictments are a nullity void ab initio because he was a person less than seventeen years of age found violating a criminal law and taking into family court custody jurisdiction based on probable cause under SC Code Ann 20-7-7205(a) (Supp.1998) Titled "Taking a Child into Custody";20-7-6605(1),(2);20-7-400(a),(1),(d) of the Children Code of Laws Act, Family Court acquired the "first" jurisdiction, and that the solicitor should have filed a Petition in family court under section 20-7-7605(6) (Supp. 1998) Titled "Transfer of Jurisdiction" and that the Family Court judge should have first issued an order under section 20-7-7605(6) with a statement of reason. Kent v. the United States, 86 Sct 1045 (1966). Appellant asserted because family court never issued an order transferring jurisdiction the trial court was without jurisdiction to accept his plea and sentence him as an adult offender because when the

Grand Jury True Billed his indictments, the Court of General Sessions did not have jurisdiction which is a State v. Funderburk, 191 SE.2d 520 (SC 1972) violation.

The State contends State v. Rice, 401 SC 330,331-32,737 SE2d 485 (2013) preclude Appellant's jurisdictional claims because he waived the issues by pleading guilty. Jarmel Rice was charged as a juvenile when he was fifteen years old for a series of violent crimes. Following a contested waiver from family court to general sessions court, Appellant pled guilty to three counts of armed robbery and one count of assault with intent to kill and received a sentence of eleven years in prison, with many other charges dismissed. In pleading guilty, Appellant raised no objection to the family court waiver. On appeal, Appellant seeks to resurrect his family court constitutional challenge to the waiver as violative of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Appellant asserts the Rice case relied on by the State to prevent this court from doing what's good in law is not similar to his case and to be exact directly has no relations. (1) Rice was properly waived into adult court (2) Rice challenged a constitutional challenge to the waiver as violative of Apprendi v. New Jersey. As well in the State v. Yodprasit, 564 N.W.2d 383,386 (Iowa 1997) case cited in the Rice case the juvenile was properly waived into adult court and challenged the waiver proceedings. The Respondent asserted State v. McBride, 416 SC 379,386, 786 SE.2d 435, 438 (Ct. App. 2016) also preclude Gordon from asserting his jurisdictional claims in his Motion to Vacate Conviction and Sentence where this Court (finding argument that the circuit court lacked subject matter jurisdiction to hear the case because he was sixteen at the time of the alleged crime and the case was not properly transferred to the court of general sessions did not implicate subject matter jurisdiction and could not be raised at any time). Gordon asserts his case and arguments are totally inapposite then McBride case.

(1) McBride attempted to for the first time raise a subject matter jurisdictional issue on appeal stating merely because he was sixteen when his offense was committed the trial court lacked subject matter jurisdiction, whereas the lower court in this case made a ruling on Gordon's subject matter jurisdictional claims and committed an error of law and abuse his discretion when the court did not consider all statutes relating to the same general law when making a finding general sessions properly had jurisdiction in this case;
(2) McBride never asserted that his indictments were a nullity because the trial court was without jurisdiction. In State v. Funderburk, 191 SE.2d 520 (1972) our Supreme Court labeled this claim in the subject matter jurisdiction jurisprudence when the Court held " We think it elementary, with no need for citation of authority, that the acts of a court with respect to a matter as to which it has no jurisdiction are void. The jurisdiction of a grand jury is co-extensive with the criminal jurisdiction of the court in which it is impaneled and for which it is to make inquiry. 42 C.J.S. Indictments and Information § 17, page 855; 38 C.J.S. Grand Juries § 34b, page 1029. The court being without jurisdiction, the indictment in this case was a nullity.It is elementary that lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal in this Court. State v. Castleman, 219 S.C. 136, 64 S.E. (2d) 250; State v. Adams, 73 S.C. 435, 53 S.E. 538". Like in Funderburk case the Family Court and General Sessions Court have concurrent jurisdiction to try criminal matters relating to children in this state. S.C. Code Ann 20-7-400(a),(1),(d): See S.C. Const. art. V section 11. In this case the trial court did not have the authority to exercise it's subject matter jurisdiction to accept Appellant's plea and sentence him as an adult offender. It's clear the guilty plea judgment is void as matter of law in this case.
(3) McBride did not assert the solicitor never filed a petition which is a notice document in juvenile proceedings. Thus, Appellant asserted that even though he faced mandatory bindover under section 20-7-6605(1) once charged with one of the class felonies listed and that the solicitor should have filed a petition under section 20-7-7605(6) alleging Appellant was sixteen and charged with murder. This Court in In re Jason T, 531 SE2d 544 held "In a

court of general sessions,with the exception of certain minor offenses, the circuit court lacks subject matter jurisdiction to accept a guilty plea unless there is an indictment sufficiently stating the offense, there is a waiver of indictment, or the charge pled to is a lesser included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). Any waiver of presentment must be in writing. See Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982); see also S.C.Code Ann. §§ 17-23-130 to -140 (1985).For an indictment to be valid, it must state the offense with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer. Carter, 329 S.C. at 362-3, 495 S.E.2d at 777. This requirement that a defendant receive notice of the charges against him is rooted in due process. See State v. Butler, 277 S.C. 452, 456, 290 S.E.2d 1, 3 (1982), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 329 n. 5 (1991).

These same due process concerns extend to juvenile proceedings. Our supreme court has held that the fairness and due process requirements that ensure an adult criminal defendant will receive sufficient notice of the charges against him also apply to juvenile matters. In re Corey B., 291 S.C. 108, 109-10, 352 S.E.2d 470 (1987) (holding a juvenile cannot be found guilty of a greater offense than alleged in the petition); see also In re Gault, 387 U.S. 1, 30-33, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding the due process protections requiring notice of the alleged charges extends to juveniles); In re Arisha K.S., 331 S.C. 288, 293, 501 S.E.2d 128, 131 (Ct.App.1998) ("[A] child in a juvenile proceeding has a right to fundamental due process and thus, our courts must ensure that due process and fair treatment surround a juvenile's plea of guilty.").

Based on the due process protections governing juvenile proceedings and the exemplary procedure employed in courts of general sessions to preserve adults' due process rights, we now hold that a family court lacks subject matter jurisdiction to adjudicate a juvenile delinquent for a charge *459 not alleged in the juvenile petition unless the adjudication is for a lesser included offense or there has been a written waiver of notice.Consequently, the notice requirement is not satisfied by merely serving notice of a delinquency proceeding without notifying the juvenile and his parents of the charges to be considered at the family court hearing. See In re Gault, 387 U.S. at 33, 87 S.Ct. 1428. To hold otherwise would violate a juvenile's due process right to notice. See In re Gault, 387 U.S. at 33, 87 S.Ct. 1428 (holding due process protections extend to juveniles and require a child and his parents or guardian to be notified in writing, and sufficiently in advance of the hearing, of the specific charge or factual allegations to be considered at the hearing); In re Corey B., 291 S.C. at 109-10, 352 S.E.2d at 470.

In footnote 3 of In re Jason T, supra this Court stated "We recognize that juvenile delinquency proceedings in family court do not require presenting an indictment to a grand jury, unlike criminal cases in circuit court. Nevertheless, we find the practice followed in a court of general sessions provides useful instruction in resolving the case at bar". Appellant argument is that because the York county grand jury did not have jurisdiction to indict him as an adult offender, the filing of a juvenile petition charging him with a crime was required in this case and because one was never filed, the trial court was without subject-matter jurisdiction. Kansas Supreme court in State v. Mayfield, 241 Kan.555,738 P2d 861 (1987) dealt with a case almost identical to Gordon where Mayfield was prosecuted as an adult without no proceedings being commenced in the juvenile court the only difference then Mayfield case and Appellant case is the fact Appellant faced mandatory bindover. The Kanas Supreme Court revisit Mayfield case in State v. Breed love, 285 Kan. 1006,179 P.3d 1115 (2008) the Kansas Court held "The Mayfield court observed that the juvenile code provided in part that "`when any person charged with having committed an act of delinquency before reaching the age of eighteen years is brought before the court after reaching said age, the court shall proceed pursuant to the Kansas juvenile code.'" 241 Kan. at 556, 738 P.2d 861. The juvenile code also provided a procedure where certain individuals charged under the code could be prosecuted as an adult. However, that procedure was not followed in Mayfield. Indeed, similar to the instant case, the

State conceded that Mayfield was charged as an adult pursuant to the criminal code and "proceedings were never commenced pursuant to the Kansas juvenile code." 241 Kan. at 556-57, 738 P.2d 861.

This court rejected the holdings of the district court and the Court of Appeals that Mayfield had waived any objection to jurisdiction, personal or otherwise. While the Court of Appeals also found that the district court had subject matter jurisdiction because the alleged offense was a felony, this court disagreed that "because the offense is categorized as a felony under the criminal code that the court obtained subject matter jurisdiction. *1119 At the outset we note that subject matter jurisdiction cannot ordinarily be waived." 241 Kan. at 558, 738 P.2d 861.

After a review of Kansas statutes and case law, the Mayfield court concluded that the district court lacked jurisdiction to accept the theft by deception guilty plea from a defendant who was a juvenile when the crime occurred. 241 Kan. at 561, 738 P.2d 861. In support of its holding, the court observed that the jurisdiction of the district court over juveniles is based exclusively upon compliance with the juvenile code:

"Although, since court unification in 1977, we no longer have separate juvenile courts, the policy adopted by the legislature and consistently recognized by the courts has not changed. The jurisdiction of the district court over juvenile offenders in 1978 was based solely upon compliance with the provisions of the Kansas juvenile code and today is based solely upon the provisions of the Kansas juvenile offenders code. (K.S.A. 38-1601 et seq.)" (Emphasis added.) 241 Kan. at 561, 738 P.2d 861.

The court went on to articulate why the complete failure of the lower court to even commence proceedings in compliance with the juvenile code made the action void:

"Thus, we think it is abundantly clear that the Kansas juvenile code (and now the Kansas juvenile offenders code) established an exclusive procedure for those subject to its provisions and the district court did not have jurisdiction of the subject matter of the action against appellant. To obtain such jurisdiction the proceedings had to be instituted under the provisions of the Kansas juvenile code as it existed in 1978. Failure of the State to proceed in accordance with the [juvenile] code deprived the court of jurisdiction to accept appellant's attempted plea of guilty to a crime when the acts complained of were done by appellant at a time when he was under the age of eighteen. The district court and the Court of Appeals were in error in concluding that as the acts of Mayfield would have constituted a felony if he had been an adult, the court had jurisdiction of the subject matter. The subject matter of the action was not a criminal prosecution for a felony but a juvenile proceeding which was never commenced pursuant to the juvenile code." (Emphasis added.) 241 Kan. at 561, 738 P.2d 861.

Accordingly, the judgments of the lower courts were reversed, and the case was remanded with directions to set aside the conviction. 241 Kan. at 561, 738 P.2d 861.

We agree with the Mayfield court on several important counts. First, we note that subsequent Kansas decisions have treated similar jurisdiction questions as concerning subject matter jurisdiction, not personal. See, e.g., State v. Elliott, 281 Kan. 583, Syl. ¶ 1, 2, 133 P.3d 1253 (2006) (municipal courts lack subject matter jurisdiction over third or subsequent driving under the influence violations because they are felonies). As we stated regarding a related issue in Belcher, 269 Kan. at 8-9, 4 P.3d 1137:

"'[I]f a crime is not specifically stated in the information or is not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented. [Citation omitted.]

"'... In a criminal action the trial court must not only have jurisdiction over the offense charged, but it must also have jurisdiction of the question which its judgment assumes to decide. A judgment for the offense of battery where the court is without jurisdiction to decide the issue is void.' [Citation omitted.]". Gordon case clearly represent subject matter jurisdiction and the trial court guilty plea judgment is void as a matter of law.

In Gibson v. State, 47 Wis.2d 810, 177 NW2d 912 (1970) the Supreme Court of Wisconsin dealt with a case very similar to Gordon and the court held "***While the county court of Waukesha county had personal jurisdiction of Gibson by his appearance, it could acquire subject matter jurisdiction only after a proper waiver of jurisdiction by the juvenile court.***

Criminal subject matter jurisdiction was defined in Pillsbury v. State (1966), 31 Wis. 2d 87, 94, 142 N. W. 2d 187. The court said therein:

"Criminal jurisdiction of the subject matter is a power of a court to inquire into the charge of the crime, to apply the law, and to declare the punishment in the court of a judicial proceeding and is conferred by law."

****816 In State ex rel. La Follette v. Raskin (1966), 30 Wis. 2d 39, 45, 139 N. W. 2d 667, the court stated, "... jurisdiction of subject matter is derived from law and cannot be waived nor conferred by consent...." Accordingly, even though there has been no objection by Gibson to his arraignment in the criminal court, the conviction is void ab initio unless the juvenile court has ceded its jurisdiction to the criminal court regarding each particular charge contained in the information".***

In State v. Wilson, 73 Ohio St.3d 40 (1995), Ohio Supreme Court were asked 2 certified questions The issues certified to this court are: (1) "In the absence of a bindover from juvenile court pursuant to R.C. 2151.26, does the general division of the common pleas [sic] court have jurisdiction to try, convict and sentence a juvenile defendant?" and (2) "In the absence of the bindover, can the juvenile court jurisdiction be waived?" We answer both of these queries in the negative.

In the case before us, Wilson, a "child" at the time of his criminal activity, never even appeared before the juvenile court, apparently because the state and the court mistakenly believed that Wilson was eighteen years of age when he stole Becker's property. He appeared before and was convicted and sentenced by the general division of the court of common pleas without being bound over by the juvenile court. Therefore, Wilson was still subject to the exclusive special subject matter jurisdiction of the juvenile court, and the court of common pleas lacked subject matter jurisdiction to convict him.

Like Wilson, Gibson and, Mayfield supra the Appellant was a child found violating a criminal law and taken into family court custody jurisdiction based on probable cause under sections 20-7-7205(a);20-7-6605(1),(2);20-7-400(a),(1),(d), Appellant asserts family court was the exclusive original jurisdiction and the solicitor should have filed a petition under section 20-7-7605(6);20-7-6605(1),(2) and the family court judge should have issued an order waiving jurisdiction to general sessions under section 20-7-7605(6);20-7-6605(1),(2) with a statement of reason pursuant to Kent v. United States, 86 Sct. 1045 (1966);In the Interest of Shaw, 274 SC 534,274 SE2d 522 (1980) and then the York County Grand Jury could have true billed appellant's indictments pursuant State v. Funderberk, supra and the General Sessions Court could then properly have subject matter jurisdiction. State v. Gentry, 363 S.C. 93,100,610 SE2d 494,498 (2005);State v. Funderburk, Esq. Even though

Appellant faced mandatory bindover under section 20-7-6605(1) of the Children Code of Laws Act, Appellant is challenging the Court of General Sessions authority to exercise its subject matter jurisdiction and its subject matter jurisdiction absence of the bindover from family court after being taken into family court custody jurisdiction based on probable cause. State v. Wilson, Esq Appellant's guilty plea judgment is void. Id

Finally, the State should be barred from arguing unpreserved issues under State v. Dunbar, Esq as well as judicial estoppel preclude the Respondent from adopting their new positions. " Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. See Colleton Reg. Hosp. v. MRS Med. Rev. Systs., 866 F.Supp. 896 (D.S.C.1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. Estoppel & Waiver § 139, at 593 (1996). Judicial estoppel generally applies only to inconsistent statements of fact. Cannon v. H.K Porter Co., 705 F.Supp. 288 (E.D.Va.1989). Although some courts have held to the contrary, the doctrine does not apply to conclusions of law or assertions of legal theories. See United States v. Siegel, 472 F.Supp. 440 (N.D.Ill.1979).

Gordon research of South Carolina case law has not revealed an explicit discussion of judicial estoppel; however, there are opinions alluding to the doctrine. For example, Boykin v. Prioleau, 255 S.C. 437, 179 S.E.2d 599 (1971) intimated that the doctrine exists in this state: "The defense of judicial estoppel has not been raised, and the facts appearing here would not support it." Id. at 441, 179 S.E.2d at 601; see also Zimmerman v. Central Union Bank, 194 S.C. 518, 532, 8 S.E.2d 359, 365 (1940)("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.").

The Court in Cothran v. Brown, Esq adopt the doctrine of judicial estoppel as it relates to matters of fact (not law). In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence. The Appellant's case offers a vivid illustration.

Lastely, the State's initial brief does not contest Gordon's questions on appeal before this court but ask this court to dismiss his appeal based on procedural grounds that's not properly before the court and adding on to the very long tortured procedural history that they initiated in PCR (1414) and now pleading with this court for a bailout by setting forth frivolous arguments in hopes this court turn a blind eye to Gordon properly raised jurisdictional claims through the illegal procedures use of a different standard on appeal rather than the proper standards. In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). In reviewing a challenge under the Fourth Amendment, the Court must affirm if there is any evidence to support the ruling. State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). Accordingly, this Court reviews the trial court for clear error and will affirm if there is any evidence to support the ruling. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). It's clear the State does not contest Gordon allegations that the trial court erred in not considering all the statutes relating to the same general law when finding the general sessions court properly had jurisdiction but also asks this court to ignore principles of statutory construction announced in State v. Cutler, 264 SE2d 420 ((1980) where our Supreme Court held "In construing statutory languages, the statutes must be read

as a whole and sections which are apart of the same general statutory law must be construed together".

This Court should therefore find that the State is precluded from raising their procedural argument for the first time on appeal that does not specifically challenge the lower court ruling as an abuse of discretion or committing error of law and find the lower court erred in finding general sessions court properly had jurisdiction without first considering all the statutes relating to the same general law and vacate Appellant's plea judgment as being void an initio.

Conclusion of law

It is respectfully asked that this Honorable Court reverse the trial court decision and Vacate Appellant's conviction and sentence and or remand to the lower court for a hearing or whatever relief this Court deems necessary and proper.

Respectfully Submitted

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