

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-000975
Indictment Nos. 1998-GS-46-2847; 2849; 2850; 2851; 2852

THE STATE,

Respondent,

v.

ANTONIO GORDON,

Appellant

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SC Court of Appeals

RETURN TO MOTION TO BE RELIEVED AS COUNSEL

The Respondent, State of South Carolina, hereby makes a Return to the Motion to be Relieved as Counsel by Jeremy A. Thompson. For the reasons set forth below, Respondent takes no position concerning the request to be relieved and alternately leaves it to the Court's discretion on whether to appoint the Division of Appellate Defense or Mr. Thompson or require the Appellant to appear pro se.


I.

In the motion, counsel Thompson declares the following:

1. He was retained by Appellant specifically limited to handling the Rule 29 Motion for new trial hearing in Circuit Court and expressly not retained as part of the retainer for an appeal.

2. Counsel Thompson filed a Notice of Appeal and Rule 203(d)(1)(B)(iv) explanation to preserve Gordon's appellate rights from the denial of the motion by Judge Hayes pursuant to SCACR Rule 264.
3. The Appellant has failed to retain Thompson (or any other person) to handle the appeal.
4. Chief Attorney Robert Dudek of the South Carolina Division of Appellate Defense advised Thompson that his agency does not handle Rule 29 appeals by indigent convicted defendants by policy.
5. To preserve the appeal, the Appellant must order the hearing transcript by August 1, 2013 per July 2, 2013 letter from the Clerk of Court. He seeks these limits to be stayed pending resolution of the motion.

II.



In State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995), the South Carolina Supreme Court held that a convicted defendant was not entitled to appointment of counsel for a hearing on a motion for new trial based on after-discovered evidence. The Court reasoned that a new trial motion was not a critical stage. The Court opined that the constitutional right to counsel extends only to the first right of appeal, citing Pennsylvania v. Finley, 481 U.S. 551 (1987). Clinkscales, 318 S.C. at 515, 458 S.E.2d at 549. See U.S. v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004)(right to counsel does not extend to post-conviction, post-appeal Rule 33 motions), U.S. v. Harrington, 410 F.3d 598, 600 (9th Cir. 2005)(right to appointed counsel does not extend to motion for new trial after conclusion of direct appeal).

A review of the Defense of Indigents Act, S.C. Code § 17-3-5, et.seq., does not expressly provide for a statutory right to appointed counsel in a Rule 29 motion for new trial on the basis of

after-discovered evidence¹ or an appeal from such a proceeding. This case in Circuit Court arose from a Rule 29 motion, not an application pursuant to the Post-Conviction Relief Act, § 17-27-10.

At the outset, Respondent asserts that there is no constitutional or statutory right to appointed counsel in this appeal. However, the Respondent recognizes that the Court has the authority, but not the requirement under § 17-3-360(3) and § 17-3-370 to appoint counsel in appeals from motions for new trial. See Ex Parte Brown, 393 S.C. 214, 711 S.E.2d 899 (2011). It has been stated that the court has the inherent power to appoint counsel for indigents. Ex Parte Dibble, 279 S.C. 592, 319 S.E.2d 440 (1983). But see S.C.D.S.S. v. Tharp, 312 S.C. 243, 246, 439 S.E.2d 854, 857 (1994).

III.

23 Respondent takes no position concerning counsel Thompson and whether withdrawal is approved pursuant to SCACR, Rule 264. Respondent further note that should the Court authorize the withdrawal, the Respondent leaves it to the Court's discretion on whether to appoint and who to appoint under the cited authorities.

Respondent would request that if the Court authorizes withdrawal and requires the Appellant to proceed pro se, that Appellant be required to strictly comply with the appellate court rules concerning briefing and preparation of the Record on Appeal set forth in SCACR Rules 207 through 222.

¹ Respondent notes that the Uniform Post-Conviction Relief Act, § 17-27-20(a)(5) have been interpreted to allow claims of after-discovered evidence to be presented. See Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). This Act allows for the appointment of counsel. S.C. Code § 17-2760, and Appellate Defense handles these appeals pursuant to their Act.

WHEREFORE, Respondent has made Return to the Motion to Be Relieved.

Respectfully submitted,

ALAN WILSON
Attorney General

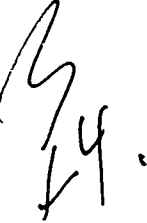
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar #5758

ATTORNEYS FOR RESPONDENT

By: 

Donald J. Zelenka


P.O. Box 11549
Columbia, SC 29211

August 8, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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v.

ANTONIO GORDON,

Appellant

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served Respondent's **Return to Motion**

to Be Relieved as Counsel on:

Jeremy A. Thompson, Esquire
P. O. Box 12891
Columbia, South Carolina 29201

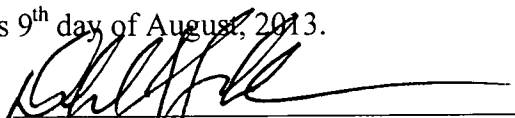
Antonio Gordon, #259798
Evans Correctional Institution
610 Highway 9 West
Bennettsville, SC 29512

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by depositing a copies in the United States Mail this 9th day of August, 2013.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

August 9, 2013

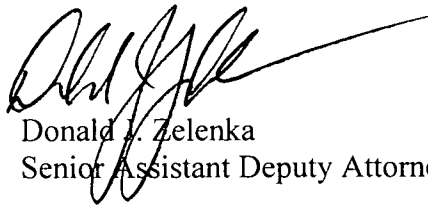
Honorable Jenny A. Kitching
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Antonio Gordon
Appellate Case No. 2013-000975

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's **Return to Motion to Be Relieved as Counsel** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Jeremy A. Thompson, Esquire
Antonio Gordon, #259798
Robert M. Dudek, Esquire

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