

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appellate no. 2022-000972
(1994-GS-39-1490/1491)

NOV 27 2023

SC Court of Appeals

Robert Earl Dillard.....Appellant,

v.

State of south carolina.....Respondent,

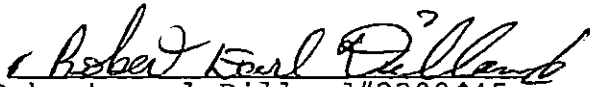
objection

Amended Appellant's REPLY BRIEF OF RESPONDENT
BRIEF INITIAL AND DESIGNATION MATTER

Appellant Robert Earl Dillard#220045, motions to this Honorable C
Court to Grant Relief to his REPLY Brief Initial-brief with Rule
208 of the south carolina Appellate Court Rules on This _____ da
of november, 2023. That was GRANTED on oct, 17. 2022.

CC:
Jenny Abbott Kitchings, Clerk
Alan McCrory Wilson, Esquire
Taylor Zane Smith, Esquire,

date 11-21-2023.


Robert earl Dillard#220045

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeals from pickens county

The Honorable Perry H, Gravely

SC Court of Appeals

ROBERT EARL DILLARD,

APPELLANT,

V.

THE STATE,

RESPONDENT.

Appellate Case no;2022-000972

objection

REPLY BRIEF TO RESPONDENT BRIEF
INITIAL AND DESIGNATION MATTER

date 11-21- 2023.


Robert E, Dillard#22004

INDEX

Index	.....	1
Questions Presented	.....	2
Statement	.....	3
Arguments	.....	4
Opinion	.....	11
Conclusion	.....	12

QUESTION PRESENTED

WHETHER Appellant was Granted to proceed in forma pauperis
by the court of Appeals on his merits.

STANDARD OF REVIEW

THIS COURT OF APPEALS has found that an order denying a request for informa papuperis status to allow filing without payment of cost was Granted on september 2, 2022.

Appellant, Robert Earl Dillard#220045. file a 59 (e) motion to Appeals the order of the honorable Perry G, Gravely, dated June 7 2022. appellate received written notice of order denying of an pleading order dated on June 14, 2022. see exhibit of court of Appeals order granted to proceed informa papuperis to the Appellant's dated on september 2, 2022. and court of Appeals order dated october 17, 2022. to file Appellant's initial brief and Designation of matter is Granted, and filed on January 18, 2023.

see exhibit order, and page (10) of the Respondent brief.

80. criminal proceeding vii due process of Law.

The court has also held that when an appeals is Granted, to an accused in a criminal processing a due process right to that appeals is created. See Attachment order

our standard of review in PCR cases depende on the specific issue before(US). [WE defer to a PCR courts findings of fact and will u uphold them if there is evidence in the record to support them, small v. state, 422 S.C. 174 180, 810 S.E.2d 836, 839 (2018). Appeals court will reverse the lower court's decision if it is controlled by an error of law! milledge v. state, 422 S.C.366,374 811 S.E.2d 796,800 (2018). WE, review questions of trial court's small, 422 S.C. at 180-81 810 S.E.2d at 839 (footnote omitted.

ARGUMENT

[WE] an indigent files motion to proceed in forma pauperis pursuant to Rule 18.5. The court of appeals has found that an order for the request for to proceed in forma pauperis status to allow appellant to filing without payment of cost. in conjunction, the south carolina supreme court has held that anytime criminal procedures discriminate against a petitioner by reason of their indigent status, such procedures violate the guarantee of equal protection where the indigent petitioner is subjected to a process which is not required of a non-indigent petitioner, then the process become invidiously discriminatory and violative of equal protection expart Lexington county, v. state 442,S.E.2d 589,594(1994). 17-27-60 cod (1995).

IN support of his motion, U.S. Supreme court has held that fundamental fairness entitles petitioner to an adequate opportunity to present their claims fairly within the adversary system AKA V. O OAKLOHMA, 470 U.S. 68 (1985).

Here, The State, is miss leading the court with false pretention^o apond the court.

Motion to Alter/amend judgment pursuant to rule 59(e) was file on june 20, 2022. in the perry C.I. mailroom and was return back to me july 6, 2022. stating of the previous order, the court received this motion on june 28, 2022. and send back unfile by the clerk of court.

The appellant, argued below that he is right in his motion to filed to proceed in forma paperis, action (case no. 2022-cp-39-006, and that pursuant to this court decision in Lake v. state, 333 S.C.382 inmate petitioning for writ of habeas corpus, moved for order to proceed in forma pauperis the circuit court orangeburg county, charles w, whetstone, jr, motion denie and inmate appeals, the COURT OF APPEALS Held that inmate was Entitled to proceed in form pauperis, reversed and remaned on appeal.

The petitioner request his pleading/REPLY MOTION be construed liberalby and held less stringent standard fact formal pleading d drafted by attorney.

Finally, as the PCR COURT has rendered a decision in conflict with this court decision Lake v. state, the appellant. pray this honorable court reversed the PCR court decision, and remand the case for an evidence hearing on the merits of his claims to served the interest of justice.

CONCLUSION

FOR the forgoing reason, this honorable court Dissial of the Respondent, response brief and designation matter, by fraud apound the court in it brief, and should alter/amend its prior judgment to reflect the forgoing and provide an hearing on the evidence and or vacate petitioner conviction and sentence on the pleadings// REPLY MOTION AND OBJECTION to the state, Respondent brief. filed,

As a result, on May 25, 1999, applicant filed a second PCR (99-CP-39-0406) pursuant to Austin v. State, 409 S.E.2d 385 (1991). On August 28, 2000, an evidentiary hearing was held before the Honorable John W. Kittredge. Applicant was represented by John D. Jorge, Esq. By order dated August 29, 2000, Judge Kittredge granted applicant a belated appeal from the denial of his first PCR application (97-CP-39-0826).

On March 21, 2002, the SC Supreme Court entered an order granting the petition for writ of certiorari from Judge Kittredge's order, and upon review of Judge Patterson's order denied writ of certiorari. Dillard v. State of SC, order (SC S.Ct. March 21, 2002).

On August 6, 2002, applicant filed a third (technically his second) PCR (02-CP-39-1217). The applicant raised the following grounds:

- (1) After-discovered evidence of solicitor's knowing use of perjured testimony.
- (2) Denial of due process by trial judge's definition of "reasonable doubt".
- (3) Applicant's murder indictment(s) was not lawfully presented by a grand jury for trial of his case(s).

On July 28, 2003, a motion hearing was held before the Honorable John C. Few. The applicant was represented by Cheree Gillespie, Esq. On August 19, 2003, Judge Few issued an order denying the PCR application as untimely and successive. A timely appeal was filed on applicant's behalf.

On September 24, 2006, the Court of Appeals issued an order denying the Johnson petition; Dillard v. State, (SC App. September 27, 2006). A timely petition was filed on January 29, 2007, the Court of Appeals denied the rehearing. On April 24, 2007, petitioner filed a writ of certiorari to the SC Supreme Court. The Supreme Court denied the writ.

STANDARD OF REVIEW

In Aice v. State, 409 S.E.2d 392 (SC 1991), a case addressing an exception to procedurally barred claims, the SC Supreme Court held that "finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice... at some point judicial review must stop, with only the very rarest of exception. When the (judicial) system has failed a defendant and where to continue his imprisonment without a review would amount to a miscarriage of justice." In addition, the Court has held that "a defendant's filing of four PCR actions, one of which was successful, was not repetitive, numerous, or totally frivolous, and thus defendant was not subject to strict restriction on future filings. Williams v. State, 583 S.E.2d 52 (SC 2003).

As shown above, the applicant has previously prevailed in a PCR action (99-CP-39-0406) pursuant to Williams, infra. He will now present the following arguments for entitlement to review under the miscarriage of justice standard under the holding in Aice, infra.

ARGUMENT

UNDER MCQUIGGIN V. PERKINS, 133, s.ct. 1924(2013) actual innocence,
I. THE APPLICANT SUFFERED A MISCARRIAGE OF JUSTICE WHEN HE WAS CONVICTED UPON A STANDARD OF GUILT BELOW THAT REQUIRED BY THE FOURTEENTH DUE PROCESS CLAUSE (Alternatively, applicant raised this ground under ineffective assistance of counsel).

The applicant submits that the record of his trial shows that after the jury found him guilty, he discovered that during its deliberation the jury had sent the judge a note requesting a layman's definition of "reasonable doubt". He further discovered that the judge had conferred with both applicant's counsel and the solicitor regarding the jury's request before writing on the jury's note that "he could not comply with the jury's request." Also, without publishing the jury's request in open court, the

judge sent the note back to the jury with a response that "he could not comply with their request." Tr.p. 681-82

In addressing such an error, the SC Supreme Court has recognized that a "reasonable doubt" charge could be erroneous if it could cause a jury to interpret the charge to allow a finding of guilt based on a degree of proof below that required by the Fourteenth Amendment, Due Process Clause. As a result, the SC Supreme Court has offered a definition which would be acceptable for use by the bench, as follows:

"a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act...."

State v. Manning, 409 S.E.2d 372 (1971). The Court has further guided that the courts are not restricted to the exact definition in Manning, but that the charge must legally equate to that offered in Manning. See, State v. Clute.

Nevertheless, to warrant reversal, a trial judge's refusal to give a requested jury instruction must be both erroneous and prejudicial. State v. Hughey, 529 S.E.2d 721 (SC 2000). Where a general instruction to jury is insufficient to enable jury to understand fully law of case, the refusal to give requested charge is reversible error. Brown v. Smalls, 481 S.E.2d 444 (SC App. 1977). Moreover, the U.S. Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. To this end, the "reasonable doubt" standard is indispensable (to a fair trial). In re Winship. 397 U.S. 358 (1970).

Here, as evidenced by the jury's "note" requesting a layman's definition of "reasonable doubt", it is logical to assume that the jury had, at this point, entertained a degree of doubt as to applicant's guilt and had focused critical attention on the definition of "reasonable doubt" to reach its verdict. Therefore, the layman's definition of reasonable doubt which the

judge should have conveyed to the jury would be given special consideration in reaching a verdict since it was in response to its own inquiry. Under this circumstance, the judge's failure to comply with the jury's request was an error of law that prejudiced applicant's fundamental right to a fair trial. See e.g., State v. Blassingame, 244 S.E.2d 528 (SC 1978); See also, Winship (holding that a conviction below the reasonable doubt standard would amount to a miscarriage of justice).

Finally, applicant contends that the failure of the judge, solicitor, and his counsel to provide a confused jury a layman's definition of "reasonable doubt" in his case should amount to a failure of the judicial system and a corresponding miscarriage of justice to entitle him to review of the merits of his claim. An applicant's right to a fair trial is basic requirement of the Due Process Clause, and includes a fair judge: Liljerberg v. Health Serv. Corp., 486 U.S. 847 (1988); a right to be prosecuted by a prosecutor whose duty is to see that justice is done. Berger v. U.S., 295 U.S. 78 (1936); and the right to effective assistance of trial counsel, Strickland v. Washington, 466 U.S. 668 (1984).

II. THE APPLICANT DISCOVERED AFTER HIS TRIAL AND FIRST PCR ACTION THAT THE SOLICITOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN HIS CONVICTION (Alternatively, applicant raised this ground under ineffective assistance of counsel).

The SC Supreme Court has recognized prosecutorial misconduct as a ground for PCR action in the absence even of a claim of ineffective assistance of counsel. Gibson v. State, 514 S.E.2d 320, 323-27 (SC 1999) (Setting aside applicant's guilty plea, and granting a new trial because of prosecutor's Brady violation.) [fn.1]

With regard to his claim, the applicant submits that pursuant to his discovery and Brady Motion the solicitor disclosed the

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)

detention records of its chief witness, James Simpson. However, the solicitor failed to disclose any records of Simpson's detention in the Greenville Detention Center (GDC) for the months of November 25, 1992 through April 30, 1993, which covered the time period Simpson testified that applicant admitted to him (Simpson) that he (applicant) had committed the murders while they were at the "Haynie Street Men's Club" in downtown Greenville. As the State's evidence against applicant was entirely circumstantial, Simpson's testimony regarding applicants murder confession to Simpson in "February 1993" at the Haynie Street Men's Club was the only evidence the State had that directly connects applicant to the murders.

Following his trial and before filing his first PCR action in 1997, applicant contacted the GDC requesting requesting Simpson's detention records but was not provided any of Simpson's records covering the time period between November 1992 through April 1993. Finally, on January 17, 2001, pursuant to the SC Freedom of Information Act (FOIA), the GDC Record Manager, Jinny Morgan, provided applicant the records of Simpson's detention. These records showed that Simpson was, in fact, detained in the GDC from 11-25-92 until 4-30-93. Thus, Simpson's GDC records showed that he obviously could not have been at the "Haynie Street Men's Club" in downtown Greenville in February 1993 when he was detained in the GDC the entire month of Febraury 1993. The records clearly showed that Simpson testified falsely.

As the GDC records shows that Simpson testified, the inquiry should now focus on whether the solicitor knowingly introduced Simpson's false testimony to convict applicant. A review of the solicitor's closing argument did not only show that he knowingly introduced Simpson's perjured testimony, but also showed that the solicitor actually provided Simpson with key evidence from the murder scene to convince the jury of Simpson's credibility, in relevant part, as follows:

Solicitor: Mr. Warner (applicant's counsel) might argue that Simpson was the one who killed them. I don't

know, he might argue that, but I just simply ask you to remember "that Simpson was in jail at the time (of the murders)". Tr.p. 632.

Solicitor: What did he (Simpson) tell us? He told us some things in the statement that nobody else knew, that the general public did not know, that had not been released to the public, to the media.

Of particular note, the murders took place on December 17, 1992. The GDC records showed that Simpson was detained in the GDC from 11-25-92 until 4-30-93. Consequently, the solicitor's closing argument shows that he knew from his own records that Simpson had been detained in the GDC from 11-25-92 until 4-30-93, which also included the time of the murders as the solicitor argued. Therefore, as Simpson could not have been at the "Haynie Street Men's Club" in downtown Greenville to witness any confession by applicant, or get any details of the murder scene from applicant, it logically follows that he was provided the details of the murder scene from the solicitor's files. [fn.2]

To obtain relief on the basis of subornation and perjury, an applicant must demonstrate (1) that the witness made a false statement, (2) that the false statement was material to case, (3) that the false statement was knowingly and intentionally employed by the State. See Beasley v. Holland, 649 F.Supp. 561 (S.D.W.Va. 1985). Furthermore, a conviction must be set aside if there is a reasonable probability that false testimony (or evidence) could have affected the outcome of the trial. See e.g., United States v. Bagley, 105 S.Ct. 3375, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); Miller v. Pate, 87 S.Ct. 785 (1967); Brady, supra.

[2] See print-out of 13th Circuit Solicitor Office practice of using false testimony by incarcerated witnesses to obtain conviction, attached herewith as Exhibit A-1A-2A3.

(3) see ALSO U.S. V. FREEMAN, 650 F3d 673, 680 (7th cir 2011)

III. THE SOLICITOR PROSECUTED AND CONVICTED APPLICANT UPON UNINDICTED MURDER OFFENSES.

The applicant contends that the solicitor did not obtain his murder indictment by way of a lawfully convened Pickens County Grand Jury to empower the general sessions (circuit) court to adjudicate his murder cases. In reviewing such a claim as alleged by applicant, the SC Supreme Court has held that it will presume the regularity and legality of the proceedings before the grand jury was complied with absent any evidence to the contrary. State v. James, 472 S.E.2d 38. To prove that the solicitor did not comply with the regular and legal proceedings before the grand jury for presentment of his murder indictment, the applicant will show that he received a "general sessions court calendar" from the SC Court Administration and its implication. Government records and official conduct should be accorded a presumption of legitimacy. U.S. Dept. of State v. Ray, 112 S.Ct. 541, 502 U.S. 164 (1991).

Accordingly, the applicant's indictment shows that the grand jury presented it during a November 17, 1994, term of Pickens County general sessions court. Conversely, the SC Court Administration's calendar shows there was no term of general sessions court held in Pickens County on November 17, 1994. See SC Court Administration calendar attached hereto as Exhibit ~~B-15B-2~~. As a result, the applicant directs the Court's inquiry to whether the "absence of a term of general sessions court for attendance of a grand jury could deprive the court of its 'power' (jurisdiction) to adjudicate cases." To resolve this question, it will be necessary to interpret the U.S. Supreme Court's holding in United States v. Cotton, 122 S.Ct. 1781 (2002), which guided the SC Supreme Court's ruling in State v. Gentry, 610 S.E.2d 494 (2005). In both Cotton and Gentry, the Court's held that the term "Subject Matter Jurisdiction" means the "Court's statutory and constitutional power to adjudicate the case."

Likewise, in South Carolina, the general sessions court's power (jurisdiction) to adjudicate a criminal case is determined by statutory law as follows: (1) the grand jury... shall meet with general sessions court at each of its terms -- SC Code, Ann., § 14-9-170; (2) the solicitor shall prepare and, through the presiding judge of general sessions court, submit to grand jury, while in attendance upon general sessions court, bills of indictment (for grand jury presentment) -- SC Code, Ann., § 14-9-210. No indictment may be true billed by grand jury when circuit court (general sessions) lacks jurisdiction (or is not in term), since the grand jury's jurisdiction is co-extensive with the criminal jurisdiction of the general sessions court in which it is convened and for which it is to make inquiry (on bills indictment). State v. McClure, 289 S.E.2d 158 (1982); State v. Wheeler, 193 S.E.2d 515 (1972).

In addition, the SC Constitution mandates that "no person may be held to answer for any crime... unless on a presentment of indictment by a grand jury of the county where the crime has been committed." SC Const., Art. I, § 11; and "the grand jury of each county... shall consist of eighteen (18) members, twelve (12) of whom must agree on a matter (true bill) before a case can be presented for trial (of case) by general sessions court." SC Const., Art. V, § 22. The presentment of indictment for general sessions court's jurisdiction to try criminal cases is (according to Cotton and Gentry) determined by the above statutory and constitutional laws, and is fundamental. Anderson v. Anderson, 382 S.E.2d 897 (1989).

As a threshold matter, the SC Constitution gives the general sessions court jurisdiction to try all criminal cases. SC Const., Art. V, § 11. However, the jurisdictional claim raised by applicant is not a challenge to the Pickens County general sessions court's jurisdiction to try criminal cases. Instead, the applicant is contending that the solicitor failed to comply with statutory and constitutional laws, set forth above, which are jurisdictional in nature, specifying the manner and means for presentment of his murder indictment by lawfully convened grand

[Cont]-

A Notice of Appeal was Filed and Perfected at the South Carolina Supreme Court, M. Anne Pearce, Esquire of the South Carolina Office of Appellate Defense Perfected the Appeal. The Supreme Court "Affirmed" -Petitioner's Conviction and Sentence in State V. Dillard, OP.no. 97-mo-012 [S.C. Sup.Ct., Filed February 11, 1997].

In essence, Applicant is alleging that there was no legal -- obtained indictment charging him with murder because there was no-term of General Sessions Court with a Grand-Jury in -- "Attendance to present his indictment" for trial of his case under General Sessions Court's Criminal Jurisdiction. THUS, The absence of a presentment of indictment of indictment was a "defect in subject-matter jurisdiction" that deprived the Court of it's "Power to Act". Smith V. United States, 360 U.S. 1, 10, 79 S.Ct. 991, 3 L.Ed.2d 1041 [1959].

Finally, Both the United States and South Carolina Supreme Courts have held "defect/s in subject-matter jurisdiction require - correction whenever raised. COTTON, GENTRY, SUPRA. And, the Court's "lack of subject-matter jurisdiction" may be raised at any time, including FOR THE FIRST TIME ON APPEAL, OR COLLATERAL CHALLENGE. Hope V. State, 492 S.E.2d 76 [SC 1997]. See The United States Supreme Court has HELD that Government Records' and OFFICIAL Conduct must be Accorded a Presumption of - Legitimacy, in Dept. of U.S. V. Ray, 112 S.Ct. 541 [1991].

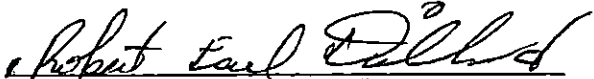
OPINION BELOW

The order of the Court of Appeals. After careful consideration, Respondet's Motion to Dismiss this appeal and to strike Appelant's July 13, 2022 filing is denied.

CONCLUSION

WHEREFORE, for the foregoing Reason, The Honorable Court should Grant Relief to reverse& vacate Appellant's Conviction and sentence AND DISMISS THE STATE MOTION OF FALSE FACTS.

on this 21st day of november, 2023.


Robert Earl Dillard #220045
perry correctional inst,
430 oaklawn road q4b/209
pelzer, s.c. 29669

THE STATE OF SOUTH CAROLINA
THE COURT OF APPEALS

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SC Court of Appeals

_____ case no; 2022-000972 _____

Robert E, Dillard,.....Appellant,

v.

State of south carolina,.....Respondent.

CERTIFICATE OF SERVICE

OBJECTION REPLY TO STATE INITIAL BRIEF.

I, Robert E, Dillard#220045, do hereby certify that I served True-Copy(s) of the filed and served my objection Reply to the state initial response brief TO:

CC:

court of appeals
c/o jenny abbott kitchings, clerk
post office box 11629
columbia, S.C.29211

melody j, brown
senior assistant deputy
attorney general
post office box 11549
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date 11-21- 2023.


Robert E, Dillard#22004

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SC Court of Appeals

RE Robert E, Dillard v. State of south carolina
pickens countys, c/a no. 2022-000972/1490-1491
1994-GS-39-1490/1491.

Dear; clerk;

Enclosed please find my original objection Reply to the
state initial brief and designation of matter Rrspone motion
on a appeals to the court of appeals, and my proof of service
to be filed in your office.

CC:Resppndent's ATTORNEY
FILE.

DATE 11-21 2023.

Sincerely yours


Robert E, Dillard#220045

Robert Earl Willard #220065
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