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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals

Appeal from York County

Honorable William A. Kinnon, Circuit Court Judge

Appellate Case No. 2024-001905

THE STATE,

Respondent,

Vs.

Antonio Gordon,

Petitioner.

**MEMORANDUM OF LAW IN SUPPORT OF REPLY TO
RESPONDENT RETURN FOR WRIT OF CERTIORARI**

Antonio Gordon#259798

R.C.I. SB#33

5 CORRECTIONAL RD

RIDGELAND, S.C 29936

I.

Gordon hereby make objections to the Respondent Return to his Writ for Certiorari.

Gordon do hereby adopt the "Statement of the Case" and "Statement of Facts " in his Writ for Certiorari.

II.

Petitioner hereby file his reply and objects to the Respondent Return to his Writ for Certiorari. Gordon contends this Court should exercise its original jurisdiction in the interest of justice and to cure an ongoing miscarriage of justice.

In this case, the Respondents are arguing the Court of Appeals did not error by finding Gordon could not file his motion to vacate conviction and sentence based on lack of subject matter jurisdiction and that the lower court judge did not have the authority to reopen PCR judgment (1414) because he filed his motion far beyond the ten days outline in Rule 29(a),SCRCP; State v. Warren,392 S.C. 235,239, 708 SE2d 234,236 (Ct.App.2011). Petitioner contends:

- (1) The Circuit Court had subject matter jurisdiction to adjudicate Gordon Subject matter jurisdiction issues and reopen PCR judgment (1414) in this case pursuant to State v. Gentry,363 S.C. 93,100-101, 610 SE2D 494,498-499 (2005) (Explaining subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings belongs and instructing circuit courts obviously have subject matter jurisdiction). See Rule 60(b)(4) scrp

The issue of a statute's constitutionality may be raised for the first time on appeal, however, where the statute determines subject matter jurisdiction. See State v. Keenan,296 SE2D 676. Gordon contends construing section 20-7-6605(1) single handedly his "**age combined with being charged with a Class A, B, C or D felony determine which court will exercise its subject matter jurisdiction** " and he therefore could have challenged the constitutionality of section 20-7-6605(1) in the lower court in his motion to vacate conviction and sentence based on lack of subject matter jurisdiction and in this Court for the first time on appeal. **See Fn1**

Fn1 Petitioner asserts this is the first time he has mounted this particular subject matter jurisdiction claim and even though he has previously asserted other subject matter jurisdictional claims relating to section 20-7-6605(1) and ask the Court to take judicial notice of his filings. Petitioner rely on Brown v. State,540 SE2d 846 (2001). In Brown case he asserted a subject matter jurisdiction claim in his first pcr constitutionally challenging the Crack statutes and was denied on his first pcr appeal on a Writ of Certiorari . Brown filed a second post conviction relief application and challenged the same exact Crack statute but in a different perspective with relying on different law. This Court

found res judicata did not apply and found Brown could proceed with his subject matter jurisdiction claim. Like Brown Petitioner asserts his guilty plea judgment is void ab initio because "The Children Code of Laws Act is 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). Petitioner asserts his Conviction under it is not merely erroneous, but illegal and void under Ex Parte Siebold, 100 U.S. 371-77 (1879).

Furthermore, this Court in State v. Campbell, 656 SE2d 371 (2008) this Court held while we have used the "jurisdiction" language we have not stated that the trial court lacks subject matter jurisdiction when the term of court ends". Rule 29(a)SCCrimp ten day deadline does not apply to the instant case. See Barnes v. Am Fertilizer Co., 144 VA. 692,705, 130 SE 902, 906 (1925)(Consequently, Rule 1:1 limiting the jurisdiction of a court to twenty-one days after the entry of the final order does not apply to an order which is void ab initio) Therefore, State v. Warren, supra, State v. Campbell, supra is inapplicable to the instant case where Gordon is asserting a true legitimate subject matter jurisdiction claim. This Court should grant certiorari to consider whether Rule 29(a) scrp ten day limitation apply to Motions attacking the judgment which is void ab initio. See Singh v. Mooney,541 SE2d 549 (2001).

- (2) The decision to deny a Rule 60(b)(4) motion is within the sound discretion of the trial judge and will not be disbursed on appeal absent a clear abuse of that discretion. BB&T v. Taylor,633 SE2D 501 (2006). In this case Petitioner asked the lower court to exercise its discretion and reopen pcr judgment (1414) due to the judgment being issued in violation of due process of law under our State constitution article 1, section 3 and the 14th amendment to the United States Constitution when the Respondent and the pcr court failed to adequately provide Petitioner with notice in advance and the opportunity to be heard before the signing of the order on the State's 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 AT THE DISCRETION OF THE SOLICITOR. THEREFORE, THE GENERAL SESSIONS COURT HAD JURISDICTION. See Fn2

Fn2 Petitioner contends the Court of Appeals did not make a ruling that the lower court could not exercise its authority and reopen pcr judgment (1414) and reconsider his jurisdictional issues and the Respondent appears to make this argument as a jurisdictional ground to deny Gordon relief. Gordon contends their arguments on this issue has not been preserved for appellate review. The Respondent had adequate notice and the opportunity to respond to Gordon asking the lower court to exercise its authority and reopen the pcr judgment but failed to do so. See ***State v. Oxner***, 705 SE2D 51 (2011); ***Durlach v. Durlach***, 596 SE2d 908 (2004) (finding husband due process claim unpreserved and raised for the first time in the appellate courts).

- (3) The Respondent asserts the Court of Appeals correctly found Petitioner issues raised was not subject matter jurisdiction but that of a judicial error. Gordon asserts the Respondent did not properly preserve their judicial error claim for appellate review despite given notice in advance. Gordon contends he has multiple subject matter jurisdictional issues tied into one claim and because Gordon is not a trained attorney he will do his best to put his claims in the proper perspective for the Court to understand. In the case sub judice Gordon asserted because he was a ***person less than seventeen years of age*** when found violating a criminal law and taken into family court custody jurisdiction based on probable cause family court acquired the first jurisdiction pursuant to section 20-7-7205(a); 20-7-6605(1),(2); 20-7-400(a),(1),(d). If this is true in fact according to those provisions then the Solicitor should have filed a juvenile Petition charging Gordon with murder pursuant to section 20-7-7605(1),(6). See ***Fn3*** Petitioner asserts section 20-7-6605(1) exclusion

Fn3 Petitioner asserts the trial court lack subject matter jurisdiction to accept his guilty plea because the solicitor never provided notice of a charge by filing a juvenile Petition in family court charging Gordon with a crime pursuant to section 20-7-7605(1)(6); ***In re Corey B***, 352 Se2d 470 (1987).

Of him does not triggers until such time he is charged. Gordon is relying on the case of ***People v. Pico***. ***People v. Pico***, 678 NE 2d 780 - III: Appellate Court, 1st Dist., 3rd Div. 1997

678 N.E.2d 780 (1997)

In Pico the defendant contended that his statement should have been suppressed because the police did not make a reasonable effort to notify his parents that he was in custody, as required by section 5-6(2) of the Act. 705 ILCS 405/5-6(2). Section 5-6(2) states in pertinent part:

"A law enforcement officer who takes a minor into custody without a warrant under Section 5-5 shall, if the minor is not released, immediately make a reasonable attempt to notify the parent or other person legally responsible for the minor's care * * *; and the law enforcement officer shall without unnecessary delay take the minor to the nearest juvenile police officer * * *."

The trial judge denied the defendant's motion to suppress his statement, finding, based on the testimony of Detective Boudreau, that the requirements of section 5-6(2) had been satisfied.

Initially, the State contends that section 5-6(2) does not apply to the defendant, because he was in custody as a murder suspect and was, therefore, not a "delinquent minor" who benefits from the protection in the Act. We disagree. Section 5-5 of the Act, to which section 5-6(2) refers, provides that "[a] law enforcement officer may, without a warrant, take into custody a minor * * * whom the officer with reasonable cause believes to be a delinquent minor." 705 ILCS 405/5-5(1)(a). Section 5-3(1) of the Act defines "delinquent minor" as "any minor who prior to his 17th birthday has violated * * * any * * * state law." 705 ILCS 405/5-3(1). The State correctly notes that section 5-4(6)(a) exempts certain minors from the definition of delinquency as set forth in section 5-3; however, we do not believe the language of section 5-4(6)(2) supports the proposition that the defendant was exempt at the time Detective Boudreau began and continued to question him.

Section 5-4(6)(a) states that "[t]he definition of delinquent minor under Section 5-3 of this Act shall not apply to any minor who at the time of an offense was at least 15 years of age *and who is charged* with first degree murder * * *. These charges and all other charges arising out of the same incident shall be prosecuted under the Criminal Code of 1961." (Emphasis added) 705 ILCS 405/5-4(6)(a). We believe that the plain language of section 5-4(6)(a) indicates that its exemption is triggered only when the minor has been charged. Until that point, the minor retains the protection of the Act. This is the only logical interpretation of section 5-4(6)(a), for until such time as the minor is charged, the State cannot know whether he will be tried pursuant to the Criminal Code as an adult or as a delinquent minor under the Act.

The State relies primarily on the decision in People v. Sevier, 230 Ill.App.3d 1071, 174 Ill.Dec. 336, 598 N.E.2d 968 (1992), contending that the Act does not apply to a minor who is taken into custody and subsequently charged with murder. In Sevier, this court held that police were not required to follow the parallel provisions of the former Juvenile Court Act (Ill.Rev.Stat.1983, ch. 37, par. 701-1 et seq.) requiring both parental notification ⁷⁸⁴ and the presence of a juvenile officer during custodial interrogation of a 16 year-old murder suspect. The court reasoned that the defendant had been arrested because of his suspected involvement in the murder "and not because of a juvenile court violation." Sevier, 230 Ill.App.3d at 1084, 174 Ill.Dec. 336, 598 N.E.2d 968. In reaching this result, the court in Sevier relied on People v. Visnack, 135 Ill.App.3d 113, 89 Ill.Dec. 901, 481 N.E.2d 744 (1985); however, in Visnack, the defendant was apparently already 17 years old at the time he committed murder. Accordingly, he was simply not subject to the terms of the Juvenile Court Act

(see Ill.Rev.Stat. 1979, ch. 37, par. 702-7), and the court so held. Visnack, 135 Ill. App.3d at 126, 89 Ill.Dec. 901, 481 N.E.2d 744.

We consider the holding in *Sevier* to constitute an unfounded application of the holding in *Visnack* to minors under age 17 who clearly fall within the ambit of the Act's protection. Cf. People v. Cole, 168 Ill.App.3d 172, 179, 118 Ill.Dec. 965, 522 N.E.2d 635 (1988) (recognizing that the former Juvenile Court Act requires police to attempt to notify parents that their child, who was being interrogated in a murder case, is in custody). Accordingly, we hold that under section 5-4(6)(a), a minor being held in custody pursuant to section 5-5 does not lose the protection of the Act until such time as he is charged with one of the section 5-4(6)(a) offenses. In this case, the defendant was not charged with murder at the time he was being questioned. That being the case, he was nothing more than a possible delinquent minor at the time he was questioned. Therefore, section 5-6(2) of the Act applied and required that the police attempt to notify the defendant's parent.

Like Pico Gordon was not Charged with a Class A, B, C or D felony when he was taken into custody because he was taken into custody based on probable cause, therefore, the Act applied to Gordon **See Fn4** The Respondent should have filed a Juvenile Petition charging Gordon with

Fn4 Gordon contends the lower trial court in this case applied the Act to Gordon when finding his parents was notified of him being taken into custody when the court did not dismiss his statement made to law enforcement agency.

a crime. State v. Corey D, 529 SE2d 20 (2000) finding "**Applying the reasoning of Shaw to the current version of the transfer statute, section 20-7-7605(6) authorizes transfer on the basis of offense murder without regard to age, while other subsections of 20-7-7605 authorize transfer on the basis of age and classification of the offense. Because there is no expressly contain age restriction, we conclude that the Legislature intended these separate subsections to cover separate situations. Shaw, 265 SE2d at 524**". Gordon contends his case fit within this thin ambit because he was taking into family court custody jurisdiction based on probable cause and faced mandatory bind-over had the solicitor filed the Juvenile Petition charging Gordon with a crime. *In re Corey B*, Supra. This is a true legitimate subject matter jurisdiction claim that warrant this Court to exercise its original jurisdiction on Writ for Certiorari. Therefore, the Court of Appeals decision should be reversed accordingly.

- (4) The Respondent ask this Court to affirm the Court of Appeals decision finding that his *State v. Funderburk*, 191 SE2d 520 (1972) subject matter jurisdiction claim is a judicial error. This Court held in *Funderburk* "No indictment may be true billed by the grand jury when the circuit court lacks jurisdiction since the grand jury's jurisdiction is co-extensive with the criminal jurisdiction of the court in which it is impaneled and for which it is to make inquiry". In this case the Petitioner was 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). Gordon asserts family court acquired the first jurisdiction and pursuant to section 20-7-7605(6) the grand jury could not issue true bill indictments until an order was issued with a statement of reason pursuant to section 20-7-7605(1)(6);Kent v. United States, 86 S.ct 1045 (1966);State v. Funderburk, Supra. Likewise, Gordon contends the trial court lacked subject matter jurisdiction in this case. *Funderburk* ID This Court should grant certiorari to decide if the Court of Appeals made an error of law.
- (5) This Court must be reminded that the only true issues on appeal is

- (A) Whether the lower court committed error of law and abuse of discretion when the lower 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)(1)(d);20-7-7605(1)(6) as applied to Gordon 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?
- (B) Whether the trial court committed error of law and abuse of discretion when the trial court did not make findings of fact and conclusion of law in its Order of dismissal on Gordon's claim raised in his motion to vacate conviction and sentence that of "The Children Code of Laws Act 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 term charged as outlined in section 20-7-6605(1) 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). Gordon asserted his conviction under it was not merely erroneous, but illegal and void under Ex Parte Siebold, Supra, holding?

The Respondent is now asking this Court to uphold the Court of Appeals decision without the Court of Appeals adhering to this Court precedent that the appellate court sit to review errors of law only. State v. Wilson, 345 S.C. 1,5, SE2d 827,829 (2001). Its clear after the lower court reopen PCR judgment (1414) and reconsidered Gordon subject matter jurisdictional claims the lower court did not consider all of the statutes that was properly before the court when making a finding General Sessions Court properly had jurisdiction under section 20-7-6605(1). This is an error of law. See Joiner v. Rivas, 536 SE2d 372 (2000); State v. Smith, 194 NE3d 498 (*The in pari materia rule of statutory construction applies when the wording of a statute is in doubt or ambiguous capable of bearing more than one meaning. Because the juvenile transfer process involves the application of different sections within R.C. Title 21, this canon should be followed*). The Court of Appeals findings focus solely on the Respondent unpreserved issues. This Court should grant certiorari to ensure that the interest of justice is met in the interest of Due Process of law under our State constitution article one section 3 and the 14th amendment to the United States Constitution.

Finally, Gordon contends the Respondent is adamant about asking this Court to suppress his fundamental constitutional rights to place objection and respond to their assertion in PCR (1414) that General Sessions properly had jurisdiction under section 20-7-6605. Regardless of Gordon filings history Gordon should be excused of any and all procedural bars concocted by the Respondent because he has spent many many years trying to correct what he did not do, the combined errors of the Respondent and the PCR court not providing Gordon with adequate notice in advance and the opportunity to object and respond to the State's out of time claim that General Sessions had jurisdiction under section 20-7-6605 of the Children Code of Laws Act coupled with the ineffective assistance of pcr counsel failing to argue Gordon claims, amend his pcr application in conjunction with failing to file a Rule 59(e) and 60(b) scrcp motion at Gordon request deprived him of his procedural right to one full fair bite at the apple pursuant to Odom v. State, 523 Se2d 753 (1999) and this Court should provide Petitioner with a vehicle to travel in accordance with due process and equal protection of the laws under our State constitution article one section 3 and the 14th


amendment to the United States Constitution. Therefore, this Court should grant Certiorari in the interest of justice and to cure an ongoing miscarriage of justice.

Conclusion

It is respectfully asked that this Court grant certiorari to decide if the Court of Appeals erred when it made finding of fact and conclusion of law on the Respondent unpreserved issues and to provide Petitioner with a remedy to cure the defects occurred in PCR (1414) and or whatever this Court deems proper and necessary.

Respectfully Submitted

Antonio Gordon

A handwritten signature in black ink, appearing to read "Antonio Gordon", with a stylized flourish at the end.

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