

EXHIBIT A

RECEIVED

JUL 22 2014

SC Court of Appeals

EXHIBIT A



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 14, 2014

Robert Holland Koon, #227826
Lieber Correctional Institution
P. O. Box 205
Ridgeville SC 29475

Re: Robert Koon v. SCDPPPS
Appellate Case No. 2014-000803

Dear Mr. Koon:

This office is in receipt of your letter and related documents dated 6/21/14 addressed to Chief Judge Few. In the future, please address all your correspondence to this office, not to a judge.

I have reviewed your file and it does not contain an initial brief, therefore I cannot provide you with a copy.

With respect to your request regarding Op. No. 2013-UP-216, our records indicate the record on appeal is 191 pages, the Appellant's Brief is 13 pages and the Respondent's Brief is 10 pages. Upon payment of \$55.90, copies of these documents will be forwarded to you by mail.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

cc: Matthew C. Buchanan, Esquire

MAILROOM

7-17-14

Robert Koon
227826
MA109

VERIFICATION OF
MAILING CECAL DO C
to Ct. OF APPEALS

I NEED Debit Sheet FOR
6-19-14 the SC COUNT OF APPEALS
STATED that did NOT receive
my Brief that was MAILED to
them I NEED you to CONTACT
GENERAL COUNSEL AND HAVE them
CALL COUNT OF APPEALS to VERIFY
DOCUMENTS SENT ON 6-19-14 WAS
PLACED IN US MAIL BY YOU

(Reply)

Inmate Koon I will ask Ms
Percy to get a copy of your
June 19, 2014. You need to keep
up with your Return Debit Form
Once I Forwarded the mail to US Post Office
it is out of my hand.

		hearing. (kmca) (Entered: 01/22/2007)
01/22/2007	<u>120</u>	RESPONSE in Opposition re <u>110</u> MOTION to Compel Production of Transcript of 12/5/06 Brady and Fareta Issues Be Made Part of the Record.. Response filed by Colie Rushon, Henry Dargan McMaster.Reply to Response to Motion due by 2/1/2007 (Attachments: # <u>1</u> Certificate of Service)(Salter, William)
01/24/2007	<u>121</u>	REPLY to respondents' <u>117</u> Response to petitioner's <u>110</u> MOTION to Compel Production of Transcript. Response filed by Robert Holland Koon. (Attachments: # (1) exhibit explanation, # (2) Exhibit 1, # (3) Exhibit 2, # (4) Affidavit, # (5) Envelope)(kmca) (Entered: 01/24/2007)
01/25/2007	<u>122</u>	Additional Attachment (Supplemental Authority) to Main Document <u>98</u> MOTION to Stay/Abeyance of Habeas Petition. (kmca) (Entered: 01/25/2007)
01/26/2007	<u>123</u>	RESPONSE in Opposition re <u>115</u> MOTION to Apoint Counsel MOTION for Discovery MOTION for Hearing "Request to Admit" Response filed by Colie Rushon, Henry Dargan McMaster.Reply to Response to Motion due by 2/5/2007 (Attachments: # <u>1</u> Certificate of Service)(Salter, William) (Entered: 01/26/2007)
02/05/2007	<u>124</u>	Additional Attachment (Motion to Compel Discovery, Motion for Sanctions for Misrepresentations) to Main Document <u>115</u> MOTION to Apoint Counsel, MOTION for Discovery, MOTION for Hearing. (kmca) (Entered: 02/05/2007)
02/06/2007	<u>125</u>	ORDER denying <u>98</u> Motion to Stay and respectfully declining to adopt <u>97</u> Report and Recommendation. The matter is recommitted to the Magistrate Judge for further proceedings consistent with this Order. Signed by Judge R Bryan Harwell on 2/6/2007.(mwel,) (Entered: 02/06/2007)
02/06/2007	<u>126</u>	***DOCUMENT MAILED <u>125</u> Order, placed in U.S. Mail to Robert Holland Koon (kmca) (Entered: 02/06/2007)
02/15/2007	<u>127</u>	MOTION for Reconsideration re Judge Haywell's <u>125</u> Order on Motion to Stay, by Robert Holland Koon.Response to Motion due by 3/5/2007. (Attachments: # (1) letter asking if this motion for reconsideration, stays the time limits to respond to <u>125</u> Order, # (2) Envelope)No proposed order. (kmca) Modified on 2/15/2007: not referred to magistrate (kmca). Modified on 2/21/2007: see <u>137</u> Offer of Proof-Motion to Stay (kmca). (Entered: 02/15/2007)
02/15/2007	<u>128</u>	REPLY to Judge Harwell's <u>125</u> Order; Petitioners Motion to Delete Amended Brady and Fareta Issues: and to Proceed Only on Original Nine Issues Over Objection by Petitioner, by Robert Holland Koon. (kmca) (Entered: 02/15/2007)
02/15/2007	<u>129</u>	MOTION to Amend/Correct <u>40</u> Amended Petition for Writ of Habeas Corpus to Delete Amended Brady and Fareta Grounds from Petition - and to Proceed ONLY on Original Nine Grounds by Robert Holland Koon.Response to Motion due by 3/5/2007. No proposed order.Motions

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Division of Inmate Services

AGREEMENT TO DEBIT E.H. COOPER ACCOUNT

Inmate's Name: <i>Robert Koop</i>	SCDC #: <i>227826</i>	Housing Unit: <i>M109</i>	Date: <i>6/19/14</i>
--------------------------------------	--------------------------	------------------------------	-------------------------

GENERAL MATERIAL

** Inmate must have the funds in his/her account to pay for the materials.

To be completed by
SCDC staff:

Item	Amount
Envelope	
Pen	
Paper	
Postage	
Tape	
Box	
Electronic Repair	
Other	

Sub-Total:

Cost

LEGAL MATERIAL

** Inmate is not required to have the funds in his/her account to pay for the materials; however, his/her account must be debited for all materials s/he elects to receive.

To be completed by
SCDC staff:

Item	Amount
Envelope	
Pen	
Paper	
Postage	
Other	

Sub-Total:

Cost
<i>5.05</i>
<i>5.05</i>

PHOTOCOPIES

** Inmate may be required to have funds in his/her account. See SCDC Procedure GA-01.03(OP), "Inmate Access to the Courts," to determine if inmate may receive copies with/without funds.

To be completed by
SCDC staff:

Item	Amount
Photocopies	

Cost
<i>5.05</i>

TOTAL

Inmate's Signature
Robert Koop

Mailroom/Canteen Signature (Request filled by)
[Signature]

Date
6/19/14

White - Inmate
Canary - Mailroom/Canteen Employee

SC COUNT of APPROVALS
SCPPPS

EXHIBIT B

EXHIBIT B

IN THE COURT OF APPEALS
STATE OF SOUTH CAROLINA
In The Administrative Law Court
Docket Number 13-ALJ-15-0018

APPEAL OF FINAL DECISION
Department of Probation, Parole, and Pardon Services

ROBERT KOON, #227826..... APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES..... RESPONDENT

2014-000803

RECORD ON APPEAL

Mr. Robert Koon, 00227826
Lieber Correctional Institution
P. O. Box 205
Ridgeville SC 29475

FINAL Apxct Dec.

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



KELA E. THOMAS
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

March 21, 2013

Robert Koon, #227026
Lieber Correctional Institution
PO Box 205
Ridgeville, South Carolina 29472

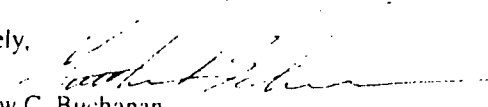
Dear Mr. Koon:

I have been asked to respond to your letter and Mr. Harry Lovelaces' letter addressed to the Chairman of the Parole Board inquiring about a commutation of your sentence. In South Carolina, there is not a procedure to commute a sentence other than the commutation of a death sentence to a life sentence. Also, there are only two types of clemency. One is parole and the other is a pardon. Because you are serving a life sentence without the possibility of parole, the only option available to you is a pardon.

The guidelines which must be utilized by the Board of Probation, Parole and Pardon Services (the Board) when determining when an individual is eligible for pardon consideration are set forth in Section 24-21-950 of the South Carolina Code. The guidelines are very restrictive in regard to inmates. The Code provides that: "An inmate must be considered for a pardon before a parole eligibility date only when he can produce evidence comprising the most extraordinary circumstances." S.C. Code Ann. § 24-21-950(A)(4) (2007). The South Carolina Legislature has not created any specific criteria for what constitutes "extraordinary circumstance" for purposes of the pardon statute. Instead, the pardon application process under this provision is two-fold. First, the inmate must make a written request for pardon consideration which describes what he or she feels are the "extraordinary circumstances" which would support the request. The request is then reviewed and it is determined as to whether or not an investigation and pardon consideration is warranted. If the Board comes to the conclusion that a full investigation is truly warranted, the inmate is instructed to provide a full pardon application, and an investigation by the county of conviction would be completed. Then the Board would consider the case for pardon in the regular course of its duties. South Carolina Code Ann. §24-21-910 through -1000 (2007).

I hope I have adequately addressed your concerns. Thank you for your inquiry.

Sincerely,


Matthew C. Buchanan
General Counsel

FILED
APR 22 2013
SC ADMIN. LAW COURT

APR 01 2014

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

SC ADMIN. LAW COURT

Robert Koon, 227826,

Docket No. 13-ALJ-15-0018-AP

Appellant,

vs.

South Carolina Department of Probation,
Parole and Pardon Services,

ORDER

Respondent.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC" or "Court") pursuant to the appeal of Robert Koon ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. On May 29, 1998, the Appellant was convicted of Burglary in the Second Degree and Grand Larceny. Because the Appellant had previously been convicted of two other "serious" crimes, the Appellant received a life sentence without the possibility of parole. The Appellant appealed to the South Carolina Court of Appeals, but in an opinion issued April 18, 2000, the Appellant's convictions were upheld.

Subsequently, the Appellant wrote the South Carolina Governor's Office and the Chairman of the South Carolina Parole Board ("Board") seeking to have his sentence commuted. On March 21, 2013, Matthew C. Buchanan, General Counsel of the South Carolina Department of Probation, Parole and Pardon Services ("Department") responded to the Appellant by letter explaining that the Appellant's sentence is not eligible for commutation as South Carolina law only permits the commutation of a death sentence to a life sentence. Mr. Buchanan further explained that there are only two types of clemency remedies available in South Carolina, parole and pardon. Because the Appellant was sentenced to life without the possibility of parole, the only remedy available to the Appellant is a pardon.

Mr. Buchanan's letter outlined the guidelines the Board utilizes when considering a request on for a pardon pursuant to S.C. Code Ann. § 24-21-950. The most essential of those guidelines being that the inmate must produce evidence of the "most extraordinary

circumstance” warranting a pardon. Thereafter, on April 22, 2013, the Appellant filed a Notice of Appeal with this Court challenging the Department’s determination that he is not eligible for parole and seeking an order remanding the matter to the Department for a determination of whether an “extraordinary circumstance” exists which would allow the Appellant to be considered for a parole pursuant to S.C. Code Ann. § 17-25-45.

DISCUSSION

The ALC’s jurisdiction to review a final decision of the Department is derived from the South Carolina Supreme Court’s decisions in Al-Shabbaz v. State, 338 S.C. 334, 527 S.E.2d 724 (2000) and Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002). In Al-Shabbaz, the court held that inmates have the right to appeal final decisions rendered by state agencies in matters that are “non-collateral” and related to an inmate’s conviction or sentence to the ALC pursuant to the Administrative Procedures Act. The court recognized that these matters typically arise (1) when an inmate is disciplined and a punishment is imposed, and also, (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status. Al-Shabbaz, at 369. In Furtick the South Carolina Supreme Court held that an allegation that the Department has erroneously determined that an inmate is not eligible for parole is appealable under the second prong in Al-Shabbaz. The court also held that permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process and review by the ALC. Furtick, at 149.

Additionally, the court determined in Furtick that although an inmate has a liberty interest in parole *eligibility* pursuant to S.C. Code Ann. § 24-21-620, this statute creates no such liberty interest in the granting of parole itself. Furtick, fn 4, see also Sullivan v. South Carolina Dep’t of Corrections, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review).

In his appeal, the Appellant seeks review of the Department’s determination that he is not eligible for parole. The Appellant argues that even though he is serving a “life sentence without the possibility of parole,” the Parole Board is obligated to consider the Appellant for parole pursuant to S.C. Code Ann. § 17-25-45. Appellant contends that information provided to this Court establishes “extraordinary circumstances” warranting review of his case and subsequent

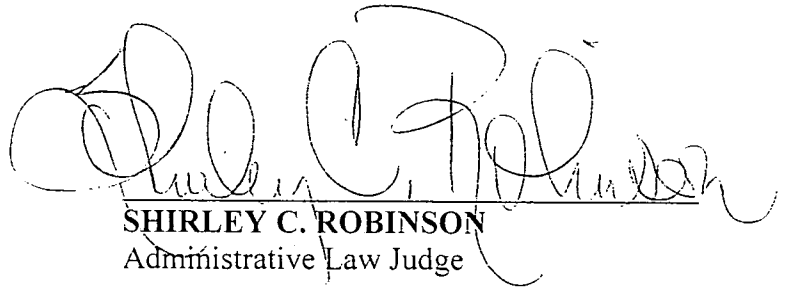
release on parole and that the case should be remanded to the Department for said review.¹

However, the Appellant is currently not eligible for parole and while S.C. Code Ann. § 17-25-45 outlines the process Appellant must follow prior to being considered for parole, he has not complied with that process. Appellant's request that this Court remand the matter to the Department with instructions to review the case for compliance with section 17-25-45 is not within the Court's review authority as outlined in Al-Shabazz.²

ORDER

Based upon the foregoing reasons, **IT IS HEREBY ORDERED** that the matter is **DISMISSED**.

AND IT IS SO ORDERED.


SHIRLEY C. ROBINSON
Administrative Law Judge

April 1, 2014
Columbia, South Carolina

DEPARTMENT OF CORRECTIONS
This document is a true and correct copy of the original as served and filed with the Department of Corrections. It is not to be used for any other purpose. In the United States, this document is the property of the Department of Corrections and may be subject to the laws of the State of South Carolina.
File: 1 Date: April 30, 2014
By: [Signature]

¹ The Department filed the Record on Appeal with the Court on May 23, 2013, and on June 13, 2013, the Appellant filed a Motion requesting that the Record be expanded. Appellant included numerous documents along with the Motion, and on June 28, 2013 Appellant filed his own Record on Appeal. Appeals to this Court are governed by ALC Rules 58 and 61, and those matters not considered by the agency during its review will not be considered by this Court.

² Appellant filed a Motion with the Court on June 28, 2013 asking that the Court appoint counsel to represent Appellant in this matter, however there is no provision providing for the appointment of counsel in appeals to this Court.

Mr. C. David Baxter, Chair
SC Board of Pardons and Paroles
PO Box 50666
Columbia, SC 29210

June 3, 2012

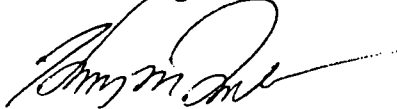
Dear Mr. Baxter,

Mr. Robert Holland Koon is serving a Life Without Parole (LWOP) sentence. As you can see from the enclosed letters that I have sent to numerous officials, Mr. Koon's sentence has been enhanced by prior convictions that the State can not show occurred, i.e. Nighttime burglary. As the victim of the 1986 break-in, I can assure you that nobody could prove that the crime occurred at night. I am requesting as the victim of Mr. Koon's second strike, that you would commute his 1998 conviction from LWOP to a maximum of fifteen (15) years. Mr. Koon's 1998 conviction is for breaking into the Cherokee County probation office, so if this creates a conflict with this board's ability to fairly consider commutation of Mr. Koon's sentence then please forward this request for commutation to the Governor's office. A severe injustice has been done to give this man LWOP for an office break-in when the predicate offense can not be deemed worthy of any trust, as the victim even I can not say the offense (1986) occurred at night. Mr. Koon has served over fifteen years (date of offense February 1, 1997) and should be considered for commutation of his sentence. Mr. Koon plans to enter the Jumpstart faith-based program upon his release. As the victim, I make this request.

Please contact me in regards to this petition:

Harry M. Lovelace
PO Box 71
Gaffney, SC 29342
P: (864) 838-1381

Kindest Regards,



Harry M. Lovelace

June 3, 2012

Re: Miscarriage of Justice in the case of Robert Holland Koon

To Whom It May Concern:

Please find enclosed numerous items of correspondence I have sent to the courts, solicitors, and the Governor on behalf of Robert Koon. Mr. Koon is serving Life Without Parole under the 'three strikes' law for a 1998 second degree burglary conviction. His sentence was enhanced from fifteen (15) years to natural life based upon his two previous 1986 convictions. As the victim of his 1986 offense, I have for the past several years attempted to help Mr. Koon obtain his freedom as I will attest that there is absolutely no evidence that his second 'strike' occurred during the nighttime and should therefore not be considered a strike under SC law. After a hearing in June 2011, Judge Mark Hayes denied Mr. Koon's motion for a new trial on his 1986 conviction, stating in essence that Mr. Koon should have discovered this fact earlier and failed to address the fact that the State never had any evidence to even charge much less induce a plea of nighttime burglary. As part of the plea, Mr. Koon (nineteen years old at the time) received two (2) strikes at one plea and pleaded guilty to an offense the State can not show even occurred as there is no evidence of nighttime entry. Mr. Koon has served over fifteen (15) years for the 1997 office burglary and, without the unjust enhancement; he would be released for time served.

We are seeking concerned citizens, attorneys, judges, and Christians to petition Solicitor Barry Barnette to consent to the pending motion for arrest of judgment the Life Without Parole sentence filed with the trial judge The Honorable John C. Hayes III (York county) and to allow Mr. Koon to be released to a Christian-based halfway house – possibly Jumpstart of Spartanburg or Hope House of Greenwood. Mr. Koon has given his life to God, and, despite the hardships, he has kept his faith in God. Having developed a relationship with Mr. Koon over the past several years, I believe that he would be a law-abiding and productive citizen upon his release.

I would encourage all interested persons to contact the following individuals to assist Mr. Koon in obtaining his release:

Ms. Salley W. Elliott, Office of the Attorney General, PO Box 11549 Columbia, SC 29211. (803) 734-3737. She is the attorney overseeing the appeal.

Mr. Barry Barnette, Solicitor, Seventh Judicial Circuit, 180 Magnolia Street, Spartanburg, SC 29304. (864) 596-2575. He is the solicitor over the pending motion for arrest of judgment.

Governor Nikki Haley, Office of the Governor, 1205 Pendleton Street, Columbia, SC 29201. (803) 734-2100. Gov. Haley could pardon Mr. Koon or at least commute his sentence.

Please call and/or write these officials and ask them to review Mr. Koon's case and correct what amounts to a travesty of justice. We are also looking for someone who will create a website to inform the public of Mr. Koon's situation. No citizen should be subjected to Life Without Parole when there is no evidence to support the underlying offense and evidence of courts refusing to render equal justice under the law.

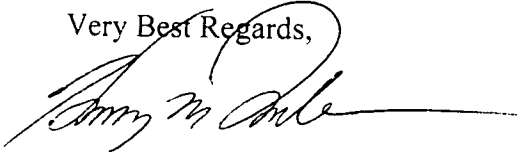
If you would like further information or have any questions, please contact me:

Harry M. Lovelace
PO Box 71
Gaffney, SC 29342

Or

Robert Koon 227826
MCI
386 Redemption Way
McCormick, SC 29899

Very Best Regards,



Harry M. Lovelace

Enclosures (Copies of):

- Letter to Governor Sanford
- Affidavits (2) April 8, 2010 and March 7, 2012
- Letter to Judge J. Mark Hayes II (January 6, 2011)
- Letter to Detectives Skinner and Weaver
- Letter to Solicitor Barry Barnette (January 6, 2011)
- Letter to Solicitor Barnette (August 4, 2011)
- Letter to SC Parole and Pardon Services (cover letter for this letter)
- Jumpstart info sheet



The Hon. J. Mark Hayes, II
180 Magnolia Street
Spartanburg, SC 29306

Harry M. Lovelace
31 Bo Lane
Gaffney, SC 29340
(864) 838-1381

January 6, 2011

Re: Robert Holland Koon
State v. Robert Koon 86-GS-11-289 Rule 29 (b) SCR.Crim.Pro.

Dear Judge Hayes,

I am enclosing a letter to Seventh Circuit Solicitor Harold W. Gowdy, III regarding the Rule 29(b) referenced above. As stated in the letter, I am requesting a status conference between you, Mr. Barnette, Mr. Koon, and myself for the sole purpose of determining whether the 1986 Second Degree Burglary (violent nighttime) should be *reduced* to Third Degree Burglary (no nighttime) and the possibility of reducing Mr. Koon's sentence to the statutory maximum of twenty years.

I would very much appreciate your assistance in arranging this conference as soon as possible. Please contact me at the phone number above to advise or if you have any questions.

Respectfully,



Harry M. Lovelace

Cc: Mr. Barry Barnette, Seventh Circuit Solicitor
Mr. Michael Moran,
Mr. Holman C. Gossett, Attorney at Law
The Hon. Roger L. Couch
The Hon. Gary E. Clary
Mr. Ray E. Thompson, Attorney at Law
Mr. Gary P. Mallard, Attorney at Law

Governor Mark Sanford
Office of the Governor
PO Box 12267
Columbia, SC 29211

Harry M. Lovelace
31 Bo Lane
Gaffney, SC 29342
(864) 838-1381

Re: Commutation of Sentence - Robert Holland Koon

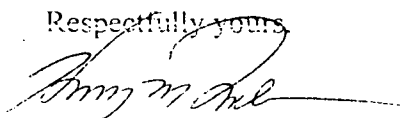
Dear Governor Sanford,

I am writing as the victim in Mr. Koon's 1986 conviction, which is set forth in the attached letter to the Attorney General of South Carolina. This conviction was obtained by police presenting unsubstantiated information to the magistrate and the grand jury, wherein they stated that the offense occurred at night when in fact the offense of a break-in of an unoccupied building (our insurance agency) occurred between 5:00 pm March 28, 1986 and 9:00 am March 29, 1986; thereby leaving several hours of daylight when this offense could have occurred.

In researching this case, it appears that the police made unfounded claims to the magistrate to obtain a warrant which resulted in the nineteen year-old defendant's guilty plea to two strikes in one guilty plea, Koon v. State (March 2007 SC Supreme Court). As the victim, I do not condone and stand firmly against such actions, and I ask you to commute his 1986 conviction for Second Degree Burglary (Nighttime) to Third Degree Burglary which would allow the Life Without Parole sentence to be reduced to time served. I believe that Mr. Koon's case is a miscarriage of justice to which he has served over twenty years, and I hope you will agree that he has paid his debt to society. The attached letter to the Attorney General sets forth the relevant facts, but the bottom line, as the victim, I ask the Governor to review the facts of this case and commute Mr. Koon's sentence to time served to correct this injustice so that this man does not spend the rest of his life in prison.

Please contact me if you have any questions. I thank you for in advance for your consideration of this request.

Respectfully yours,



Harry M. Lovelace
With Attachments

Cc: Honorable J. Mark Hayes II, Circuit Court Judge
Chief Justice Jean Toal, SC Supreme Court
Professor Patrick Flynn, USC Law School
Hon. Brandi McBee, Cherokee County Clerk of Court
Governor Mark Sanford
Ray E. Thompson, Jr., Attorney At Law
Trey Gowdy, 7th Circuit Solicitor's Office
60 Minutes, CBS
The Gaffney Ledger

Gov. Nikki Haley, Governor

Mr. C. David Baxter, Chairman of the Board

✓ Ms. Kela E. Thomas, Director

SC Dept. of Probation, Parole, and Pardon Services (SCDPPPS)

P.O. Box 50666

Columbia, SC 29211

Re: Consideration of Robert Holland Koon

Dear Gov. Haley, Mr. Baxter, and Ms. Thomas,

It has come to my attention that since January 2011, several persons, including the victim of my Second Strike (1) Harry Lovelace of Cudd-Lovelace Agency and Detective Richard Weaver, who signed the warrants for Cudd-Lovelace and Stylette Salon (2) have petitioned the SCDPPPS to commute my life sentence to time served or to grant me parole under the 'extraordinary circumstances' provision of 17-25-45.

First, I would respectfully request that you provide me copies of that documentation mentioned above along with this agency's decision on that matter.

Second, pursuant to the 'extraordinary circumstances' clause of 17-25-45, which states that under section(E) "...a person sentenced pursuant to this section may be paroled if: (d) the person can produce evidence comprising the most extraordinary circumstances.", I would ask that a formal hearing be scheduled as soon as possible based upon the deteriorating health of Mr. Weaver who has suffered from debilitating medical conditions within the past year and that extraordinary circumstances exist that would warrant the granting of a commutation of the life sentence to 'time served' of sixteen (16) years on the 1998 conviction for the 2/01/97 offense of Second Degree Burglary. 16-11-312 (B) based upon the fact, inter alia, that my second strike (Cudd-Lovelace) conviction is fundamentally flawed as evidence exists that the State had "no evidence to establish the corpus delicti of a nighttime burglary existed", and without nighttime allegation Cudd-Lovelace would at most be 'Burglary Third Degree' and not a Strike (see attached).

Third, I did not receive a mental evaluation prior to the plea in 1986 in which I received 'two Strikes out of one plea'. This, despite prior documented evidence of mental and psychological problems resulting from my maltreatment at the SC State Hospital and the misuse of psychotropic medication as detailed in the attachment.

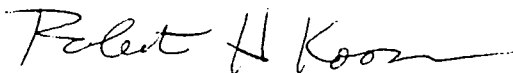
Additionally, I would like to assert the following: that since the 1998 conviction for which I am serving LWOP was for the burglary of the SCDPPPS branch office in Cherokee County, there is therefore a conflict of interest whereby the SCDPPPS staff would be conflicted in making a determination as to whether extraordinary reasons exist to commute/reduce the sentence to time served or grant parole pur to 17-

25-45 as SCDPPPS is the "victim" of this offense. Thus, this matter should be transferred to the Governor's office for disposition based upon the inherent conflict of interest.

I would ask that these documents be submitted to the full parole board for a decision as to the scheduling of a hearing, and the disclosure of the documents presented by the victim Mr. Lovelace and Det. Weaver.

Thank you for your kind attention.

With Kindest Regards,

A handwritten signature in cursive script that reads "Robert H Koon".

Robert Holland Koon

Lieber CI

P.O. Box 205

Ridgeville, SC 29472

Enclosures

Cc:

Gov. Nikki Haley

Donald Zelenka, Attorney General's office

Harry Lovelace

Det. (Retired) Richard Weaver

Solicitor Barry Barnette

W. Gaston Fairey, Esq. (Ret)

Nelson & Mullins, Attorneys at Law

(1) Koon v State 643 SE2d 680(2007)

(2) Reversed by SC Supreme Court Koon v State 595 SE2d 495(2004)

To Whom It May Concern:
Attorneys

Re: Child tortured at S.C. State Hospital coerced into plea in 1986 used as basis for Natural Life Sentence for property crime seeks justice after thirty (30) years.

The following account is written in order to provide evidence of the adverse effect of medication misuse, childhood physical and psychological torture, and judicial misconduct that resulted in a Life Without Parole sentence for the victim of said abuse. The pattern of abuse began when subject was prescribed and administered Ritalin and Mellaril from age five to age thirteen and remained in a continuously medicated state on psychotropic drugs as school records will attest: from 1971-1973 (Leroy Gordon Cooper School, Cliffwood Beach, NJ), 1974-1975 (West End Elementary School, Gaffney, SC), and 1975-1979 (Central Elementary School, Gaffney, SC).

In 1982, subject was one of eight (8) children who were patients of the S.C. Department of Mental Health (SCDMH) who were tortured and abused, forcibly injected against their will with high dosages of psychotropic drugs, kept naked in a strip cell, four pointed to beds and forced to drink fruit juice infused with psychotropic drugs. A nurse concerned about the abuse reported the maltreatment of these children to the State Law Enforcement Division (SLED) prompting their investigation. Others became involved in the investigation, including Attorney W. Gaston Fairey, a renowned author on S.C Law; South Carolina Protection and Advocacy for the Handicapped; Child Advocate Attorney John D. Elliott; and Attorney Gary Mallard. As a result of the investigation, a federal civil rights action was filed in the U.S. District Court **Robert K. (Child) et al. v Robert Bell, et al. SC Dept of Mental Health. (Case No. 3:83cv287, Filed 02/02/83).** The case was settled out of court for in excess of \$200,000. In 1983, Robert K. was Robert Holland Koon (RK). He was fourteen (14) years old at the time he experienced the abuse. After the abuse at the State Hospital, RK received absolutely no follow up care, counseling, or any other treatment for the abuse and torture he incurred and seems to have suffered from severe Post Traumatic Stress Disorder (PTSD) as a result. He began to manifest symptoms of PTSD: In 1984, RK stole the Mayor of Gaffney's daughter's vehicle and drove it to Myrtle Beach, SC for a high school graduation party. He was arrested and sentenced to probation, whereupon he stole the Mayor of Gaffney's wrecker and crashed into a S.C.H.P. patrol car – within two weeks of being released on probation! At that time, RK was sentenced to one to six years under the Youthful Offender Act. Upon his release in March 1985, RK received the proceeds from the \$6,000 settlement – the remaining balance after his mother purchased a car and home furnishings for the house that his father set on fire in January of 1984. During the time period between his release from the S.C. Department of Mental Health and Juvenile Custody in December 1983, RK began to consume large quantities of alcohol and became a black-out alcoholic. In spite of patently obvious symptoms, RK still received no treatment or counseling for the abuse suffered at the SCDMH. In May, 1985 he was cited for Driving Under Suspension and was placed in the custody of the S.C. Department of Corrections (SCDC). While in SCDC, he attempted to commit suicide several times and was placed in the Gilliam Psychiatric Hospital at Kirkland under the care of Dr. Mansoor Daniels. RK was released from SCDC in December of 1985. He continued to consume large quantities of alcohol as a means of coping with the PTSD.

On March 14, 1986, RK was arrested in Jonesville, SC where he was located approximately five miles from a truck stolen from Gaffney with no evidence whatsoever to connect him to the stolen truck or keys taken from a business. RK was charged with two (2) counts of Second Degree Burglary and Larceny of the truck. The charges were made by Morgan Doug Harvey of the Gaffney City Police Department. While in jail, he retained Gary Paul Mallard as his counsel and was subsequently released on bond which his mother posted.

On April 2, 1986, RK was rearrested and charged without any proof whatsoever of two more nighttime Second Degree Burglaries which allegedly occurred sometime between 5:00pm on March 28 and 9:00am on March 29, 1986 but listed only as occurring at night. Following RK's arrest, his \$10,000 bond was revoked. No proof has ever been presented that RK committed any of these offenses. None.

In May 1986 while in jail awaiting trial on these charges, police left a ten foot ladder on the recreation field and RK was conveniently (according to Gary Mallard's testimony) allowed to escape from the charges for which the Gaffney City Police had no evidence. Several weeks later RK was captured. During the next term of General Sessions Court, Chief of Police Chris Skinner entered RK's jail cell and encouraged him to take a ten (10) year plea; this was done in spite of the fact that RK's attorney Gary Mallard had previously explicitly told Chief Skinner not to speak with RK about the case without him (Mallard) being present (testimony at June 27, 2011 hearing) State v Koon 86-GS-11-289 motion for a new trial. After his conversation with Chief Skinner, RK was escorted to the Cherokee County Courthouse to enter a ten year plea. RK's decision prompted by Skinner's statement that if he did not plea, he would receive a forty (40) year sentence. It was only after this action that Attorney Mallard was contacted in Greenville and informed of his client's plea and he was advised to come to Gaffney. Mr. Mallard represented RK on the March 14, 1986 offense involving the stolen truck. Public Defender Harry Cline represented RK on the March 28-29, 1986 charges. RK proceeded to enter a plea, but the court without any evidence to convict of the offenses could not and did not "establish a factual basis" for the plea as required by NC v Alford. In fact, during the plea, RK stated "I did not do these crimes" but the court still accepted the plea without establishing a factual basis. Also, per the 1986 plea transcript, RK plead guilty to the break-in at Stylette Salon for nighttime burglary, a conviction later reversed by the SC Supreme Court. The court asked RK if he committed the crime on April 29th to which he consented. This could not have occurred as RK was in jail on April 29th. Stating that he wanted to give RK a forty year sentence, The Hon. Jonathan McKown gave RK ten years. RK immediately filed a P.C.R. alleging his plea was involuntary and the result of coercion and the ineffective assistance of counsel, the police's failure to disclose that alleged mud samples that Morgan Harvey portrayed to RK connecting him to the stolen truck / March 14th burglary were inconclusive, and the fact that the plea was negotiated without counsel present.

In October 1987, RK was denied relief in the P.C.R. hearing in which he was represented by Wade S. Weatherford. Mr. Weatherford would not file an appeal and the transcript of the hearing was subsequently destroyed. In 2004 (17 years later) the SC Supreme Court granted a review of the 1987 P.C.R. Koon v State 595 SE2d 456 (2004), holding that Weatherford was ineffective for failing to file an appeal. The March 29, 1986 offense was vacated as it did not allege Nighttime element. The basis of the Second Degree Burglary is that it allegedly occurred at

night. In 2010, Harry Lovelace, the owner of Cudd-Lovelace Agency that was the location of the March 28, 1986 offense, came forward with a sworn affidavit stating that no evidence existed that the break-in offense occurred at night as required to establish Second Degree Burglary. The Cudd-Lovelace Agency and Stylette Salon offenses which were alleged to have occurred on separate dates actually occurred at the same time between 5:00 pm March 28th and 9:00 am March 29th. However, the police misrepresented the date of the offenses and of nighttime occurrence.

During the June 27, 2011 motion for a new trial, Mr. Mallard testified that no evidence existed to connect RK to any of these crimes and the plea transcript sets forth no factual basis as required by law. In spite of this, the court denied the motion for a new trial, determining that RK should have discovered earlier that the police misrepresented the facts and that no evidence existed to show the crime occurred at nighttime. In **Koon v State** 643 SE2d 680 (2007), it was held the RK received two strikes (under three strike law) at this one 1986 plea and thus he was properly sentenced to Life Without Parole for his 1986 conviction. RK's life sentence is predicated on his 1986 plea. He did not receive a mental evaluation before his 1986 plea despite the fact that his attorney knew he had a history of mental problems, including suicide attempts, and possibly PTSD stemming from his abuse and torture at the State Hospital prior to his plea. This is a major constitutional issue that has never been addressed and a viable issue under S.C. law. Even after the plea and while serving the ten year sentence, RK was twice placed in SCDC's Gilliam Psychiatric Hospital for attempted suicide. In fact, RK's SCDC history from 1986 to 1993 shows extreme behavioral problems toward authority, likely a result of his childhood torture and abuse at the State Hospital and resentment from being coerced into a plea that placed him in a maximum security prison due to his escape.

At his 1998 competency hearing, the State Hospital found RK competent but could not review the 1982 records of torture and abuse as those records are "sealed by the court" and remain sealed. In 2008, the SC Supreme Court held that no statute of limitations exists on the issue of competency to stand trial. Therefore, RK has a viable issue on failure to be evaluated prior to his plea. RK is now attempting to present this to the SC Supreme Court, which stated in an October 27, 2010 order that he could not file any collateral attack on the 1986 conviction without their permission. Chief Justice Jean Toal (for the court) stated that the 1982 State Hospital records of RK's torture and abuse should be unsealed so that he can show that "suffering from untreated and undiagnosed Post Traumatic Stress Disorder" left him unduly susceptible to being influenced by an authority figure to enter a plea to a crime he was not guilty of and can not even be shown to have occurred, due to his fear and intimidation grounded in his abuse at the State Hospital (see lawsuit on torture) and no evidence existed then or now to show that RK should have been charged or indicted and his first two strikes are the result of police misconduct by contacting a represented defendant without counsel present despite specific instructions not to do so, and presenting false evidence to the magistrate in order to obtain a warrant and indictment when no proof existed to connect him to the crimes and he only pleaded guilty due to his PTSD and fear of authority figures as a result of the documented torture and abuse he suffered while at the State Hospital. The court records of **Robert K. v Robert Bell et al** establish that eight (8) children were tortured and abused. Two committed suicide within three years of suffering the abuse, two are now serving life sentences. The status of the other four is unknown. RK was never treated or

diagnosed and, more importantly, was never given a mental evaluation prior to his coerced 1986 plea.

In the interest of justice, RK is seeking to have his 1986 plea vacated to remove two of the three strikes under the three strike Life Without Parole law. He has served seven (7) years on the 1986 plea and had served fifteen (15) years on the 1998 trial for Second Degree Burglary. In all he has served over twenty-three (23) years and has paid his debt to society without question. However, the torture and abuse he suffered as a child has never been addressed and should play a key role in his being resentenced. Since the S.C. Supreme Court has "estopped" RK from an appeal without their permission, RK seeks to have an attorney: procure his mental health records from the State Hospital that are sealed as well as his SCDC mental health records; prepare a petition asking the S.C. Supreme Court to allow him assert that he should have had a mental evaluation before his 1986 plea was accepted based on their recent decision and the fact that his record of torture and abuse has been sealed and no factual basis was established at plea and no evidence connects him to the offenses. If you are interested in assisting RK correct a terrible injustice that began with a child being tortured and abused by the State and culminated in him serving natural life for offenses that the State has no proof he committed, please contact him or me as follows:

Robert Koon 227826
Lieber C.I.
PO Box 205
Ridgeville, SC 29472

Harry M Lovelace
PO Box 71
Gaffney, SC 29342
(864) 838-1381

RK is also seeking Gov. Nikki Haley recommend to the S.C. Parole and Pardon Board that his sentence be commuted to time served.

In between his 1986 and 1998 sentence, RK earned a paralegal degree from Old Dominion University in Virginia. However, due to his untreated PTSD and problem as a blackout alcoholic he could not adapt to society without professional treatment / counseling for his childhood torture and abuse. Since 1986, RK has continuously protested and fought the coerced plea to no avail – to no avail because the issue of his mental competency has never been addressed.

John D. Elliott

ATTORNEY AT LAW

THE NBSC BUILDING
1122 LADY STREET, FIFTH FLOOR
Post Office Box 607
Columbia, South Carolina 29202

phone (803) 252-9236
fax (803) 799-2079
email jayel@mindspring.com

July 1st, 2013

Robert Koon
No. 227826
Lieber Correctional Institute
P.O. Box 205
Ridgeville SC 29472

RE: Legal Matters

Dear Mr. Koon:

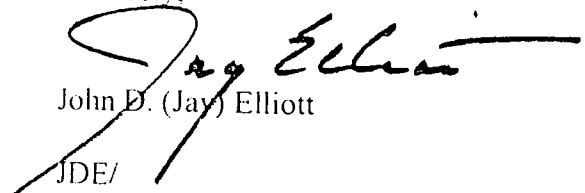
I have reviewed your correspondence and packages of materials. I regret that I am fully booked with work and cannot take on your matters.

I have your request for the *Robert K. vs. Bell* file. Unfortunately that file was purged many years ago, as it has been nearly 30 years since that case was concluded.

As to the lawsuit regarding the use of Ritalin on children, I have no expertise in that area of law, and recommend that you contact any lawyer for the members of the class of plaintiffs to see if you can be included.

I wish you the best of luck with your cases. I am returning the documents and materials to you.

Sincerely,


John D. (Jay) Elliott

JDE/

ENCL.

John D. Elliott

ATTORNEY AT LAW

THE NBSC BUILDING
1122 LADY STREET, FIFTH FLOOR
Post Office Box 607
Columbia, South Carolina 29202

phone (803) 252-9236
fax (803) 799-2079
email jayel@mindspring.com

January 4th, 2014

Harry M. Lovelace
Correll Insurance
P.O. Box 71
Gaffney SC 29342

RE: Robert Koon

Dear Mr. Lovelace:

I have the materials you forwarded regarding Robert Koon, and his request that I provide something on his behalf with the Parole and Pardon Board.

I haven't seen Mr. Koon in over 30 years, and know very little about him, other than my involvement in a legal matter regarding his welfare which concluded around that time. I regret that I am not in a position to assist him.

Accordingly, I am returning the materials to you in the hopes that someone else might be of more help.

Sincerely,



John D. (Jay) Elliott

JDE/

ENCL.

June 9, 2013

The Hon. Ralph K. Anderson, III
Chief Administrative Law Judge
SC Administrative Law Court
1205 Pendleton Street
Columbia, SC 29201

Mr. Harry M. Lovelace
31 Bo Lane
Gaffney, SC 29340

Dear Judge Anderson,

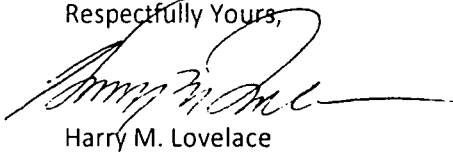
Enclosed please find documents related to the case for Robert Holland Koon who is currently serving a LWOP sentence under the SC 'three strikes' law. Included is his request to the SCDPPPS for their consideration of pardon under the 'extraordinary circumstances' clause of 17-25-45. Per the enclosed letter of March 21, 2013 from the SCDPPPS citing SC Section 24-21-950(A)(4), in addition to the provision for consideration due to 'extraordinary circumstances', I am further petitioning the court under SC Code 24-21-950(A)(5) which states that "*the victim of a crime...may petition for a pardon for a person who has completed supervision or has been discharged from a sentence.*" As indicated in the enclosed documents, I was a "victim" of one of Mr. Koon's offenses which led directly to his LWOP sentence, and I am by this letter formerly petitioning the court to pardon Mr. Koon for time served. It is my contention that Mr. Koon should have never received the conviction of Second Degree Burglary when the state did not produce any evidence that the offense occurred in nighttime, which was the basis for Second Degree, as opposed to Third Degree; and, thus, constituted his third strike.

Additionally, I have personally spoken with the investigating officer, Det. Richard Weaver (retired) and he stated that it was his desire that Mr. Koon be pardoned for time served. Mr. Weaver told me that he sent a letter to a member of the Board of Probation, Parole, and Pardons that he knew requesting the member's consideration of Mr. Koon's pardon. He did not indicate to me which member was so addressed. Unfortunately, since that time, Mr. Weaver's health has significantly deteriorated – to the point that the assistance he stated so clearly to me that he wished to provide for Mr. Koon cannot now be counted upon with any reliability. Mr. Weaver's wife has respectfully requested that he not be contacted until further notice, again due to the swiftness and severity of his declining health. This fact alone should constitute ample evidence of an extraordinary circumstance meriting consideration for pardon, and when apprised with the circumstances noted in the enclosed letter regarding Mr. Koon's childhood experience at the state hospital, etc., there should be no doubt that the provisions of SC Section 24-21-950(A)(4) should be applied.

In my attempts to assist Mr. Koon as a victim, I have thus far been met with indifference, resistance, and/or hostility by officers of the court representing the state. Perhaps they are not accustomed to

dealing with a victim working as an advocate on behalf of a defendant, but their response has resulted in much frustration on my part. It is my sincere hope going forward that the proceedings will allow for a fair assessment of Mr. Koon's and my petition for consideration of pardon. I make myself available, and indeed welcome any opportunity to further augment any of the attestations set forth in the enclosed documents.

Respectfully Yours,

A handwritten signature in black ink, appearing to read "Harry M. Lovelace", with a long horizontal flourish extending to the right.

Harry M. Lovelace

Enclosures (note: several of the documents from Robert Koon do not contain his signature. They were all previously submitted to the recipients with his signature, but due to the difficulty in getting photocopies from him, I am sending without the signatures)

Cc:

Gov. Nikki Haley

Mr. C. David Baxter, Chairman – SC Board of Pardons and Paroles

Ms. Kela E. Thomas, Director – SC Dept. of Probation, Parole, and Pardon Services.

Mr. Robert H. Koon

Mr. Barry Barnette
Seventh Circuit Solicitor
180 Magnolia Street
Spartanburg, SC 29306

Harry M. Lovelace
31 Bo Lane
Gaffney, SC 29340
(864) 838-1381

August 4, 2011

Re: Resentencing of Robert Holland Koon

Dear Mr. Barnette,

Under the provisions of the Victim Bill of Rights, I would request as Solicitor that you carefully review the case of State v Robert Koon 86-GS-11-289 in which Mr. Koon was indicted for Second Degree Burglary when the State did not have any proof the offense occurred at nighttime as required by 16-11-312 (b) 3) SC Code of Laws (1986). According to Mr. Koon, he entered a plea as part of a package plea deal in 1986 not knowing that he would receive two strikes at the one plea. Koon v State 643 SE2d 680 (2007). The offense that constitutes the 'second strike' was my family's insurance agency Cudd-Lovelace Agency, and as the victim, I would respectfully ask you to allow the 1986 conviction to be reduced to Burglary Third Degree so that Mr. Koon can be resentenced from Life Without Parole to twenty years for his 1998 conviction for a subsequent Second Degree Burglary. 98-GS-11-650. Koon v State Supra.

It is my understanding that the State prosecuted this individual for a nighttime burglary without any proof of Corpus Delecti of the nighttime element, and I feel as the victim that a grave injustice has been done to this man where the State can not show his second strike offense ever occurred. As a citizen of this state, I am opposed to the fact that Mr. Koon was prosecuted for nighttime entry of the insurance office (in which nothing was discovered to have been stolen) when no proof exists that it occurred at night, only that it occurred sometime between 5:00 pm March 28, 1986 and 9:00 am March 29, 1986.

I would like to meet with you to discuss this matter with you in person at your earliest convenience. I may be reached at (864) 838-1381. Thank you in advance for your consideration of this request.

Respectfully Yours,



Harry M. Lovelace

Cc: The Hon. J. Mark Hayes III
Mr. Robin File, Assistant Solicitor

March 10, 2014

Mr. Bobby Frederick
S.C. Association of Criminal Defense Lawyers
PO Box 8353
Columbia, SC 29202



Robert H. Koon 227826
Lieber C.I.
PO Box 205
Ridgeville, SC 29472

Miscarriage of Justice

Dear Mr. Frederick,

I am writing to earnestly request your help. I am the victim of gross prosecutorial misconduct. Please see Koon v State 595-SE2d-456 (2004); Koon v State 643-SE2d-680 (2007); State v Koon 29(b) Appeal (Russ Racine); Cherokee County 86-GS-11-289 (Robert Pachak, App Def). Appeal denied 5/23/13 SC Court of Appeals (Prosecutorial misconduct not ruled upon).

The police lied to get a warrant and the solicitor lied to get indictment for **Nighttime Burglary** (2nd Degree). The victim of the Cudd-Lovelace break-in Harry Lovelace testified that there was **NO** evidence that the crime occurred at nighttime; only that it occurred between 5:00pm March 28, 1986 and 9:00 am March 29, 1986, with over five hours of daylight in the interim period. Please see enclosed documents where victim Mr. Lovelace has fought to expose this injustice (e.g. to have 86-GS-11-289 reduced to Burglary 3rd Degree and void my 2nd Strike at 643-SE2d-680, 682).

(AG) Fraud upon the Court and Barratry even by Donald Zelenka who conducted my 1987 PCR without a plea transcript (see attached Writ of Habeas Corpus). Fraud was also committed in my case as evidenced in the 29(b) transcripts (i.e. opposite side of duplex 86-GS-11-290 was reversed by SC Supreme Court as it DID NOT allege nighttime 595-SE2d-459. This was the same solicitor, same county, and same year as Riddle v Ozment 631-SE2d-70 (2006) – a landmark Cherokee County prosecutorial misconduct case.

Mr. Frederick, I have served seventeen years on 3 Strike LWOP and I do not wish to die in prison based on unchecked and unchallenged prosecutorial misconduct. Please send me copies of **any** letters you have sent regarding prosecutorial misconduct; perhaps you can ask Solicitor Barnette to agree to reduce 86-GS-11-289 to Burglary 3rd Degree and I will be released for time served. Please review enclosed with an eye towards justice...maybe S.C. can establish a Commission on Miscarriages of Justice similar to N.C.

As stated previously, the victim Mr. Lovelace is willing to assist in any efforts undertaken to ensure that this injustice is corrected. I have a paralegal certificate from Old Dominion University (1994) and will gladly assist as I am able.

Respectfully Yours,

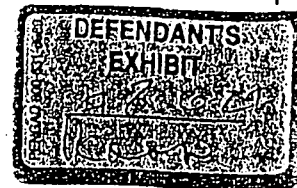
Robert Koon (typed and submitted by Harry M. Lovelace)

A handwritten signature in black ink, appearing to read "Harry M. Lovelace", with a long horizontal flourish extending to the right.

Enclosures (note: several of the documents from Robert Koon do not contain his signature. They were all previously submitted to the recipients with his signature, but due to the difficulty in getting photocopies from him, I am sending without the signatures). Harry Lovelace can be reached at (864) 838-1381 or emailed at hlovelace@correllinsurance.com.

Cc:

Mr. Robert H. Koon



Mr. Barry Barnette, Solicitor
Office of the Seventh Circuit Solicitor
180 Magnolia Street
Spartanburg, SC 29306

Harry M. Lovelace
Gaffney, SC 29340

January 6, 2011

Re: Robert Holland Koon

State v. Robert Koon 86-GS-11-289 Rule 29 (b) SCR.Crim.Pro.

Dear Mr. Barnette,

As the victim in the above referenced case, it is my sincere desire that Mr. Koon's 1986 Second Degree Burglary conviction 86-GS-11-289 Cudd-Lovelace Insurance Agency (3/28/1986) be *reduced* to Burglary Third Degree which will allow him to be sentenced to twenty years on his 1998 conviction for Second Degree Burglary 98-GS-11-650 rather than have him serve Life Without Any Possibility Of Parole (LWOP). It is clear to me that the police did not provide sufficient evidence to the magistrate that this offense definitely occurred at nighttime. See State v. Smith 493 S.E.2d 506 (Ct. App. 1997). While it is not my place to accuse the detectives or solicitor of falsely swearing under oath, a very serious allegation indeed and I would not impugn their character in doing so, the evidence in this case does indicate that the nighttime element was misrepresented (to the magistrate and the Grand Jury) as stated previously in my affidavit when I contend that it occurred between 5:00 pm on March 28, 1986 (office closing time) and 9:00 am March 29, 1986, when the break-in was discovered. Therefore, it is impossible to swear under oath that this offense occurred at night; it could have just as easily occurred in the intervening daylight hours that were available between 5:00 pm and 9:00 am. I have submitted affidavits to the Attorney General and Judge Hayes in regards to these facts.

As a victim, a citizen, and a Christian, I am very upset and opposed to the fact that Mr. Koon is in jail for LWOP based on *unsubstantiated* evidence on my behalf as the victim. Further questions arise about the reliability of the evidence in the fact that a break-in at an adjacent location (Stylette Salon), alleged to have occurred at the same time, did not allege a nighttime element and was therefore held by the Supreme Court to at most be Third Degree Burglary and was vacated by Order Koon v. State 595 S.E.2d 456 (2004). As the copies of the enclosed warrants attest, both warrants allege "on or about", but with differing dates. If the dates themselves are uncertain as stated on the warrants, how can the assertion of nighttime element not also be called into question? This *unsubstantiated* allegation of nighttime on the Cudd-Lovelace warrant resulted in Mr. Koon's "second strike" and his current sentence of LWOP would not have applied had he been convicted of the same offense as Stylette. It is my understanding that without the nighttime allegation in the Cudd-Lovelace warrant (number 540173), Mr. Koon would be eligible to receive a twenty year sentence on his 1998 conviction upon resentencing. With credit for time served, he would have already completed or nearly completed his sentence. I therefore believe that a miscarriage of justice has resulted in a LWOP sentence for a

A TRUE COPY

Brendy H. McBee

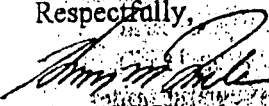
CLERK OF COURT
CHEROKEE COUNTY, S.C.

property offense with no theft included, and from my research, it is the solicitor's duty to correct this misrepresentation of the facts.

Mr. Koon has filed a Rule 29 (b) SCR.CRIM.PRO in Court of General Sessions to have this conviction reduced to Burglary Third Degree and I was referred to your office as the Rule 29(b) is on the General Sessions Court docket. Therefore, I ask that the Solicitor's office consent to this motion and allow Mr. Koon to be resentenced, in order that justice might be served. I am also requesting that a status conference between you, the Circuit Court Judge Honorable J. Mark Hayes II, Mr. Koon, and myself be held as soon as possible for the sole purpose of determining whether the 1986 Second Degree Burglary (violent nighttime) should be *reduced* to Third Degree Burglary (no nighttime) and if so, reducing the LWOP sentence to statutory maximum of twenty years. To assist with your review, I have enclosed copies of various correspondences regarding this matter.

I strongly and humbly request your urgent attention in correcting this injustice. Thank you for your time and I eagerly await your response.

Respectfully,


Harry M. Lovelace

Cc: The Hon. J. Mark Hayes, II, Circuit Court Judge
Mr. Michael Morin, Assistant Solicitor
Mr. Holman C. Gossett, Attorney at Law
The Hon. Roger L. Couch
The Hon. Gary E. Clary
Mr. Ray E. Thompson, Attorney at Law
Mr. Gary P. Mallard, Attorney at Law

Mr. Robin File, Asst. Solicitor
7th Circuit Solicitor's Office
180 Magnolia Street
Spartanburg, SC 29306-2359

Harry M. Lovelace
Gaffney, SC 29340

April 14, 2011

Re: State v. Robert Koon 86-GS-11-289
Article 1, Section 24 SC Constitution (Victim's Bill of Rights) and pending Rule 29
(b) SC Rules Crim.Pro.

Dear Mr. File,

I am the victim in the March 28, 1986 Second Degree Burglary of Cudd-Lovelace Agency to which Mr. Koon (based upon my affidavit) has filed for a motion for a new trial based on after discovered evidence. Rule 29 (b) SCR Crim Pro.

First, I would like to formally request, as victim per Article 1, Section 24 paragraph 11 (of Victim's Bill of Rights) "a reasonable disposition in this case", that Second Degree Burglary (Nighttime) be reduced to by consent of the Solicitor's office to third Degree Burglary (no Nighttime). As based upon the facts of this case (and my affidavit), the state did not have any evidence to even allege a nighttime burglary occurred at all. It seems the Police Detective Richard Weaver, who signed the warrant made a mistake in alleging nighttime on our (Cudd-Lovelace) side of the building while the opposite side of the duplex (Stylette) did not allege nighttime. It is clear that the break-in of both sides of the duplex occurred at the same time, yet the alleged different offense date - 28th for Cudd-Lovelace (with nighttime) and 29th for Stylette (no nighttime).

Mr. Koon should have never been charged with Nighttime offense as there was no proof Aliunde of the Corpus Delecti as required by State v. Smith 493 S.E.2d 506 (SC App. 1997) and State v. Osborne 516 S.E.2d. 201 (1999). As the victim, I believe that I have a constitutional right per Art. 1, Sect. 24, Para. 11, to seek a "reasonable disposition" to have Mr. Koon's charge reduced to Third Degree Burglary 16-11-313. As a citizen, a Christian, and the victim, I believe it is my duty to request this reduction. I contend justice requires this reduction as offense occurred sometime between 5:00pm on March 28, 1986 (office closing time) and 9:00 am March 29, 1986 with no proof that it occurred at night.

Secondly, per Art. 1, Sect. 24, Para. 8 of Victim's Bill of Rights, I am formally requesting "reasonable access" to Solicitor's file and evidence in regards to the March 28, 1986 break-in of Cudd-Lovelace #86-GS-11-289. Specifically, I would like to be provided with the proof that this offense occurred at night (Corpus Delecti of Nighttime Burglary). Please mail this information to me at the above address.

ATRUE COPY
Brandy H. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.



Thirdly, per Art. 1, Sect. 24, Para. 3, I would respectfully request to be notified of any hearings and other proceedings in this case in writing ten days prior to the hearing. E.G. (Rule 29(b)).

Finally, I would like to formally request a conference with you to discuss the above matters at your earliest convenience.

Thank you for your time, and I await your response to this letter.

Respectfully,



Harry M. Lovelace

Cc: The Hon. J. Mark Hayes, II, Circuit Court Judge
Mr. Russ Racine, Attorney at Law

STATE OF SOUTH CAROLINA

COUNTY OF CHEROKEE

STATE OF SOUTH CAROLINA

Plaintiff,

v.

ROBERT H. KOON,

Defendant.

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

Case No.: 86-GS-11-289

**AFFIDAVIT OF DUE DILIGENCE IN
SUPPORT OF RULE 29(B) MOTION FOR
NEW TRIAL**

I, Robert Holland Koon, the Defendant in the above entitled action, hereby swear and attest to the following:

1. I am over 18, of sound mind, not under any intoxicants, and make the following statements under penalty of perjury.
2. On June 17, 1986, I pled guilty to four indictments, including 86-GS-11-289 for second degree burglary. I entered my plea of guilty not because I was in fact guilty of the alleged crime, but because I was facing the potential of a large amount of time if I was found guilty at trial.
3. The Gaffney Police told me that they had mud samples from the scene of a crime and had performed an analysis against mud samples taken from my shoes when I was arrested. The police told me the analysis showed the mud was the same. I later discovered that no analysis had been performed.
4. At the time of my guilty plea, my attorney, Mr. Cline, attempted to fully investigate the facts surrounding the incidents and to fully analyze the State's evidence against me. As part of Mr. Cline's due diligence, he filed a Rule 5/Brady motion requesting the State produce all material evidence against me and any exculpatory evidence tending to show my innocence.

A TRUE COPY
Brendy H. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.



5. Prior to and at the time of my guilty plea, Mr. Cline attempted to interview and investigate the charges against me by interviewing Mr. Cudd, one of the victims, and other employees of the business. Mr. Cudd and the other employees refused to speak with or cooperate with Mr. Cline, and therefore my attorney was not able to fully investigate the charges against me.

6. The other owner and victim of the Cudd-Lovelace Insurance Company burglary was Mr. Lovelace. Mr. Lovelace had died twelve days prior to the burglary. It was unknown to me and my lawyer that a second Mr. Lovelace worked at Cudd-Lovelace Insurance Company.

7. The Gaffney Police never told me or my attorney that there was a second Mr. Lovelace, Harry Lovelace, who worked at Cudd-Lovelace Insurance Company at the time of the burglary.

8. The Gaffney police never told me or my attorney that the burglary was discovered at approximately 9:00 am, after closing the prior day at 5:00 pm, despite my attorney filing a Rule 5 motion. As such, my attorney never discussed a strategy to reduce the second degree burglary to a third degree burglary, which does not require the nighttime element.

9. I did not know of the existence of Harry Lovelace at the time of my plea. I did not know that the police had suppressed evidence of the time at which the burglary was discovered because they alleged nighttime and did not disclose that the burglary was discovered at 9:00 am.

10. Had this information been provided to my attorney, I never would have pled guilty to a second degree burglary because the State could not prove beyond a reasonable doubt the nighttime element required by second degree burglary.

11. My attorney at the time exercised due diligence in an attempt to investigate all facets of the charges against me. However, my attorney was unable to learn of the time at which the burglary was discovered.

12. Subsequent to my plea and incarceration in the Department of Corrections, I became aware that the police had discovered the burglary at 9:00 am. This came about through my mother who attended the same church as the Cudd family. Through her interaction with relatives of Mr. Cudd who had died, my mother learned that the burglary was not discovered until approximately 9:00 am on March 29, and that the business had closed at 5 pm on March 28.

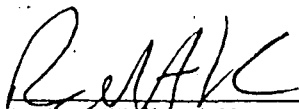
13. Once my mother relayed this information to me, I diligently began to investigate this new information. Through my investigation, I learned that there was another Mr. Lovelace who worked at the business at the time of the burglary.

14. As soon as I learned of Mr. Harry Lovelace's existence, I began to correspond with Mr. Lovelace through the mail and discovered that he possessed information critical to the facts surrounding the Cudd-Lovelace burglary.

15. I discovered that Mr. Lovelace was a witness to the matters surrounding the burglary and knew that the burglary was discovered at approximately 9:00 am. Thus, Mr. Lovelace is a witness whose testimony defeats the nighttime element of second degree burglary. Had I known of his existence and the evidence he possessed, I never would have pled guilty to second degree burglary. The only evidence regarding the time of the burglary is testimony of Harry Lovelace, and his testimony shows that the burglary could have occurred during daylight hours.

16. I have exercised due diligence over the years fighting this conviction. I have continually sought to obtain all the information and fully investigate these matters. Once I learned of and possessed the knowledge of Mr. Harry Lovelace's evidence, I filed a motion for a new trial based upon his affidavit.

I swear and affirm the foregoing is true.


Robert Holland Koon

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Sworn to signed before me this
27 day of June, 2011.



Notary Public of South Carolina

My commission expires 3-7-21



AFFIDAVIT

Robert Koon V. State of SC ~~Case No. 86-11-289~~
#86-ES-11-289

I, Harry M. Lovelace, hereby give the following statement freely and voluntarily that is true and correct, under oath:

I was an employee of Cudd-Lovelace Agency in Gaffney, SC in March 1986. I recall that a break-in occurred at the office location between the close of business on Thursday, March 28, 1986 and the opening of the office on Friday, March 29, 1986. The break-in was discovered by Mr. J.D. Cudd who was assisting the staff of the office at the time. Mr. Cudd is now deceased. My recollection of details about the break-in and subsequent investigation is diminished by the length of time since the event occurred and the fact that my father had passed away a couple of weeks before the break-in. There is some question as to when the break-in occurred and whether or not it would necessarily be considered a "night time" event. I can not present evidence to refute the allegation that it occurred at "night time"; however, I am familiar enough with the routine of opening and closing the office that I can provide a time frame which might, at the least, bring into question whether or not the break-in had to have occurred at "night". For years prior to and subsequent to the break-in, Cudd-Lovelace Agency had posted hours of operation of 9:00 am to 5:00 pm Monday, Tuesday, Thursday, and Friday, and 9:00 am to 12:00 pm on Wednesday. The staff normally arrived no earlier than fifteen minutes before opening (8:54 am), and typically closed the office no later than 5:15 pm. It would have been very unusual for an employee to arrive before 8:30 am or close later than 5:30 pm. I would confidently testify that the break-in could have occurred anytime between 5:30 pm March 28, 1986 and 8:30 am March 29, 1986. I believe that an examination of the investigation report will show an initial contact time from Mr. Cudd that is consistent with the time frame I have referenced. My position is that the break-in may very well have occurred during a time period *other than* "night time".

Further AFFIDAVIT sayeth not

Harry M. Lovelace

Harry M. Lovelace Daytime Phone: 864-838-1381

Cc: Henry D. McMaster, State Attorney General
Hon. J. Mark Hayes II, Judge

Sworn and Subscribed before me this 8th day of April, 2010.

My Commission expires:

Randa B. Arrow
Notary Public

11-22-2017

A TRUE COPY
Brandy H. McBee
CLERK OF COURT
CHEROKEE COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

STATE OF SOUTH CAROLINA

Plaintiff,

v.

ROBERT H. KOON,

Defendant.

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

Case No.: 86-GS-11-289

**AMENDED MOTION FOR NEW TRIAL
UNDER SCRCrimP 29(B)**

Defendant, by and through the undersigned attorney, hereby submits his Amended Motion for New Trial Under SCRCrimP 29(b).¹ For the reasons contained herein, Defendant respectfully requests that this Court grant Defendant's motion.

1. FACTUAL HISTORY²

In 1986, when he was only 19 years old, Defendant pled guilty to numerous charges including 86-GS-11-289 for second degree burglary and 86-GS-11-290 for second degree burglary. The second degree burglary charges were indicted by the grand jury as a second degree burglary due to the allegation that the burglary occurred in the nighttime, an essential element to upgrade burglary of a building (not a residence) to second degree. The factual basis for the charge of second degree burglary as alleged at the guilty plea was that the defendant broke into two businesses, Cudd-Lovelace Insurance and Stylette, with the intent to commit a

¹ Defendant filed an original pleading entitled "Rule 29(b) Motion for a New Trial – Based Upon After Discovered Evidence" on October 10, 2010. Defendant was unrepresented at the time and filed said motion *pro se*. As part of Defendant's motion, he requested the Court appoint him an attorney to assist with his motion. This Court appointed the undersigned attorney to represent Defendant.

² Defendant filed numerous motions, PCRs, and additional pleadings preceding the instant motion. For the sake of brevity, only the pleadings pertinent to the instant motion are discussed. For a more thorough discussion of the procedural history of this matter, please see Amendment to Application and Incorporated Memorandum of Law filed in the Family Court for the Seventh Judicial Circuit on September 22, 2005, in case 1993-CP-11-109, 260, and 280.

crime therein, during the nighttime. At his guilty plea, Defendant asserted to the court that he was not guilty but only pleading because he was facing a lot of time.

The Court: What would those witnesses tend to prove?

Defendant: That I wasn't there at the scene of the crime. I didn't do these.

...

The Court: Why are you pleading guilty then? You told me you were guilty. Are you guilty?

Defendant: I'm facing a lot of time; it just would be better for me to plead guilty.

The Court accepted Defendant's plea, and he received a ten year sentence on each of these burglaries, the sentences to run concurrently.

In 2004, the Supreme Court vacated Defendant's conviction on indictment 86-GS-11-290 for second degree burglary of the Stylette business. Specifically, the Supreme Court found that "the Stylette indictment fails to allege any aggravating factor, such as whether the burglary occurred at nighttime, as required by §16-11-312(A) or (B), and only alleges the elements of third-degree burglary." Koon v. State of South Carolina, Opinion No. 25798, April 5, 2004. The Supreme Court vacated that conviction because the State did not sufficiently allege the elements for a second degree burglary, instead only asserting enough for a third degree burglary. Unknown to Defendant at the time of the guilty plea was the fact that these two burglaries were discovered at the same time, approximately 9:00 am the following morning. Despite that fact, the police represented that Defendant burglarized Stylette on March 29, 1986, and Cudd-Lovelace Insurance Company on March 28, 1986, during the nighttime.

2. LEGAL STANDARD OF REVIEW

South Carolina Rule of Criminal Procedure 29(b) provides a defendant with a mechanism to challenge a conviction upon the discovery of new evidence. A successful motion will not

absolve the defendant of the crime of which he was convicted, rather a successful motion pursuant to Rule 29(b) simply grants the defendant a new trial. The state may reconvict the defendant, or the defendant may be acquitted. In essence, a Rule 29(b) motion, if successful, gives the defendant and the state the opportunity to re-litigate the case with the newly discovered evidence.

Rule 29(b) states:

(b) New Trials Based on After-Discovered Evidence. A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence; provided, however, that a motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

SCRCrimP 29(b) (As Amended through January 19, 2011).

The legal standard for a Rule 29(b) motion for a new trial based upon newly discovered evidence is well settled. "To prevail on a motion for a new trial based on after-discovered evidence, it is necessary to show that the evidence: '(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.'" State v. Hill, 359 S.C. 301, 597 S.E.2d 822, 830-831 (S.C.App. 2004), quoting State v. South, 310 S.C. 504, 507, 427 S.E.2d 666, 668-69 (S.C. 1993). See also Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (S.C. 1983); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (S.C. 1979). Furthermore, "a motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge..." State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 738 (S.C. 1979).

In addition to the standard of review for a motion for a new trial, it is also within the Court's power to correct a wrong via granting a new trial when the court finds that justice has not been done. "In South Carolina the trial judge has a broad discretion sitting as the thirteenth juror to grant a new trial when he is convinced, as obviously here, that justice has not been done in the trial." Watson v. Town of Pendleton, 294 S.C. 155, 363 S.E.2d 234, 235 (S.C.App. 1987). See Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990) ("A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law."). See also Peeler v. Town of Cowpens, 2010-UP-334 (SCCA).

In order for a court to accept a guilty plea, the factual basis for the proper charge must exist. The United States Supreme Court has stated that in a case where the Defendant asserts his innocence, a court must find a factual basis establishing the crime before a Defendant's guilty plea can be accepted. "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)(emphasis added). "In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it." Id. at 38. Thus, when a Defendant asserts innocence, a court must establish a factual basis for the charge. If a court fails to establish a factual basis for the charge, the remedy is a new trial. "Because Mastrapa challenged the sufficiency of the factual basis for his plea before our court and because we find that the

factual basis was insufficient, the appropriate remedy in these circumstances is to vacate the judgment and remand to the district court for a new Rule 11 proceeding.” United States v. Mastrapa, 509 F.3d 652, 661 (4th Cir. 2007); United States v. Carr, 271 F.3d 172, 180-81 (4th Cir. 2001).

3. ANALYSIS AND ARGUMENT

a. The newly discovered evidence.

The newly discovered evidence in this case is the existence of a witness/victim that was previously unknown. This witness, Harry Lovelace, provided testimony in the form of an affidavit swearing that the burglary of the Cudd/Lovelace Insurance Company was discovered at 9:00 in the morning. The significance of this revelation is that the underlying crime, burglary of a building, could not be enhanced to a second degree burglary because no evidence existed that the burglary occurred at nighttime. Mr. Lovelace swore that the business closed the prior day at 5:00 in the afternoon and the burglary was not discovered until 9:00 the following morning. This means that there were multiple daylight hours in which the burglary could have taken place. Thus, the State could not prove beyond a reasonable doubt that the burglary happened at night, and the burglary should never have gone to the grand jury as a second degree burglary. The defendant was indicted for and convicted of a crime for which the State could not establish the *corpus delicti*.

Twelve days prior to the discovery of the burglary of Cudd-Lovelace Insurance, Mr. Lovelace died. At the time, the Defendant believed that the only Mr. Lovelace who was involved in this matter was the deceased individual. The Defendant reasonably believed that the only Lovelace that was connected with the Cudd-Lovelace Insurance was the man who had died,

and had no reason to know of the younger Mr. Lovelace. Despite Defendant's Rule 5 motion, the police never disclosed to Defendant that a second Mr. Lovelace existed. Indeed, Mr. Harry Lovelace, who had just begun working at Cudd-Lovelace Insurance, had information regarding the time at which the crime was discovered – in this case a crucial, exculpatory fact.

Defendant's newly discovered evidence further consists of the findings of the Supreme Court that the Cherokee County police and Solicitor engaged in wrongful conduct during the time in which Defendant was charged and pleaded guilty to the second degree burglary. Such evidence of wrongdoing has been conclusively found by the Supreme Court in the Riddle case. In the Riddle case, the Supreme Court found that the police and Solicitor's Office failed to provide defendant Riddle with Brady information necessary to his defense. Specifically, a witness gave a second statement to police days before defendant's trial, and the statement the witness gave was inconsistent with a previous statement. Neither the police nor the Solicitor disclosed this fact to the defense. The South Carolina Supreme Court found this to be a Brady violation stating "Not only is it unrealistic to require petitioner and his attorneys to reinterview all officers and investigators in the days before the trial, but that is not what *Brady* requires. The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70, 73 (S.C. 2006). The same situation occurred in the instant case. Defendant filed a Rule 5/Brady motion, but the police did not disclose the evidence of the time at which the burglary was discovered. Moreover, the police did not disclose the existence of Harry Lovelace, a witness crucial to Defendant's case.

b. The evidence would probably change the result if a new trial is had.

Despite the fact that the State could not and did not establish the corpus delicti of the offense to which Defendant plead guilty, the court accepted Defendant's plea and Defendant was convicted of second degree burglary. "Before a defendant in a criminal case can be required to present a defense, the State must present some proof of the corpus delicti of the crime. That is, the prosecution must show the actual commission by someone of the particular offense charged. A conviction based on an extra-judicial confession by the defendant cannot stand unless corroborated by proof aliunde of the corpus delicti." State v. Smith, 328 S.C. 622, 493 S.E.2d 506, 508 (S.C.App. 1997)(citations removed). See also, State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Teal, 225 S.C. 472, 82 S.E.2d 787 (1954); State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996). In this case, the plea should have never been accepted because the State could not prove the nighttime element of second degree burglary, a necessary element.

Defendant's newly discovered evidence shows conclusively that the burglary may have been committed during daylight hours. The State has no evidence, nor has the State ever presented any evidence, that the burglary occurred at night. The only evidence that the State presented regarding the time of the offense was to elicit a statement at Defendant's guilty plea, by Defendant, admitting to committing a second degree burglary. However, Defendant also indicated to the plea court that he was only pleading because he was faced with a lot of time should he be convicted at trial. In effect, although not necessarily stated, Defendant entered an Alford plea. It is an insufficient factual basis for the State to rely on the Defendant's statement to establish the corpus delicti of the crime charged; the State must have alternative evidence. Even under Alford, when a defendant is pleading guilty, the State must present enough of a factual basis so that "the record before the judge contains strong evidence of actual guilt."

Alford at 37. As is evident by even a cursory review of the transcript of Defendant's guilty plea, the State utterly failed to establish the nighttime element of second degree burglary.

If Defendant has a new trial, the outcome would certainly be different. As with the Stylette burglary, the State has no evidence that this crime took place at nighttime. Rather, the facts that are established by the newly discovered evidence prove that there were plenty of daylight hours in which this crime could have occurred. The State cannot allege the corpus delicti of second degree burglary and can only allege the corpus delicti of third degree burglary. Thus, the State cannot get a grand jury indictment and cannot prosecute, much less convict, Defendant of second degree burglary. Where the State cannot establish the corpus delicti of a crime, the court has no subject matter jurisdiction to try a defendant for that particular crime. See State v. Smith. As such, Defendant could only be tried for third degree burglary, not second degree burglary. Thus, the newly discovered evidence would lead to a completely different conviction (if any) at trial.

c. The newly discovered evidence has been discovered since trial.

Defendant pled guilty to 86-GS-11-289 on June 17, 1986, in front of Judge McKown. Prior to the plea, counsel for Defendant attempted to interview Mr. Cudd regarding the facts surrounding the burglary. However, Mr. Cudd refused to cooperate with the Defendant's attorney. Thus, Defendant was left relying solely on the evidence provided to him by the Gaffney police regarding any interviews with Mr. Cudd. The Gaffney police did not disclose the fact that Mr. Harry Lovelace, the son of the recently deceased Mr. Lovelace, existed. The existence of Mr. Harry Lovelace did not become known to Defendant until Defendant's mother discovered Mr. Lovelace by inquiring around Gaffney. Defendant's mother spoke to members

of the Cudd family and they revealed that a Mr. Lovelace, Harry Lovelace, was still alive and had worked at Cudd-Lovelace Insurance at the time of the burglary. It was unknown to Defendant at the time of his plea that Harry Lovelace was a witness and had information regarding these events. This is due to the refusal of Mr. Cudd to cooperate with Defendant's attorney in the investigation of the matter, and the Gaffney police and Solicitor's failure to provide full disclosure of the facts of the case as required by Rule 5 and Brady v. Maryland.

Defendant did not discover the pattern of misconduct engaged in by the police and Solicitor's Office until much later than the guilty plea. Riddle v. Ozmint was decided in 2006, approximately twenty years after Defendant's guilty plea.

d. The newly discovered evidence could not have been discovered before trial.

The newly discovered evidence could not have been discovered before Defendant's guilty plea. As discussed *supra*, Defendant, through his attorney Mr. Kline (now deceased), attempted to investigate fully the facts surrounding the burglary of the Cudd-Lovelace Insurance building. However, Mr. Cudd refused to cooperate with the defense regarding the investigation. Mr. Kline did everything possible to discover the relevant facts surrounding the incident. This included filing a Rule 5/Brady motion. The knowledge of the Defendant at the time was that Mr. Lovelace, who Defendant believed to be the only Mr. Lovelace, had died twelve days prior to the burglary. Thus, Defendant did not attempt to interview Mr. Harry Lovelace, not knowing that he existed. It was unknown to Defendant that a second Mr. Lovelace had worked at the business.

It was excusable neglect that Defendant did not discover the existence of Harry Lovelace prior to the time of the plea. Mr. Lovelace, Sr., was a co-founder of Cudd-Lovelace Insurance and well known in the Gaffney area. His passing, twelve days prior to the incident, obviously

precluded any interview of him by Defendant. His son, Harry Lovelace, the newly discovered witness, had just begun to work at Cudd-Lovelace insurance and was unknown to Defendant. Moreover, Mr. Cudd refused to cooperate with Defendant, and Defendant was unable to discover that there was another Mr. Lovelace who worked at the business and had information regarding the burglary. Mr. Cudd was extremely upset over the burglary, and he refused to give a statement to Defendant's attorney. Moreover, despite efforts by Defendant's attorney, none of the victims of the burglary would discuss the matter with the defense. This left relying on the police and Solicitor as the only means of obtaining information regarding the burglary pursuant to their duty under Rule 5.

Defendant was duly diligent in his attempt to investigate the facts surrounding the burglary. Counsel for Defendant filed a Rule 5 motion seeking disclosure of evidence under the Rules of Court and pursuant to *Brady v. Maryland*. The requested Brady material should have included all notes regarding the existence of Harry Lovelace. Further, the Brady material should have indicated that the burglary was not discovered until approximately 9:00 am the following morning. The State's failure to provide this information constitutes a violation of Defendant's rights. The prosecution's failure to provide Brady material and the concealment of evidence must be considered in any analysis of due diligence on the part of the Defendant. See generally State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (S.C. 1999).

In addition to the Supreme Court's finding in *Riddle*, the Gaffney police used a false mud sample analysis to induce Defendant to plead guilty to an unrelated event. Indeed, the Gaffney police represented to Defendant that they had performed an analysis on mud samples taken from the scene of the crime and compared that to mud found on Defendant's feet. The police indicated that the analysis showed the mud was the same. However, the police never performed

an analysis. This evidence was used to convince Defendant to plead guilty to this charge which was included in the charges pled to during the June 17, 1986, plea. This further illustrates how the police at the time of this incident engaged in a pattern and habit of misrepresentation and concealment related to evidence and disclosure to Defendant.

e. The newly discovered evidence is material to the issue of guilt or innocence.

The newly discovered evidence is material to the issue of guilt or innocence. As discussed *supra*, Defendant has maintained that he did not commit this offense. Rather than risk a lengthy sentence if he was found guilty at trial, Defendant elected to plead guilty to this offense, along with several others. However, based upon the newly discovered evidence, it is clear that Defendant could not have been found guilty of second degree burglary in connection with the Cudd-Lovelace Insurance building. Indeed, the State could not establish the corpus delicti of second degree burglary. The State could only put forth evidence that the building was burglarized between the hours of 5 pm and 9 am. This means that there were several hours of daylight in which the crime could have occurred. Thus, the newly discovered evidence directly affects the issue of guilt or innocence -- Defendant could not be found guilty of second degree burglary because there was no evidence showing that the burglary occurred at night. It would be impossible for a fact finder to conclude beyond a reasonable doubt that the burglary of the Cudd-Lovelace Insurance building occurred at night. Thus, the newly discovered evidence is material to the issue of guilt or innocence, in essence proving innocence of second degree burglary.

f. The newly discovered evidence is not merely cumulative or impeaching.

1

The newly discovered evidence is not merely cumulative or impeaching. The evidence establishes that the burglary may have occurred during daylight hours. Thus, the newly discovered evidence directly contradicts a required element of the crime. In order to find Defendant guilty of second degree burglary, the State must prove *beyond a reasonable doubt* that the Defendant entered the business at night. It cannot do so. The evidence is not cumulative because the evidence/testimony of Harry Lovelace did not exist prior to Defendant learning of Harry Lovelace's existence. Further, the evidence is not impeachment evidence; it is direct evidence that refutes a charge of second degree burglary.

4. SUBSTANTIAL JUSTICE AND FAIRNESS

Defendant was 19 years old when he pled guilty to this charge. His attorney at the time counseled him regarding proceeding to trial on multiple charges and the potential to receive a lengthy sentence. Even though Defendant maintained his innocence to this charge, he pled guilty to these charges in exchange for a recommendation by the State of a ten year sentence. During the plea, the judge asked him why he was pleading guilty if he was not, in fact, guilty. Defendant clearly stated that he was pleading guilty because he was faced with a lot of time.

Considering the newly discovered evidence it becomes clear that there are substantial constitutional issues with the State's lack of evidence to support a conviction for second degree burglary. This crime should have been charged as a third degree burglary. Evidence of misconduct on the part of the solicitor and police during the time period in which these events occurred further weighs in favor of a finding that a charge of second degree burglary is improper. At most, the State had enough evidence to submit a charge of third degree burglary to the grand jury.

As a result of this conviction for second degree burglary, Defendant received a strike under the recidivist statute. At a subsequent sentencing hearing on an unrelated crime of which Defendant was convicted, this conviction for second degree burglary was used by the court to enhance Defendant's sentence to life without parole. Consequently, this conviction for second degree burglary will ensure that Defendant spends the rest of his life in prison.

Defendant is not without culpability for the crimes he committed. Defendant accepted the punishments that the courts levied against him. However, when one of those convictions is called into question, such as the case is here, it is manifestly unjust not to reconsider the facts and all the evidence available. This is true for any conviction, but becomes especially important when that conviction will keep a person incarcerated for their natural life. If that conviction is in any way improper, it must be rectified. Otherwise, there can be no confidence in our judicial system.

That is precisely the situation before the court in this matter. The Cudd-Lovelace burglary should never have been charged as a second degree burglary. It should have been charged as a third degree burglary. Had it been correctly charged, Defendant would not have had a strike, and would not have been sentenced to life without parole at a subsequent sentencing. This injustice must be corrected. It cannot be allowed to stand, and Defendant must get a new trial with the proper charge, third degree burglary, not second degree burglary.

5. CONCLUSION

Defendant's newly discovered evidence meets the standard to justify a new trial. The evidence clearly shows that the State did not have sufficient proof that the burglary of the Cudd-Lovelace Insurance Company occurred at night. Specifically, the newly discovered evidence

Cherokee

AFFIDAVIT

Personally appeared before me, judge of the Court, one Inv. R. F. Weaver
being duly sworn, deposes and says that Robert Holland Koon (name of defendant) did within this County
state on or about 3-28-86, violate the criminal laws of the State of South Carolina [or ordinance of the municipality
City of Gaffney] in the following particulars:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and
that such probable cause is based on the following facts:

The defendant, Robert Holland Koon, did break into the office of Cudd-Lovelace Insurance
Company located at 217 East Fredrick Street within the city limits of Gaffney, South
Carolina, [on or about March 28th, 1986] by kicking side door open and entering during the
nighttime with the intent to commit a felony therein.

Sworn to and Subscribed before me,

This 2nd day of April, 19 86

James T. Lowe (L.S.)
Signature of Issuing Judge

Address _____

Phone: _____

Richard Weaver
Signature of Affiant

Address Gaffney Police Department

Gaffney, S. C.

Phone: 489-8115

STATE OF SOUTH CAROLINA

ARREST WARRANT

COUNTY OF Cherokee

[or MUNICIPALITY OF City of Gaffney]

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE, COUNTY OR MUNICIPALITY, OR ANY CONSTABLE OF THIS COUNTY:

appearing from the above affidavit that there are reasonable grounds to believe that Robert Holland Koon
(name of defendant) did on or about 3-28-19 86, violate the criminal laws of the State of South Carolina [or ordinance
of the municipality of City of Gaffney] as set forth below:

DESCRIPTION OF OFFENSE

Burglary, 2nd Degree

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be
dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.

Done at Gaffney
on April 2nd, 19 86

James T. Lowe
Signature of Judge

FORM CONTINUES ON BACK
ORIGINAL

Returning defendant:

Robert Holland Koon

on the 2 day of April, 1986

Signature of Constable or Law Enforcement Officer

This warrant is certified for service in
County _____ Municipality _____ (Circle one)

The accused is to be arrested and brought before me
to be dealt with according to law.

Signature of Judge _____ (L.S.)

PRELIMINARY HEARING held by

Judge _____
on _____, 19____
with _____ Attorney for Defendant

Decision: _____

BAIL _____

Date Set _____, 19____

Judge _____

Amount _____

Surety _____

RETURN WARRANT TO:

ARREST WARRANT

No. B 540173

STATE OF SOUTH CAROLINA

County _____ Municipality _____ (Circle one)

City of Gaffney

against

Robert Holland Koon

Address: 510 East Jefferies Street

Gaffney, S. C.

Phone _____ SSN 540173-9182

Sex M Race W Height 5'7" Weight 145

DOB 8-9-66 DL _____

Offense Burglary, 2nd Degree

Code (or Ordinance) § 16-11-310

Date of Offense 3-28-86

Officer R. F. Weaver

Agency Gaffney Police Department

Date of Disposition _____

Disposition _____

Sentence _____

Co-Defendants _____

FILED IN OFFICE OF
CLERK OF COURT
SOUTH CAROLINA

APR 3 3 30 PM '86

KATIE W. BAINES
CLERK OF COURT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Robert H. Koon, Appellant.

Appellate Case No. 2011-200608

Appeal From Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2013-UP-216
Submitted March 1, 2013 – Filed May 22, 2013

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Deputy Attorney General David A. Spencer, both of
Columbia, for Respondent.

PER CURIAM: Affirmed¹ pursuant to Rule 220(b), SCACR, and the following authorities: Rule 29(b), SCRCrimP ("A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence."); *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) ("In order to prevail in this new trial motion, appellant must show the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching."); *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) ("The granting of a [motion for a] new trial because of after-discovered evidence is not favored, and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion." (internal quotation marks and citation omitted)); *id.* ("The credibility of newly-discovered evidence is for the trial court to determine."); *State v. Mercer*, 381 S.C. 149, 167, 672 S.E.2d 556, 565 (2009) ("On review, we may not make our own findings of fact."); *id.* ("The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.").²

AFFIRMED.³

FEW, CJ., and GEATHERS and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² As to any argument regarding alleged police misconduct: *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal."); *id.* ("Further, it is error for the appellate court to consider issues not properly raised to it.").

³ The South Carolina Supreme Court's order of October 27, 2010, barring Appellant from further collateral actions challenging his 1986 burglary convictions does not affect our consideration of this appeal because Koon filed this case in the circuit court on October 10, 2010.

AFFIDAVIT

Robert Koon V. State of SC ~~CR 11-513~~

86 CS 11289

I, Harry M. Lovelace, hereby give the following statement freely and voluntarily that is true and correct, under oath:

I was an employee of Cudd-Lovelace Agency in Gaffney, SC in March 1986. I recall that a break-in occurred at the office location between the close of business on Thursday, March 28, 1986 and the opening of the office on Friday, March 29, 1986. The break-in was discovered by Mr. J.D. Cudd who was assisting the staff of the office at the time. Mr. Cudd is now deceased. My recollection of details about the break-in and subsequent investigation is diminished by the length of time since the event occurred and the fact that my father had passed away a couple of weeks before the break-in. There is some question as to when the break-in occurred and whether or not it would necessarily be considered a "night time" event. I can not present evidence to refute the allegation that it occurred at "night time"; however, I am familiar enough with the routine of opening and closing the office that I can provide a time frame which might, at the least, bring into question whether or not the break-in had to have occurred at "night". For years prior to and subsequent to the break-in, Cudd-Lovelace Agency had posted hours of operation of 9:00 am to 5:00 pm Monday, Tuesday, Thursday, and Friday, and 9:00 am to 12:00 pm on Wednesday. The staff normally arrived no earlier than fifteen minutes before opening (8:54 am), and typically closed the office no later than 5:15 pm. It would have been very unusual for an employee to arrive before 8:30 am or close later than 5:30 pm. I would confidently testify that the break-in could have occurred anytime between 5:30 pm March 28, 1986 and 8:30 am March 29, 1986. I believe that an examination of the investigation report will show an initial contact time from Mr. Cudd that is consistent with the time frame I have referenced. My position is that the break-in may very well have occurred during a time period *other than* "night time".

Further AFFIDAVIT sayeth not



Harry M. Lovelace Daytime Phone: 864-838-1381

Cc: Henry D. McMaster, State Attorney General
Hon. J. Mark Hayes II, Judge

Sworn and Subscribed before me this 8th day of April, 2010.

My Commission expires:



Notary Public

11-28-2017

260 JUN 28 11:03

Affidavit of
Robert Holland Koon

86-GS-11-289

I, Robert Holland Koon, do hereby attest and affirm Under Oath, freely and voluntarily and truthfully,

(1) That prior to the June 17, 1986 Plea to 86GS11289 Second Degree Burglary myself and counsel Kline reviewed the Rule 5 and No Statement or Report existed to show that this crime was discovered at 9:00 am March 29, 1986, allegedly at Nighttime.

(2) Counsel offered No advice as to the State evidence in Re: to the Nighttime Element and conducted No investigation.

(3) Mr. Loyd H. Lovelace of Cudd-Lovelace Agency died before the offense occurred and it was not known to Applicant until 2006 that another "Mr. Lovelace" (Harry M. Lovelace) who was also an employee of Cudd-Lovelace Agency, even existed.

(4) Based upon conversations with Applicant's mother (prior to her death) she related conversations she had with members of the Cudd family that the offense was discovered on March 29, 1986 at approximately 9:00 am and then reported to the Police.

See Koon v. State 595 SE2d 456 (2004) (Opposite side of same duplex reversed by SC Supreme Court based upon lack of Nighttime Element).

At first (etc) PCR Hearings, it was believed both J.D. Cudd and "Mr. Lovelace" had passed. It was not known that a second "Mr. Lovelace" (Harry M. Lovelace) existed.

However, once that fact was ascertained, Applicant contacted Mr. Lovelace and on April 8, 2010 obtained his Sworn Affidavit which is attached hereto.

Re: Nighttime Allegation.

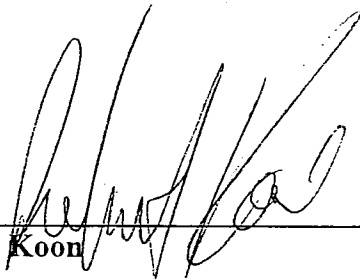
Applicant asserts that had he known this offense was discovered at 9:00 am March 29, 1986, he would have known that Police could not prove the Nighttime Element required to make this a Second Degree Burglary as opposed to a Third Degree Burglary, and he would not have pleaded guilty to the Nighttime Element. The Police did not inform Applicant or his Counsel that the offense was reported after 9:00 am on March 29, 1986, even though this was material to Nighttime Element and favorable to the accused. Counsel never investigated the Nighttime Element or advised client Re: Nighttime.

Mr. Lovelace's Statement was discovered within the last year as required by 17-24-45(C).

Under Oath,

S/

Robert Holland Koon



2010 JUN 28 11:03

2010 JUN 28 11:03

7

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

IN THE FAMILY COURT FOR THE
SEVENTH JUDICIAL CIRCUIT
CASE NO.: 1993-CP-11-109
1999-CP-11-260
1999-CP-11-280

ROBERT H. KOON,)
)
Plaintiff,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Defendant.)
_____)

**AMENDMENT TO APPLICATION
AND INCORPORATED
MEMORANDUM OF LAW**

2005 SEP 22 A 11:13

The Applicant, by and through counsel, would hereby amend his Application for Post Conviction Relief.

PROCEDURAL HISTORY

1. Applicant was indicted by the Cherokee county Grand Jury on April 21, 1986, for four (4) counts of Second Decree Burglary and one (1) count of Grand Larceny. (#86-GS-11-289, 290, 291, 292).
2. Applicant was represented by Harry Kline, Esquire (deceased); and Gary Paul Mallard, Esquire; and on June 17, 1986 pled guilty, in a plea recommendation before the Honorable Jonathan Z. McKown and was sentenced to four ten-year sentences concurrent to each of the Second Decree Burglaries. No direct appeal was filed.¹
3. Applicant filed a Post Conviction Relief February, 1987 alleging, inter alia, the plea was involuntary and the State withheld favorable evidence, and plea was coerced. The Respondent filed its Return and Motion to Dismiss

¹ 86-GS-11-290 was overturned by the Supreme Court (S.C.) on April 5, 2004. Koon v. State, 595 S.E.2d 456 (2004)

on October 9, 1987. A Evidentiary Hearing was held on October 26, 1987. Applicant was represented by Wade S. Weatherford, III. Following the hearing, the Honorable Dan F. Laney, Jr. issued an Order denying relief and dismissing the application. Koon v. State, 87-CP-11-103. Wade S. Weatherford, III did not file a Notice of Appeal.

4. On November 27, 1991, Applicant filed a Writ of Habeas Corpus that was construed as a P.C.R. Application, alleging, inter alia, he was not advised of right to appeal his first PCR (87-CP-11-103). This PCR (91-CP-11-539) was summarily dismissed November 27, 1992. A Notice of Appeal was filed (pro se); and the South Carolina Supreme Court remanded the PCR for a Evidentiary Hearing to determine whether the Applicant "knowingly and willingly waived his right to Appellate Review of his first PCR Application."² Koon v. State, (1993-MO-308)(filed October 12, 1993).
5. The 1991-CP-11-539 Remand Hearing pursuant to Order of the Supreme Court (93-MO-308) was initially scheduled October 25, 1994, but the Applicant was incarcerated in Virginia on misdemeanor offense, and the PCR was dismissed without prejudice by Order of the Honorable Thomas Ervin dated December 10, 1994. The Applicant was represented by Thomas Shealy of Cherokee County Public Defender's Office. (Same office the represented Applicant at his plea).
6. On March 14, 2001, the PCR 1991-CP-11-539 was heard before the Honorable Paul Short, Jr. (under revised case number 2000-CP-11-623).

² Under Austin v. State, 409 S.E.2d 395 (1991)

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² Under Austin v. State, 409 S.E.2d 395 (1991)

(E)

B. Allen Bullard, Esquire "Former Assistant Attorney General" was assigned to represent the Applicant. Applicant decided to proceed pro se.

The PCR Court addressed two issues:

- a. Subject matter jurisdiction; and
- b. Whether the Applicant knowingly waived his right to appeal the denial of the first PCR in 87-CP-11-103.

By Order dated August 10, 2001, the Court dismissed the application and denied relief.

7. A Notice of Appeal was filed, and the writ of certiorari was perfected by Andrew Grimes, Esquire of Summerville. The Supreme Court granted certiorari and reversed in part, affirmed in part; Koon v. State, 595 S.E.2d. 456 (April 5, 2004), and overturned the 1986-GS-11-290 Second Degree Burglary for lack of subject matter jurisdiction; and held Applicant was entitled to Appellate Review of his 1987 PCR allegations by the Supreme Court as he did not "knowingly" waive his right to appeal of his first PCR (1987-CP-11-103) and ordered the issues of that PCR to be fully briefed by appellate counsel Andrew Grimes, Esquire.
8. At that time, appellate counsel Grimes was informed by the State the 1987 PCR transcripts were "lost or destroyed" (by the State), and Mr. Grimes, therefore, moved for a "reconstruction hearing" pursuant to China v. Parrott, 162 S.E. 2d. 276 (1968), and Whitehead v. State, 574 S.E. 2d 200 (2002), stating that he was unable to brief the appeal without the 1987 transcripts.

(E)

AFFIDAVIT
of
VICTIM
04-08-10

The Supreme Court denied the "Motion to Remand for a Reconstruction of the 1987 PCR Record", holding that "In his brief, Petitioner failed to allege any specifics regarding the allegation (that the guilty plea was involuntary, and that the State withheld Brady material), id 595 S.E.2d. 457. (Footnote [7] Petitioner failed to include a copy of the 1987 Order (1987-CP-11-103) denying relief and has provided no reason why the Order could not be included in the Appendix).

- 4- 9. Thus, the Applicant has never been afforded appellate review of the substance of his 1987 PCR allegations as provided by 17-27-100 (South Carolina Code of Laws) and Austin v. State, 409 S.E.2d. 395 (1991), Odom v. State, 523 S.E.2d. 753 (1999).

ISSUE ONE

10. Applicant was denied "Appellate Review" of his 1987 PCR application due to a procedural irregularity in the PCR/Appellate process when Exhibit (A) (in 1991-CP-11-339)(revised as 2000-CP-11-623), which contained the 1987 PCR Order (referenced in Koon v. State, 595 S.E.2d. 456, 457 (2004) Footnote [7]) was not provided to appellate counsel to be made a part of the Appendix in the Austin review proceedings of 595 S.E.2d. 456 as mandated by S.C.A.C.R. 227(c),(e) which requires the Appendix contain the entire lower court record of the PCR court. And 17-27-70 (SC Code of Laws) states, "If the Application is not accompanied by the record of the proceedings challenged therein the Respondent shall file with its answer the record or portions thereof that are material to the questions

raised in the application. Based on violations of SCACR 227(c),(e) and 17-27-70 the Appellate has not received "His full bite at the apple" in re: to 1987 PCR.

ARGUMENT
(Timeliness/Successiveness)

11. As a initial matter Austin reviews are not subject to 17-27-45 (a) Statute of Limitations Odom v. State, 523 S.E.2d 753 (1999).

Secondly, this is not a successive application, but merely a continuation of the 1987 PCR proceedings and Appellate Review thereon, pursuant to Austin and Odom Guidelines. More cogently, the issue of a procedural irregularity in the PCR process through the lack of a complete record of the lower court id SCACR 227, Section 17-27-70, could not have been raised at the Mach 14, 2001 PCR Hearing, as those facts were not yet in existence, but rather came into knowledge of the Applicant after the decision in Koon v. State, 595 S.E. 2d. 456(2004). And, therefore 17-27-45(c) provided Applicant one year from the date of these "material facts not previously presented or heard that requires the vacation of the conviction or sentence; the application must be filed under this chapter (17-27-45(c)) after the actual discovery of these facts by the Applicant or the date these facts could have been ascertained by the exercise of reasonable diligence.

*See SCARCR 205 which states "Upon the service of the Notice of Appeal, the Appellate Court shall have exclusive jurisdiction over the appeal". Thus, SCACR 205 prevented the Applicant from raising these claims (and the jurisdiction of the PCR Court) until the appeal in Koon v. State, 595 S.E.2d. 495 (2004) was decided April 5, 2005.

12. As a related matter, it must be noted this matter was initially raised and preserved within four (4) months of the decision in Koon v. State, 595 S.E.2d. 456 (April 5, 2004) by the July 30, 2004 filing of Koon v. State 2004-CP-11-412.

(E)

On February 15, 2005 the 2004-CP-11-412 PCR was dismissed on SCRCP Form 4, Rev. 2/96. Since that form order did not state a dismissal with prejudice under South Carolina Law, that dismissal is assumed to be without prejudice.

Nevertheless, the South Carolina Supreme Court vacated this dismissal Form 4 Order as it did not purport with 17-27-80 Factual Findings and a Motion to Withdraw the Motion for Dismissal is pending before the Honorable J. Mark Hayes, II. The 2004-CP-11-412 is as a matter of law is still pending, and the 2004-CP-11-412 Factual Issues are amended into this PCR (as amended) which precedes the filing date.

- 13 In Aice v. State, 409 S.E.2d. 392 (1991), in re: to 17-27-90 held "Any new grounds raised in a subsequent application is limited to those grounds that could not have been raised in the previous application."

Thus, under the PCR Statute successive post convictions are forbidden unless a Applicant can point to a sufficient reason why the new grounds for relief were not raised or were not properly raised in previous applications Aice v. State supra.

- 14 It is beyond obvious that the violations of 17-27-70 (in not providing records material to PCR) and Rule 227(c),(e) (not providing entire lower court record in Appendix) could not have been raised in prior PCR Application or until after April 5, 2004 pursuant to SCACR 205 (a jurisdiction lied with Supreme Court). And is sufficient reason for this PCR which is not successive, but merely a continuation of the original Austin claim 91-CP-11-539, remanded by Supreme Court 93-MO-308. (given a revised case number 2000-CP-11-623) and not fully ruled upon due to incomplete Appendix barred review by Supreme Court in Koon v. State, 595 S.E.2d. 456 (2004). While Koon v. State, 595 S.E.2d 456 (2004) granted a Austin review, that review has yet to take place on the substance of the 1987 PCR issues.

- 15 Thus, this PCR is not successive under 17-27-90 Aice v. State, supra, Land v. State, supra. id 17-27-45(c), held statute of limitations do not apply to Austin claims.

ISSUE ONE

ARGUMENT

- 16 It is clear beyond doubt Applicant entered Exhibit (A) into the lower court record on March 14, 2001 (2000-CP-11-623, Appendix page 000019, line 6-25). First, Mr. Shealy was examined at 000024, line 7-20 (etc) – second, the 1987 PCR order contained in Exhibit (A) was used to examine 1987 PCR counsel Wade Weatherford appendix of 2000-CP-11-623 (page 115 of Exhibit A) at 000030 app. Line 3 – 000037 line 25. This conclusively shows that the 1987 PCR order inter alia, was contained within Exhibit (A) of the March 14, 2001 hearing. Yet, this Exhibit (A) – 1987 PCR order was not provided to the Supreme Court (see: Footnote 7 of 595 S.E.2d. 456 Koon v. State). This is a procedural violation of Rule 227(c),(e) which requires the Appendix contain the entire lower court record. In Washington v. State, 478 S.E.2d. 833 (SC 1996) held "procedural irregularities in PCR process denied Applicant due process." Likewise, Odom v. State, supra, held Applicant "entitled to one full bite at the apple", with PCR and Appellate Review. The prejudice from this gross procedural irregularity (incomplete lower court record) is that Applicant was denied a Reconstruction Hearing because the 1987 PCR order was "mysteriously" missing from the record.
17. Notwithstanding Exhibit (A) and its contents, 17-27-70 has a mandatory requirement that "Respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application." However, the State failed to do so.
18. Thus, had the State complied with the mandatory requirements of 17-27-70, the 1987 PCR Order would have been in the record and Applicant

would in all probability received a Reconstruction Hearing in Koon v. State; 595 S.E.2d. 456 (2004).³

Applicant asserts this "procedural irregularity" deprived him of due process. Washington v. State, supra, and denied him Appellate Review of his Austin claim, Odom v. State, supra.

1987 PCR ISSUES

Applicant plea was involuntary as the State withheld favorable evidence, Rule 5 and Brady material, that had Applicant been apprised of this evidence (a), he would not had plead guilty (b) been able to challenge the indictment as a product of false testimony to the Grand Jury pursuant to 17-19-20, 17-19-90, 17-19-100, and 14-7-1140 SC Code of Laws and its companion statutes relevant hereto.⁴

19. (A) Guilty plea was involuntary as the State withheld the fact that there was absolutely no evidence available to show that the offense was committed at nighttime in re: 86-GS-11-289 March 28, 1986 Burglary of CUDD-Lovelace Insurance Company Gibson v. State. (The withholding of this favorable evidence prejudiced the defendant's right to show that without any evidence at all, that the burglary occurred at nighttime a True Bill Indictment could not have been properly obtained, and that some type

³ It must be noted initial PCR counsel was B. Allen Bullard (Esquire) the former counsel for the Attorney General's Office, who at the March 14, 2001 PCR Hearing was back at the Attorney General's Office – 2000-CP-11-623 Appendix page 000007 (line 16-21) – and he (as counsel for Applicant) allowed the State to violate 17-27-70 (in not providing the lower court records) while Applicant asserts he was not entitled to effective assistance of PCR counsel, he was entitled to counsel "free from conflict" of interests. In addition to the above conflict, Mr. Bullard was subject to a malpractice/conspiracy to violate civil rights lawsuit Koon v. Slade, 1999-CP-11-489. (Applicant asserts these two conflicts affected the adequacy of his representation, and suggests collusion of government officials with the Attorney General's Office (i.e.) 17-27-70 violations inter alia. This is a procedural error in violation of 17-27-60 appointment of counsel).

⁴ While the Applicant recognizes under Austin v. State, supra, the Supreme Court would review the reconstructed record in this proceedings to determine if the 1987 PCR Order should be affirmed or reversed in regard to the Brady violation. Due to the procedural posture of this case, the Applicant respectfully request the court to make a factual finding as to whether or not a Brady violation occurred based on evidence and credibility of the witness at the hearing. Foye v. State, 335 S.C. 586 (1999)

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AFTER DISCOVERED
PROOF OF
CLAIM

of false testimony obviously was presented by State to obtain a indictment on this element when no evidence was available to support the indictment. Especially as the indictment was obtained in violation of State v. Capps with the prosecution officer as the sole witness before the Grand Jury. See: State v. Anderson.

More cogently, had defendant been apprised under Brady that no evidence existed to show the offense occurred at nighttime. Defendant would not have plead guilty to that element and would not have accepted package (plea).

(B) The guilty pleas to 1986-GS-11-289, 291, 292 were involuntary as there

was no evidence to show that the defendant committed these offenses: no witnesses, no fingerprints, no confession, no physical evidence or circumstantial evidence. Again, without any evidence to connect defendant to the offense, it is suspicious as to how the State obtained the indictment as a True Bill with no evidence to support its finding. Again, the prosecuting officer was the sole witness before the Grand Jury see Capps, and Anderson, supra.

20. More cogently, had the defendant been apprised under Brady that there was no evidence to connect him to these three (3) offenses, he would not have plead guilty, and he would have been able to challenge the manner in which the indictment was obtained (i.e.) by false testimony of the sole witness. In Evans v. State, 611 S.E.2d. 510 (2005) at 518, Footnote [7].

[11] Although this case involves the State Grand Jury, we similarly conclude that challenges to the legality and sufficiency of the process of a County Grand Jury also must be made before the jury renders a verdict in order to preserve the error for Appellate Review. 17-19-90, 14-7-1140 SC Code of Laws.

21. The State withholding of favorable evidence (that no evidence existed the 86-289 Burglary occurred at night, or that defendant committed 86-289, 291, 292) deprived him of the right to show this indictment process was

11/11/11
 Plaintiff's
 motion for
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13th offenses
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tainted, (i.e.) how can a True Bill be returned with no evidence to support offense.

More cogently, the defendant was induced to plead by fabricated evidence on "mud samples" on shoes that was represented as conclusive match by S.L.E.D. when no tests had been conducted. This is a Brady violation that rendered plea involuntary.

23. The (19 year old) Applicant had been informed by police that a conclusive match had been made between his shoes, crime scene, and stolen truck in that the mud from the crime scene existed in all three places and his shoe print was a positive match. This was the only evidence in 86-GS-11-291, 86-GS-11-292. Bill Willard/P&G Motors Office offense.

24. It is asserted that had the 19 year old Applicant (or his counsel) been informed the mud sample evidence was inconclusive (or unavailable), he would not have entered the plea. See State v. Kennerly, 503 S.E.2d. 214, Kyles v. Whitley, 514 U.S. 519 (1995): Rule 5, SC Rules of Criminal Procedures.

25. It is noted in 86-GS-11-289, 290 offense of CUDD-Lovelace and Stylette Offices:, the Stylette offense did not allege a nighttime element and was reversed by the Supreme Court in Koon v. State, 595 S.E.2d. 456 (2004).

26. The police alleged the Stylette and Cudd-Lovelace offenses occurred at the same time, this is supportive of the theory no evidence existed of the crucial nighttime element in either Stylette or Cudd-Lovelace offenses and had this been disclosed, no evidence existed to prove nighttime, he would not have plead guilty. Thus, there is a reasonable probability the result of the trial would have been different if the suppressed evidence had been disclosed to the defense. Strickler v. Greene, 119 S.Ct. 1936 (1999) See U.S. v. Bagley, 105 S.Ct. 3375 (1985) "Favorable evidence is material under Brady only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Gibson v. State, held that prosecution withholding of

EVIDENCE
NOW
AVAILABLE →

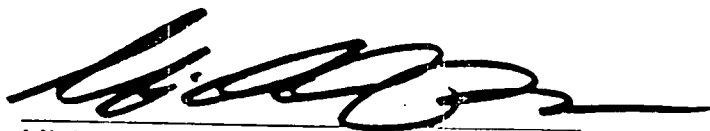
favorable evidence can render a plea involuntary, as it effects decision whether to plead or go to trial based on the evidence (paraphrased).

27. Applicant subject the prosecution's failure to disclose that (1) no evidence existed on 86-GS-11-289 that the offense occurred at nighttime would have cause him not to plead to Second Degree Burglary or accept the package pea of ten (10) years; (2) no evidence existed to place defendant at offenses 86-GS-11-289, 290, 291, 292; and (3) most crucially, that the State had no physical evidence of claimed mud samples that would connect him to the offense.

28. And the result of the proceedings would have been different U.S. v. Bagley, supra, as (A) he would have had a basis to challenge and quash the indictment as there was no evidence to support its true bill and (b) defendant would have plead not guilty and been acquitted.

RELIEF: New Trial.

Respectfully Submitted:



Michael R. Jeffcoat
MICHAEL R. JEFFCOAT,
ATTORNEY AT LAW, P.A.
407 West Main Street
Post Office Box 1860
Lexington, South Carolina 29071
Phone: 803-808-9600
Facsimile: 803-808-2240

ATTORNEY FOR THE
PLAINTIFF/APPLICANT

Lexington, South Carolina

September 19, 2005

NO EVIDENCE
HOW
AVAILABLE



Mr. Robin File, Asst. Solicitor
Cherokee County Courthouse
125 E. Floyd Baker Blvd
Gaffney, SC 29340

Harry M. Lovelace
31 Bo Lane
Gaffney, SC 29340
(864) 838-1381

March 30, 2011

Re: State v. Robert Koon 86-GS-11-289
Article 1, Section 24 SC Constitution (Victim's Bill of Rights) and pending Rule 29
(b) SC Rules Crim.Pro.

Dear Mr. File,

I am the victim in the March 28, 1986 Second Degree Burglary of Cudd-Lovelace Agency to which Mr. Koon (based upon my affidavit) has filed for a motion for a new trial based on after discovered evidence. Rule 29 (b) SCR Crim Pro.

First, I would like to formally request, as victim per Article 1, Section 24 paragraph 11 (of Victim's Bill of Rights) "a reasonable disposition in this case", that Second Degree Burglary (Nighttime) be reduced to by consent of the Solicitor's office to third Degree Burglary (no Nighttime). As based upon the facts of this case (and my affidavit), the state did not have any evidence to even allege a nighttime burglary occurred at all. It seems the Police Detective Richard Weaver, who signed the warrant made a mistake in alleging nighttime on our (Cudd-Lovelace) side of the building while the opposite side of the duplex (Stylette) did not allege nighttime. It is clear that the break-in of both sides of the duplex occurred at the same time, yet the alleged different offense date - 28th for Cudd-Lovelace (with nighttime) and 29th for Stylette (no nighttime).

Mr. Koon should have never been charged with Nighttime offense as there was no proof Aliunde of the Corpus Delecti as required by State v. Smith 493 S.E.2d 506 (SC App 1997) and State v. Osborne 516 S.E.2d. 201 (1999). As the victim, I believe that I have a constitutional right pur. Art.1, Sect. 24, Para. 11, to seek a "reasonable disposition" to have Mr. Koon's charge reduced to Third Degree Burglary 16-11-313. As a citizen, a Christian, and the victim, I believe it is my duty to request this reduction. I contend justice requires this reduction as offense occurred sometime between 5:00pm on March 28, 1986 (office closing time) and 9:00 am March 29, 1986 with no proof that it occurred at night.

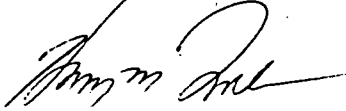
Secondly, per Art. 1, Sect. 24, Para.8 of Victim's Bill of Rights, I am formally requesting "reasonable access" to Solicitor's file and evidence in regards to the March 28, 1986 break-in of Cudd-Lovelace #86-GS-11-289. Specifically, I would like to be provided with the proof that this offense occurred at night (Corpus Delecti of Nighttime Burglary). Please mail this information to me at the above address.

Thirdly, per Art.1, Sect.24, Para. 3, I would respectfully request to be notified of any hearings and other proceedings in this case in writing ten days prior to the hearing. E.G. (Rule 29(b)).

Finally, I would like to formally request a conference with you to discuss the above matters at your earliest convenience.

Thank you for your time, and I await your response to this letter.

Respectfully,

A handwritten signature in black ink, appearing to read "Harry M. Lovelace", written in a cursive style.

Harry M. Lovelace

Cc: The Hon. J. Mark Hayes, II, Circuit Court Judge
Mr. Russ Racine, Attorney at Law

State of South Carolina)
County of Cherokee)
)

Court of Common Pleas
#06-CP-11-513

Robert Holland Koon,
Applicant
V.

)
)
) Supplement to Rule 60 (B) 1)
) SCRCF.
) Motion to Set Aside Judgement (filed 6/8/10)
)

State,
Respondent

The *Pro Se* Applicant would hereby move to supplement the Rule 60 (B)1) motion pending before this Honorable Court, as follows:

Applicant asserts based upon Mistake, Inadvertence, Surprise, or Excusable Neglect He is entitled to Relief from Judgment, as set forth,

* Rule 60 (B) (1)*

Applicant *Pro Se* asserts he committed a Mistake in failing to set forth the Affidavit of victim Harry M. Lovelace to the court during his PCR hearing January 18, 2008. (However, said Affidavit did not become available until April 8, 2010).

This Affidavit of Harry M. Lovelace shows that neither J.D. Cudd nor original "Mr. Lovelace" (Loyd H. Lovelace) was available at the time of trial and/or first PCR hearing October 1987. It was not discovered until recently that Loyd H. Lovelace and Harry M. Lovelace were two different persons. It was believed that "Mr. Lovelace" (Loyd H. Lovelace) was deceased, which he was. Harry M. Lovelace's Affidavit as set forth in the Rule 60 (B) 1) shows that the police did not (and could not) have probable cause to obtain an Arrest Warrant for Nighttime Burglary pur

an Indictment) that this offense occurred at Nighttime.

The Police/Solicitor knew that Break-In was not discovered until 9:00 am the following day. Thus, NO one can say this offense occurred at Night. This is Prosecutorial Misconduct.

(II) * Brady Violation *

The Police, by extension, knew when this crime was reported March 29, 1986 at 9:00 am, and in violation of Gibson v. State 514 SE2d 320 (1999) failed to disclose same. Thus, a material factual dispute exists to preclude Summary Judgment of this Brady Violation that would render Plea Involuntary if Proven pur Anderson v. Liberty Lobby 477 U.S. 242,248 (1986). This issue can not be summarily dismissed without a hearing as this evidence was in Possession of Police, Favorable to Accused and Withheld by the State and Material to Nighttime Element, and False Evidence in re: to Nighttime Element presented to Magistrate/Grand Jury.

(III) * Ineffective Assistance of Counsel *

Cronic v. US

The Affidavit of Mr. Lovelace opens the door to the third claim that trial counsel was ineffective pur Cronic v. US 104SCT 2039 (1984) as this Affidavit is Affirmative Proof trial counsel conducted No investigation into Nighttime Element in order to be able to advise his client whether (or not) to plea to Second Degree Burglary (Nighttime) or Third Degree (No Nighttime). This is proof in support of Original PCR Allegation 87-CP-11-103 that trial counsel failed to investigate. Pur 17-27-20 (A) 4) Interests of Justice requires Applicant be heard on this allegation.

* Affidavits*

In accord with Bowers v. Bowers, 403 SE2d 127 (SC App1991) I Movant (pur to Rule 60 (B)) seeking to have Judgment set aside has burden of presenting evidence proving facts essential to entitle him to Relief. Such evidence is usually proved by Affidavits. Id.

Applicant asserts that due to his *Pro Se* status coupled with his mistake in failing to present the Affidavit of the Harry M. Lovelace at the PCR with a citation of how the mistake of two "Mr. Lovelaces" caused confusion in the presentment of these issues, this Court should set aside the Judgment pur to Rule 60 (B) 1) and allow Applicant a Hearing upon,

(A) Prosecutorial Misconduct in setting forth Under Oath to obtain a (1) Warrant (2) Indictment that 86-GS-11-289 occurred at Nighttime when No Evidence has ever existed to show when this offense occurred.

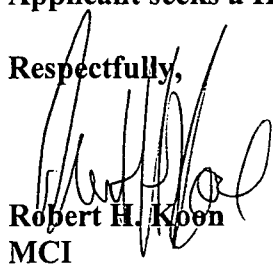
(B) Brady Violation,

Police withheld Favorable Evidence material to Nighttime Element rendering please involuntary pur Gibson v. State.

(C) Ineffective Assistance of Counsel pur Cronic v. US, Re: Failure to investigate Nighttime Element. Ard v. Catoe (SC 3/07).

Applicant seeks a Hearing upon the same.

Respectfully,


Robert H. Koen
MCI

McCormick, SC 29899

STATE OF SOUTH CAROLINA)
)
COUNTY OF Cherokee)

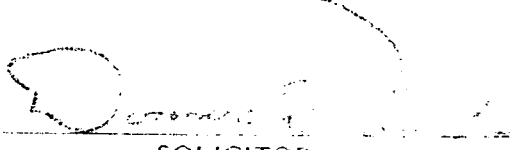
INDICTMENT FOR LARCENY

At a Court of General Sessions, convened on MAR 03 1997
the Grand Jurors of Cherokee County present upon their oath:

COUNT ONE — GRAND LARCENY

That Robert Holland Koon
did in Cherokee County on or about February 1, 1997
feloniously take and carry away the personal goods of South Carolina Probation, Parole
One Thousand and Pardon Service
of the value of more than ~~Two Hundred~~ Dollars, described as follows:
a Smith & Wesson revolver, 2 Motorola radios, 5 sets of handcuffs, 2 ID holders
and badges, approximately \$20, and one cell phone
with intent to deprive the owner permanently of such property.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 26, 2013

Mr. Robert H. Koon, #227826
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your letter

Dear Mr. Koon:

I received your letter about the same time I got a phone call from Harry Lovelace. He said Mr. Weaver's wife feels Mr. Weaver is not up to the stress right now to do anything. Your case is scheduled to be looked at by the Court of Appeals this month, but I do not know when they will decide it. It is too early to tell if I will petition for rehearing and go cert. if we lose. I will have to wait and see how the decision is worded.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/pcm

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT H. KOON,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the lower court erred in denying appellant's motion for a new trial on appellant's 1986 guilty plea to the Cudd-Lovelace burglary because a new witness/victim, Harry Lovelace, provided evidence that the burglary could have occurred in the daytime as opposed to the nighttime?

STATEMENT OF THE CASE

On June 17, 1986, appellant appeared before the Honorable Jonathan Z. McKnown in Cherokee County and pled guilty to four (4) counts of second degree burglary. A ten (10) year concurrent sentence was imposed on each charge. Gary P. Mallard, Esquire represented appellant on two (2) of the burglaries and Harry L. Cline, Esquire represented appellant on the other burglaries.

Appellant filed a Motion for a New Trial-Based on After Discovered Evidence on October 10, 2010 and Amended Motion for New Trial under SCRCrim 29 (B) dated June 25, 2011. A hearing was held on the motion on June 27, 2011, before the Honorable J. Mark Hayes, II. Appellant was present and was represented by Russell Racine, Esquire. Respondent was represented by Robin File, Esquire, Assistant Solicitor. Appellant testified in his own behalf and he presented the testimony of Gary Mallard, Esquire and Harry Lovelace.

On August 2, 2011, Judge Hayes issued an order denying appellant's Rule 29(b) motion.

This appeal follows.

ARGUMENT

The lower court erred in denying appellant's motion for a new trial on appellant's 1986 guilty plea to the Cudd-Lovelace burglary when a new witness/victim, Harry Lovelace, provided evidence that the burglary could have occurred in the daytime as opposed to the nighttime.

Appellant pled guilty to four (4) burglaries on June 17, 1986. Two (2) of the burglaries were on March 13, 1986, and Gary Mallard, Esquire represented appellant on those charges. The other burglaries occurred on March 28 and March 29, 1986, and Harry Cline, Esquire represented appellant on those charges. The March 28 burglary involved the Cudd-Lovelace Insurance Company. The March 29 burglary involved the Stylette Salon. Both businesses were in the same building. The affidavit in the arrest warrant for the Cudd-Lovelace burglary alleged that it occurred on or about March 28 and it occurred during the nighttime. The affidavit for the Stylette Salon alleged that it occurred on or about March 29 but it did not allege that it occurred in the nighttime.¹

At the guilty plea the solicitor told the court that its recommendation was for appellant to serve ten (10) years. (R. p. 168, lines 7-9). The Court asked appellant if he broke into the Cudd-Lovelace Insurance Company in the nighttime and he replied in the affirmative. (R. p. 172, lines 15-19). Later, however, appellant said he had some witnesses that would say he was not at the scene of the crime. The court then asked, "Why are you pleading guilty then? You told me you were guilty. Are you guilty?" Appellant replied,

¹ The Stylette Salon burglary conviction for second-degree burglary was vacated later because the indictment did not allege an aggravating factor such as nighttime. State v. Koon, 358 S.C. 359, 595 S.E.2d 459 (2004).

"I'm facing a lot of time; it would just be better for me to plead guilty." (R. p. 174, line 20-p. 10, line 17)²

The newly discovered evidence in appellant's case was the existence of a witness/victim that was previously unknown. This witness was Harry Lovelace.

At the hearing on the motion for a new trial pursuant to Rule 29 (b), SCRCrimP Harry Lovelace testified that his father and J. D. Cudd were the founding partners of the Cudd-Lovelace Insurance Company. Mr. Lovelace passed away about two weeks before the 1986 burglary. But the son, Harry Lovelace, said he was working in the business during the time of the burglary. He testified that the normal business hours were from 9 AM to 5 PM. Their office was in a triplex and next door was the Stylette Salon. The Stylette generally opened at 10 AM. He and Mr. Cudd had no idea a burglary occurred prior to Mr. Cudd's arrival on the morning of March 29. (R. p. 41, line 2 – p. 46, line 17). Mr. Lovelace said to his knowledge no one could say the burglary occurred at night. It was possible that the burglary occurred during the daylight hours. (R. p. 51, line 23 – p. 52, line 15). He said he sent a letter to the solicitor asking that appellant be sentenced for third degree burglary as opposed to second degree burglary because he did not think there was sufficient evidence to show that it occurred in the nighttime. (R. p. 54, lines 2-12).

Gary Mallard, Esquire testified that he represented appellant on the two (2) earlier burglaries that occurred on March 13 or 14 of 1986. (R. p. 20, line 7 – p. 21, line 21). He said the plea was a package deal on all four (4) burglaries for ten (10) years. (R. p. 24, lines

² The record does not indicate a factual basis for the Cudd-Lovelace burglary occurring in the nighttime. See, Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

8-16). Appellant negotiated the plea with the police even though he indicated he was not guilty. (R. p. 24, line 24 – p. 25, line 4). Mr. Mallard said the Gaffney Police misrepresented to appellant that they had conducted an analysis of mud found on his shoes with mud found at the crime scene and that it had matched when that was not true. He also said there was an incentive by the Gaffney police to change crimes that could have occurred on the same day on separate days. This is because S.C. Code §24-21-640 forbids parole being granted to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction for violent crimes. (R. p. 25, line 5 – p. 28, line 15) The police had also talked to appellant after he had retained Mr. Mallard and a letter was written to the police not to discuss the charges that appellant was being represented on. (R. p. 29, line 17 – p. 31, line 3). Mallard testified that he was present at appellant's guilty plea along with Harry Cline, Esquire who represented appellant on the Cudd-Lovelace burglary. He said Mr. Cline had since passed away. (R. p. 31, lines 7-17).

Appellant testified that the two (2) burglaries that occurred around the 13th and 14th of March were discovered at the same time and both were right next door to each other. But the police charged one on the 13th and the other on the 14th. (R. p. 72, line 11- p. 74, line 15). They did the same thing by charging different dates on the Cudd-Lovelace and the Stylette Salon burglaries that were also next door to each other and were discovered at the same time. (R. p. 78, lines 2-20). How could the police say they were on different days and that Cudd-Lovelace was in the nighttime and Stylette was not?

Appellant testified that he was told he would get ten (10) years if he pled guilty to the four (4) burglaries and he would get forty (40) if he did not. (R. p. 84, lines 19-25). His attorney, Harry Cline, did not get to interview witnesses of the Cudd-Lovelace burglary.

Mr. Lovelace had passed away and Mr. Cudd was too upset to talk. (R. p. 86, line 14 – p. 87, line 2). Appellant said he pled guilty because he did not want to risk incurring a lot of time. (R. p. 94, lines 1-8; R. p. 95, line 9 – p. 96, line 19).

Appellant said at the time of his plea he did not know that Mr. Lovelace had a son named Harry Lovelace and that he worked at the insurance company. (R. p. 100, line 10 – p. 101, line 5). He first learned of Harry Lovelace through some information his mother gave him before she passed away. There no longer was a Cudd-Lovelace Insurance Company. It had merged with the Coral Insurance Company. It took a while, but he finally found Harry Lovelace. He began to correspond with him. He found out that the burglary was discovered at 9:00 AM and it was on the same day as the Stylette burglary. (R. p. 102, line 24 – p. 106, line 7). Appellant also testified that what got him into looking at the facts and circumstances of his case was when he read Riddle v. Ozmint, 369 S.C. 39, 631 S.E. 2d 70 (2006) which came into his possession in 2009. The Riddle case dealt with police and prosecutorial misconduct in Cherokee County because of a failure to disclose evidence. (R. p. 110, line 17 – p. 115, line 11).

Appellant testified that he received Harry Lovelace's affidavit in the summer of 2010. He then filed his Rule 29(b) motion within 60 to 90 days. (R. p. 122, line 24 – p. 123, line 7). Rule 29(b) states that "A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence." The legal standard for a Rule 29(b) motion is that the evidence:

- (1) Would probable change the result if a new trial is had;
- (2) Has been discovered since the trial;
- (3) Could not have been discovered before trial;
- (4) Is material to the issue of guilt or innocence; and

(5) Is not merely cumulative or impeaching.

State v. South, 310 S.C. 504, 507, 427 S.E. 2d 666, 668-669 (1993); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

In addition to the above standard of review for a motion for a new trial, a trial judge has broad discretion, sitting as 13th juror, to grant a new trial when he is convinced that justice has not been done. Watson v. Town of Pendleton, 294 S.C. 155, 363 S.E. 2d 234 (1987). Also, when a defendant asserts his innocence at a guilty plea the court has to find a factual basis for the plea. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

The newly discovered evidence in this case was the existence of Harry Lovelace who was not known to appellant. He had knowledge that the Cudd-Lovelace Insurance Company closed at 5:00 PM and opened the next morning at 9:00 AM when the burglary just as easily have occurred in the daytime as opposed to the nighttime. The existence of Harry Lovelace and when the burglary was discovered as well as when the business closed the day before was never disclosed to appellant by the solicitor or the police. A guilty plea "cannot be truly voluntary unless the defendant possesses and understanding of the law in relation to the facts." McCarthy v. U.S., 394 U.S. 499, 89 S. Ct. 1166, 1171 (1969). What determines the validity of a guilty plea "is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 369 (1985), (citations omitted). Appellant could not make an intelligent choice among alternative actions open to him because he did not know of Harry Lovelace and when the burglary was discovered.

- (1) The evidence in this case would probably change the result if a new trial is had.

There was no factual basis presented in this case to show that the Cudd-Lovelace burglary occurred in the nighttime. "A conviction based on an extra-judicial confession by the defendant cannot stand unless corroborated by proof aliunde of the corpus delicti." State v. Smith, 328 S.C. 622, 493 S.E. 2d 506, 508 (Ct. App. 1997); State v. Williams, 321 S.C. 381, 468 S.E. 2d 656 (1996). A jury could not convict appellant for second degree burglary because there is no proof beyond a reasonable doubt that the crime was committed in the nighttime. The State has to prove every element of crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979). The newly discovered evidence would change the result if a new trial was held.

- (2) The newly discovered evidence has been discovered since trial.

Plea counsel tried to talk to Mr. Cudd about the burglary but he would not cooperate. There was no disclosure that Harry Lovelace existed. Thus, it was not known at the time of the plea that Harry Lovelace was a witness and had information surrounding the burglary time frame.

- (3) The newly discovered evidence could not have been discovered before trial.

As discussed above, appellant's attorney could get no information from Mr. Cudd because he refused to cooperate. Appellant only had knowledge that Mr. Lovelace had died almost two weeks before the burglary. He had no knowledge that a Harry Lovelace existed and that he worked at the insurance company at the time of the burglary. This case arose around the same time as the case of State v. Riddle, 291 S.C. 232, 353 S.E. 2d 138 (1987), which was also out of Cherokee County. The Court subsequently found in Riddle v. Ozmint, 369 S.C. 39, 631 S.E. 2d 70 (2006), that the solicitor's office in that

county “maintained an unusual ‘open file’ policy in that they removed not only work product, but also ‘other documents on a case-by-case basis.’” 369 S.C. at 46, 631 S.E. 2d at 74. So there’s no reason to know what was in the solicitor’s file concerning appellant’s case. Harry Cline, Esquire appellant’s attorney on the Cudd-Lovelace burglary is deceased and his file could not be found. At the time of the Rule 29(b) hearing, the current solicitor stated that he could not locate Detective Weaver who signed the affidavits on the Cudd-Lovelace and the Stylette burglary arrest warrants. (R. p. 131, line 17 – p. 132, line 3). Appellate counsel, as an officer of the court, would like for the court to know that Detective Weaver has been located. In the interest of justice and because appellant is serving a sentence of life without parole, this court may wish to remand this case for the limited purpose of finding out what Detective Weaver’s testimony is as it relates to this case.

(4) The newly discovered evidence is material to the issue of guilt or innocence.

The newly discovered evidence in this case shows that the Cudd-Lovelace burglary occurred between the hours of 5:00 PM and 9:00 AM. That fact casts serious doubt as to whether the burglary occurred in the nighttime which was an essential element to the crime of second degree burglary to which appellant was charged as committing. This newly discovered evidence is material to the issue of guilty or innocence.

(5) The newly discovered evidence is not merely cumulative or impeaching.

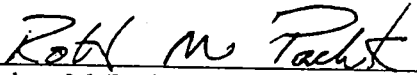
The newly discovered evidence establishes that the burglary may have occurred during the daylight hours. That is contrary to the charge of second degree burglary which requires it be in the nighttime. The evidence is not cumulative because the evidence and testimony of Harry Lovelace did not exist prior to appellant’s hearing of the witness’s

existence. Also, the evidence is not impeachment evidence as it is direct evidence that reflects the charge of second degree burglary.

CONCLUSION

Appellant's motion for a new trial should be granted or his case should be remanded to obtain the testimony of Detective Weaver.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

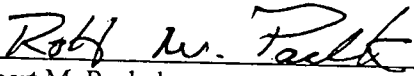
ATTORNEY FOR APPELLANT

This 20th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20, 2012


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County

J. Mark Hayes, II, Circuit Court Judge

THE STATE,

RESPONDENT,

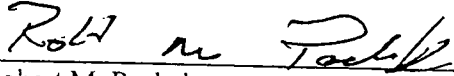
V.

ROBERT H. KOON,

APPELLANT

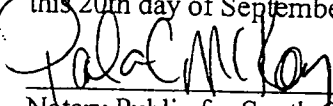
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of September, 2012.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

The Supreme Court of South Carolina

Robert Koon, Petitioner,

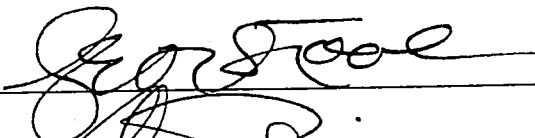
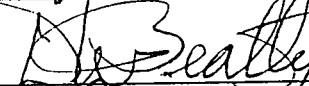
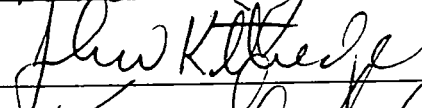
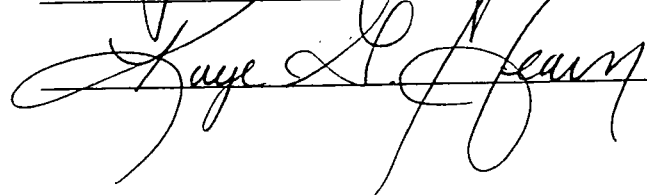
v.

State, Respondent.

Appellate Case No. 2014-001266

ORDER

This matter is before the Court on a petition for a Writ of Habeas Corpus dated June 2, 2014. The petition is denied. *See Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998) (holding the petitioner must allege a constitutional violation which constitutes a denial of fundamental fairness shocking to the universal sense of justice); *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998) (holding the petitioner has the burden of establishing a prima facie case showing he is entitled to relief).

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
June 26, 2014

cc:
Robert Holland Koon, 00227826

IN SOUTH CAROLINA SUPREME COURT

CHEROKEE COUNTY GENERAL SESSIONS
1998 GS-11-650

HONORABLE JOHN C. HAYES III

2014-1266

ROBERT HOLLAND KOON,

PETITIONER

v.

THE STATE,

RESPONDENT

WRIT OF HABEAS CORPUS IN THE ORIGINAL JURISDICTION OF THE S.C. SUPREME COURT

OVERVIEW

The **Prose** Petitioner would respectfully move this honorable court to grant a Writ of Habeas Corpus to effect his **immediate release** pursuant to ART v. SCCT S. SC Constitution, where his 1998 Life (LWOP) sentence pursuant to 17-25-45 'Two Strike Law' as discussed in Koon v. State 643 SE2d 680 (2007) is based upon prior convictions that were obtained in **clear** violations of his U.S. Constitutional Rights 5,6,14 Amendments as the pleas were **not** knowingly and voluntarily made pursuant to Boykin v. Alabama 395 US 238 (1969) and were in violation of NC v. Alford 400 US 25 (1970) and the State did not and cannot establish *Corpus Delecti* upon Petitioner's Second Strike 86-GS-11-289 Burglary Second Koon v. State 595 SE2d 456 (2004) and that he can meet (5) elements enunciated in Gibson v. State 495 SE2d 426 (1998) where, clearly his PCR proceedings, now exhausted, were "fundamentally flawed" to show that the procedural defects in the PCR proceedings denied Petitioner due process of law Washington v. State 478 SE2d 833 (1996) and that the use of said prior convictions (1986) to impose Life Without Parole sentence being obtained in violation of Petitioner's U.S. Constitutional rights, that "evaded and

eluded" correction in the PCR process would constitute a "denial of fundamental fairness shocking to the universal sense of justice" as set forth in Butler v. State 397 SE2d 87,88 (1990) and "should shock the conscience of this court" to the extent that the Writ of Habeas Corpus should issue, and the relief should be Petitioner being released based on 17 years he has served on 1998 Second Degree Burglary and Grand Larceny, as but for use of prior convictions he would have maxed out the maximum sentence allowed by 16-11-312(b) (15 years) and Grand Larceny (5 years) which would be 20 years and the Petitioner has no other remedy at law but eh Writ of Habeas Corpus. Gibson v. State Supra

PROCEDURAL HISTORY

PLEA (1.) - 1986 CONVICTIONS –

Appended to this Writ of Habeas Corpus is the 1986 guilty plea transcripts in which the Petitioner, then 19 years old, entered a plea of guilty to 86-GS-289,290,291,292 Second Degree Burglary (Exhibit A). At page (9) of the plea it is clear that the Petitioner was **not** advised of his right to confront his accuser as mandated by Boykin v. Alabama Supra. and Moore v. State (2012). In Moore, it was stated that the waiver of the right to jury trial, right to confront accuser and the right against self-incrimination **must be "on the record"** see Johnson v. Zerbst 304 US 458 (1938). "A waiver of constitutional rights cannot be presumed from a **silent** record". Petitioner asserts that the failure to advise 19-year old of his right to confront his accuser rendered pleas involuntary as a **matter of law**. In addition, and perhaps even more 'shocking', is at page 10 of the plea Petitioner asserted his innocence to the offenses he was pleading to stating: "I didn't do these...".

The Court: "Well, why are you pleading guilty?"

Defendant: "Because I am facing a lot of time".

At that point, pursuant to NC V. Alford Supra, the court was required to establish a factual basis for the

plea when faced with a Defendant who is pleading guilty but at the time asserts his innocence.

The trial court **failed** to establish a factual basis for the plea or Corpus Delicti of 86-GS-11-289 offense.

In South Carolina, a person may plead to charges he is not guilty of but court must establish a factual basis for the plea. _____, Accord NC v. Alford. The court nevertheless accepted guilty plea and sentenced Petitioner to 10 years on each offense.

P.C.R. II

Petitioner within six months filed a P.C.R. 87-CP-11-103 appended to the Writ as Exhibit (B) in which he alleged ineffective assistance of counsel. Involuntary plea (Inter Alia) it must be noted that this prose P.C.R. was filed without benefit of guilty plea transcripts. See Exhibit (A).

In fact, P.C.R. counsel Wade S. Weatherford III proceeded to P.C.R. **without the benefit of the 1986 plea transcripts**, as the plea transcripts were **not** transcribed until January of 1992; some four years and three months after the October 1987 P.C.R. hearing, and only after Petitioner had filed a second P.C.R. pur. to Austin v. State 409 SE2d 395 (1991) and only **then** was 1986 Plea transcribed to be provided in appendix in Koon v State 93-MO-308, which **remanded** the Attorney General "shall provide the entire lower court record upon making a return to the P.C.R.". The State failed to do so, ass the plea transcripts were vital to the assessment of not only the issues raised *pro se* but **vital** to P.C.R. counsels ability to amend P.C.R. pursuant to Rule 71.1(d) SCRCP and **vital** to P.C.R. counsels ability to represent his client so that he could have his proverbial "one bite at the apple" and **vital** to P.C.R. court to be able to rule on the issues. In this case, the State "hid the apple from the Petitioner, his P.C.R. counsel, and the P.C.R. court" and committed an act of fraud and barratry: by concocting a proposed P.C.R. order that stated that P.C.R. court had an opportunity to review the lower court records which P.C.R. counsel for State

knew the court did not review the plea transcripts as he did not provide them **to be reviewed**. This constitutes barratry and fraud by the State. Donald J. Zelenka.

In January 1992 when the 1986 plea transcripts transcribed for 93-MO-308 Austin appendix the 1987 P.C.R. transcripts were **not** transcribed as require by Rule 227 SCACR and after five years from the P.C.R. hearing in October 1987 they were destroyed.

Eight years later after 93-M)-308 order remanding the case back for an Austin v State hearing, Petitioners P.C.R. counsel B. Allan Bullard asked to be relieved and went back to work at the Attorney General's office and Petitioner proceeded to represent himself. P.C.R. denied relief.

In Koon v State 595 Se2d 456 (2004) the S.C. Supreme Court granted certiorari (Chief Justice Toal dissenting in grant of certiorari) and held that 'Petitioner did **not** knowingly and voluntarily waive his right to appellate review of his P.C.R., but **denied** his motion to remand case to reconstruct 1987 P.C.R. hearing' as the 1987 P.C.R. order was not made part of the appendix (as required by Rule 227) one of the four 1986 were **reversed** ass the indictment did **not** allege essential element of nighttime to cause the offense to be a 16-11-312 (b) Second Degree Burglary. 595-SE2d-459 Id. (Stylette burglary) 286-GS-11-290 Exhibit (C) Case History and 06-CP-11-513

Rule 29(b) Motion for a new trial III

Appended hereto are transcripts and affidavits (Exhibit D) on June 27, 2011a hearing was held upon a motion for a new trial based on after discovered evidence pur. to Rule 29 (b).

The victim of the Cudd-Lovelace burglary Harry Lovelace testified that there was no evidence that the offense occurred at night, only that it occurred between 5:00pm and 9:00 am March 29, 1986 and that the Cudd-Lovelace and Stylette offices were in a **duplex building** and discovered at the **same time**. This

relates back to the trial court's failure to establish a "substantial factual basis for the plea when Petitioner asserted his innocence at the plea".

In failing to do so, the plea court allowed the State to prosecute the petitioner when they could not, did not, and have not established the *Corpus Delecti* of a nighttime burglary (86-GS-11-289) State v Epes, 39 SE2d 769 (SC 1946) as no proof was ever adduced that the crime occurred at night vis-à-vis no evidence to establish *Corpus Delecti* of **nighttime** burglary. In fact, the police detective Richard Weaver **most probably** presented false evidence to magistrate that the offense occurred at night Riddle v Osment 369-SE-39 (2006) and solicitor failed to correct that false representation in how a warrant was obtained with no evidence of nighttime. The SC Court of Appeals affirmed State v Koon 2013 UP 216 (2013), however the Court of Appeals at FN2 did not address lack of evidence as to nighttime in relation to police/ prosecutorial misconduct issues. The Cudd-Lovelace offense is deemed to be Petitioner's **second** strike 643 SE2d 680,682. Id. And it is submitted an inherently and fatally flawed conviction and should not be allowed to be considered a "strike".

1998 Life Without Parole Sentence IV

After Petitioner was convicted on 1997 Second Degree Burglary in which the 1986 burglaries were used as an element of the offense pur. 16-11-312 (b) (2) that 'defendant had two or more prior burglary convictions the State used **same** 1986 burglaries (that had been used to enhance his offense pur. to 16-11-312 (b) (2) to **again** enhance his sentence from zero to fifteen years pur. 16-11-312 (c) to Life Without Parole pursuant to 17-25-45(b) a/k/a 'three strike law' State v Koon 2000 UP 291 (CT App. 2000) Exhibit E.

It must be noted that this type of **double enhancement** was held to be violative of the double

jeopardy prohibition of using the **same fact** to enhance offense then enhancement of the sentence.

Simpson v US 98 SCT 909 but State v Washington 526 SE2d held that such double enhancement to be proper, which is contrary to Simpson v US SUPRA and Washington opinion makes no reasoned decision as to **why** it would not be double enhancement pur. to Simpson. This court can and should reverse Washington and overturn Petitioner's LWOP. Nevertheless, **but for the 1986 convictions**, Petitioner could have only been sentenced to zero to twenty years on the 1998 burglary 2nd and grand larceny convictions, at this point Petitioner has served seventeen years, and would be entitled to **immediate release**.

Relief V

Petitioner for the purposes of this Writ of Habeas Corpus does not seek to have the 1986 convictions vacated but merely seeks a judicial decree from the SC Supreme Court that they **shall not be used to enhance his 1998 sentence** to Life Without Parole as they were obtained upon a plea that was in violation of both Boykin v Alabama and NC v Alford and that the state failed to establish *Corpus Delecti* of a nighttime burglary on Petitioner's second strike (Cudd-Lovelace offense) 643 SE2d 680 Id.

Additionally, **except for** procedural irregularities in the P.C.R. process that denied Petitioner due process of law these convictions which are themselves fundamentally flawed would not have been able to be used as predicate convictions to uphold the 1998 LWOP sentence or would void the LWOP based upon double enhancement violation. Simpson v US and overturn State v Washington.

Procedure VI

Pursuant to the procedure established in Johnson v Catoe 548 SE2d 587 (SC2001) this court **may** wish to remand matter to the circuit court for a referee to establish any factual questions in dispute or as a

matter of law.

Conclusion VII

Petitioner being required to serve the rest of his **natural life** in prison for a Second Degree burglary that was **double enhanced** from zero to fifteen years to Life Without Parole based on prior convictions that were obtained in an **involuntary plea** (Boykin) where no factual basis was established to accept plea (NC V Alford) and no *Corpus Delecti* established by the State (State v Epes) and these **major** constitutional violations "**evaded** judicial correction" based on procedural irregularities in P.C.R. process has resulted in a miscarriage of justice and denied Petitioner due process of law (Washington v State) including but **not** limited to failure of P.C.R. court to have access to 1986 plea transcripts while the Austin appeal was ongoing (93-MO-308) and denial of reconstruction hearing due to lack of P.C.R. order in record. These facts, *Inter Alia*, among other things constitute a "denial of fundamental fairness shocking to universal sense of justice" (Butler) and these fatally flawed convictions cannot be used as the foundation of a natural life sentence under 17-25-45(b) (three strike law) nor should court allow the double enhancement.

Relief

Thus the Petitioner is entitled to be resentenced pur. 16-11-312 (c) zero to fifteen years and zero to five years for grand larceny (less \$5,000) and after seventeen years served is entitled to immediate release. (Fay v Noia).

I verify these facts,

Proof of Service

I hereby attest and affirm true copy was served upon Alan Wilson, Attorney General Office

P.O. Box 11549, Columbia, SC 29211 this 10th day of March, 2014.

6/2/14

I affirm under oath


Robert Holland Koon

State of South Carolina)
County of Cherokee)
)
)
)

General Sessions Court
Seventh Judicial Circuit
Case #86-GS-11-289
Warrant # B-540173

State)

) Affidavit of Detective Major Richard F.
) Weaver

v.)

Robert Holland Koon
Defendant)

I, Richard F. Weaver, a former Detective with the Gaffney City Police Department,
hereby swear and attest to the following:

That I responded to the break-in of Cudd-Lovelace Agency at 217 E. Frederick
Street in Gaffney, SC at approximately 9:00 am on March 29, 1986. This structure
was a triplex containing an apartment with adjoining spaces occupied by Cudd-
Lovelace Agency and Stylette Salon. It was discovered and reported by J.D. Cudd
(deceased) that the section occupied by Cudd-Lovelace Agency had been entered
without consent with no evidence of theft. Mr. Cudd ascertained that the break-in
occurred sometime between 5:00pm March 28th (closing time) and approximately
8:30 am on March 29th. Specifically, there was no probative evidence that the entry
was in the nighttime. The allegation of nighttime as alleged in the Cudd-Lovelace
arrest affidavit was likely a scrivener's error mistakenly made when the warrant
was prepared by police secretaries and overlooked by myself at the time the warrant
was signed.

This is the first time that I was made aware of this error and would like to set the
record straight – again, there was absolutely no evidence to establish *corpus delecti*

for the offense of nighttime burglary for the Cudd-Lovelace offense of March 28,
1986.

Further Affidavit sayeth not.

Under Oath I Affirm

S/ _____
Richard F. Weaver

Sworn and Subscribed to me on this _____ day of _____, 2012.

My Commission expires:

Notary Public



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 26, 2013

Mr. Robert H. Koon, #227826
Lieber Correctional Institution
PO Box 205
Ridgeville, SC 29472

Re: Your letter

Dear Mr. Koon:

I received your letter about the same time I got a phone call from Harry Lovelace. He said Mr. Weaver's wife feels Mr. Weaver is not up to the stress right now to do anything. Your case is scheduled to be looked at by the Court of Appeals this month, but I do not know when they will decide it. It is too early to tell if I will petition for rehearing and go cert. if we lose. I will have to wait and see how the decision is worded.

Sincerely,

Robert M. Pachak
Appellate Defender

RMP/pcm

EYS

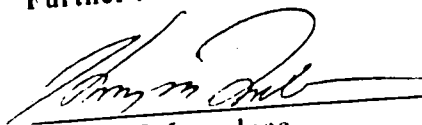
AFFIDAVIT

I, Harry M. Lovelace, hereby give the following statement freely and voluntarily that is true and correct, under oath:

The first statement pertains to my attempts to obtain a viable address and phone number for Richard F. Weaver. It is my understanding that Mr. Weaver was the detective who lead the investigation of the break-in at Cudd-Lovelace Agency in March 1986 and Robert Koon believed that his testimony could assist in Mr. Koon's 29(b) hearing and he requested that Mr. Weaver, since retired, be located and subpoenaed. Mr. Koon was advised by his legal defense that Mr. Weaver could not be located and was therefore unavailable to provide testimony. Mr. Koon subsequently requested that I try to contact a private investigator to locate Mr. Weaver. I asked an associate at work if he happened to know Mr. Weaver and he said remembered him and that his wife's name was Carla. With that item of information, I conducted an internet search on PublicRecords.com, and was able to locate three possible addresses and a phone number in less than thirty minutes from the time I began the search.

The second statement is my attestation that part of the structure that was broken into in March 1986 was an apartment, i.e. dwelling. The structure is a triplex that included the space leased to Cudd-Lovelace Agency, the business that I managed in March 1986. It is my understanding that the fact that a dwelling was located in the structure could have a material impact on Mr. Koon's case as in the decision by the SC Supreme Court in Koon v State (2004). Again, this structure was an apartment dwelling with an office and salon contained therein.

Further AFFIDAVIT sayeth not


Harry M. Lovelace

Daytime Phone: 864-838-1381

Sworn and Subscribed to me on this 7th day of March, 2012.

My Commission expires:


Notary Public

11-28-2017

EXHIBIT 4

SC Supreme Court
Office of Judicial Misconduct
P.O. Box 11330
Columbia, SC 27201

ROBERT KOON
~~ROBERT KOON~~
~~ROBERT KOON~~
MD CCI
Redemption Way PO Box 205
McCormick, SC 29899 RIDGEVILLE SC
29472

October 3, 2011

Complaint Hon. J. Mark Hayes II
State v. Robert Holland Koon 86GS 11289 (1)

In the matter of State v Koon 86GS 11289 Rule 29(b) motion for a new trial in Cherokee County General Sessions Court, I would like to lodge a formal complaint and request an independent investigation into evidence of trial court Hon. J. Mark Hayes II.

- A) Refusing to schedule and hear motion to relieve counsel of conflict of interest with members of the Seventh Circuit Solicitor office when primary thrust of Rule 29(b) is prosecutorial misconduct (and habit, routine pur SC RE 406 of the same) in the prosecution of the Second Degree Burglary (Building/ Nighttime) 16-11-312 (b) where the police/solicitor presented false testimony to magistrate/ grand jury in Re: to Nighttime: See Koon v State 595 SE2d 456 (2004) (2)
- B) Allowing counsel to proceed without moving to recuse trial court (Hayes) as set forth in December 30, 2010 letter from Judge Hayes (counsel failure to do so grounded in conflict with the Seventh Circuit Solicitor) of civil action against Judge's law partner Koon v Thompson (Cherokee). The bias of the court is manifested, and the basis of the recusal grounded in the fact, when counsel was to be appointed from outside the Seventh Circuit based upon numerous conflicts, the court appointed counsel from Fort Mill, SC (outside Seventh Circuit) but lo and

behold counsel is formerly a Seventh Circuit Solicitor who allowed the State to hide the whereabouts (at 29(b) hearing) of key Brady/Giglio witness detective Richard Weaver who first presented false information of nighttime to the magistrate / as proven by victim statement / testimony established at June 27, 2011 29(b) hearing. The court had full awareness of counsel Russ Racine's former history as Seventh Circuit Solicitor, to cause hearing to be mere sham and pretense, while actually,

C) trial counsel and court acted to subvert the legal process as direct evidence of prosecutorial misconduct in State v Ernest Riddle (Riddle v Jon Ozmint 2006 SC) was relevant to State v Koon 29(b) as same solicitor, same county, same staff committed misconduct in both Riddle and Koon at the same time period (1985 – 1986) to show SC RE 406, habit, routine, that same people acted in conformity with prior conduct, to wit, prosecutorial misconduct.

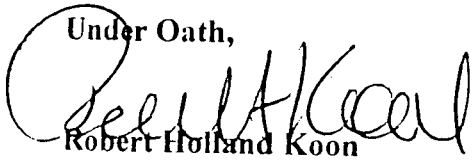
Is it any coincidence or relevancy to the fact that now trial Judge Hayes is the trial judge in Riddle, a death penalty case to be tried soon? Judge Hayes understands the nexus between Koon and Riddle, Brady and Giglio claims will in fact affect the retrial of Riddle and thus allowed counsel with a conflict of interest with same parties (ala Seventh Circuit Solicitor) to suppress evidence and misrepresent the factual issues presented and allow State to hide Det. Weaver who falsely claimed could not be located despite his retirement check records from Gaffney P.D. (major 30 days).

I ask for a complete investigation by this office for judicial misconduct in office and that proceedings for the impeachment of Hon. J. Mark Hayes II be initiated.

(1) 1986 conviction at issue is second of three strikes Koon v State 643 SE2d 680 (2007)

(2) Giglio v United States

Under Oath,

A handwritten signature in cursive script, appearing to read "Robert Holland Koon", written over the printed name.

Robert Holland Koon
LWOP in SC

Cc: Diana Hoit (Esq) (Counsel for Riddle)
Harry M. Lovelace (Victim – Koon case)
Clerk of Court 86-GS-11-289
News Media (via Network)

The Supreme Court of South Carolina

Robert Holland Koon, Petitioner,

v.

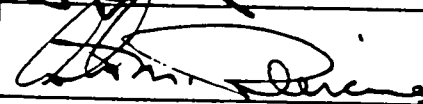
State of South Carolina, Respondent.

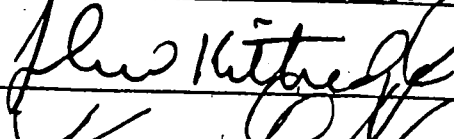
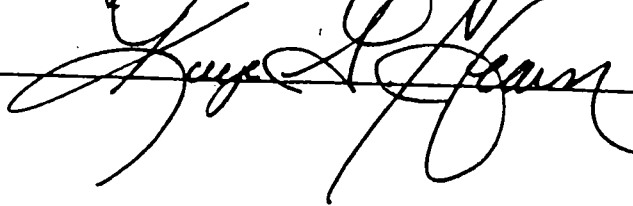
2000 OCT 29 A 11:47
BRANDY W. MCBEE

ORDER

Petitioner has filed a notice of appeal from an order denying Rule 59 and 60, SCRCR, motions he made following the denial of his seventh application for post-conviction relief. We find the explanation petitioner has provided pursuant to Rule 243(c), SCACR, fails to set forth an arguable basis for asserting the decision of the circuit court was improper. Accordingly, the notice of appeal is hereby dismissed. Moreover, we hereby prohibit petitioner from filing any further collateral actions challenging his 1986 burglary convictions in the circuit court without first obtaining permission to do so from this Court.

IT IS SO ORDERED.

 C. J.
 J.

 J.
 J.
 J.

Columbia, South Carolina

October 27, 2010

cc: Appellate Defense
Robert Holland Koon #227826
Assistant Attorney General Suzanne H. White
The Honorable Brandy McBee

The Supreme Court of South Carolina

Robert Holland Koon, Petitioner.

Appellate Case No. 2012-212100

ORDER

By order dated October 27, 2010, this Court prohibited petitioner from filing any further collateral actions challenging his 1986 burglary convictions in the circuit court without first obtaining permission from this Court. Additionally, this Court has issued several orders regarding petitioner's ability to seek relief from this Court under Rule 245, SCACR.

Petitioner now seeks permission to file a habeas corpus action or a post-conviction relief action in the circuit court challenging the 1986 convictions. This request is denied.

An appeal arising out of the 1986 convictions is currently pending before the South Carolina Court of Appeals, and he is represented by counsel in that matter. Therefore, petitioner's *pro se* requests for leave to file a Rule 29, SCRCrimP, motion, to certify the pending appeal for review by this Court or to remand the case to the circuit court, are improper and are hereby stricken. *Miller v. State*, 388 S.C. 347, 697, S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989).

Finally, to the extent petitioner may be seeking any other relief from this Court under Rule 245, SCACR, that request is hereby stricken for noncompliance with the prior

orders placing restrictions on his filings under that rule.



C.J.
FOR THE COURT

Columbia, South Carolina
June 21, 2012

cc: Mr. Robert Holland Koon, #227826
Office of the Attorney General
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

The State, Respondent,

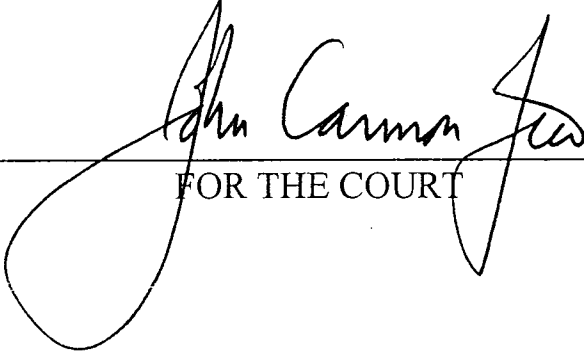
v.

Robert H. Koon, Appellant.

Appellate Case No. 2011-200608

ORDER

Appellant's motion to relieve counsel and proceed *pro se* is denied. Because Appellant is represented by counsel, this court declines to consider Appellant's remaining *pro se* filings. See *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010); *Jones v. State*, 348 S.C. 13, 558 S.E.2d 517 (2002); *State v. Stuckey*, 333 S.C. 56, 508 S.E.2d 564 (1998); *Foster v. State*, 298 S.C. 306, 397 S.E.2d 907 (1989). Appellant is further prohibited from filing any additional *pro so* motions or requests in this matter.



FOR THE COURT

Columbia, South Carolina

cc:

David A. Spencer

Robert M. Pachak

Alan McCrory Wilson

John W. McIntosh

Salley W. Elliott

FILED

1/30/13 AT

JUMPSTART

Faith-Based Prison Rehabilitation

State corrections officials say Terry's program helps break that cycle.

"The product that Tim is putting out on the table is a very good product because what they do is very much needed," said Gary Boyd, director of inmate services for the corrections department.

Boyd said the state doesn't track the percentage of JumpStart's clients who end up back in prison, but he said that rate is very low for a similar program called Changing the Way.

BREAKING THE CYCLE

The final part of JumpStart's program involves finding full-time employment for ex-felons. Terry partners with several local employers who are willing to hire people with a criminal background.

One of his employees is James Fowler, 42, who went through JumpStart's in-prison and transitional housing programs.

He recently bought a house. He also is a registered sex offender.

He said he has changed, and JumpStart is what helped him progress.

"Often, people who have been incarcerated never get that second chance from society. They cannot move forward," he said. "They're stuck. ... JumpStart provides a way out of that cycle."

For Terry, a big part of moving forward came in 2004, when he reconciled with his son and daughter.

He'd left them as toddlers when he killed their mother and tried to overdose.

Since that 2004 meeting, they've worked on their relationship, he said.

When he talks about all the woes he caused for his own children, he goes back to his own childhood.

"Ninety-nine percent of people are in prison because of childhood issues that are not dealt with, and more and more mistakes happen because of them," Terry said. "Why not stop that cycle?"

But some cycles are hard to break, and Terry knows that firsthand.

Terry's son, Jacob Lee Terry, 26, was charged with murder in August. His daughter, Jacolyn Jacobus, 28, was charged with accessory after the fact of murder.

Both are awaiting trial.



JUMPSTART

Faith-Based Prison Rehabilitation

"At (the) expense of people calling me names, I said, 'Listen, y'all, I've done this stuff for 29 years, and the best it's gotten me is 30 years in this penitentiary. I'm going to try things another way,'" he said.

From living in prison to living in Spartanburg

In 2002, Terry walked free, having served 15 years of a 30-year sentence.

In his 15 years, he'd seen inmates leave prison only to repeatedly return. He set out to change that through programs that help ex-offenders make a successful transition back to society.

Terry uses pastor Rick Warren's "Purpose-Driven Life" as his lesson plan for the 40-week course for inmates who are up for parole or release within two years.

The duration helps "whittle out the riffraff," he said.

Tommy E. Timms Jr., 37, stuck with Terry's program and is now awaiting release next March. This is his third stint in prison. All of his charges are drug-related.

He says he's ready to make a change this time. He's now a team leader in Terry's in-prison program at Livesay Correctional Institution in Spartanburg.

"My real test is coming in just a few months," he said to the class. "So I ask that you all keep me in your prayers."

He's asked Terry to help him find a good church and a room in JumpStart's transitional housing, a strategy that prison officials support.

"It's very beneficial to have someone on the outside who is willing to mentor them and keep them accountable," said Lloyd Roberts, chief chaplain with the S.C. Department of Corrections.

JumpStart manages seven units of transitional housing in Spartanburg County and several other parts of the Upstate. After inmates serve their time, Terry shepherds them into JumpStart's housing, where they must abide by strict curfews and visitation limits.



Levonne Jamison, 34, served seven years for a lewd act on a minor and was released Sept. 30. He's living in one of the JumpStart houses in Spartanburg County and has recently found full-time employment.

Jamison said he grew up in the Midlands but chose to stay in Spartanburg because he knew he had to stay away from his childhood neighborhood.

"You have to leave the old behind," he said.

In prison, he said he saw people from his neighborhood get out and quickly return to prison.

"It's a revolving door," Jamison said. "They go right back to the same thing they did before. ... They go and come back and get more time."



JUMPSTART

Faith-Based Prison Rehabilitation

BEHIND BARS

When Terry talks about the night he killed his wife and his eventual journey to God, he tells prisoners that he was "tore up from the floor up."

"I tell people I used to be a dope dealer, now I'm a hope dealer," he says:

His story always addresses his youth. He often says that 99 percent of inmates are behind bars because of unresolved childhood issues.

For Terry, his problems began when he was a 14-year-old boy enrolled in a Christian school.

"I had a mama who loved God," he said. "And all of the sudden, out of the blue, this woman, she took my little .22 pistol and stuck it to her chest."

After his mother's suicide, he said he shook his fist at God and sought comfort in alcohol and drugs.

"That sent my life into a tailspin," he said. "It went from smoking marijuana to drinking liquor to doing an ounce of cocaine a night because of that raging monster inside of me."

Terry hears similar stories through JumpStart's 40-week in-prison program.

At the chapel inside Livesay Correctional Institute in Spartanburg in November, Terry's class was in its 39th week. Dozens of inmates listened to stories of bad childhoods and mistakes. Grown men broke down in tears, sang songs, read poetry.

After they told their stories and their reasons for being behind bars — most for stealing and dealing drugs — the room grew quiet when Terry revealed his voluntary manslaughter conviction.

Terry told the crowd that, following his mother's death, he dropped out of school, got married to his high school sweetheart and had a daughter and a son. Through it all, he said he kept using and selling cocaine and marijuana.

But his marriage soured, and he killed his wife one night in anger. He tried to overdose immediately after. His 3-year-old daughter and 1-year-old son were in a nearby bedroom. "I didn't want to live anymore," he said. He ended up with a 30-year sentence at McCormick Correctional.

In prison, he found lucrative ways to keep dealing marijuana.

Then he met Paul Gray.

Gray arrived at McCormick via Kairos Ministries — a national prison ministry — and took Terry to the prison library, where Terry collapsed in tears and reconciled with God.

"That event in the library took a 29-year-old man trapped in a 14-year-old's body and set him free," he said.

He got rid of the marijuana and cleaned up.



JUMPSTART

Faith-Based Prison Rehabilitation

Former convict now leads prison ministry program.

By Andrew Doughman - andrew.doughman@shj.com

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Terran Mosley, right, talks with Tim Terry and Chris Phillips at Sun Surveillance. Mosley is active in Terry's JumpStart Ministries, which provides in-prison classes for prisoners, transitional housing for people who have been recently released from prison and employment opportunities for ex-offenders.



Meet Timothy Lee Terry: age 47, a father, a Christian, a leader of a local, faith-based prison ministry program, and an ex-convict guilty of voluntary manslaughter.

Sentenced to 30 years in 1987, Terry said his life changed when he found God in prison.

"For the first time in my life, I felt the weight lift off of my shoulders," he said of his experience in McCormick Correctional Institution. "I knew I was saved."

He was released on parole in 2002. Now he directs JumpStart Ministries, a prison ministries program for reforming inmates through God.

Terry thinks the problem is that the state's correctional system too often fails to correct behavior. There are 22,666 incarcerated men and women in South Carolina's prison system; one in three of these inmates would end up back in prison within three years if current trends continue.

* "I have seen people come through the system that I've dealt with before, and obviously I'm not happy when I see them," said Barry Barnette, Seventh Circuit solicitor.

Taxpayers pay for them to return to prison again and again, at the cost of \$16,000 a year.

Locally, Greenville and Spartanburg counties commit more people to prison than other counties in the state.

But Terry says almost no one who goes through his program goes back to prison. Here's how it works:

- Inmates attend an in-prison ministry class for 40 consecutive weeks.
- They live in transitional housing with strict rules upon release.
- JumpStart connects them with local churches and employers for spiritual and financial support.

2 Photocopies

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Division of Inmate Services

AGREEMENT TO DEBIT E.H. COOPER ACCOUNT

Inmate's Name: <i>Robert Koor</i>	SCDC #: <i>227826</i>	Housing Unit: <i>M-A109</i>	Date: <i>7/17/14</i>
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GENERAL MATERIAL

** Inmate must have the funds in his/her account to pay for the materials.

To be completed by
SCDC staff:

Item	Amount
Envelope	
Pen	
Paper	
Postage	
Tape	
Box	
Electronic Repair	
Other	

Cost

Sub-Total:

LEGAL MATERIAL

** Inmate is not required to have the funds in his/her account to pay for the materials; however, his/her account must be debited for all materials s/he elects to receive.

To be completed by
SCDC staff:

Item	Amount
Envelope	
Pen	
Paper	
Postage	
Other	

Cost

Sub-Total:

PHOTOCOPIES

** Inmate may be required to have funds in his/her account. See SCDC Procedure GA-01.03(OP), "Inmate Access to the Courts," to determine if inmate may receive copies with/without funds.

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SCDC staff:

Item	Amount
Photocopies	<i>246</i>

Cost

TOTAL

Robert Koor
Inmate's Signature

B. Bryant
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