THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina — Respondents

v.

Alfonso Ware Jr. — Appellant

INITIAL BRIEF OF APPELLANT

ALFONSO WARE JR.
Appellant
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

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STATEMENT OF ISSUES ON APPEAL

DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN SOUTH CAROLINA CODE ANN. §§ 17-28-320(A) and 17-28-320(C)?

STATEMENT OF THE CASE

The Appellant is presently confined in South Carolina Depart -ment of Corrections pursuant to Order of Commitment of the Clerk of Court Lexington County. The Appellant was indicted at the January 1990 Term of the Grand Jury for Lexington County for Murder (90-GS-32-0056). Appellant was represented by Thomas Bellinger, on June 25-27, 1990, Appellant went to trial by Jury, found guilty as indicted. He was sentenced by the Honorable Hubert E. Long to Life.

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed Appellant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct App. filed February 24, 1992).

The Appellate subsequently filed an Application for PCR on August 21, 1992, the State filed its Return on October 9, 1992. On May 2, 1995, an Evidentiary hearing was held before the Honor -able Daniel E. Martin at which the Appellate was present and was represented by Wayne Floyd. By Order dated June 16, 1995, Judge Martin denied and dismissed the Appellant's Application.

A timely Notice of Appeal was filed and a petition for Writ of Certiorari was submitted by Wayne Floyd. On November 8, 1996, the S.C. Supreme Court denied the petition. A petition for rehearing

was denied on December 16, 1996.

The Appellant filed a Petition for Writ of Habeas Corpus in the U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons Jr. on January 14, 1998. The Appellant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The dismissal of the Appellant's petition was Affirmed on June 2, 1998.

The Appellant file another PCR Application of February 10, 2000. An Evidentiary hearing was held on June 14, 2001, the Honor -able J.C. Nicholson denied Respondent's Motion to Dismiss and allowed Appellant to submit another Application for PCR. An Evidentiary hearing was held on August 27, 2001, before the Honorable Thomas G. Cooper. Judge Cooper denied the Application. The Appellant filed another PCR Application on December 6, 2001, an Evidentiary hearing was held on January 6, 2003, the Honorable Marc Westbrook denied the Application. Appellant filed PCR Applic -ations on August 14, 2003, and April 7, 2004.

By Order of the Court the Clerk of Court filed this Application for DNA Testing on July 26, 2013. On October 22, 2013, the Solici -tor's Office filed a Response and Motion for Summary Dismissal. On June 16, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the Application for DNA Testing. Appellant filed a timely Response to the Order of the Court.

ARGUMENTS

DID THE COURT ERR, WHEN IT DENIED APPELLANT'S APPLICATION FOR D.N.A. TESTING WITHOUT REQUIRING THE SOLICITOR'S OFFICE AND THE CUSTODIAN OF THE EVIDENCE TO FOLLOW THE STATUTE?

17-28-70(C)(D)

"For physical evidence or ~~an~~ biological material that the custodian of evidence asserts has been lost or destroyed, the Court shall Order a Custodian of Evidence to locate and provide the Appellant and the Solicitor or Attorney General, as applicable with a copy of any document, note, log or report relating to the physical evidence or biological material.

The Solicitor's Office determined the following:

(1) The weapon and the clothing are not available for testing

(2) The evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998

(6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Dept. on January 23, 1990 which was prior to the trial.

The Court in its Order of intention to Summarily Dismiss the Application for DNA Testing. Factual response state "The response recites the procedural history of the Appellant's murder conviction, including four (4) PCR Application and various appeals."

Clearly from this statement from the Court the evidence should have been preserved, beyond the January 1998 date that the Court claims to have released the evidence from the trial. There is a record of the evidence being released, however, the Solicitor's Office does not indicate who the evidence was released to. 17-28 -70(C) in part states "A copy of any document, note, log, or report relating to the physical evidence or biological material" by not providing the Appellant with the name of the person who the evidence was released to or what was released. Just as important who determined and by what method that the evidence should be released.

Office of the Custodian of the Evidence or the Solicitor have not followed the requirements of the statute in their investigation. This Application should not have been denied.

The Solicitor's Office states that "S.L.E.D. does not have any evidence from the trial as the weapon and evidence tested" were returned to the Lexington County Sheriff Dept. January 23, 1990, prior to the trial. Again it is clear that S.L.E.D. tested the weapon and evidence, prior to the trial. What are the results of those test? What was tested? Who at S.L.E.D. tested it? Who was this evidence turned over to? These questions are available at S.L.E.D.! Results of their work was retained in their records.

Appellant has claimed from the beginning that he did not fire the gun that killed the victim and as stated by the Court it is conceivable that this is true; See footnote 1 of Order of Intention to Summarily Dismiss.

When the State fails to preserve evidence which might have exonerate the Appellant, the Court must determine both. Whether the evidence was constitutionally material of apparent exculpatory value, and incomparable. Lost or destruction of relevant evidence by the government not only ~~xas~~ raises general questions of the fundamental fairness of a criminal trial, but may also deny the Appellant the right to compulsory process. It is the manifest duty of the to vindicate guarantees of confrontation compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced 94 S.Ct 3090.

It must be established that the law concerning this issue has been followed, and before we can say with certainty that there is no evidence to be tested we must be satisified that all of the statute is complied with. To protect the rights and interest of the Appellant.

That is not the case here. We are not certain of the existence of any evidence or the results of any test done (S.L.E.D.). If the Custodian of the Evidence or the Solicitor had followed the commands of the statute we may be sure of the existence of the evidence. As long as the dictates of the law is not been applied equally then the Appellant right to due process in his application. As long as the Chain of Custody, the log, notes, and records that have not been produced we will never know with certainty the existence of any evidence, in fact the record reflect more in favor of there being evidence than not, (S.L.E.D. tested and turned over prior to trial), if the Custodian of the Evidence conducts a

search then we will know for certain.

The law is a two-edge sword that cuts both ways. It not be applied to the Appellant and not the Respondents, they must be made to make a thorough search following the guide-lines already set-out, in the statute §17-28-80, find those records, notes, logs, and Chain of Custody.

This Application is to important to settle on conclusory statements and not fact.

CONCLUSION

The question present by the Appellant remains unanswered. Appellant pray that this Court will Order the Respondents to comply with the law as it applies to this issue (Preservation of Evidence Act).

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CERTIFICATE OF SERVICE BY MAIL

I, Alfonso Ware Jr., declare under the penalty of perjury that I have served the Initial Brief of Appellant by depositing a copy of it in the U.S. Mail, postage prepaid, to all parties listed below and clearly addressed.

South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Solicitor, Eleventh Judicial Cir.
Donald V. Myers, Solicitor
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Clerk of Court, Lexington County
Ms. Beth Carrigg, Clerk
205 E. Main Street, Suite 227
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Attorney General's Office
Alan Wilson, Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
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Columbia, SC 29210

July 28, 2014

cc: File

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 28, 2014

South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

RE: Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed you will find the Initial Brief of Appellant to be filed and a copy to be clock-stamped and returned to me for my records with a S.A.S.E. postage prepaid. My copy has the paper clip on it.

I do appreciate your assistance in this matter. Thank you.

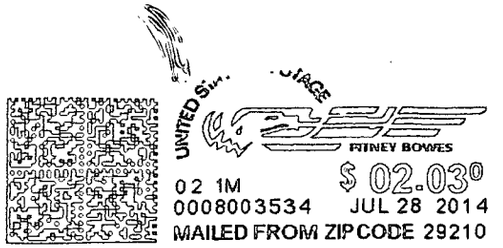
Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.

cc: File

Alfonso Ware Jr.
BRCI/Watercee 286; #168464
4460 Broad River Rd.
Columbia, SC 29210



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