

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SALUDA COUNTY  
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

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Montavis K. Gaines SCDC #323168

Petitioner

VS

State of South Carolina

Respondent

Case no: 2013 - CP - 41 - 0010

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Petitioner explanation per SCACR 243(c) pro se brief

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Montavis K. Gaines  
MCCI F-3-166  
386 Redemption Way  
McCormick, S.C. 29899

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ISSUE PRESENTED

Did the PCR judge err in not finding that the prosecutor committed Prosecutorial misconduct, and a Brady violation for failure to disclose potentially exculpatory evidence related to the charged offences?

This matter comes before this court by way of an application for post-conviction relief (second PCR) filed January 16, 2013. In its return, Respondent requested that the action be summarily dismissed as successive on October 7, 2013. The Petitioner objected to response to consider conditional order of dismissal entered on October 21, 2013. The clerk of courts office at Saluda county received the conditional order of dismissal signed by the Honorable Thomas A. Russo on February 6, 2014. The Petitioner received the same on February 10, 2014.

#### CASE HISTORY

The records before this court reflect that the Petitioner along with co-defendant, Jerome Rhoads, was indicted at the for assault and battery with intent to kill (2006-GS-41-0421), criminal conspiracy (2006-GS-41-0420), armed robbery (2006-GS-41-0419). The Petitioner claims innocence and demanded a jury trial (on July 26, 2007). His position is that he didn't know anything about the crimes. Petitioner was represented by Michael Ray Ellisor, esquire, and was found guilty on all counts based on the sole testimony of the states witness co-defendant, Jerome Rhodes. The honorable William P. Kessley sentenced Petitioner to a total term of twenty (20) years.

#### APPEAL HISTORY

A timely notice of appeal was filed on Petitioners behalf and an appeal was perfected. A brief was filed on Petitioners behalf pursuant to Anders v. California 386 U.S. 738 (1967). Katherine H. Hudgins represented the Petitioner and raised the following issue on appeal:

Did the judge err in allowing a police officer to testify that he recognized an individual in the videotape of a robbery as the appellant, Montavis Gaines, as the officer had contact with Gaines in the past?

Additionally, Petitioner was given a 45 days notice to file a pro se brief addressing any issues he believed the court should consider in this appeal. Petitioner raised the following issues on appeal:

Did the trial court err in allowing the solicitor to exercise a peremptory challenge in a discriminatory manner?

Did the trial court abuse its discretion in admitting identification testimony that was suggesting in nature and defective under Neil v. Biggers.

The court of appeals dismissed the appeal State v. Gaines 2009-UP-446. (S.C. ct. app. filed October 2, 2009). The remitter was sent on October 21, 2009.

#### PCR HISTORY

Petitioner, subsequently, timely filed a PCR application on November 6, 2009 (2009-CP-41-0176). The Petitioner raised several allegations during his PCR hearing.

#### INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

Counsel failed to object to Lt. Turner and Lt. Holloway's testimony inferring prior criminal conduct in the past on the part of Petitioner.

Counsel failed to enter into evidence the prior inconsistent statement of witness, Jamie Mae Boham, for impeachment.

Counsel failed to discover, through their independent investigation, that co-defendant, Jerome Rhoads, had a sweetheart deal with the state to receive a favorable plea deal in exchange for his testimony.

#### PROSECUTORIAL MISCONDUCT CLAIMS

State failed to disclose under Brady v. Maryland and State v. Kennerly that co-defendant, Jerome Rhoads, had been offered a deal to testify against Petitioner in exchange for reduced charges and recommendation for leniency at his plea hearing.

By order dated April 5, 2012, and filed April 11, 2012, the honorable Eugene C. Griffith, Jr. denied and dismissed the application with prejudice, concluding that the Petitioner had failed to present any evidence of a deal existed between the state and co-defendant, Jerome Rhoads, and that Petitioner has not established any constitutional violation or deprivations that would require the court to grant his application for post-conviction relief.

On April 23, 2012, Petitioner filed a rule 59(e) motion in this case and raised the following allegations.

The court erroneously failed to consider the testimony of Jerome Rhoads and the prosecuting attorney to the effect that the police had given him a deal and that everyone knows that is how the police are able to get favorable testimony from co-defendant.

On May 22, 2012, Judge Griffith filed an order denying Petitioners Rule 59(e) motion.

#### SOUTH CAROLINA SUPREME COURT HISTORY

A timely notice of appeal was filed on Petitioners behalf. A petition for writ of certiorari brief was also filed on Petitioners behalf. Wanda H. Carter, esquire, represented Petitioner and raised the following issue on appeal.

Trial counsel erred in failing to object to portions of the police officer's identification testimony that included references to their familiarity with Petitioner based on past encounters with him. This constituted prejudicial prior bad act evidence that should not have been admitted into evidence at trial.

Petitioner has a PCR appeal presently pending before the Supreme Court of South Carolina.

#### THE FACTUAL ALLEGATIONS

On February 4, 2011, the court held a hearing at the Lexington County Courthouse before the honorable R. Lawton McIntosh. Petitioner's counsel, Mr. Gleissner, moved for permission to serve discovery, in this case, interrogatories, request to produce and request to admit. See exhibit (1) per continuance transcript page 5, line 2-25 attached to Petitioner's motion.

In response to counsel's discovery requests the state cited S.C. code ann. § 17-27-150 (a) requiring a showing of good cause for discovery. The state made a return to PCR counsel's first set of continuing interrogatories on April 6, 2011. See exhibit (2) attached to Petitioner's motion.

The respondent objected to PCR counsel's first set of continuing interrogatories number 1-9 on the grounds that counsel has failed to show the court good cause as to why discovery should be granted in this matter.

The state made a return to counsel's first set of requests for production of documents on April 6, 2011, see exhibit (3) attached to Petitioner's motion. The respondent objected to counsel's request for production of documents number 1-9 on the same ground that counsel has failed to show the court good cause as to why discovery should be granted in this matter.

The state made another return to PCR counsel's first set to request to admit on April 6, 2011. See exhibit (4) attached to Petitioner's motion.

The respondent objected to PCR counsel's request to admit number 1-6 on the same grounds that counsel has failed to show the court good cause as to why discovery should be granted in this matter.

On February 4, 2011, Petitioner moved to allow discovery showing good cause. The honorable judge McIntosh granted our motion specifically providing that counsel may serve discovery. The office of the Attorney General consented to our motion. See exhibit (5) PCR continuance transcript page 6, line 1-5 attached to Petitioner's motion.

The respondent was required to respond to discovery request served by counsel for Petitioner interrogatory. As it relates to the interrogatories, the improper responses are simply due to the complete incompetence of the office of Attorney General.

Interrogatory number (4) requested:

Set forth statements taken in the investigation of the underlying action involving plaintiff and/or Jerome Rhoads.

Interrogatory number (8) requested:

State with particularity the substance of each discussion between the law enforcement officer, the member of the solicitor's office or other employee of a governmental agency concerning the testimony of Jerome Rhoads, and identify all documents memorializing each such discussion, including memoranda, witness

statements, interviewer notes, or any other documentation that discusses the testimony.

Requests to Produce number (1) request:

All documents identified in response to the plaintiff's first set of continuing interrogatories service contemporaneously with this request to produce.

Request to Produce number (4) requested:

All documents, including notes, memoranda, e-mails, witness statements, or other -physical recording, in the possession of the investigating officers and/or detectives from their investigation of the underlying action involving plaintiff, to include, but not limited to notes, e-mails, summaries, photos, videotapes, interviews, correspondence, and all other documents in the possession of investigating officers and/or detectives.

Request to Produce number (6) request:

All documents in the possession of investigating officers and/or detectives from their investigation of the action involving Jerome Rhoads, to include, but not limited to notes, e-mails, summaries, photos, videotapes, interviews, correspondence, and all other documents in the possession of investigating officers and/or detectives.

Clearly, all documents relating to the detectives or investigating officers investigation, and their interviews with Jerome Rhoads should have been produced.

On January 31, 2012, an evidentiary hearing into this matter was convened on at the Lexington county courthouse. The Petitioner was present at the hearing and was represented by Richard R. Gleissner, esquire. The Respondent was represented by Kaelen E. May of the office of the Attorney General. The Petitioner offered the testimony of Jerome Rhoads At the PCR hearing, Mr. Rhoads testified on his own behalf, who was also the state witness in this case. Jesse Allen Near, esquire, was appointed as counsel for Mr. Rhoads for the purpose of the hearing.

(Trial counsel did not testify at the PCR hearing.)

The state offered the testimony of Franklin Young, esquire, and Ervin Maye, esquire, the solicitors who handled the Petitioner's case at trial. One of the primary grounds in the first PCR application was that: (A) The prosecutor failed to turn over evidence of the agreement between the state of South Carolina and Jerome Rhoads, in which Rhoads was to receive favorable treatment in exchange for his testimony against Petitioner.

At the trial of the PCR hearing, Rhoads testified that he had a deal with the state, but Petitioner nor counsel, had any statement from the police or prosecutor's office suggesting that Rhoads had a deal in exchange for his testimony.

During the trial, the respondents witness vehemently denied the existent of a deal.

In this incident report, the officer states that he interviewed Jerome Rhoads and specifically states:

Subject now willing to testify for leniency from the state. In reference to subject, I spoke to the solicitor's office on his behalf for a lighter sentence in exchange for subject's testimony.

See Petitioner's exhibit (A) that was attached to Petitioner's second application for PCR. The Petitioner and counsel reviewed all of the documents produced in discovery. This Incident Report was not included in the discovery responses. This incident report clearly is covered by the documents requested and the interrogatories asked. Further, this incident report should have been turned over to counsel in regards to Petitioner's motion of discovery, prior to trial so counsel for Gaines could have used this incident report in the cross examination of Jerome Rhoads, and in the cross examination of the arresting officer. No such cross examination occurred and one can only assume that trial counsel was never provided with the incident report.

#### ARUGUMENT

the PCR Judge err in not finding that the prosecutor committed prosecutorial misconduct, and a Brady violation for failure to disclose potentially exculpatory evidence related to the charged offences?

In the present case, the record is clear that in the process of Petitioner's appeal from the denial of his post-conviction relief, petitioner continued to write letters to each of the agencies that were involved with his case. After the fact of Jerome Rhoads testimony that he had a deal during Petitioner's PCR hearing.

One of the central issues in Petitioners case is whether or not there was a deal struck between the police and the co-defendant, Jerome Rhoads.

It is true, indeed, that Petitioner filed a Rule (5) motion to the Saluda clerk of court's office and another to the Saluda police department on October 1, 2012. See Petitioner's exhibit (B) that was attached the Petitioner's second application for PCR. After the fact, Mr. Rhoads testified whether or not he had a deal, during Petitioner evidentiary hearing that was held January 31, 2012. The Petitioners PCR was denied on April 11, 2012. An appeal was filed on June 6, 2012, and exhibit (B) was answered on December 6, 2012, within that same year of the entry of the order. ( A letter from Saluda county Chief of police describing the incident report.) See exhibit (C) that was attached to Petitioners second application for PCR.

Petitioner filed his second application for a PCR on January 16, 2013. Thus the Petitioner had the "Incident Report" within one year of the entry of the order. Instead of filing the motion to set aside the order, Petitioner filed a second application for PCR to protect his "NEWLY DISCOVERED EVIDENCE". Petitioner states that he had the incident report within one (1) year of the entry of the order to be filed within the one year limitation of the date of when this evidence has been discovered or if the court agrees, then clearly it would fall within both (1) NEWLY DISCOVERED EVIDENCE, and (2) prosecutorial misconduct, and Brady violation. Thus the prosecutors failed to disclose potentially exculpatory evidence related to the charged offence that was withheld by the state. It would fall within newly discovered evidence because clearly, the appointed PCR counsel engaged in due diligence and this evidence was not discovered prior to trial on the first PCR matter. Additionally, it would fall within the "NEWLY DISCOVERED EVIDENCE" because the Petitioner has shown due diligence through his own investigation post-trial, after the fact Mr. Rhoads testified that he had a deal during Petitioners first PCR hearing. See Petitioner's exhibit (D) PCR transcript of record page 12 line 11-21 that was attached to Petitioners second application for PCR. Additionally, which by

due diligence was not discovered in time to move for a new trial on the first PCR matter. Furthermore, it would fall within prosecutorial misconduct, and Brady violation category because the prosecution had a duty to turn over this evidence as part of their responses to the discovery request and their failure to do so prevented appointed counsel and Petitioner from using that evidence in the trial of this case. (see 1a)

Clark v. State 315 S.C. 385, 434 S.E. 2d 266 (1993). Clark provides: To obtain a new trial based on after discovery evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; (5) is not cumulative or impeaching. (citing Hayden v. State 278 S.C. 610, 299 S.E. 2d 854 (1983)).

(1a) In determining whether this evidence was material under Brady, the question is not whether Petitioner would more likely have been acquitted had this evidence been **disclosed**, but whether without this impeachment evidence, the Petitioner received a fair trial resulting in a verdict worthy of confidence.

Additionally, this in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the other acting on the governments behalf in the case, including the police. But, whether the prosecutor succeeds or fails in meeting this obligation, that is a failure to disclose in good faith and bad faith in a particular case. Kyle v. Whitley, 115 S.ct. 1555 (1995) Moore v. Illionis, 92 S.ct. 2562 (1972) The prosecutor knew that evidence existed that might help the defence, that the defence had ask to see it, and it was never disclosed. It makes no difference whatever, the evidence that was suppressed was found in the file of the police officer who directly aided the prosecution or in the file of the prosecutor himself. (see 2a)

In this case, the prosecutor consciously used police officers as a part of the prosecutorial team, therefore the officer may not conceal evidence that the prosecutor himself would of had a duty to disclose to the defence.

(2a) The prosecutor's must have conspired and agreed in advance with the other acting on the governments behalf both intentionally participating in the

conspiracy as they act together for their shared view to a benefit within the scope of the conspiracy for the purpose of that deal agreement as found in exhibit (A).

It is unconscionable to permit a prosecutor to adduce evidence demonstrating guilt without also requiring that he bear the responsibility of producing all known and relevant evidence tending to show innocence.

Obviously some burden is placed on the shoulder of the prosecutor when he is required to be responsible for the person who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the state that tries a man, and it is the state that must insure that the trial is fair. A citizen has the right to expect fair dealing from his government. See *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.C. 968, 3 L Ed. 2nd 1012. "and this entails...treating the government as a unit rather than as a amalgam of separate entities." See *S&E contractors Inc. v. United States*, 409 U.S. 1, 10, 92 S.ct. 1411, 1417, 31 L.Ed. 2nd 658 (1972). "The prosecutor's office is an entity and as such it is the spokesman for the government." See *Barker v. Wingo*, 407 U.S. 514, 92 S.ct. 2182, 33 L.Ed. 2nd 101 (1972).

During Petitioners first PCR hearing asst. solicitor Ervin Maye, testified that he talked with the police and spoke with them directly and they specifically told him that they had not. See Petitioner exhibit (E), PCR transcript page 38 line 3-21 that was attached to Petitioners second application for PCR. There is no testimony from the officers before the court to say that a deal did not exist to confirm asst. solicitor Ervin Maye's testimony when the incident report specifically refuted his testimony. Furthermore, the prosecuting attorney asked Rhoads during the original trial if there was a deal extented by law enforcement. See Petitioner exhibit trial transcript page 145 line 5-13 that was attached to Petitioners second application for PCR. The solicitor did not only lie during Petitioners trial, but also during Petitioners PCR hearing that a deal did not exist. In other words, the prosecutor, Mr. Young, knew that a deal did exist and that it might help the the defence, that's why he asked Mr. Rhoads the question during the original trial if a deal had been extended by law enforcement. When this information was solicited by the prosecution, the attorney for the prosecution knew what he testified to at the PCR hearing, that is you have to promise a defendant leniency to get them to testify. In *Giglio v. U.S.*, 92 S.Ct. 763

(1972). Additionally, Rhoads PCR testimony is uncontradicted from his sworn testimony during the original trial.

The obvious and only inference that can be derived from this testimony is that this incident allowed the state to "conceal" the benefits given to Rhoads in exchange for his testimony against Petitioner until after Petitioner was convicted. There is no question in this case that the jury surely was entitled to know of it as the jury could have discredited the credibility of Rhoads's testimony. It is clear Rhoads was just testifying for a deal in reference to Petitioner exhibit (A). This is a fundamental due process violation of Petitioners 5th and 14th amendment rights afforded under the United States constitution.

In this case, it was not provided to trial counsel nor counsel involved in the PCR hearing. Such favorable evidence include evidence that may be used to impeach the veracity of the witness to be called by the prosecution and must include all pre-trial negotiations between the prosecution and witness. See State v. Hill, opinion number 3795 (S.C. App. May 11, 2004), U.S. v. Bagely, 473 U.S. 667,676, S.ct. 3375, 87 L.Ed. 2nd. 481 (1985). Subsequent to Mr. Rhoads testimony, pursuant to the agreement as found in exhibit (A) that was attached to Petitioner's second application for PCR, Rhoads received a significant reduction in his potential sentence and a recommendation of leniency from the prosecution.(see 3a)

Rhoads received only a four (4) year, non-violent sentence with 23 months credit of time served. See exhibit (F), Rhoads sentence sheet attached to Petitioner's motion.

The PCR court may grant a motion by either party for summary disposition of the PCR application when..."there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law", S.C. code ann. 17-27-70 (C). When considering the state's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the Petitioner are true and view those facts in light most favorable to the Petitioner. Leamon v. State, 363 S.C. 432,434, 611 S.E. 2nd 494, 495 (2005) citing S.C. code ann. 17-27-80. Where an petitioner alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is

raised which can only be resolved by a hearing. *Delaney v. State*, 269 S.C. 555, 556, 238 S.Ed. 2nd 679, (1977).

(3A) Rule 608 (C) S.C.R.E. to bias accuser / motive to misrepresent the facts.

As it relates to the actions of counsel on the first PCR matter, counsel found it particularly disturbing that Petitioners second application included information that was not provided to him in the first PCR matter that counsel was appointed. Petitioner would ask that this petition be granted as it relates to this action of the first PCR counsel. In July, the year 2013, Petitioner forwarded counsel an application for PCR that Petitioner filed in 2013. The second PCR counsel was not appointed in this subsequent PCR, but the Petitioner requested counsel to review his application. Petitioner included a Saluda police incident report dated 12-4-06.

After counsel's reviewing of the second application for PCR, he contacted Appellant counsel for Petitioner by letter dated July 23, 2013. He did not receive a direct response by Petitioner informing him in mid-August that Appellant counsel was willing to assist and allow PCR counsel to request leave to file the Rule 60(b) motion. On September 16, 2013, counsel requested permission to file the motion with the trial court. The South Carolina Supreme court denied counsel motion for leave to file a Rule 60(b) motion on November 7, 2013, because of this second application for PCR that was currently pending in the circuit court. See exhibit (G) attached to this motion. It should be noted that by Petitioner filing the second application for PCR, Petitioner was availing himself of the provision of Rule 60(b).

The proper mechanism was to file a second application for PCR to bring this matter before the trial court based on "NEWLY DISCOVERED EVIDENCE": The burden is on the Petitioner to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. *Aice v. State*, 305 S.C. 448, 409, S.E. 2nd 392, (1991).

Petitioner argues that he has established sufficient reason why he could not have raised this current allegation in the first PCR application, therefore, Petitioner meets the burden imposed upon him. The prosecutor's failure to disclose potentially exculpatory evidence related to the charged

offence, and in fact was "withheld" by the state which is "NEWLY DISCOVERED EVIDENCE" to Petitioner. Therefore, this act constituted prosecutorial misconduct as well as a Brady violation by the state.

In evaluating post-trial Brady claims, the Petitioner must show that (1) the prosecution suppresses evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. *United States v. Wolf*, 839 F. 2nd 1387, (10th cir., 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. *State v. Kennerly*, 503 S.E. 2nd 214, 220 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87, 83, S. ct. 1194 (1963). Favorable evidence included both exculpatory evidence and evidence which may be used for impeachment. *United States v. Bagley*, 473 U.S. 667, 105 S. ct. 3275 (1985).

Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different. *Clark v. State*, 315 S.C. 385, 434 S.E. 2nd 266 (1993). A reasonable probability of a different result is accordinally shown when the government evidentiary suppression undermines confidence in the outcome of the trial. *Bagley*, 473 U.S. at 678, 105 S. ct. 3381.

A Brady violation does not warrant reversal if the evidence is merely cumulative or impeachment *Clark supra*.

The evidence is a Brady violation and is material in this case, and there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different.

Petitioner has shown that he has "NEWLY DISCOVERED EVIDENCE" not available to him at the original trial and not provided to him in his post-conviction relief. The evidence clearly impacts the question of whether his alleged co-conspirator had a deal with the prosecution. The record clearly reflects that trial counsel was not in possession of Officer Turner's December 2006 incident report. See trial transcript page 154 line 19-25 through page 155 line 1-4. Moreover, trial counsel would have used the incident report as exculpatory evidence only for the sole purpose of impeachment during the

cross-examination of Rhoades, it did not. Furthermore, trial counsel would never have discussed the basis of Rhoades during his closing argument to the jury intimating whether or not there was a deal. Simply, trial counsel would have easily impeached Mr. Rhoades. See trial transcript page 187 line 12-15, and page 185 line 7-11. Subsequently, due diligence has been shown throughout that both defence attorneys were not provided said incident report for use at trial or PCR hearing. It's obvious that both attorneys did not receive it concluding that one has the issue of prosecutorial misconduct for failing to provide this evidence as part of the discovery in this matter.

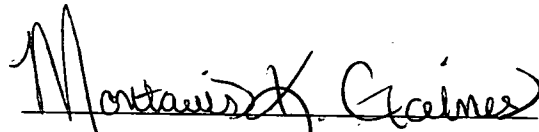
Petitioner states that the argument Respondent litigated before this court are misplaced. Respondent pled facts to compel following the South Carolina Supreme Court's controlling precedent in Kelly v. State, that dictates allegations of ineffective assistance of PCR counsel and are incognizable in subsequent PCR application. See Kelly v. State, 404 S.C. 365, 745 S.E. 2nd 377 (2013).

The Petitioner submits that the court should firmly reject the argument Respondent makes before this court. It is impossible for Petitioner to pled facts of raising a claim of ineffective assistance of PCR counsel in his subsequent PCR application. Additionally, PCR counsel asked for this information inside of his rule (5) interrogatories that were never disclosed. Petitioner further directed his argument as "NEWLY DISCOVERED EVIDENCE", not ineffective assistance of PCR counsel which override procedural bars regarding successive PCR application, and prevents from being procedurally barred by the doctrine of res Judicate.

CONCLUSION

The burden of proof is on the Petitioner to prove his allegations by preponderance of the evidence presented in the post-conviction relief act. In this instance Petitioner has proved each and every allegation by the preponderance of the evidence. This exculpatory evidence that clearly shows a Brady violation, should not be ruled as successive filing because it is within the one year statute of limitation. Therefore, Petitioner requests that the court grant his petition, and for such other and further relief as the court deems just and proper.

Date: 9-18-2014



Montavis K. Gains #323168

Petitioner pro se Brief

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SALUDA COUNTY  
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

---

Montavis K. Gaines SCDC #323168

Petitioner

vs

State of South Carolina

Respondent

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CERTIFICATE OF SERVICE

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I certify that a true copy of the Petitioner explanation per SCACR 243(c) pro se brief, and a copy of the exhibits in this case have been served on John Walt Whitmire, esquire, at the Rembert Dennis building, 1000 Assembly Street, Room 519, Columbia, South Carolina, 29201.



Montavis K. Gaines SCDC #323168

Petitioner pro se

Sworn to before me this 18 day  
of September, 2014.

 Notary Public for South Carolina

My commission expires; 12-16-2019

1 very much for agreeing.

2 MR. GLEISSNER: Your Honor, as part of  
3 this process, I made a motion for discovery as part  
4 of the PCR --

5 THE COURT: What type of discovery? Do  
6 you want depositions?

7 MR. GLEISSNER: No, Your Honor. I just  
8 want interrogatories and requests to produce. One  
9 of the central issues in this case is whether or not  
10 there was a deal struck between the police and a co-  
11 defendant, a fellow by the name of Jerome Rhodes.

12 THE COURT: Okay.

13 MR. GLEISSNER: And, Your Honor, I'd like  
14 to find out who were the people involved in the  
15 investigation associated with Mr. Rhodes. We  
16 believe that there's testimony that there was a  
17 deal, an informal deal, struck with Mr. Rhodes  
18 before he testified. And that's the direction of  
19 the discovery. So if I could get discovery along  
20 those lines, just interrogatories and requests to  
21 produce, and maybe requests to admit, that might  
22 speed the --

23 THE COURT: Process.

24 MR. GLEISSNER: -- eventual trial, Your  
25 Honor, if that's okay.

Exhibit-1

STATE OF SOUTH CAROLINA )  
COUNTY OF SALUDA )

IN THE COURT OF COMMON PLEAS

2009-CP-41-00176

Montavis K. Gaines, #323168, )

Applicant, )

RETURN TO APPLICANT'S FIRST SET  
OF CONTINUING INTERROGATORIES

v. )

State of South Carolina, )

Respondent. )

TO: RICHARD R. GLEISSNER, ESQUIRE, ATTORNEY FOR THE APPLICANT:

The Respondent objects to Applicant's Interrogatories numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9) on the grounds that Applicant has failed to show the Court good cause as to why Discovery should be granted in this matter. The Uniform Post-Conviction Act does not allow for discovery in a non-capital post-conviction relief case without good cause. S.C. Code Ann. §17-27-150(A) provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

Exhibit - 2

SALLEY ELLIOTT  
Assistant Deputy Attorney General

KAELOE E. MAY  
Assistant Attorney General

BY: Kaelon E. May  
(ATTORNEYS FOR RESPONDENT)  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737

April 6, 2011

STATE OF SOUTH CAROLINA )  
COUNTY OF SALUDA )

IN THE COURT OF COMMON PLEAS

2009-CP-41-00176

Montavis K. Gaines, #323168, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

RETURN TO APPLICANT'S FIRST SET  
OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS

TO: RICHARD R. GLEISSNER, ESQUIRE, ATTORNEY FOR THE APPLICANT:

The Respondent objects to Applicant's Requests for Production of Documents numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), and nine (9) on the grounds that Applicant has failed to show the Court good cause as to why Discovery should be granted in this matter. The Uniform Post-Conviction Act does not allow for discovery in a non-capital post-conviction relief case without good cause. S.C. Code Ann. §17-27-150(A) provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

SALLEY ELLIOTT  
Assistant Deputy Attorney General

KAELON E. MAY  
Assistant Attorney General

BY: Kaelon May  
(ATTORNEYS FOR RESPONDENT)  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737

April 6, 2011

STATE OF SOUTH CAROLINA )  
COUNTY OF SALUDA )

IN THE COURT OF COMMON PLEAS

2009-CP-41-00176

Montavis K. Gaines, #323168, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

RETURN TO APPLICANT'S FIRST SET  
OF REQUESTS TO ADMIT

TO: RICHARD R. GLEISSNER, ESQUIRE, ATTORNEY FOR THE APPLICANT:

The Respondent objects to Applicant's Requests to Admit numbers one (1), two (2), three (3), four (4), five (5), and six (6) on the grounds that Applicant has failed to show the Court good cause as to why Discovery should be granted in this matter. The Uniform Post-Conviction Act does not allow for discovery in a non-capital post-conviction relief case without good cause. S.C. Code Ann. §17-27-150(A) provides:

A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for the effective utilization of discovery procedures, counsel may be appointed by the judge for an applicant who qualifies for appointment pursuant to Section 17-27-60 or similar applicable provisions of law.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Chief Deputy Attorney General

Exhibit - 4

SALLEY ELLIOTT  
Assistant Deputy Attorney General

KAELOE E. MAY  
Assistant Attorney General

BY: Kaelon May  
(ATTORNEYS FOR RESPONDENT)  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737

April 6, 2011

1 THE COURT: What's your position on that,  
2 Mr. Lee?

3 MR. LEE: The State has no opposition to  
4 their request for discovery.

5 THE COURT: We've got your motion for  
6 discovery on that basis for interrogatories and  
7 requests for production. Is that what you're asking  
8 for?

9 MR. GLEISSNER: Just for discovery, that's  
10 correct, Your Honor, and maybe requests to admit.  
11 When you're requesting, you can always speed things  
12 along when you get them -- okay, when they're not  
13 denied, yes.

14 THE COURT: All right, we can do that.  
15 We'll do a Form 4 order on both of those.

16 MR. GLEISSNER: Fantastic, Your Honor.  
17 Thank you so much.

18 MR. LEE: Thank you, Your Honor.

19 --End of Transcript of Record--

Saluda Police Department  
INCIDENT REPORT

CASE NUMBER

061000453-T

AGENCY ID  
SC0410100

TYPE VICTIM  
Individual  
Business  
Financial Ins  
Government  
Relig. Org.  
Soc./Public  
Other  
Unknown  
Police Off.

INCIDENT TYPE				COMPLETE	FORCED ENTRY	PREMISE	UNITS ENTD						
1. ARMED ROBBERY				<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO								
2.													
3.													
INCIDENT LOCATION				ZIP CODE	WEAPON TYPE								
SALUDA COUNTY DETENTION CENTER				29138-									
INCIDENT DATE	24hr CLOCK	TO	DATE	24hr CLOCK	DISP DATE	DISP TIME	TIME ARRIVE DEPART TIME	LOCATION NO					
10/11/2006	14:55		10/11/2006	15:00	10/11/2006								
COMPLAINANT'S NAME			RELATIONSHIP TO SUBJ			RES	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE	
			#1	#2	#3						H	H	
ADDRESS			CITY			STATE	ZIP CODE	LOCATION NO					
			SALUDA			SC	29138-						
VICTIM'S NAME			RELATIONSHIP TO SUBJ			RES	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE	
			#1	#2	#3						H	H	
LOCAL CASH ADVANCE,			HEIGHT WEIGHT HAIR EYES FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.										
ADDRESS			CITY			STATE	ZIP CODE	LOCATION NO.					
429 TRAVIS AVE.			SALUDA			SC	29138-						
VISIBLE INJURY (VICT. I) YES X NO EXPLAIN:				COMPLAINT OF ANY NON-VISIBLE INJURIES: YES X NO									
VICTIM (NO. I) USING ALCOHOL YES NO X UNK DRUGS: YES NO X UNK TYPE:													
TWO-MAN VEH		ONE-MAN VEH		DETECTIVE/SPECIAL		OTHER		ALONE		ASSISTED		J-This Jurisdiction S-State O-Out of State U-Unk	
X SUSPECT		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE	ETH	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	
RUNAWAY		Rhodes, Jerome		B	M	32	N	08/06/1974	506	165	BLK	BRO	
WANTED		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.											
WARRANT		SSN - 248-29-5727											
ARREST		ADDRESS			CITY	STATE	ZIP CODE	LOCATION					
JAIL		Projects, Bouknight Ferry Rd.			Saluda	SC	29138						
SUMMONS		SUBJECT(#1) USING ALCOHOL: YES NO X UNK			ARREST NEAR SCENE	YES	DATE/TIME OFFENSE	DATE/TIME ARREST					
					X NO		10/11/2006						
		DRUGS: YES NO X UNK TYPE:			TOTAL # ARRESTED	0	14:55						

On 12/04/06 and approximate time, I Officer Turner, interviewed Jerome Rhodes (the subject) at the Saluda County Jail where subject wrote a statement about his involvement and involvement of the co-defendants of the case that occurred on 10/11/06. Subject now willing to testify for leniency from the State. In reference to subject, I spoke to the Solicitor's Office on his behalf for a lighter sentence in exchange for subject's testimony.

				JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY				JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY			
TYPE (GROUP)	CASH										TOTAL VALUE
STOLEN	1,000.00										1,000.00
DAMAGED											
BURNED											
RECOVERED											
SEIZED											
COUNTERFEIT											
UNKNOWN											
SUBJECT IDENTIFIED	SUBJECT LOCATED	X ACTIVE	ADM CLOSED	ARRESTED UNDER 18		EX-CLEAR UNDER 18					
<input checked="" type="checkbox"/> YES	<input checked="" type="checkbox"/> YES	UNFOUNDED		X ARRESTED 18 AND OVER		EX-CLEAR 18 AND OVER					
REASON FOR EXCEPTIONAL CLEARANCE:											
OFFENDER DEATH		NO PROSECUTION		EXTRADITION DENIED		VICTIM DECLINES COOPERATION		JUVENILE-NO CUSTODY			
REPORTING OFFICER(S)	DATE	UNIT #	APPROVING OFFICER				DATE	UNIT #			
J.A. TURNER	12/04/06	SPD5	FOLLOW-UP OFFICER								
			INVESTIGATION No								

EXHIBIT - A

State of South Carolina  
County of Saluda  
The State

In the Court General  
Sessions

- VS -

Montavis K. Gaines  
Defendant

Request For Discovery of  
Favorable to the Defendant

2012 OCT - 1 PM 2:43  
CLERK OF COURT  
SALUDA CO. S.C.

FILED

Now comes the Defendant Pro se, pursuant to Rule (5) of the South Carolina Rules of Criminal procedure, in addition to Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 364 (1959);

Moore v. Illinois, 408 786 (1972) that your office supply to me or make available for inspection, all evidence which may be favorable to the Defendant with regard to the offense with which he has been charged on octe 11, 2006 with Armed Robbery, Criminal Conspiracy and Assault and Battery with intent to kill

(A) all statements, confessions or notes taken as a result of discussions with any witnesses or co-Defendant the state may call to testify at the trial of this case.

(B) Any other evidence or information which might lead to evidence tending to lessen the credibility of any of the potential witnesses for the state, or which in any other way might tend to show that the defendant is not guilty of the charges against him/her.

EXHIBIT - B

Recognizing that Brady v. Maryland, supra and other authorities cited require that only information favorable to the defendant be made available, and further recognizing that a genuine disagreement may arise as to whether or not particular item of evidence is favorable, it will be required that the court order to provide for "in camera" inspection of the items sought to be discovered, should you feel that such items are not favorable to the defendant. By permitting the court to examine the items requested, the legitimate interests of the state will be protected in that no disclosure in excess of Brady, et al., will occur. Further it will be a continuing one, provided that in the event any items sought to be discovered herein become available subsequent to making of the order pursuant to this motion, any agreement between the prosecution and co-defendant Jerome Rhodes Rhodes testified that he did have a deal with law enforcement.

The purpose of said motion is to enable the defendant herein to properly prepare a defendant to the offenses charged and to properly prepare for the examination of any witness whom may testify in this case. Defendant would show that the failure to produce any of the foregoing evidence or information by the law enforcement agency involved would result in a violation of the Fifth, sixth, and Fourteenth Amendment of the Constitution of the United States.

In the state of South Carolina  
County of Saluda

Montavis K. Gaines

vs.

State of South Carolina  
Defendants.

In the court of common  
pleas

Certificate of service

I the undersigned defendant Montavis K. Gaines hereby certify that I have served the motion pursuant to Rule (5) SCRPC in the above captioned matter by placing a copy in the first class mail ~~with~~ with sufficient postage prepaid addressed to

Doris B. Helmes  
Saluda County Clerk of Court  
100 East Church St. Suite 6  
Saluda, SC 29138

Saluda Police Department  
101 South Jefferson St  
Saluda, SC 29138

s/ Montavis K. Gaines  
Montavis K. Gaines  
386 Redemption way  
McCormick SC 29879

2012 OCT -1 PM 2:43  
CLERK OF COURT  
SALUDA CO. S.C.

FILED

TOWN OF  
**SALUDA**

SOUTH CAROLINA

101 South Jefferson Street Saluda South Carolina 29138

• Phone 864-445-7336 • Fax 864-445-7065

Town of [Saluda@link.com](mailto:Saluda@link.com)

Montavis Kentrail Gaines  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, South Carolina 29899

RE: State v. Montavis Gaines

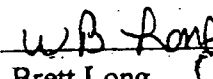
December 6, 2012

Dear Mr. Gaines,

This letter is to check on whether or not you have received the information that I forwarded to you previously. Officer Turner is no longer employed with this office. He is currently employed at Louis Rich. As a result, I have been assigned to investigate into the allegations of misconduct that you have made against Mr. Turner. I have requested for Mr. Turner to come in and speak to me at here at the Saluda Police Department. He has indicated to us that he was the investigating officer for this matter that occurred on October 11, 2006.

Please confirm that you now have what you need.

Sincerely,

  
Brett Long  
Acting Chief of Police

Cc: Montavis K. Gaines

EXHIBIT-C

1 THE WITNESS: As far --

2 THE COURT: You can claim the Fifth Amendment right  
3 at whatever time you'd like.

4 THE WITNESS: Yeah, that's what -- I mean, just as  
5 far as certain questions, that's it.

6 By Mr. Gleissner:

7 Q That's fine. The last time I learned anything  
8 about the Fifth Amendment was when I was in law school and  
9 that was many, many years ago, so I'm not going to contest  
10 your right to the Fifth Amendment.

11 All right. Now, in your trial testimony, you  
12 testified that you did not have a deal with the police or  
13 prosecutors. Now, that's what you testified to?

14 A Yes. I mean, I testified to that. I had no deal  
15 with the solicitors or nothing like that, I only knew what  
16 the officer -- what the police officer said, that was it.

17 Q Okay. So did you have a deal with the police  
18 officers?

19 A I mean, as far as to testify on him?

20 Q Yeah, to testify.

21 A Nah, they was just saying different things, that's  
22 it.

23 Q They were just telling you that if you didn't  
24 testify that you were going to get put away for a long  
25 time?

Exhibit D

## Ervin Maye - Cross-Examination by Mr. Gleissner

1 office to your knowledge did not have any deal with Mr.  
2 Rhodes; is that right?

3 A Absolutely not. They did not. We did not have any  
4 specific deal, nor was anyone else authorized in any regard  
5 to convey to Mr. Rhodes in any way that he had any deal.  
6 And we spoke with the law enforcement officers about that  
7 prior to trying the case; and like I said, no one ever  
8 brought to my attention that there had ever been any  
9 promise to him or any hope of reward. And in fact, Mr.  
10 Gaines himself testified during the trial that he had no  
11 deal prior to that time and specifically refuted that.

12 Q Okay. And -- now, you obviously -- I mean, you can  
13 only testify based upon your personal knowledge, and you  
14 have no knowledge of what the police officers talked  
15 directly to Mr. Rhodes about, do you?

16 A No. If I wasn't present, it was outside of my  
17 presence. No. But I know that I talked with them and  
18 spoke with them directly and asked them and they  
19 specifically told me that they had not. Mr. Gaines  
20 confirmed that with his sworn testimony during the trial.  
21 that no one had promised him anything in exchanged for his  
22 testimony.

23 Q Okay. And were you there during the closing  
24 arguments when -- were you there during the closing  
25 arguments when Mr. Rhodes was specifically discussed by the

Exhibit E

Jerome Rhoads - direct examination by Mr. Young

1 A November the 29<sup>th</sup> or 30<sup>th</sup>, something like that.

2 Q Okay. And you've been in jail since then?

3 A Yes, sir.

4 Q When you were picked up, what'd you tell law enforcement you did?

5 A Sir?

6 Q When you were picked up, did you tell law enforcement you were involved in this?

7 A Yes, sir.

8 Q Did you confess?

9 A Yes, sir.

10 Q Did they make a deal with you?

11 A No, sir.

12 Q You got any deal now?

13 A No, sir.

14 Mr. Young: Your witness.

15 The Court: Cross-examination.

16 CROSS-EXAMINATION

17 BY MR. ELLISOR

18 Q Mr. Rhoads---

19 A Yes, sir.

20 Q You got a sister?

21 A Yes, sir.

22 Q What's her name?

23 A Nicole Rhoads.

24 Q Nicole. Did you talk with Nicole Rhoads yesterday and tell her that the state--

25 Mr. Maye: Object to the hearsay. Object to the hearsay of a third party, Your Honor.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SALUDA  
STATE VS.

INDICTMENT/CASE#:

2007-GS-41-063

JEROME D. RHODES

A/W#: H 995109

AKA:

Date of Offense: 10/11/06

Race: B

Sex: M

Age: 34

S.C. Code §: 16-11-0330(A)

DOB: 8/6/74

SS#: [REDACTED]

CDR Code #: 0139

Address:

City, State, Zip

SALUDA, SC 29138

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS

TO: STRAIGHT ARM PROBATION

in violation of § C/L

of the S.C. Code of Laws, bearing CDR Code # 0137

NON-VIOLENT

VIOLENT

SERIOUS

MOST SERIOUS

Mandatory GPS (CSC

§17-25-45

w/minor 1<sup>st</sup> or Lowd Act)

4 YEARS

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST

[Signature]

Solicitor

[Signature]

Defendant

[Signature]

Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,

for a determinate term of 4 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years

and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable\*; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. CREDIT 23 MO. TIME SERVED. (WAA)

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

RESTITUTION:  Heard,  Waived,  Ordered

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms:

set by SCDPPPS

PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling \_\_\_\_\_

Random Drug/Alcohol Testing \_\_\_\_\_

Fine may be pd. in equal, consecutive weekly/monthly

\_\_\_\_\_ pmts. of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: PAY COURT COSTS W/IN 180

DAYS OF RELEASE FROM ACTUAL INCARCERATION

IN PRISON.

Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Recipient:

\*Fine: \$ \_\_\_\_\_

§14-1-206 (Assessments 107.5%) \$ \_\_\_\_\_

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ \_\_\_\_\_

§56-5-2995 (DUI Assessment) \$12 \$ \_\_\_\_\_

§35.13 (Public Def/Prob) \$500 \$ \_\_\_\_\_

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ \_\_\_\_\_

§50-21-114(BUI Breath Test Fee) \$50 \$ \_\_\_\_\_

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ \_\_\_\_\_

3% to County (if paid in installments) \$ \_\_\_\_\_

TOTAL \$ 500

\$ 340

133.90

[Signature]

Clerk of Court/Deputy Clerk

Court Reporter: Stacy Sheppard

PRESIDING JUDGE

Judge Code: 210 15 10

Sentence Date: Oct. 10, 2008

EXHIBIT-F

# The Supreme Court of South Carolina

Montavis K. Gaines, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212227

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## ORDER

---

Petitioner has filed a motion for leave to file a Rule 60(b), SCRCP, motion in the circuit court. The motion is denied.<sup>1</sup>

  
C.J.  
FOR THE COURT

Columbia, South Carolina

November 7, 2013

cc:

Wanda H. Carter, Esquire

John Walter Whitmire, Esquire

---

<sup>1</sup> This ruling has no impact on petitioner's second application for post-conviction relief currently pending in the circuit court.

EXHIBIT - G