

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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SC Court of Appeals

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Appeal From York County  
Court of Common Pleas  
Post-conviction Relief  
Habeas Corpus Petition

S.C.R Civ. Proc. Rule 60 (b)(5)  
S.C.R. Civ. Proc. Rule 59 (e)  
Daniel D. Hall Presiding Judge

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Appellate Case No: 2015-001004  
PCR Case No: 2006-cp-46-0010

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Antonio Gordon, #259798,

Appellant,

v.

State of South Carolina,

Respondent.

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MOTION REQUESTING LEAVE  
TO PROCEED IN FORMA PAUPERIS

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The Appellant hereby motion this court to proceed in forma pauperis because he is without the required filing fee at this present time.

Furthermore, Appellant will point out that he is attacking his conviction and sentence which should come without the filing fee on appeal. Appellant will provide this court with a detail history of the case with attachments to support his position.

On January 3, 2006 the Appellant filed a statutory habeas corpus. Antonio Antonio Gordon v. State, Case No: 2006-cp-46-0010. See Attachment (1) (Habeas Corpus). Dismissed with prejudice on 4-30-07. See Attachment (2) (Order of dismissal). See Fn1

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Fn1 This Habeas was rechacterized as a PCR application. See Attachment (3) (letter from Clerk).

Two months later the appellant filed a S.C.R. Civ. Proc. Rule 60(b) alleging Judge Hayes was a conflict of interest and requested a different judge consider the habeas on the merits. See Attachment (4) (First Rule 60(b) filed 8-7-07). On January 31, 2008 the Honorable Judge Rogers Couch granted appellant relief for which he did not ask and failed to consider the merit of the claims that challenged the conviction and sentence. See Attachment (5) (Order granting relief). Appellant's Counsel failed to file a Rule 59(e) and notice of appeal at appellant's request.

On February 2, 2015 the appellant filed a second S.C.R. Civ. Proc. Rule 60(b)(5)-Austin v. State, 409 S.E.2d 395 (1991) Belated Appeal on judge Couch Order issued on January 31, 2008. See Attachment (6) (Appellant's second Rule 60(b) motion) On March 9, 2015 Judge Hayes issued an order dismissing the Rule 60(b) motion without prejudice finding he was not a conflict of interest, Appellant seeked to have the same claims considered a second time that had already been ruled against him, and that appellant's Austin review must fail be cause he was granted the relief he asked for in his motion. See Attachment (7) (Order filed March 9, 2015).

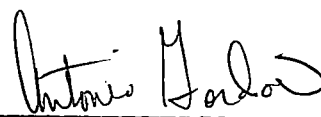
On March 23, 2015 appellant filed a Rule 59(e) motion on judge Hayes Order issued March 9, 2015 pointing outh several error of law in his Order of dismissal. He recused himself and the Honorable Daniel D. Hall presided over the case sub judice and on April 20, 2015 the Honorable hall issued and order denying relief on several error of law. See Attachment (8) and (9). See Fn2

The appellant attempted to file a second Rule 59(e) motion to preserve his claims for appellate review specifically that he file his "first" Rule 59(e) on time but the clerk of court failed to process his filing and the motion back unfiled. See Attachment (10) (second rule 59(e) motion). Apparently if this court does not allow the appellant to proceed in forma pauperis the appellant right to access the court's would be

violated seriously where Gordon has been deprived his right to seek redress on his jurisdiction claims and deprived the opportunity to appellate review on the erroneously decisions issued by the lower courts. Therefore, this court should grant appellant's motion to proceed in forma pauperis so appellant could seek redress on his claims. Boddie v. Connecticut, 41 S. Ct. 780 (1971); Hefener v. Destiny, Inc., 471 S.E.2d 135 (S.C. 1995). This case involve "fundamental rights", so access to the Courts is constitutionally required. Martin, 321 S.C. at 535, 471 S.E.2d at 135

Conclusion

It is respectfully asked that this Honorable Court grant appellant's motion to proceed in forma pauperis.



Antonio Gordon, #259798

This 28<sup>th</sup> Day of May, 2015

STATE OF SOUTH CAROLINA  
IN SUPREME COURT

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Appeal from York County  
Court of Common Pleas  
Post-Conviction relief  
Habeas Corpus petition  
S.C.R. Civ.Proc.Rule 60(5)  
S.C.R.Civ.Proc.Rule 59(e)  
Daniel D. Hall Presiding Judge

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Appellate Case No: 2015-001004  
PCR Case No: 2006-cp-46-0010

Antonio Gordon,

Petitioner,

v.

State of South Carolina,

Respondent.

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CERTIFICATE OF SERVICE

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i, Antonio Gordon hereby certify I served respondent with Appellant's motion requesting leave to proceed in forma pauperis on.

Attorney General Office  
Ashley Anne McMahan, Esquire  
P.O. Box 11549  
Columbia, S.C. 29211

by depositing a copy in the mail with sufficient funds this  
28th day of May, 2015

Antonio Gordon, 259798  
Kershaw C.I.  
4848 Goldmine Hwy  
Kershaw, SC 29067

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
Antonio Gordon, #259798 )  
Petitioner, )  
Vs. )  
John Ozmit )  
Director of the )  
South Carolina Dept. )  
of Corrections and the )  
Henry D. McMaster, )  
Attorney General of )  
South Carolina )

IN THE COURT OF COMMON PLEAS  
06-CP46-010  
PETITIONER FOR WRIT OF HABEAS CORPUS  
F-763891, F-763897, F-763898, F-763901, F-763902  
F-763914

FILED-RECEIVED  
2006 JAN -3 PM 4:44  
DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

Petitioner, Antonio Gordon, hereinafter Gordon an inmate of the South Carolina Department of Corrections, is seeking release from incarceration and respectfully requests that this Court grant a writ of habeas corpus and order of the Court requiring the State of South Carolina to vacate Gordon's sentence's and set a new trial. These issues bring into the legality of the Petitioner's detention, and he entreats this Court to weigh this arguments carefully and to not allow the delay in their presentation in inure to this prejudic

JURISDICTION

The Supreme Court of South Carolina held that relief pursuant to a writ of habeas corpus, is appropriate when there has been a violation, which, in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice, Butler v. State 302 S.C. 466, 468, 397 S.E.2d. 87, 88 (1990). "The general and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention". Butler, 468 at 302 S.C. 88 397, S.E. 2d (Quoting Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 562, 1968 S.Ct. 1215 (1968)).

DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC  
2006 JAN 27 AM 10:21  
CERTIFIED TRUE COPY

QUESTION PRESENTED

1. Is petitioner guilty plea involuntary (a)?
2. Is petitioner guilty plea involuntary (b)?
3. Petitioner was denied due process, petitioner pled guilty without the ability to withdraw plea where double jeopardy issue was prejudice?
4. Petitioner due process right were violated where statement on appeal was inadmissible if petitioner went to trial rather than plea guilty??
5. Petitioner was denied due process where he was allowed to plea guilty under unambiguous statute children's code of laws?
6. Did General Session Court lack jurisdiction in accepting petitioner guilty plea, where jurisdiction had not been relinquished by the family court?
7. Should a sixteen year old charged with a Class A, B, C, or D felony specified in S.C. Code Ann § 20-7-6605(1), receive a competence hearing under due process of law before the solicitor use's his discretion in trying the child as an adult?
8. Petitioner was denied due process where State psychologist was qualified to testify to petitioner competence to stand trial but was not licensed as a psychologist under South Carolina law and regulation?

## STATEMENT OF CASE

On October 15, 1998, the York County Grand Jury indicted the petitioner for murder, three counts of possession of a firearm during the commission of a violent crime, two counts of attempted armed robbery, possession of a firearm by a person under twenty-one, and criminal conspiracy.

On July 16, 1999, the petitioner pled guilty to all charges. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the petitioner to thirty years for murder, five years for each count of possession of a weapon during the commission of a violent crime, ten years for each count of attempted armed robbery, and five years for criminal conspiracy and five years for possession of a weapon under twenty one.

A timely Notice of Appeal was filed on petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals was dismissed. State v. Antonio and Monta Gordon, Op. No. 2000-UP-747 (S.C.Ct.App. filed December 6, 2000).

Petitioner filed for post-conviction relief June 15, 2000. The respondent made its return on May 2, 2001. An evidentiary hearing into the matter was convened on July 29, 2003, at the Richland County Courthouse. Petitioner post-conviction was denied August 18, 2003, by Honorable J. Ernest Kinard. This Court subsequently denied a petition for writ for certiorari. Petitioner now raises issues that are not cognizable under the PCR act.

## STATEMENT OF FACTS

On July 23, 1998, Gordon got arrested for murder, two counts of attempted armed robbery, three counts of possession of a weapon during the commission of a violent crime, possession of a weapon by a person under twenty-one, and criminal conspiracy. Petitioner's mother retained counsel to represent petitioner on July 23, 1998, counsel requested to see his client which his request were denied. Petitioner made a self-incriminating statement. The first statement petitioner made he denied any involvement in the crime, the second statement petitioner confessed to the alleged crimes.

Petitioner proceeded to pre-trial on the following dates, July 12, 14, & 16, 1999. During the pre-trial petitioner counsel argued to the court several issues that he felt was in violation of petitioner's Constitutional rights. Counsel argued that it should be a separate trial that of his co-defendant's being that petitioner had a low IQ that of 68, The State did not have probable cause to arrest the petitioner, petitioner statement to the police should be suppressed due to petitioner age and his limited of understanding at the time the self-incriminating statement was made, and finally, petitioner statement's should be suppressed due to the police did not have probable cause to arrest.

Counsel requested that petitioner be evaluated by Dr. Jonathan Venn, which he testified that he could not come to an opinion to whether the petitioner was competent to stand trial, or whether the petitioner was mentally retarded. Dr. Jonathan Venn, testified that he did not have no back-ground information, nor did he get the chance to speak with petitioner family members to try and see if he could have came up with any helpful information. However, the State requested that petitioner under-go evaluation to determine whether petitioner was competent to stand trial. Dr. Leslie N. Sandler rendered an opinion that petitioner was competent to stand trial, and that petitioner was not mentally retarded.

The trial judge ruled that he agree with the State's opinion that petitioner was competent to stand trial. The trial judge also ruled that petitioner statement's was allowed into trial and that they will not be admissible at trial. Thereafter the judge ruled that

petitioner was competent to waive his Miranda rights, and that the police had probable cause to arrest. Thereafter, the petitioner pled guilty to all charges. Petitioner received a letter from the South Carolina Board of Examiners in Psychology dated January 9, 2002 stating that "DR. LESLIE N. SANDLER" is not and has not been "licensed" as a psychologist in "South Carolina".

## INVOLUNTARY GUILTY PLEA(A)

Entering a guilty plea results in a waiver of several constitution rights, therefore the due process clause requires that guilty pleas are entered into voluntarily knowingly and intelligently by defendants. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709. The United States Supreme Court has held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he or she is waiving. *Id.* Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial and the right to confront one's accusers. This court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 433, 271 S.E.2d. 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d. 39 (1991). In addition to the requirements of BOYKIN, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.* [3-5]

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the P.C.R. hearing. Harres v. Leeke, 282 S.C. 131, 318 S.E.2d. 360 (1984). In this case, the transcripts of Gordon's plea on its face provides enough evidence to hold Gordon's plea was not entered into voluntarily or knowingly. A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea "may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel or both". State v. Ray, 360 S.C. 431, 437,

427 S.E.2d.171,174 (1993).Although the trial court is not required to direct defendant's attention to each right and obtain a separate waiver,the record should indicate the defendant was fully aware of the consequences of his guilty plea.State v. Lambert,206 S.C. 574,225 S.E.2d.340 (1975).The court failure to inform Gordon that the murder charge carried a mandatory minimum sentence of thirty years without the possibility of earning "good behavior" and "work credits",rendered the plea invalid.The mandatory minimum was only mention in passing by the judge.

The judge informed Gordon that the offense did not allow for parole,but he failed to inform Gordon that he would not be eligible for any "good time" or "earn work credits".

§ 24-13-100(B) states in part:"a prisoner convicted of a "no parole offense" against this State as defined in section § 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by section § 24-3-30, whose record of conduct shows that he has faithfully observed all the rules of the institution...is entitled to deduction from the term of his sentenc...However,no prisoner serving a sentence for life imprisonment or a mandatory minimum term of imprisonment for thirty years pursuant to section § 16-3-20 is entitled to credits under this provision.

Gordon also pled guilty to attempted armed robbery.The judge explained to him that he would have to serve 85% of his sentence. Therefore,Gordon was under the impression that he would have to do only 85% of both sentences,if he exhibited good behavior.Gordon was under the impression that he could reduce his total time actually serving by six years,when actually it could only be

reduced by 1½ years. Involving as it does, a liberty interest, the court should scrutinize the transcript closely to determine if Gordon's constitutional rights were violated.

INVOLUNTARY GUILTY PLEA(B)

The petitioner contends that his guilty plea was involuntary and unintelligently made, and in violation of due process due to the fact that petitioner suffered from a psychological chemical imbalance which had [NOT] yet been thoroughly examined nor dispositioned of before the petitioner was called for plea and sentencing in the York County Court of General Session on the date of July 19 1999. Trans. Pg. 194(9-19); See Trans. Pg. 194(9-21)

Quote from the transcript of the record to show the court of the error of law:

9. You heard about his "limited mental capacity although he's not retarded" because nobody's had the opportunity to do a (full examination) Dr. Venn [did'nt] get to speak with the family members, they didn't know much about him but the records from DJJ from 1998 and 1995 psychological check indicate borderline functional IQ's, 1995 psychological shows an IQ 68. Dr. Venn IQ examination shows IQ 68, he is an individual that's easily lead around.

Absent a "thorough psychological examination being allowed to have been conducted on the petitioner the petitioner contends that his guilty plea was involuntarily unintelligently and in violation of due process, and therefore, petitioner's guilty plea and time sentence should be vacated as a result of this action. Boykin v. Alabama, Supra, Moody v. United States, 469 F.2d. at 700; Durant v. United States 410 F.2d. 689. As the record clearly violated Rule 11 Federal Rules of criminal procedures and U.S. Constitution laws as defined by the U.S.C.A. 6th & 14th Amendments as determined by the United States Supreme Court, and on that IPSO FACTO, counsel should have withdrawn

the petitioner's guilty plea and trial judge erred in allowing the petitioner to enter into a plea of guilty, absent a adequate and thorough psychological examination which would have determined if petitioner was competent to enter a plea of guilty. Tolliver v. U.S., 563 F.2d.1117 (4th.cir.1997); U.S. v. Cain, 653 F.2d.883 (4th. cir.1981).

Based on the alleged due process violation and all the above mentioned facts petitioner request that his case be vacated and a new trial set.

PETITIONER WAS DENIED DUE PROCESS, PETITIONER  
PLED GUILTY WITHOUT THE ABILITY TO WITHDRAW  
PLEA, WHERE DOUBLE JEOPARDY ISSUE WAS PREJUDICE.

South Carolina statute § 16-23-490 provides that any person who commits any felony under the laws of the state through the use of a dangerous or deadly weapon is also guilty of the crime of "Possession of a weapon during the commission of a violent crime" punishment by imprisonment for not more than five years, which punishment shall be in addition to any punishment provided by law for the felony. Another S.C. statute provides that any person convicted of the felony of attempted armed robbery while armed with a deadly weapon shall be punished by imprisonment for not more than twenty years. Petitioner, as the result of an attempted armed robbery in which he used a firearm, was convicted in S.C. State Court of both "attempted armed robbery and possession of a weapon during the commission of a violent crime and pursuant to the statutes was sentenced to five years for possession of a firearm during the commission of a violent crime and ten years consecutive for attempted armed robbery.

The petitioner seeks reversal of his convictions and sentence for attempted armed robbery on the ground that his sentence for both Possession of a weapon during the commission of a violent crime and attempted armed robbery violated due process and violated the protection against multiple punishment for the same offense provided by the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Fourteenth Amendment. The petitioner construes the commission of a violent crime as defining the "same

offense" under the test announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306., where the same act or transaction constitutes a violation of two distinct statutes, the test for determining whether there are two offenses or only one, is whether each statute requires proof of a fact which the other does not.

Most recently, in State v. Haggard, the Missouri Supreme Court reexamined its decisions in Sours I, Supra, and Sours II, Supra, in light of the 1981 holding in Albernaz v. U.S., 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed. 2d 275. The Missouri Court, however, remained unpersuaded, stating:

Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction "619 S.W. 2d at 51.

The Double Jeopardy Clause forbids either multiple prosecutions or multiple punishment for the same offense. See E.g., North Carolina v. Pearce, 395 U.S. 711, 711 717-718, 89 S.Ct. 2072, 2076-2077, 23 L.Ed. 2d 656 (1969); United States v. Benz, 282 U.S. 304, 307-308, 51 S.Ct. 113 114, 75 L.Ed. 354 (1931), Ex Parte Lange 18 wall, 163, 169 173-175 21 L.Ed. 872 (1874). Petitioner was convicted of both attempted armed robbery and possession of a weapon during the commission of a violent crime, and sentenced for both crimes. Had petitioner been tried for these two crimes in separate trials he would plainly have been subjected to multiple prosecutions for "the same offense" in violation of the Double Jeopardy Clause. See Harris v. Oklahoma,

433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (Persuriam):  
Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), for  
the reasons stated below, I do not believe that the phrase "the same  
offense" should be interpreted to mean one thing for purposes of  
the prohibition against multiple prosecutions and something else  
for purpose of the prohibition against multiple punishment.

Attempted Armed Robbery and Possession of a weapon during the  
commission of a violent crime constitute the same offense under  
the test set forth in Blockburger V. United States, Supra, To punish  
petitioner for possession of a weapon during the commission of a  
violent crime, the state was not required to prove a single fact  
in addition to what it had to prove to punish him for attempted  
armed robbery. The punishment imposed for possession of a firearm  
was not predicted upon proof of any act, state of mind, or result  
different from that required to establish, attempted armed robbery,  
petitioner was thus punished twice for the elements of attempted  
armed robbery: once when he was convicted and sentenced for posse-  
ssion of a weapon during the commission of a violent crime. A State  
has wide latitude to define crime and prescribe the punishment for  
a given crime. For example, a State is free to prescribe two different  
punishments (e.g; a fine and a prison term) for a single offense.  
But the Constitution does not permit a State to punish as two crimes  
conduct that only constitutes one "offense" within the meaning of  
double jeopardy clause, for whenever a person is subject to the risk  
that he will be convicted of a crime under State law, he is "put  
in jeopardy of life or limb" for the same offense is to have any real  
meaning, a State cannot be allowed to convict a defendant two, three  
or more times simply by enacting separate statutory provisions .

defining nominally distinct crimes, if the Double Jeopardy Clause imposed no restrictions on legislature's power to authorize multiple punishment, there would be no limit to the number of conviction that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser included offense of the second, the second lesser included offense of the third, and so on.

Contrary to the assertion of the United States in its Amicus Brief for United States as Amicus Curiae 18-19, the entry of two convictions and the imposition of two sentence cannot be justified on the ground that the legislature could have simply created one crime but prescribed harsher punishment for that crime. This argument incorrectly assumes that the total sentence imposed is all that matters, and the number concerns underlying the Double Jeopardy Clause when multiple charges are brought, the defendant is "put in jeopardy" as each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution ability to bring multiple charges increase the risk that the defendant will be convicted on one or more charges. The very fact that a defendant has been arrested, charged and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, where the prosecution's evidence is weak its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. the submission of two charges rather than one gives the prosecution

"the advantage of offering the jury a choice-a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence."Cichos v. Indiana, 87 S.Ct.271 (1966).

However, in petitioner case he was denied due process ,petitioner pled guilty without the ability to withdrawn plea,where double jeopardy issue was prejudice.In violation of the Fifth,Sixth,and Fourteenth Amendment to the United States Constitutional.

For the foregoing reason's the petitioner should be granted a new trial.

PETITIONER DUE PROCESS RIGHT WERE VIOLATED WHERE  
STATEMENT ON APPEAL WAS INADMISSIBLE IF PETITIONER  
WENT TO TRIAL RATHER THEN PLEA GUILTY.

Defense counsel testified he told Gordon he could go to trial and still challenge "all this". However, defense counsel also told Gordon he did not have a defense and "even if we win on the issue of the statement being kept out, the fact of the matter is you have got your three co-defendants [who are] going to testify against you". You can't testify. You've got this other person out there, the victim. App. 477, 1.1-0 478, 1.5. Gordon unequivocally testified he would not have pled guilty and would have insisted on going to trial if he knew he was waiving the right on appeal to challenge the issue of his statement being involuntary and coerced.

In Shirely v. State, 306 S.C. 241, 411 S.E.2d.215 (1991), this court held defense counsel was ineffective for failing to advise petitioner prior to his guilty plea that his statements may have been involuntary because the investigating officer promised him a four-year cap. The court noted that statements are inadmissible at trial when they are involuntary, or the result of a promise. State v. Franklin, 299 S.C. 133 382 S.E.2d.911 (1989).

As here, Shirely, testified he would have insisted on going to trial to challenge his involuntary statement had he been properly advised. Shirely v. State, 411 S.E.2d.216

Furthermore, defense counsel's argument in this case that Gordon's statement was involuntary was meritorious. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. Edward v. Arizona, 451 U.S. 477 101 S.Ct.1880 (1981). It is true that where a suspect, such as Gordon, is indecisive in his request for counsel, the police need not always cease questioning. Davis v. United States, 512 U.S. 452, 114 S.Ct.2350 (1994). Yet this is an unusual case. Gordon was a juvenile and as a juvenile he did not possess the authority to waive his right to counsel without his parent or legal guardian's consent.

The U.S. Supreme Court has held that a person accused of crime "required the guiding hands of counsel at every step in the proceeding

against him, Powell v. Alabama, 287 U.S. 45 (1932) and that constitutional principle is not limited to the presence of counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. United States v. Wade, 338 U.S. 218 (1967). According, "the principle of Powell and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him and to have effective assistance of counsel at trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

Applying this test, the Court has held that "critical stages" including the pre-trial type of arraignment where certain rights may be sacrificed or lost, Hamilton v. Alabama, (1961) and the pre-trial line up, United States v. Wade; Miranda v. Arizona, (1966) where the court held that the privilege against compulsory self-incrimination includes a right to counsel at a pre-trial custodial interrogation. The question arises.... may a suspect who has retained or been appointed counsel and or been indicted (or had other "adversary criminal proceedings initiated against , e.g., appeared at preliminary hearing be question or allowed to talk) in the absence of counsel so long as he is given the Miranda warnings and waives his rights? The difficulties raised by the interplay of Massiah, supra, and Miranda are illustrated by United States v. Durham, 475 F.2d.208 (7th Cir. 1973), where a three judge panel "split" three ways. Swgert, C.J., maintained that even though defendant had been informed of and waived his Miranda rights, Massiah barred the admissibility of statements obtained from him in the absence of counsel, since the police knew that defendant had a lawyer and that the lawyer had already represented him at the preliminary hearing. Dissenting judge Castle stressed that the facts demonstrate defendant's clear and knowing waiver of any right to have his counsel notified of the interview and contended that Massiah and McLeod, supra, are "irrelevant to

situations involving a waiver of the right to have counsel present, "for both cases involved the deliberate acquisition of information under circumstances preventing an effective exercise or waiver of rights to counsel. Pell, J., concurring in part, agreed with the dissent that a defendant already represented by counsel "may waive the presence and assistance of that counsel, provided it very clearly appears that the accused deliberately and understandingly chose to forego that assistance" but disagreed that the record demonstrated defendant had done so.

A.B.A., Code of Professional Responsibility DR 7-104 (A)(1) (1970), provided that during the course of his representation as lawyer "shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or by law is authorized to do so. "Considering United States v. Thomas, 474 F.2d.110 (10th Cir.1973), viewing law enforcement officials as agents of the prosecution attorney for purposes of this canon and deeming the canon violated even though defendant requested the interview with the Federal agents and then read and signed a Miranda waiver of rights form before making a statement. "[The Canon] is obviously not something which the defendant alone can waive."

The Thomas case, however, reflects a distinctly minority view. Most courts take the position that the police may question a prisoner known to be represented by counsel without notifying his lawyer of their purpose. See e.g., United States v. Vasquez, 476 F.2d.730 (5th Cir.1973); Coughlam v. United States, 391 F.2d.371 (9th Cir.1968) (forceful dissent by Hamley, J.), sharply criticized in note, 1968 Duke, L.J.816; People v. Patterson, 39 Mich.App.467, 198 N.W.2d.175 (1971) (forceful dissent by Levin, J.); State v. Graham, 59 N.J.365, 283 A.2d 321 (1971). Most courts have even less trouble upholding the admissibility of the statement when the person represented by counsel initiated the conversation or request an interview with particular officer. See e.g. United States v. Crisp, 435 F.2d.354 (7th Cir.1970); Reinke v. U.S., 405 F.2d.228 (9th Cir.1969); State v. Sample, 107 Ariz 407, 489 P.2d.44 (1971).

People v. Arthur, 22 N.Y.2d.325, 239 N.E.2d.537 (1968), holds that

"once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, it is the defendant's right to counsel, and that "there is no requirement that the attorney or the defendant request the police to respect this right."

Footnote 35 to the Miranda opinion and the lawyer's right to assist a "client" who does not ask for, or says he doesn't want any, assistance. Section 140.7(1) of the 1974 Model Code provides that counsel who informs the station officer that he represents an arrested person shall have prompt access to such person, by telephone, and in person on counsel's arrival at any place where such person is detained "and, further that "if no counsel for the arrested person isn't present, similar privileges must be accorded to a relative or friend of the arrested person." Consider also in footnote 35 to Miranda the court looked back on ESCO BEDO as follows; The police also prevented the attorney from consulting with his client independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statements obtained in its wake."

Furthermore, the public defender, upon his request and with due regard for reasonable law enforcement administrative procedures, shall be permitted to communicate with any person in custody to determine whether that person has counsel and, if such person desires that the public defender represent him or her, to make an initial determination as to whether the person is indigent. Gordon's due process right were violated when the Rock Hill Police Department refused to allow Gordon's counsel to interview him at counsel request, and finally Gordon's due process right were violated when counsel allowed Gordon to plea guilty and waive on appeal the right to challenge a Fifth Amendment issue to the United States Constitutional.

For the foregoing reasons and facts Gordon case should be vacated and a new trial set.

PETITIONER WAS DENIED DUE PROCESS WHERE HE WAS ALLOWED TO PLEA GUILTY UNDER UNAMBIGUOUS STATUTE CHILDREN'S CODE OF LAWS.

The Supreme Court directed that, prior to transfer, a hearing must be held in which certain rights are afforded to juveniles. In an appendix to its opinion in Kent, the Supreme Court quoted, with approval, a District of Columbia policy memorandum which recited eight factors to be considered by the Juvenile Court in making a transfer decision. Although the Supreme Court did not explicitly hold that these factors must be followed by lower courts. In Patton v. Toy, 867 F.Supp. 356 (D.S.C. 1994), at 362 the Court held, this court believes that these factors provided excellent general guidance quoting the eight factors in Kent.

However, a juvenile waiver hearing must measure up to the essential of due process and fair treatment. Application of Gault, 387 U.S. 1, 30, 87 S.Ct. 1428 (1967), quoting from Kent v. United States, 86 S.Ct. 1045 (1966). "Kent and Gault make it unquestionably clear that Juvenile Court proceedings affect a young person's substantial rights must measure up to the essential of due process and fair treatment. See Kempen v. Maryland, 428 F.2d. 172 (4th Cir. 1970). However, In the Interest of Shaw, 274 S.C. 534, 265 S.E.2d. 522, 526 (1980), the Court encourages Family Court judges in South Carolina to apply the principles of the Kent case when making the decision of whether to transfer a child to adult court. With the increases participation of juveniles in more serious crimes, the Family Court judge will be called upon to make even more transfer decisions, and the Kent case will provide excellent guidance in assisting the Family Court judge to present records which a review court can consider in a meaningful manner.

With the onset of more of these cases, the burden on Family Court judges will be even greater, but it must be remembered that the objective of the Family Court

is to provide measures of guidance and rehabilitation for the child and to protect society, not fix criminal responsibility, guilt or punishment. Each "child" is entitled to due process a transfer to adult court, and any reviewing court must ensure that each "child" receives such process.

See section § 20-7-7605(1) and (10) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this state, it is ascertained that the child was under the age of "seventeen" years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the Family Court of competent jurisdiction. "However, under the same statutory subsection (10) authorize waiver on the basis of ages fourteen years or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, committed magistrate shall bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult. For purpose of this item, an adjudication or conviction is considered a second adjudication or conviction only if the date of the commission of the second offense occurred subsequent to the imposition of the sentence for the first offense.

In the case at bar, petitioner contends that his due process right to a juvenile transfer hearing were violated when the prosecutor failed to motion the court for proper jurisdiction, and obtain a waiver prior to petitioner taking a guilty plea. Petitioner was sixteen years of age and turn seventeen while awaiting on trial in the detention center, and was ultimately tried as an adult upon turning seventeen years of age. However, the solicitor in the present case failed to look to subsection § 20-7-400 and 20-7-7605(1), (10)

where petitioner is entitled to a juvenile waiver hearing under due process of law, and S.C. statutory. The argument that the petitioner was sixteen years of age and committed the offense's murder and several other felonies is ambiguous because S.C. statute § 20-7-6605(1) defining a child is in violation of the United States Constitution. However, in that statute S.C. legislature defined a child as a person less than seventeen years of age, then stated that a child is not a person sixteen years of age who commit a class A, B, C. or D felony. In William v. State, 410 S.E.2d. 563 (1991), the S.C. Supreme Court held that penal statutes are construed strictly against State and in favor of defendant. As here in the case at bar, S.C. statute § 20-7-6605(1) is in favor of the petitioner and the State of South Carolina

However, the S.C. Code Ann § 20-7-6605(1) not only in favor of the petitioner and the State, it give no set guidelines in which the prosecutor must go by to try such person sixteen years of age which rendered the statutory unconstitutional in violation of due process.

For the foregoing reasons and facts petitioner case should be vacated and a new trial set.

SHOULD A SIXTEEN YEAR CHILD RECEIVE A COMPETENCE HEARING UNDER  
DUE PROCESS OF LAW BEFORE THE SOLICITOR US'S HIS DISCRETION IN  
TRYING THE CHILD UNDER S.C. CODE ANN § 20-7-6605(1)?

Petitioner contends that while S.C. Code Ann § 20-7-6605(1) give no set guidelines while the prosecutor is vested with the discretion in trying him as an adult or child violates the petitioner right to due process of law. South Carolina, vest the prosecutor with the discretion in trying a child as an adult or child at the age of sixteen years. The United States Constitution give juvenile's certain rights, one is if a child is going to be tried as an adult he must be competent to stand trial as an adult. However, the prosecutor will not know whether a sixteen year old is competent to stand trial as an adult unless a evaluation is done on the child before the child is considered to be tried as an adult. Therefore, the theory assist his attorney and competence to stand trial has to be determined before the child is tried as an adult. Petitioner received a evaluation upon turning seventeen years old. In State v. Corey D, 529 S.E.2d. 20 (2000), a waiver hearing that involve Carlos and Toby. Dr. Charles Sailor, the forensic psychologist who performed the evaluation, the evaluation was done while the three defendant's was awaiting the juvenile waiver hearing to see whether the prosecutor, and the family court judge will waive there case to the court of General Session. However, in the present case the petitioner wasn't given that chance to foresee that if he was competent as an adult or function as a juvenile to stand trial. The factors in Kent v. United States, Supra, will be considered in determining whether a child will be tried as an adult or remain in family court. In Kent, supra, looking at the sixth factor, [The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living]. In the petitioner case that factor was not look at nor taken into consideration.

Therefore, the petitioner's due process right to the S.C. Constitutional and the United States Constitutional was violated...

For the foregoing reason's the petitioner case should be vacated and granted a new trial.

DID GENERAL SESSION COURT LACK JURISDICTION IN ACCEPTING PETITIONER GUILTY PLEA, WHERE JURISDICTION HAD NOT BEEN RELINQUISHED BY THE FAMILY COURT.

The Supreme Court directed that, prior to transfer, a hearing must be held in which certain rights are afforded to juvenile. In an appendix to its opinion in Kent, The Supreme Court quoted, with approval, a District of Columbia policy memorandum which recited eight factors to be considered by the Juvenile Court in making a transfer decision. Although the Supreme Court did not explicitly hold that these factors must be followed by lower courts. In Patton v. Toy, 867 F.Supp. 356 (D.S.C. 1994), at 362 the court held, this court believes that these factors provided excellent general guidance quoting the eight factor's in Kent.

However, a juvenile waiver hearing must measure up to the essential of Due Process and Fair Treatment. Application of Gault, 387 U.S. 1, 30, 87 S.Ct. 1428, (1967), Quoting from Kent v. United States, 86 S.Ct. 1045 (1966). "Kent and Gault make it unquestionably clear that Juvenile Court proceedings that effect a young person's substantial rights must measure up to the essential of Due Process and fair treatment. Kempen v. Maryland, 428 F.2d. 172 (4th Cir. 1970). However, in Shaw, 274 S.C. 534, 265 S.E. 2d. 522 (1980), the Court encourages Family Court judges in South Carolina to apply the principles of the Kent case when making the decision of whether to transfer a child to adult court. The objective of the Family Court is to provide measures of guidance and rehabilitation for the child and to protect society, not to fix criminal responsibility, guilt or punishment. Each "child" is entitled to Due Process a transfer to adult court, and reviewing court must ensure that each "child" receives such process.

In the case at bar the petitioner was sixteen years of age and was tried as an adult without the ability to go before a Family Court Judge, to determine whether petitioner would be waived up to be tried as a Juvenile or an adult. Petitioner further contends that he received violation of his Due Process right where jurisdiction had not been relinquished in favor of another court. Petitioner was sixteen years of age with only one charge that could carry the penalty of fifteen years or more in which that was burglary 2nd degree.

Therefore, for the forgoing reasons petitioner received violation of his Due Process right.

PETITIONER WAS DENIED DUE PROCESS WHERE STATE  
PSYCHOLOGIST WAS QUALIFIED TO TESTIFY TO PETITIONER  
COMPETENCE TO STAND TRIAL BUT WAS NOT LICENSED AS  
A PSYCHOLOGIST UNDER SOUTH CAROLINA LAW AND REGULATION

Petitioner contends that he was denied due process during and before his pre-trial and guilty plea. Petitioner was ordered to undergo a competence evaluation before the petitioner proceeded to trial to determine whether or not in fact the petitioner was competent to stand trial or whether the petitioner was retarded. Dr. Jonathan Venn who was retained by petitioner counsel to undergo a competence evaluation to determine whether or not the petitioner was competent to stand trial, or whether the petitioner was mentally retarded and competent to waive his Fifth Amendment right to remain silent. However psychologist Jonathan Venn stated that he could not come up with an opinion to whether the petitioner was competent to stand trial, but did render an opinion as to the petitioner competence to waive his Miranda right to remain silent, and stated that petitioner could not have voluntarily waive his Miranda right to remain silent. The State argued to the court that if they could not get their own psychologist to do the evaluation on petitioner that the weight would not be equal and that the retained psychology by counsel could get on the stand and testify that the petitioner is not competent to stand trial. Honorable John C. Hayes, III, ordered Gordon to undergo another evaluation.

This evaluation was done by Dr. Leslie N. Sandler, Ed.D. a Psychologist from Columbia, South Carolina who testified that the petitioner was competent to stand trial and that the petitioner was competent to waive his Miranda right to remain silent. Not only did the psychologist for the State testify that petitioner was competent to stand trial and waive his Miranda right, his opinion rendered the judge opinion in his ruling stating the psychologist provided enough testimony to show that the petitioner was competent to stand trial. Petitioner contends that the psychologist testimony is in violation of the petitioner due process right, the right to receive a fair hearing according to law, and the psychologist further in violation for violating South Carolina statute of laws that read as follows:

§ 40-55-55 "It is unlawful for a person to engage in the practice of psychology in this State without obtaining a license from the board, except as otherwise authorized by this chapter.

As in the case at bar, the psychologist who evaluated petitioner was not licensed in the State of South Carolina. The psychologist in this case rendered an opinion that the petitioner was competent to stand trial and waive his Fifth Amendment right to remain silent. For the foregoing reasons, petitioner's due process right to the United States Constitutional and South Carolina Constitution was violated.

For the foregoing reasons, the petitioner should receive a new trial and be afforded a new evaluation.

CONCLUSION

For the forgoing reasons stated above, Gordon submits that he is entitled to a writ of habeas corpus and an order directing the State of South Carolina to vacate and set a new trial.

Respectfully Submitted,

/s/ Antonio Gordon

A.Gordon#259798

December 16, 2005

MEMORANDUM OF LAW

Gordon argues that a decision by a Court not to entertain a request is not a final judgement on the merits. Rather it is a decision only as to whether the court should entertain a case on the merits. "Entertain has been defined as "To bear in mind or consider; esp., to give judicial consideration to [the court then entertained motions for continuance]." Black's Law Dictionary (7th, Ed. 1999), entertain.

Further the Key, opinion itself refutes the State's position. The Court stated in Key:

Although article V § 5, of the South Carolina Constitution vests this Court with authority to issue extraordinary writs and entertain actions in it's original jurisdiction, this Court's primary function is to act as an appellate Court to review appeals from the trial courts. In rule 229, SCACR, this Court indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State. Only when there is an extraordinary reason such as eastion of significant public interest or an emergency will this court excercise its original jurisdiction. Key, 305 S.C. at 116 406 S.E.2d. at 357 (emphasis added).

Gordon submits that the Supreme Courts dismissal of his application pursuant to Key is based upon the Court's determination that the matter could be entertained in the trial courts and that no significant public interest nor emergency existed. No mention of the merits of Gordon's request for relief was made (see Wilson v. Moore, 999 F. Supp)..

SWORN TO AND SUBSCRIBED BEFORE

ME THIS 16<sup>th</sup> DAY OF December 05

NOTARY: [Signature]

EXP: MAY 5, 2008

157 Antonio Gordon



to the murder sentence; five years for criminal conspiracy; and five years for possession of a weapon by a person under twenty-one years of age. Robert D'Agostino, Esquire, represented the Applicant.

The Petitioner timely filed a notice of appeal and an Anders brief was submitted on his behalf. The Supreme Court of South Carolina affirmed the Petitioner's convictions and sentence.

The Petitioner subsequently filed his first PCR application on June 19, 2000<sup>1</sup> (2000-CP-46-1414). Tara D. Shurling, Esquire, represented the Petitioner. The Respondent made its return on May 4, 2001, and venue was changed due to judicial conflicts. An evidentiary hearing was convened in Richland County on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by Order dated August 19, 2003.

The Applicant filed a timely notice of appeal and a Johnson petition was submitted on his behalf. The South Carolina Supreme Court denied the petition for writ of certiorari.

The Applicant then filed a second PCR application on July 6, 2004. The Respondent made its return and motion to dismiss on December 12, 2004. The application was summarily dismissed without a hearing as being successive and barred by the statute of limitations. The Order of Dismissal was dated May 20, 2005. The Applicant did not appeal the denial of his second PCR application.

The Applicant filed a petition for writ of habeas corpus in federal court (2:05-3327-MBS-R) on December 22, 2005. This petition was denied by order dated February 16, 2007.

Before this Court are the Clerk of Court records, the South Carolina Department of

<sup>1</sup> The Respondent notes that the Applicant filed a second PCR application on August 21, 2001, (2001-CP-46-1866) but that it was merged with 2001-CP-46-1414.

Corrections records, and the petition for writ of habeas corpus. Incorporated by reference are the Clerk's records for all previous PCR actions.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the Clerk of Court records, the South Carolina Department of Corrections records, the records of the prior proceedings, and the petition for writ of habeas corpus.

A habeas corpus petition must support the requested relief. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Hunter v. State, 316 S.C. 104, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, the Petitioner must make out a prima facie case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. Gibson, supra.

To warrant a hearing, the petition must include the two allegations described below. First, the petition must allege the petitioner has exhausted all available post-conviction relief (PCR) remedies. Gibson, supra; Hunter, supra; Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review. Gibson, supra.

Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Gibson, supra. PCR is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as successive. In fact, any matter which is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. "17-27-10 to -120 (1976 & Supp. 1995), may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts of this State. Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998) (emphasis added); Gibson,

supra; Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998). The Uniform Post Conviction Procedure Act (the Act) is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. Gibson, supra. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by direct appeal. Id.; Keeler v. Mauney, supra. Thus, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application." Keeler v. Mauney, supra. "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court, S.C. Const. Art. V, '5.'" Id.<sup>2</sup>

This Court finds that the Petitioner's allegations fail to meet the standards required for the issuance of this extraordinary writ. Gibson, supra; Butler, supra. Therefore, the petition should be dismissed.

In addition, this Court finds that the claims made in the Petition for Writ of Habeas Corpus could have been raised in a post conviction relief application, and to a large extent were raised in his PCR application. Therefore, these claims cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

### III. CONCLUSION

This Court finds that the allegations raised by Petitioner are cognizable under the Act; therefore, they may not be raised in this Writ for Habeas Corpus. Simpson, supra; Gibson, supra.

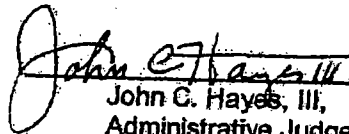
<sup>2</sup> Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S. Ct. 442, 112 L.Ed.2d 425 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only issue when there has been a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson, supra; Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994).

Keeler v. Mauney, supra. This Court finds that the Petitioner is barred from bringing a Writ of Habeas Corpus in the circuit court. Keeler v. Mauney, supra. The Respondent's Motion to Dismiss the Petitioner's Writ of Habeas Corpus is granted.

**IT IS THEREFORE ORDERED THAT:**

1. The habeas corpus petition is DENIED AND DISMISSED WITH PREJUDICE;
2. The Petitioner is remanded to the Respondent's custody for the completion of his sentence.

**AND IT IS SO ORDERED!**

  
John C. Hayes, III, #5  
Administrative Judge  
Sixteenth Judicial Circuit

April 30<sup>th</sup>, 2007

Yorks, South Carolina.

06CP46 - 10 104



Attachment (3)

**CLERK OF COURT'S OFFICE**

P.O. Box 649, York, South Carolina 29745

January 30, 2006

Antonio Gordon 259798  
McCormick Correctional Institute F-1-A-164  
386 Redemption Way  
McCormick, South Carolina 29899

Re: Petition for Habeas Corpus

Dear Mr. Gordon:

The documents referenced above have already been filed in the Clerk of Courts office as a Post Conviction Relief and therefore cannot be returned to you. If you are trying to file your document elsewhere you will need to prepare the appropriate paperwork and forward it to the correct office in which you would like it filed. The Clerk of Courts office does not forward documents and would not be able to forward this anyway because it has been filed in our office and we are awaiting direction from the Attorney General as to whether or not we are to appoint an attorney for you.

The copies of your documents were mailed to you the week of January 23, 2006 so you should receive them within the next week or so.

Sincerely,

Lisa Bennefield  
Associate Deputy Clerk

State of South Carolina  
York County  
Antonio Gordon 259798  
Applicant

v.

State of South Carolina  
Respondent

In the Court of Common Pleas  
Motion for relief from order  
Pursuant to 60 B.S.C.R. CIV. Pro.

Attachment (4)

Attachment (1) (1)

To: Honorable John C. Hayes III, and Ashley A. McMahan: Attorney General

This matter is presently before the court where the Applicant seeks for Honorable John C. Hayes III, to recuse himself from the pending habeas corpus due to the court's inability to make conclusions and facts of law to All issues raised upon the record for review due to conflict of Interest with Honorable John C. Hayes III, which prejudice the Applicant. Applicant's habeas corpus was denied review of those issues raised and presented to this Honorable court, therein depriving this applicant of a fair "adjudication" of the issues properly raised in the habeas corpus.

### History

The applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitments of the clerk of court for York County. On October 15, 1998, the York County Grand Jury indicted the Applicant for murder, two counts of Attempted Armed robbery, three counts Possession of a weapon during the commission of a violent crime, Possession of a weapon by a person under twenty-one, and criminal conspiracy.

On July 16, 1999, the applicant pled guilty as charged. On July 19, 1999, the Honorable John C. Hayes III, sentenced the applicant to thirty years imprisonment for murder, five years for each count of Possession of a weapon during the commission of a violent crime, ten years for each count of attempted armed robbery, with one consecutive to the murder sentence, five years for criminal conspiracy, and five years for a weapon by a person under twenty-one years of age. Robert D'Agostino, Esquire, represented the Applicant.

The Applicant timely filed Notice of Appeal and an Anders brief was submitted on his behalf. The Supreme Court of South Carolina affirmed the Applicant's convictions and sentence.

The Applicant subsequently filed his first PCR application on June 19, 2000. (2001-CP-46-1444). The respondents made its return on May 4, 2001, and an evidentiary hearing was convened at the Richland County Courthouse on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by order dated August 7, 2003.

The Applicant filed a timely notice of appeal and Johnson Petition was submitted on his behalf. The South Carolina Supreme Court denied and dismissed the Petition - Writ of Certiorari.

The applicant then filed a second PCR application on July 6, 2004. The respondent made its return and motion to dismissed on December 12, 2004. The application was summarily dismissed without a hearing as being successive and barred by the statute of limitations. The order of dismissal was dated May 20, 2005. The applicant did not appeal the denial of his second PCR application. Applicant's Federal Habeas was dismissed without Prejudice to allow applicant to exhaust All state remedies.

#### Statement of facts

Rule 60 B of the s.c. Rules of Civil Procedure allows any party to seek relief from judgement or order after a demonstration of mistake, inadvertance, surprise, excusable, neglect, fraud, misrepresentation, or other misconduct if an adverse party has been brought before the court, specially where such a judgement has been imposed through conflict of Interest upon the court. Such conflict upon the court places the judiciary's integrity into serious Question and jeopardizes the machinery of Judicial decision-making y causing it to become unfair and fundamentally flawed; See: Heuning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 08 (S.C. 2003).

It is recongnizable that there is usually a one year statute of limitations on Rule 60 B, S.C.R. CIV, Proc., so that the preservation of final judgement can be strictly

enforced. However, no limitations exist when a party seeks to set aside judgement due to a conflict of interest with the Judicial Judges. *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (S.C. 2000).

Consent order changing venue was issued on June 26, 2003 by Honorable John C. Hayes III, the Honorable Lee S. Alford, has recused himself due to a conflict. Judge Alford heard oral arguments and ruled on discovery issues in the Applicant's case before his trial occurred. Because both judges for the sixteenth circuit are unable to hear this case, this case should be transferred to Richland County for the PCA hearing to be heard in a more timely manner.

It is apparent through the language of Rule 60(B) that such order of Dismissal with Prejudice should be void, especially where there exists evidence presented either by actual or implied consent that supports the party's claims, and such ability to void the ruling is allowed even after judgement has been rendered.

The purpose of the applicable statutes and procedural rules is to preserve all available claims that have merit in order to guarantee a complete adjudication of the facts and issues relevant to the proceedings. This Court has competent jurisdiction and is vested with the authority to entertain this motion pursuant to Rule 60(B) of the S.C. Rules of Civil Procedure, where the claim is conflict of interest with a

Judicial Honorable Judge who signed a consent to change venue order stating that it will be a conflict with the Honorable himself.

Furthermore, even after the order was signed to dismiss applicant's habeas corpus with prejudice, in the order applicant was not advised of his appeal rights. Applicant should be entitled to an evidentiary hearing on the state habeas corpus pursuant to S.C. Code Ann § 17-17-10 to 17-17-12 17-27-10 to 17-27-120 and Rule 60(B), to determine the facts, merits and constitutional rights properly raised in the state habeas corpus.

Finally, the applicant is entitled to his evidentiary hearing by and through the rights granted in the S.C. Rules of Civil Procedure, S.C. Code of laws, and due process protection of the South Carolina and United States Constitutions, and now seeks such relief from this court. I so pray that Honorable John C. Hayes III, recuse himself from the 'order of Dismissal with Prejudice' and that an Honorable who are not in conflict with the case hear the pending habeas.

Respectfully Submitted  
Antonio Gordon

worn to and subscribed before  
e this 7 day of July 07  
story: John C. Young  
XP: 8/28/2011

Antonio Gordon 254798  
McCorm. Corr. Inst  
386 Redemption Way  
McCormick, SC 29899

State of South Carolina  
County of York  
Antonio Gordon 259798  
Applicant

State of South Carolina  
Respondent

In the Court of Common Plea  
Motion for Go B

Affidavit of Service by  
Mail

I, Antonio Gordon 259798, place in the hands of McCormick Correction Institution mail-room hands, one motion for Go B, pursuant to Rule Go B, on August 7, 2011. This is a sworn affidavit and the information enclosed in the motion is to be facts and the truth.

Antonio Gordon  
Antonio Gordon 259798  
McCorm. Corr. Inst.  
386 Redemption Way  
McCormick, SC 29899

sworn to me and subscribed  
before me this 7 day of July 2011  
Notary: Jay L Young  
XP: 8 28 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
2006-CP-46-010

Antonio Gordon, SCDC No. 259798, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Attachment (5)

ORDER GRANTING  
RULE 60(b) MOTION

2008 FEB -6 PM 12:42  
D. C. C. P. & GS  
YORK COUNTY, SC

Attachment

This matter comes before me on a Motion for Reconsideration under Rule 60(b). The Petitioner, Antonio Gordon, requested an amendment and clarification of Judge John C. Hayes, III.'s Order dated April 30, 2007, filed June 1, 2007.

The Petitioner claims that the manner in which Judge Hayes' Order reads might prejudice him from filing a State Habeas Corpus Petition in the original jurisdiction of the Supreme Court. Judge Hayes' Order recites a quotation from Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998), but does not recite in the Order that the Petitioner is not prejudiced to bring a Habeas Corpus Petition in the South Carolina Supreme Court.

The State's representative, Ashley McMahan, does not dispute the Petitioner's right to file a Habeas Corpus Petition in the original jurisdiction of the South Carolina Supreme Court.

Therefore, I grant the Petitioner's Motion to Reconsider and amend and clarify Judge Hayes' Order that the Petitioner is without prejudice to bring a Habeas Corpus Petition in the original jurisdiction of the South Carolina Supreme Court.

AND IT IS SO ORDERED.

Spencer King, South Carolina  
1/31, 2008.

Roger L. Couch  
Roger L. Couch

Antonio Gordon # 254798

A.C.I. SMU 8242

P.O. Box 1151

Fairfax, SC 29827

February 2, 2015

Attachment (6)

RE: Gordon v. State, Case No: 2006-CP-46-010

Dear Clerk:

Please find enclosed a S.C. R. Civ. Proc. Rule 60 (b) motion I am filing in this Court's jurisdiction. Can you please stamp file and send me a stamped true copy back for my records?

Furthermore, can you please provide Judge Alford or Rogers L. Couch with a copy? Judge Hayes recused himself from this case due to a conflict of interest. Thanks.

Sincerely,

Antonio Gordon

FILED-RECEIVED  
2015 MAR -9 PM 3:15  
DAVID HAMILTON  
C.C.P. & CS  
YORK COUNTY, SC

State of South Carolina  
County of York

Antonio Gordon #259798,  
Petitioner,

vs.

State of South Carolina,  
Respondent.

Attachment (6)

IN THE COURT OF Common PLEAS  
Sixteenth Judicial Circuit

Case No: 2006-CP-46-010

Motion for relief from Judgment Pursuant to S.C.P.  
Civ. Proc. Rule 60(b)(5) - Austin v. State, 409 S. E.2d  
395 (1991)

FILED-RECEIVED  
2013 MAR -9 PM 3:16  
DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, S.C.

Now Comes the Petitioner in the above-captioned matter respectfully moving this Honorable Court to grant a motion ~~for~~ relief from Judgment Pursuant to SCRPC Rule 60(b)(5) - Austin v. State, supra. The Petitioner would show unto this Honorable Court the following:

### Statement of the case

The Petitioner filed a statutory habeas corpus January 3, 2006. Gordon v. State, case no: 2006-CP-46-010. In the Petition Gordon asserted "general sessions was without jurisdiction" in accepting his guilty plea because "jurisdiction had not been relinquished by family court". See FN<sup>1</sup> The Honorable John L. Hayes, III, dismissed with prejudice without holding an evidentiary hearing. See Attachment (A) (order of dismissal dated April 30, 2007, filed June 1, 2007).

On August 7, 2007 Petitioner filed a SCRPC Rule 60(b) motion asserting Honorable John C. Hayes, III, was a conflict of interest and asked that a different Honorable Preside over the Habeas Corpus. See Attachment (b)(1) page 5 (Rule 60(b) motion). Charles B. Burnette, III, was appointed to represent Gordon. On January 31, 2008, the Honorable Rogers L. Couch issued an order granting the Rule 60(b) motion amending and clarifying Judge Hayes original order. See Attachment (b)(2). Thus the Court did not reach the merits of Petitioner's claim. See FN<sup>2</sup> Petitioner asked Counsel to file a Rule 59E motion and notice of appeal and Counsel failed to do so. See Attachment (c)(1)(2)(3) (Letters written to attorney)

FN<sup>1</sup> In the case sub judge petitioner was 16 yrs of age with an IQ 68 when he was taken into custody July 23, 1998, for murder, two counts of attempted armed robbery, three counts of pass of a weapon during the commission of a violent crime, pass of a weapon by a person under twenty-one and criminal conspiracy. The York County Grand Jury indicted the petitioner as charged on October 15, 1998. On July 16, 1999, the petitioner pled guilty in "general sessions" without "first" being waived to general sessions jurisdiction as those similarly situated less than seventeen years of age charged with a class A, B, C, or D felony. On July 19, 1999 the Honorable Court John C. Hayes, III, sentenced the petitioner to forty years of imprisonment.

FN<sup>2</sup> Lack of subject matter jurisdiction of the cause or subject matter jurisdiction can be raised at any time. See State v. Funderburk, 191 S.E.2d 520 (1972).

## Argument

The movant in a motion for relief from judgment under Rule 60(b) bears the burden of presenting evidence proving the facts essential to entitle him to relief. See BB & T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006). A party requesting relief from judgment may not invoke Rule 60(b) for relief from judgment where the issue could have been pursued on appeal. Tench v. South Carolina Dept of Educ., 347 S.C. 117, 553 S.E.2d 451 (2001).

In the instant case the petitioner filed a Rule 60(b) motion alleging Judge Hayes was a conflict of interest and could not preside over his statutory habeas corpus and also requested that a different Honorable Preside over the habeas corpus. See Attachment (b)(1) Page 5. However, the Honorable Rogers L. Couch erroneously construed Petitioner's Rule 60(b) as a motion for reconsideration under Rule 59(e), stating Gordon requested an amendment and clarification of Judge Hayes Order dated April 30, 2007, filed June 1, 2007. See FN 1 Judge Hayes Order is a nullity void ab initio. Judge Couch dismissed the habeas corpus without prejudice. See FN 2 Without deciding the merits of Gordon's "Jurisdiction" claim. Petitioner did not voluntarily and knowingly waive his statutory right and Constitutional remedy to seek release from unlawful custody as those similarly situated. See Attachment (D) Affidavit of Antonio Gordon

Furthermore, Petitioner was denied his right to appellate review on Judge Couch Order which he failed to reach the merits of his "Jurisdiction" claim. See FN 3 As a result of ineffective assistance of Counsel, (failing to file a Rule 59(e) and notice of Appeal) at Gordon's request. See Attachment (c)(1)(2)(3) In violation of Austin v. State, supra, where the Supreme Court held Applicant has a right to appellate counsel's assistance in seeking review of the denial of Post-Conviction Relief. Rule 71.1 (9) SCRCP, provides that if the applicant wishes to seek appellate review, Post-Conviction relief counsel must serve and file a notice of appeal on applicant's behalf. See FN 4

Wherefore, Gordon's case is in opposit that of Tench and he have met his burden of presenting evidence proving the facts essential to entitle him to relief. BB & T v. Taylor, supra, and he is entitled to an Austin Related Appeal.

- 
- FN1 A motion to amend and reconsideration is in actuality a Rule 59(e) motion to alter or amend Judgment.
- FN2 Lack of subject matter jurisdiction may not be waived and should be taken notice of by the Court. Anderson v. Anderson, 382 S.E.2d 897 (1989).
- FN3 A judgment by a Court without jurisdiction of the subject matter is a nullity and must be so treated by the Court's whenever and for whatever purpose it is presented and relied on. Brown v. Malloy, 546 S.E.2d 195 (2001).
- FN4 Petitioner's jurisdiction claim was the first time it could be appealed as of right because Post-Conviction relief was unavailable or inadequate because he was entitled to his immediate release.

General Sessions was without "Jurisdiction" in accepting Gordon's guilty plea to the charges where "Jurisdiction" had not been relinquished by Family Court.

Petitioner asserts that section 20-7-6605 (1) (Supp. 1998) statutorily define a "child" as a person less than seventeen years of age but arbitrarily "exclude" sixteen year old children's charged with a class A, B, C, or D felony as defined in section 16-1-20 from the definition of being a "child" is penal in nature and must be construed strictly against the state and in favor of him Pursuant to William v. State, 306 S.E. 89, 410 S.E. 2d 563 (S.C. 1991) (When a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant.)

However, because section 20-7-6605 (1) is penal in nature and must be construed strictly against the state, Gordon was considered "Person" under Family Court's exclusive original jurisdiction Pursuant to S.C. Code Ann § 20-7-400 (a) (3) (Supp. 1998) title "Exclusive Original Jurisdiction of Family Court"; when he pled guilty in General Sessions and since "Jurisdiction" had not been relinquished by Family Court his indictments and conviction is a nullity void ab initio Pursuant to State v. McClure, 289 S.E. 2d 158 (S.C. 1982) (No indictments may be true billed by Grand Jury when Circuit Court lacks Jurisdiction.) - And State v. England, 245 S.E. 2d 608 (S.C. 1978) (Defendant was a "person" under Family Court's exclusive original jurisdiction and since jurisdiction had not been relinquished in favor of another court under applicable statute, that section states that... such Person shall be dealt under § 14-21-620.)

Therefore, Petitioner is being illegally held in custody in violation of his due process rights under S.C. Const Art I, § 3 and the 14th Amendment to the United States Constitution and he is entitled to his immediate release de jure. See Gibson v. Bechtold, 1245 S.E. 2d 258 (W. Va. 1998) (The juvenile law governs and the Circuit Court was without Criminal Jurisdiction over the relator, he is being illegally restrained of his liberty.)

The constitutionality of a statute under which petitioner held in custody can be tested on habeas corpus

Petitioner asserts the constitutionality of a statute under which defendant held in custody may be tested on habeas corpus. See Ex parte Hollman, 160 S.E. 19 (The constitutionality of a statute under which defendant held in custody may be tested on habeas corpus.)

Petitioner asserts that S.C. Code Ann § 20-7-6605 (1) is unconstitutional under the equal protection clause because it arbitrarily "exclude" children's sixteen years of age charged with a class A, B, C, or D felony from being a "child" as those similarly situated less than seventeen years of age charged with a class A, B, C, or D felony. This is inconsistent with rudimentary demands of justice and renders the provision "void" and constitutionally defective, as there is no rational justification for singling out "sixteen year old children's charged with a class A, B, C, or D felony from being a "child" as others similarly situated less than seventeen years of age

Charged with a class A, B, C, or D felony, thus in violation of the equal protection clause under S.C. Const Art I. § 3 and the 14th Amendment to the United States Constitution, also in violation of Gordon's right to equal protection of the law under S.C. Const. Art I. § 3 and the 14th Amendment to the United States Constitution. See Marley v. Kirby, 245 S.E.2d 604 (S.C. 1978) (All persons similarly situated should be treated alike.); Barbier v. Connolly, 113 U.S. 27 (1885) (same).

Therefore, the unconstitutional provision deprived the York County Grand Jury and General Sessions of its jurisdiction and renders Gordon's indictments and conviction a nullity and void ab initio. Petitioner is being illegally held in custody in violation of his due process rights under S.C. Const. Art. I. § 3 and the 14th Amendment to the United States Const and he is entitled to his immediate release De Jure.

Post-Conviction Relief is unavailable and inadequate where the "only" relief available is to release Gordon immediately

---

Petitioner asserts that Post-Conviction Relief is unavailable and inadequate because he is entitled to his immediate release and habeas corpus is his "only" remedy. See McCall v. State, 244 S.C. 15, 145 S.E.2d 419 (1965) (The purpose of habeas corpus is to test the legality of the prisoner's present detention. The "only" remedy that can be granted is release from custody.)

It is clear Gordon was sixteen years of age and family court did not issue an order relinquishing its exclusive jurisdiction to General Sessions as those similarly situated less than seventeen years of age charged with a class A, B, C, or D felony, its clear section 20-7-6005 (d) is penal in nature and must be construed strictly against the state; it is clear that section 20-7-6005 (d) is unconstitutional which deprived the York County Grand Jury and the General Sessions of its jurisdiction which all entitle Gordon to his immediate release and therefore, renders PCN remedy unavailable and inadequate. Gibson v. State, 495 S.E.2d 426 (1998); McCall v. State, supra.

### Conclusion

It is respectfully asked that this Court grant Petitioner's Rule 60(b)(5) - Austin v. State, supra, belated notice of appeal and decide the merits of his claims and release him immediately from unlawful confinement.

This 2nd day of February, 2015

Respectfully submitted

Antonio Gordon

Antonio Gordon #259798

A.C.I. Smu 8242

P.O. Box 1151

Fairfax, SC 29827

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
FILED RECEIVED FOR THE 16TH JUDICIAL CIRCUIT  
Case No.: 2006-CP-46-0010

2007 JUN -1 AM 8:40

Antonio Gordon, #259798,

DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

Petitioner,

v.

**ORDER OF DISMISSAL  
WITH PREJUDICE**

*Attachment (A)*

State of South Carolina,

Respondent.

This matter comes before the Court by way of a document filed January 3, 2006, and captioned "Petitioner for Writ of Habeas Corpus." The South Carolina Post Conviction Procedure Act (the Act) comprehends and takes the place of all other common laws, statutory or other remedies theretofore available for challenging the validity of a conviction or sentence and it must be used exclusively in place of them. S.C. Code Ann. §17-27-10 et seq. (Supp. 2001).

**I. PROCEDURAL HISTORY**

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. On October 15, 1998, the York County Grand Jury indicted the Applicant for murder, three counts of possession of a firearm during the commission of a violent crime, two counts of attempted armed robbery, possession of a firearm by a person under twenty-one, and criminal conspiracy.

On July 16, 1999, the Applicant pled guilty as charged. On July 19, 1999, the Honorable John C. Hayes, III, sentenced the Applicant to thirty years imprisonment for murder; five years for each count of possession of a weapon during the commission of a violent crime; ten years for each count of attempted armed robbery, with one consecutive

*[Handwritten initials]*

to the murder sentence; five years for criminal conspiracy; and five years for possession of a weapon by a person under twenty-one years of age. Robert D'Agostino, Esquire, represented the Applicant.

The Petitioner timely filed a notice of appeal and an Anders brief was submitted on his behalf. The Supreme Court of South Carolina affirmed the Petitioner's convictions and sentence.

The Petitioner subsequently filed his first PCR application on June 19, 2000<sup>1</sup> (2000-CP-46-1414). Tara D. Shurling, Esquire, represented the Petitioner. The Respondent made its return on May 4, 2001, and venue was changed due to judicial conflicts. An evidentiary hearing was convened in Richland County on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by Order dated August 19, 2003.

The Applicant filed a timely notice of appeal and a Johnson petition was submitted on his behalf. The South Carolina Supreme Court denied the petition for writ of certiorari.

The Applicant then filed a second PCR application on July 6, 2004. The Respondent made its return and motion to dismiss on December 12, 2004. The application was summarily dismissed without a hearing as being successive and barred by the statute of limitations. The Order of Dismissal was dated May 20, 2005. The Applicant did not appeal the denial of his second PCR application.

The Applicant filed a petition for writ of habeas corpus in federal court (2:05-3327-MBS-R) on December 22, 2005. This petition was denied by order dated February 16, 2007.

Before this Court are the Clerk of Court records, the South Carolina Department of

<sup>1</sup> The Respondent notes that the Applicant filed a second PCR application on August 21, 2001, (2001-CP-46-1866) but that it was merged with 2001-CP-46-1414.

Corrections records, and the petition for writ of habeas corpus. Incorporated by reference are the Clerk's records for all previous PCR actions.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the Clerk of Court records, the South Carolina Department of Corrections records, the records of the prior proceedings, and the petition for writ of habeas corpus.

A habeas corpus petition must support the requested relief. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Hunter v. State, 316 S.C. 104, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, the Petitioner must make out a prima facie case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. Gibson, supra.

To warrant a hearing, the petition must include the two allegations described below. First, the petition must allege the petitioner has exhausted all available post-conviction relief (PCR) remedies. Gibson, supra; Hunter, supra; Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review. Gibson, supra.

Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Gibson, supra. PCR is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as successive. In fact, any matter which is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -120 (1976 & Supp. 1995), may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts of this State. Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998) (emphasis added); Gibson,

supra; Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998). The Uniform Post Conviction Procedure Act (the Act) is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. Gibson, supra. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by direct appeal. Id.; Keeler v. Mauney, supra. Thus, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application." Keeler v. Mauney, supra. "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court, S.C. Const. Art. V, '5.'" Id.<sup>2</sup>

This Court finds that the Petitioner's allegations fail to meet the standards required for the issuance of this extraordinary writ. Gibson, supra; Butler, supra. Therefore, the petition should be dismissed.

In addition, this Court finds that the claims made in the Petition for Writ of Habeas Corpus could have been raised in a post conviction relief application, and to a large extent were raised in his PCR application. Therefore, these claims cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

### III. CONCLUSION

This Court finds that the allegations raised by Petitioner are cognizable under the Act; therefore, they may not be raised in this Writ for Habeas Corpus. Simpson, supra; Gibson, supra.

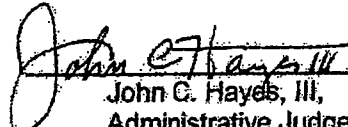
<sup>2</sup> Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S. Ct. 442, 112 L.Ed.2d 425 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only issue when there has been a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson, supra; Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994).

Keeler v. Mauney, supra. This Court finds that the Petitioner is barred from bringing a Writ of Habeas Corpus in the circuit court. Keeler v. Mauney, supra. The Respondent's Motion to Dismiss the Petitioner's Writ of Habeas Corpus is granted.

**IT IS THEREFORE ORDERED THAT:**

1. The habeas corpus petition is DENIED AND DISMISSED WITH PREJUDICE;
2. The Petitioner is remanded to the Respondent's custody for the completion of his sentence.

**AND IT IS SO ORDERED!**

  
John C. Hayes, III, #5  
Administrative Judge  
Sixteenth Judicial Circuit

April 30<sup>th</sup>, 2007

York, South Carolina.

State of South Carolina  
York County

Antonio Gordon 259798  
Applicant

v.

State of South Carolina  
Respondent

In the Court of Common Pleas  
Motion for relief from order  
Pursuant to 60 B.S.C.R. CIV. Pro.

Attachment (b)(1)

To: Honorable John C. Hayes III, and Ashley A. McMahan: Attorney General

This matter is presently before the court where the Applicant seeks for Honorable John C. Hayes III, to recuse himself from the pending habeas corpus due to the court's inability to make conclusions and facts of law to all issues raised upon the record for review due to conflict of interest with Honorable John C. Hayes III, which prejudice the Applicant. Applicant's habeas corpus was denied review of those issues raised and presented to this Honorable court, therein depriving this applicant of a fair "adjudication" of the issues properly raised in the habeas corpus.

### History

The applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitments of the clerk of court for York County. On October 15, 1998, the York County Grand Jury indicted the Applicant for murder, two counts of Attempted Armed Robbery, three counts of Possession of a weapon during the commission of a violent crime, Possession of a weapon by a person under twenty-one, and Criminal Conspiracy.

On July 16, 1999, the applicant pled guilty as charged. On July 19, 1999, the Honorable John C. Hayes III, sentenced the applicant to thirty years imprisonment for murder, five years for each count of Possession of a weapon during the commission of a violent crime, ten years for each count of attempted armed robbery, with one consecutive to the murder sentence, five years for criminal conspiracy, and five years for a weapon by a person under twenty-one years of age. Robert D'Agostino, Esquire, represented the Applicant.

The Applicant timely filed Notice of Appeal and an Anders brief was submitted on his behalf. The Supreme Court of South Carolina affirmed the Applicant's convictions and sentence.

The Applicant subsequently filed his first PCR application on June 19, 2000. (2001-CP-46-1414). The respondents made its return on May 4, 2001, and an evidentiary hearing was convened at the Richland County Courthouse on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by order dated August 1, 2003.

The Applicant filed a timely notice of appeal and Johnson Petition was submitted on his behalf. The South Carolina Supreme Court denied and dismissed the Petition - Writ of Certiorari.

The applicant then filed a second PCR application on July 6, 2004. The respondent made its return and motion to dismiss on December 12, 2004. The application was summarily dismissed without a hearing as being successive and barred by the statute of limitations. The order of dismissal was dated May 20, 2006. The applicant did not appeal the denial of his second PCR application. Applicant's Federal Habeas was dismissed without prejudice to allow applicant to exhaust All state remedies.

#### Statement of facts

Rule 60 B of the S.C. Rules of Civil Procedure allows any party to seek relief from judgement or order after a demonstration of mistake, inadvertance, surprise, excusable, neglect, fraud, misrepresentation, or other misconduct if an adverse party has been brought before the court, specially where such a judgement has been imposed through conflict of interest upon the court. Such conflict upon the court places the judiciary's integrity into serious question and jeopardizes the machinery of Judicial decision-making by causing it to become unfair and fundamentally flawed; see: *Hewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 08 (S.C. 2008).

It is recongnizable that there is usually a one year statute of limitations on Rule 60 B, S.C.R. CIV, Proc., so that the preservation of final judgement can be strictly

enforced. However, no limitations exist when a party seeks to set aside judgement due to a conflict of interest with the Judicial Judges. *Hagy v. Pruitt*, 339 S.C. 425, 529 S.E.2d 714 (S.C. 2000).

Consent order changing venue was issued on June 26, 2003 by Honorable John C. Hayes III, the Honorable Lee S. Alford, has recused himself due to a conflict. Judge Alford heard oral arguments and ruled on discovery issues in the Applicant's case before his trial occurred. Because both judges for the sixteenth circuit are unable to hear this case, this case should be transferred to Richland County for the PCR hearing to be heard in a more timely manner.

It is apparent through the language of Rule 60(B) that such order of Dismissal with Prejudice should be void, especially where there exists evidence presented either by direct or implied consent that supports the party's claims, and such ability to void the ruling is allowed even after judgement has been rendered.

The purpose of the applicable statutes and procedural rules is to preserve all available claims that have merit in order to guarantee a complete adjudication of the facts and issues relevant to the proceedings. This Court has competent jurisdiction and is vested with the authority to entertain this motion pursuant to Rule 60(B) of the S.C. Rules of Civil Procedure, where the claim is conflict of interest with a

Judicial Honorable Judge who signed a consent to change venue order stating that it will be a conflict with the Honorable himself.

Furthermore, even after the order was signed to dismiss applicant's habeas corpus with prejudice, in the order applicant was not advised of his appeal rights. Applicant should be entitled to an evidentiary hearing on the state habeas corpus pursuant to S.C. Code Ann § 17-17-10 to 17-17-12 17-27-10 to 17-27-120 and Rule 60(B), to determine the facts, merits and constitutional rights properly raised in the state habeas corpus.

Finally, the applicant is entitled to his evidentiary hearing by and through the rights granted in the S.C. Rules of Civil Procedure, S.C. Code of laws, and due process protection of the South Carolina and United States Constitutions, and now seeks such relief from this court. I so pray that Honorable John C. Hayes III, recuse himself from the 'order of Dismissal with Prejudice' and that an Honorable who are not in conflict with the case hear the pending habeas.

Respectfully Submitted  
Antonio Gordon

Antonio Gordon 259798  
McCorm. Corr. Inst  
386 Redemption Way  
McCormick, SC 29899

worn to and subscribed before  
e this 7 day of July 07  
story: John L. Young  
XP: 8/28/2011

State of South Carolina  
County of York  
Antonio Gordon 259798  
Applicant

In the Court of Common Pleas  
Motion for Go B

Affidavit of service by  
Mail

State of South Carolina  
Respondent

I, Antonio Gordon 259798, place in the hands of McCormick Correction Institution mail-room hands, one motion for Go B, pursuant to Rule Go B, on August 7, 2011. This is a sworn affidavit and the information enclosed in the motion is to be facts and the truth.

/s/ Antonio Gordon  
Antonio Gordon 259798  
McCorm. Corr. Inst.,  
386 Redemption Way  
McCormick, SC 29899

sworn to me and subscribed  
before me this 7 day of July 07  
Notary: Joyce L Young  
JP: 8 28 2011

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2006CP4600010

*Attachment (b)(2)*

**Antonio Gordon vs. John Ozmit**

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other:
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other:

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

**ORDER GRANTING RULE 60(b) MOTION**

Dated at York, South Carolina, this 31st day of January, 2008.

Court Reporter:

*s/Roger L. Couch*

**PRESIDING JUDGE - Roger L. Couch**

This judgment was entered on the 6th day of February, 2008, and a copy mailed first class this 6th day of February, 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Connie F. Payne  
Charles B. Burnette, III  
Burnette & Payne, PA  
P.O. Box 12186  
Rock Hill, SC 29731

Ashley Anne McMahan  
Office Of The Attorney General  
P.O. Box 11549  
Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

**David Hamilton**

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
2006-CP-46-010

*Attachment (b)(2)*

Antonio Gordon, SCDC No. 259798, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

**ORDER GRANTING  
RULE 60(b) MOTION**

FILED - 6 FEB 12  
CLERK OF COURT  
YORK COUNTY, SC

This matter comes before me on a Motion for Reconsideration under Rule 60(b). The Petitioner, Antonio Gordon, requested an amendment and clarification of Judge John C. Hayes, III.'s Order dated April 30, 2007, filed June 1, 2007.

The Petitioner claims that the manner in which Judge Hayes' Order reads might prejudice him from filing a State Habeas Corpus Petition in the original jurisdiction of the Supreme Court. Judge Hayes' Order recites a quotation from Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998), but does not recite in the Order that the Petitioner is not prejudiced to bring a Habeas Corpus Petition in the South Carolina Supreme Court.

The State's representative, Ashley McMahan, does not dispute the Petitioner's right to file a Habeas Corpus Petition in the original jurisdiction of the South Carolina Supreme Court.

Therefore, I grant the Petitioner's Motion to Reconsider and amend and clarify Judge Hayes' Order that the Petitioner is without prejudice to bring a Habeas Corpus Petition in the original jurisdiction of the South Carolina Supreme Court.

AND IT IS SO ORDERED.

*Antonio Gordon*, South Carolina  
1/31, 2008.

*Roger L. Couch*  
Roger L. Couch

Antonio Gordon #259798  
McCormick Correctional Inst  
386 Redemption Way  
McCormick, SC 29899  
February 21, 2008

RE: Antonio Gordon #259798 v. State of South Carolina  
Case No: 2006-CP-46-0010

Attachment (c) (1)

Dear Mr. Burnette:

I recieved the Order Granting Rule 60(b) motion signed by Judge Couch on January 31, 2008. However, I am requesting that you file a Rule 59(e) motion and notice of Appeal because I wish to have my claims decided on the merits.

Antonio Gordon

Antonio Gordon #254798  
McCormick Correctional Inst  
386 Redemption way  
McCormick, SC 29899

March 13, 2009

Attachment (c) (2)

Dear Mr. Burnette:

I wrote to you concerning a Rule 59(e) motion and appealing Judge  
Couch order granting the Rule 60(b) motion. As you know I did not wish to  
have my claims waived. Have you filed the Rule ~~60(b)~~ 59(e) motion and  
Notice of Appeal. Please write me back. Thanks.

Antonio Gordon

Attachment (c) (3)

Dear Mr. Burnette:

I've written to you twice concerning filing a Rule 59(e) motion and notice of appeal from Judge Leach order and I have not heard back from you or no one. I am requesting the status of the 59(e) and notice of Appeal.

Antonio Gordon

July 18, 2010

LEGAL MAIL

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Antonio Gordon, #259798, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
Case No.: 2006-CP-46-0010

Attachment (7)

ORDER

FILED-RECEIVED  
2015 MAR -9 PM 3:18  
DAVID HAMILTON  
C.C.C.P. & GS  
YORK COUNTY, SC

Petitioner seeks to file with the Court a "Motion for Relief from Judgment Pursuant to S.C.R. Civ. Proc. Rule 60(b)(5) – Austin v. State, 409 S.E. 2d 395 (1991)" (The Motion).

Petitioner alleges the undersigned has recused himself from matters dealing with Petitioner due to a "conflict of interest." There is nothing in the file, nor in the motion, which supports this claim. In fact, the undersigned has addressed prior filings in this proceeding. The undersigned is unaware of any "conflict of interest" and therefore, will address Petitioner's motion as I am the Chief Judge for Administrative Purposes for the Sixteenth Judicial Circuit.

The last activity in this file is an Order of the Honorable Roger L. Couch granting Petitioner relief pursuant to rule 60(b) SCRCPP. The relief was, in effect, a finding that Petitioner could pursue a Habeas Corpus in the original jurisdiction of the Supreme Court.<sup>1</sup>

The file does not reflect whether or not Petitioner filed a Habeas Corpus petition in the Supreme Court subsequent to the issuance of the Order of Judge Couch (January 31, 2008).

A review of the file reflects that the issue the current motion raises, namely that the jurisdiction of his case was in the Family Court due to his age and not in the Court of General

<sup>1</sup> The undersigned's Order of April 30, 2007, notes the presence of some "judicial conflicts," but obviously such did not pertain to the undersigned as the author of said Order.

goh #1

Sessions, was raised in this proceeding previously in his initial filing, dated December 16, 2005, in this case.

I find that Petitioner now seeks to raise for at least the second time, an issue regarding Family Court/General Sessions jurisdiction and therefore, the current proceeding on this issue is dismissed as it is a subsequent request for relief which has been previously ruled on and unappealed.

Petitioner also has claimed a right to an Austin review regarding his prior counsel's failure to appeal Judge Couch's Order of January 31, 2008.

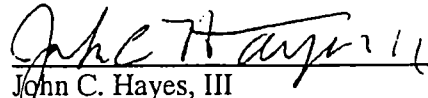
Attached to the instant motion are copies of letters from Petitioner to prior counsel regarding an appeal of Judge Couch's Order which granted petitioner the relief he sought in his Rule 60(b) SCRCF Motion. As stated above, the relief was acknowledgment that Petitioner could file a Habeas Corpus proceeding in the South Carolina Supreme Court. This Order is the law of the case and is not a ruling which would appear to generate an appeal by the prevailing party. However, to the extent Petitioner has been denied his right to appeal, the undersigned has conducted an Austin review.

I find that the failure to appeal a ruling, which granted petitioner the relief he sought, resulted in no prejudice to Petitioner. Petitioner asked to and was granted the right to file a Habeas Corpus proceeding in the Supreme Court of South Carolina. Therefore, there existed no grounds upon which an appeal favorable to Petition could be predicated.

Therefore, Petitioner's Motion is to be filed, without costs, and by this Order Dismissed without Prejudice.

JENH 2

IT IS SO ORDERED.

  
\_\_\_\_\_  
John C. Hayes, III  
Chief Judge for Administrative Purposes  
Sixteenth Judicial Circuit

March <sup>24<sup>th</sup></sup>, 2015  
York, South Carolina

#3

Antonio Gordon # 259748  
Kershaw CI Smu Room 46  
4848 Goldmine Hwy  
Kershaw, SC 29067  
March, 23, 2015

Attachment (8)

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

FILED-RECEIVED  
2015 MAR 25 PM 4:02

RE: Gordon v. State, Case No: 2006-CP-46-0010

Dear clerk:

Please find enclosed A motion to Reconsider, Alter amend  
Judgment Pursuant TO S.C.R. Civ. Proc. Rule 59(c) I am  
filing with the Court in the order issued March 9, 2015. Attachment  
(b)(1) goes with the Rule 59(c) motion.

Also find enclosed A petition for Belated Notice of  
Appeal In the original ~~original~~ <sup>Petitioner's</sup> order issued in this case  
on April 30, 2007, filed June 1, 2007, signed by Judge Hayes.  
These are Attachments. ~~Thank~~ Can you please Stamp file  
And send me a certified true copy back? Thanks

Antonio Gordon

State of South Carolina )  
County of York )

Antonio Gordon #259998 )  
Petitioner )

v. )

State of South Carolina )  
Respondent. )

Attachment (8)

In The Court of Common Pleas  
Sixteenth Judicial Circuit  
Case No: 2006-CP-46-0010

Motion To Reconsider, Alter and Amend Judgment  
Pursuant To S.C. R. Civ. Proc. Rule 59(c)

FILED-RECEIVED  
MAR 25 PM 4:02  
HAMILTON  
P. & G. S.  
COUNTY, SC

Now Comes Antonio Gordon, the Petitioner in the above caption-matter moving in this Honorable Court on a Motion to Reconsider, Alter and Amend Judgment Pursuant To S.C. R. Civ. Proc. Rule 59(c). This motion arises from the Order of dismissal entered by the Court on March 9, 2015 and received by the Petitioner on March 14, 2015.

It is asked that this Honorable Court recuse himself from the case due to a motion to change venue due to a conflict of interest signed by Honorable Hayes himself in Antonio Gordon v. State, case no: 2000-CP-46-1414 which is law of the case. Therefore, this Court should reconsider, alter and amend its Judgment, see Attachment (b) (1) (Letter from Attorney Charles B. Burnette to Judge Hayes showing he recused himself from case no: 2006-CP-46-0010)

It is asked that this Honorable Court reconsider, alter and amend its finding, conclusion of law and judgment and grant a evidentiary hearing on Petitioner's [Jurisdiction] claim, claim "B". This Court found that Petitioner seeks to raise for at least the second time, an issue regarding Family Court / General Sessions Jurisdiction and therefore, the current proceeding on this issue is dismissed as it is a subsequent request for relief which has been previously ruled on and unappealed.

Petitioner will point out the difference on the two (2) separate "[Jurisdiction]" claims, claim "A" in which Gordon asserted section 20-7-6605(1) is "penal" in nature and must be construed strictly against respondent are totally inopposit that of claim "B". Yes claim "A" was attached to the initial habeas but however its obvious that Gordon are asserting in claim "B" that section 20-7-6605 (1) is unconstitutional under the equal protection clause of S.C. Const Art I, § 3 and the 14th Amendment to the United States Constitution, which the unconstitutional provision deprive York County Grand Jury and General Sessions of its [Jurisdiction] over Gordon's person and renders his indictments, conviction, and custody all a nullity and void ab initio. See FN1 Its clear from Petitioner's

FN1 Petitioner asserts this [Jurisdiction] claim could be raised at any time Pursuant to State v. Funderburk, 191 S.E.2d (Lack of subject matter jurisdiction of the cause or subject matter jurisdiction can be raised at any time), And should be taken notice of by the Court Pursuant to Anderson v. Anderson, 382 S.E.2d 897 (1989)

initial filing this "Jurisdiction" claim was "not" included and what this Court is doing is trying to sweep Gordon's claim under the rug to avoid ruling on the merits of the claim put before it, which is obvious the claim does have merits.

Petitioner will also point out he did ~~not~~ make a claim that the "Constitutionality of a statute" under which a defendant held in "custody" may be tested on Habeas Corpus Pursuant to Ex Parte Hollman, 100 S.E. 19. It's clear Petitioner asserted Section 20-7-6605 (1) was unconstitutional which deprived Respondent of its [custody] and Petitioner also asserted he was entitled to his immediate release. Therefore, it's clear these claims were not in the initial Habeas Corpus.

To the contrary Petitioner did make an assertion in the initial petition that Section 20-7-6605 (1) was unconstitutional because it gave no set guidelines in which the Solicitor must go by in trying sixteen year old defendant's which rendered the statutory unconstitutional under due process of law.

Wherefore, Petitioner asserts his Jurisdiction claim that Section 20-7-6605 (1) is unconstitutional under the "Equal Protection Clause" requires an evidentiary hearing Pursuant to Ex Parte Hollman, supra, State v. Funderburk, supra, and was "not" filed in the initial petition and this Court should reconsider, alter, amend its finding of fact and conclusion of law and judgment.

Petitioner will ask that the Court reconsider, alter and amend its judgment to find Petitioner did "not" ask to have Judge Hayes "Original" Order dated April 30, 2007, filed June 1, 2007 "reconsidered amended and clarified". The relief Petitioner asked for in his Rule 60 (b) motion states: "I do pray that Honorable John C. Hayes, III, recuse himself from the order of dismissal with prejudice and that a Honorable who are not in conflict with the case hear the pending habeas." Note: The record in the case of Antonio Gordon v. State, Case No. 2000-CP-46-1414 reflects Honorable Hayes signed a change of venue order alleging he was a conflict of interest which is law of the case. See Attachment (b) (1)

However, Petitioner's Rule 60 (b) motion speaks for itself, there is "nowhere" therein Petitioner asked to have Judge Hayes Order amended and clarified. See Rule 60 (b) motion on file. Gordon's Rule 60 (b) motion was to have Judge Hayes Order "reopen" and a different Judge considered the habeas on the merits and when Judge Couch granted relief in which Petitioner did "not" ask for in his motion was controlled by abuse of discretion and error of law. See Fru Therefore, Gordon was prejudice and counsel was ineffective in failing to seek appellate review at Gordon's request. This Court should reconsider its Austin review.

This 23rd day of March 2015.

Respectfully Submitted  
Antonio Gordon

Footnote: Generally, a moving party should be confined to the relief asked for in his motion. See Coaster v. California Ins. Co of San Francisco Co, 5 S.E.2d 459 (S.C. 1939). And Judge Couch granted his Rule 60 (b) motion under Rule 59 (c) analysis which time had lapsed and this error of law too was appealable, as the Court was without jurisdiction.

State of South Carolina  
County of York

Antonio Gordon #259798  
Petitioner,  
V.

State of South Carolina  
Respondent,

In The Court of Common Pleas  
Sixteenth Judicial Circuit  
CASE NO: 2006 - ~~46~~<sup>CP</sup> - 46 - 0010

Certificate of service

DAVID HAMILTON  
C.C.P. & G.S.  
YORK COUNTY, SC

2015 MAR 25 PM 4:02

FILED-RECORDING

I, Antonio Gordon, hereby certify that I served Petitioner  
S.C. R. Civ. Proc. Rule 59(e) motion on opposing counsel at:

Attorney General office  
Ashley Anne McMahon  
P.O. Box 11549  
Columbia, SC 29211

by depositing one copy in the mail with sufficient postage  
this 23 day of March 2015.

Antonio Gordon

# BURNETTE & PAYNE, P.A.

Attorneys at Law

Charles B. Burnette III  
Connie H. Payne

414 E. Main Street  
P.O. Box 12186  
Rock Hill, SC 29731

Telephone (803) 328-1800  
Fax (803) 328-9494  
INTERNET E-MAIL  
burnettelaw @ Comporium.Net

September 11, 2007

The Honorable John C. Hayes, III.  
1675-1H York Highway  
York, SC 29745

*Attachment B(1)*  
*(1)*

RE: Antonio Gordon, #259798 v. State of South Carolina  
Case No.: 2006-CP-46-0010

Dear Judge Hayes:

I have recently been appointed on the above captioned case. It is my understanding that you have recused yourself in this matter. I have been in communication with Ashley McMahon regarding a CLE conflict along with the fact that I have no file materials to date.

Ashley has agreed to schedule this matter for the week of December 3, 2007 in Spartanburg. Therefore, it is respectfully requested that the matter set before Judge Patterson on October 24, 2007 be continued to the week of December 3, 2007.

Hopefully by then, I will have received a copy of the Application, Return, prior transcripts and orders in order to properly prepare for the hearing.

With best wishes, I am

Sincerely,



Charles B. Burnette, III.

CBBIII/jow

cc Ashley McMahon, Asst. Atty. Gen.  
cc Antonio Gordon ✓

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 Antonio Gordon, )  
 S.C.D.C. No. 259798, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT  
 CASE NO: 2006-CP-46-0010

*Attachment (9)*

ORDER

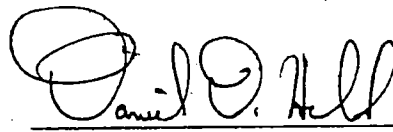
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 2015 APR 20 5 AM 11:21  
 DAVID HAMILTON  
 C.C.P. & GS  
 YORK COUNTY, SC

This matter comes before this Court by way of Antonio Gordon's ("Petitioner") Motion to Reconsider, Alter, and Amend Judgment pursuant to Rule 59(e) of the S.C. Rules of Civil Procedure.

This Court received a handwritten post-trial motion on April 8, 2015. This case was fully adjudicated, complete with an Order granting a Rule 60(b). The Petitioner then had a second PCR action, complete with a full evidentiary hearing (2008-CP-46-4951) and an appeal.

This handwritten motion requests that the court reconsider "for at least a second time" the jurisdictional issues previously brought before the court. These issues have been litigated and orders issued. Also, as per S.C.R. Civ.P. 59(e) mandates, the motion must be made "not later than 10 days after the receipt of written notice of entry of judgment." Since these issues have been previously heard and ruled on, and since these issues are untimely, the Defendant's motions are DENIED.

AND IT IS SO ORDERED.



Daniel D. Hall  
 Sixteenth Judicial Circuit

April 14, 2015  
 York, South Carolina

OFFICE OF  
CLERK OF COURT  
DAVID HAMILTON  
POST OFFICE BOX 649  
YORK, SOUTH CAROLINA 29745  
(803) 684-8507

Attachment (10)

TO: Antonio Gordon

FROM: DAVID HAMILTON, YORK COUNTY CLERK OF COURT

RE: POST CONVICTION RELIEF  
WRIT OF HABEAS CORPUS

\_\_\_\_\_ All correspondence concerning your PCR application must be presented to our office by your appointed attorney.

\_\_\_\_\_ All PCR's are scheduled directly by the Office of the Attorney General, you may contact them at: PO Box 11549, Columbia, SC 29211.

\_\_\_\_\_ When filing your PCR application be sure to complete the verification form in full, otherwise the document cannot be filed in our office.

\_\_\_\_\_ When requesting transcripts from your proceedings you will need to contact the South Carolina Court Administration, 1015 Sumter Street, Suite 200, Columbia, South Carolina 29201.

\_\_\_\_\_ If you have any question concerning matters in your case and an attorney has been appointed, you must contact your attorney.

\_\_\_\_\_ You have filed a PCR application and requested that an attorney be appointed to represent you. Please be advised that pursuant to a memorandum issued by Chief Justice Toal dated January 12, 2004 the Clerk of Courts office is not to appoint an attorney until directed to do so by the Office of the Attorney General.

\_\_\_\_\_ Your PCR was filed on \_\_\_\_\_ and is being processed.

\_\_\_\_\_ Requires original signature on filings

\_\_\_\_\_ Must have "Application to Proceed Without Payment of Costs and Affidavit in Support Thereof" signed and notarized before application can be processed.

XX \_\_\_\_\_ Other You previously filed the same type of motion and an order was signed denying that motion, furthermore an Order Restricting Future Filings is in place therefore our office is returning your motion.

\*\*\* If your paperwork has been returned by our office, please address the checked items and return to our office for proper handling. \*\*\*

York County Clerk of Court  
P. O. Box 649  
York, SC 29745

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

Antonio Gordon, #259798,  
Petitioner,

v.

State of South Carolina  
Respondent

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Case No: 2006-cp-46-0010

MOTION TO RECONSIDER, ALTER AND  
AMEND JUDGMENT PURSUANT TO S.C.R.  
CIV.PROC.RULE 59(e)

Now Comes Antonio Gordon, the petitioner in the above caption matter moving this Honorable Court on a motion to Reconsider, Alter and Amend Judgment pursuant to S.C.R. Civ.Proc.Rule 59(e). This motion arises from an Order denying Petitioner's Rule 59(e), motion filed March 25, 2015. This court entered its order April 20, 2015 and received by petitioner April 30, 2015. See Attachment (1), (1)(a) and (1)(b).

It is asked that this Honorable Court reconsider, alter and amend its judgment and grant an evidentiary hearing on Gordon's Austin v. State, 409 S.E.2d 395 (1991) claim. This Court found that Gordon had a full and complete post-conviction relief Antonio Gordon v. State, 2008-cp-46-4951 after Gordon v. State, 2006-cp-46-0010. Petitioner asserts he "did not" discover that counsel failed to file a Rule 59(e) motion and notice of appeal at his request until "after" Gordon v. State, (4951) was complete with a ruling. See Fnl Therefore, his Austin, supra, claim could not have been raised in Gordon v. State, (4951). Tilley v. State, 432 S.E.2d 689 (1999).

Matter of fact the one year statute of limitation for post-conviction is not applicable to appeals filed pursuant to Austin, supra, under S.C. Code Ann § 17-27-45(a)(supp.2006). An application for relief must be filed within one year after entry of the judgment or conviction or within one year after

---

Fnl Gordon v. State, (4951) became final January 25, 2010 and petitioner last letter addressed to counsel was July 18, 2010. See Attachment (c)(3) attached to Rule 60(b)(5)-Austin filed March 9, 2015

the sending the remittiture to the lower court from an order of an appeal or the filing of a final decision upon an appeal, which ever is later. Austin appeals are considered "belated appeals" and are used to rectify unjust procedural defects such as when an attorney does not file a timely appeal. See Hope v. State, 492 S.E.2d. 76 (permitting a belated notice of appeal pursuant to Austin in 1992 from a denial of a PCR application in 1989).

Gordon's Austin appeal is attacking the PCR procedural used in his case, not the merits of his sentence so the one year statute of limitation § 17-27-45(a), is not applicable. Petitioner further asserts that his Austin claim must be considered as a post-conviction relief application pursuant to Hendrick v. State, 692 S.E.2d 892 (2010) and Austin v. State, supra, where his original habeas corpus was treated as a post-conviction relief application. See Attachment (c) (Letter from clerk) which is law of the case. Therefore, it is asked that this Court reconsider, alter and amend its judgment.

It is respectfully asked that this court reconsider, alter and amend its judgment and grant petitioner an evidentiary hearing on his Ex Parte Hollman, 60 S.E. 19 (1908) claim where the court held the "constitutionality of a statute under which a defendant held in custody may be tested on habeas corpus." See Fn2 As Petitioner will point out that S.C. Code Ann § 20-7-6605(1)(supp.1998) Titled Defined "[C]hild" statutory is unconstitutional under S.C. Const Art I., § 3 and the 14th amendment to the United States Const because it is "arbitrary and unreasonable" whereas in [arbitrarily] "[e]xclude" sixteen year old children's charged with a class A, B, C, or D felony as defined in section 16-1-20 from the definition

---

Fn2 Petitioner asserts this claim should be considered under S.C. Code Ann § 17-17-10-17-17-200 (supp.2014) pursuant to Hendrick v. State, supra, S.C. Const. Art V., § 4 "subject to the statutory law, the Supreme Court shall make rules governing the practice and procedures in all such courts. Marrochlis, LLC v. Derrick, 682 S.E.2d. 301 (2009). A civil procedure may not limit the provisions of a statute. See Hendrick, supra, (Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of SCRCP, the statutory procedure must be followed).

of being a "[c]hild" and a "[p]erson" under family court's exclusive original jurisdiction as those "similarly situated" less than seventeen years of age charged with a class A,B,C, or D felony as defined in section 16-1-20. This is inconsistent with rudimentary demands of justice and renders the provision "[v]oid" and constitutionally defective as there is no rational justification for singling out children's "sixteen" years of age charged with a class A,B,C, or D felony as defined in section 16-1-20 from the definition of being a "[c]hild" and a "[p]erson" under family court's exclusive original jurisdiction as those "similarly situated" less than seventeen years of age charged with a class A,B,C, or D felony as defined in section 16-1-20. Thus in violation of the equal protection and due process clauses of the 14th amendment of the United States const and Art I, §3 of S.C. Const. See Fn3 marley v. Kirby, 245 S.E.2d 604 (S.C. 1978) (All persons similarly situated should be treated alike); Barbier v. Connolly, 113 U.S. 27 (1885) (same); Central Airlines, INC v. US, 138 F3d 333 (8th cir. 1988) (Equal protection clause prohibits government officials from selectively applying law in discriminatory manner). As well in violation of Gordon's fundamental right to equal protection of the law under S.C. Const Art I., § 3 and the 14th amendment to the United States Const

Therefore, the unconstitutional provision deprived the York County Grand Jury of its jurisdiction and renders Gordon's indictments a nullity void ab initio pursuant to State v. McClure '289 S.E.2d 158 (S.C. 1982) (No indictments may be true billed when circuit court lacks jurisdiction) and the conviction void ab inition and a nullity pursuant to State v. England, 245 S.E2d 608 (1978) (Defendant was a person under family court exclusive jurisdiction and since jurisdiction had not been relinquished by family court, General Sessions lacked jurisdiction), and the term for which Gordon could lawfully be held under family court's jurisdiction has "[e]xpired" thereof making his custody unlawful pursuant to Kent v. United States, 383 U.S. at 556 (1966) (Juvenile defendant can be detained only until he's

[21]). Therefore, Petitioner asserts he's being held in respondent custody unlawfully in violation of his fundamental constitutional rights to equal protection and due process of law under S.C. Const Art I., § 3 and the 14th amendment to the United States const. See Fn4

However, this court found that this claim has been raised and decided against petitioner in his original habeas corpus filed January 3, 2006. Petitioner asserts that at page 24 of his original habeas corpus he asserted "General Sessions" lacked jurisdiction in accepting his guilty plea where jurisdiction had not been relinquished by family court which his guilty plea was accepted in violation of his due process rights. Thus its quite clear that Gordon "did not" [test the constitutionality] of section 20-7-6605(1), supra, which he is held in custody under and he "did not" test the lawfulness of his "custody" in his original habeas corpus. Its clear that Gordon did not even mention section 20-7-6605(1), supra, which support his position that the said herein "jurisdiction" claim is totally distinguished and inopposit that of the jurisdiction claim mention at page 24 of his original habeas. See Fn 5 Therefore,, Gordon asserts his claim that the constitutionality of statute under which he held in "custody" can be raised for the first time pursuant to Ex Parte Hollman, supra, in that he may test the legality of his "current detention" on habeas corpus pursuant to Walker v. Wainwright, 390 U.S. 335, 88 S.Ct

---

Fn4 Lack of subject matter jurisdiction or jurisdiction of the cause can be raised at any time. See State v. Funderburk, 191 S.E.2d 520 (S.C. 1972)

Fn5 Petitioner asserts because when he filed his habeas corpus and it was recharacterized and filed as a post-conviction. See Attachment (2)(a), supra, which is law of the case, that this current habeas corpus under Ex Parte Hollman, supra, is not a successive action.

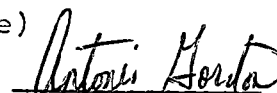
962 (1968).

Petitioner asserts failure to hold an evidentiary hearing on his Ex Parte Hollman, supra claim will (1) deprive him of statutory right under §17-17-10-17-17-200(supp.2014) and constitutional remedy pursuant to S.C. Const. Art I., §18-Pennington v. State, 441 S.E.2d 315 (1994), to test the constitutionality of the statute which he is held under, and to test the legality of his "current detention" as those "similarly situated", and (2) will deprive Gordon of his first and Fourteenth fundamental right to petition the court and state to a redress of grievance as those similarly situated where post-conviction relief is inadequate and unavailable because Gordon is entitled to his immediate release. Therefore, it is asked that this court reconsider its order.

It is respectfully asked that this court reconsider, alter and amend its judgment where this court found petitioner did not file his Rule 59(e), motion in a timely manner. Petitioner will point out he asserted on page one of his motion that he received the order of dismissal on March 19, 2015. The Clerk of Court mailed the order to Allendale C.I in which it was received at that institution on March 16, 2015 approx seven days after the order was entered. See Attachment (2) (Envelope order mailed in). See En6 Allendale C.I forward the Order to Kershaw C.I. in which Kershaw C.I received it on March 19, 2015 and furnish Gordon with said order on March 19, 2015. Therefore, approx 10 days had elapse from the time the order was entered and Gordon received it and he filed his Rule 59(e), motion March 25, 2015 within 10 days after his receipt of the order. See Attachment (2), supra March 19, 2015 at Kershaw C.I.

#### Conclusion

It is respectfully asked that this court reconsider, alter and amend its judgment pursuant to Rule 59(e)  
This 7th, day of May 2015.



Antonio Gordon  
Kershaw .C.I Smu  
4848 Goldmine hwy  
Kershaw, S.C 29067

5.

En6 At the time the order was mailed Gordon was at Kershaw C.I

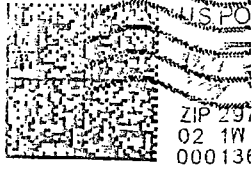
**York County**  
south carolina

CLERK OF COURTS OFFICE

Post Office Box 649, York, South Carolina 29745-0649

CHARLOTTE

NC 282



PM 1

APR 29 2015

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MAILROOM

*Kershaw*

*SMW  
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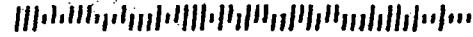
Antonio Gordon #259798  
Perry Correctional Institution  
430 Oaklawn Road  
Pelzer SC 29669

**RECEIVED**

APR 23 2015

P.C.I. MAIL

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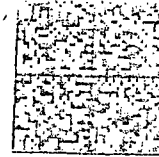
*Attachment (1)*



CLERK OF COURT'S OFFICE

Post Office Box 649, York, South Carolina 29745-0649

CHARLOTTE  
NC 282



US POSTAGE  
\$ 0.00  
\$ 0.00.39

Attachment (2)

RECEIVED  
MAR 10 2015

Shulky

Antonio Gordon #259798  
ACI SMU B 242  
PO Box 1151  
Fairfax SC 29827

RECEIVED  
MAR 19 2015  
KerCI  
MAILROOM

29827115151



state of south Carolina  
County of York

Antonio Gordon, # 259798,  
Petitioner,

v.

State of South Carolina,  
Respondent.

In The Court of Common Pleas  
Sixteenth Judicial Circuit

Case No. : 2006-46-0010

Attachment  
(1) (B)

Affidavit of Antonio Gordon In Support of his  
Rule 59 (e), motion

I, Antonio Gordon, hereby declares: In Lancaster County S.C. that:

- (1) I recieved Judge Hayes Order entered March 9, 2015 denying Rule 60 (b) (5) - Austin Motion on March 19, 2015 and I filed my Rule 59 (e), motion March 25, 2015.
- (2) I recieved Judge Hall Order denying Rule 59 (e), motion on April 30, 2015 and filed my Rule 59 (e), motion on May 7th, 2015.
- (3) I did not discover that Counsel failed to file a notice of appeal until after Gordon v. State, (4951) was complete when I called the S.C. Supreme Court and S.C. Court of Appeals as a concern family member on a cellphone in 2011 and was told there was no appeal on file.
- (4) I did not assent the constitutionality of section 20-7-605 (1) claim in my original pleading.
- (5) Judge Hall Order entered April 20, 2015 was mailed to Perry Correctional Institution and recieved on April 23, 2015 when Gordon is housed at Kershaw correctional Inst and recieved it on April 29, 2015 at Kershaw C.I. and Gordon recieved it April 30, 2015.

29

I assent the foregoing is the truth under the penalty of perjury.

Sworn to and subscribed before me

this 7<sup>th</sup> day of May, 2015

Notary: Catherine A. Canevar

Exp: My Commission Expires December 22, 2018

Antonio Gordon

Antonio Gordon # 259798

State of South Carolina,  
County of York

Antonio Gordon, #259798,  
Petitioner,

v.

State of South Carolina  
Respondent.

In The Court of Common Pleas  
Sixteenth Judicial Circuit

Case NO: 2006-CP-46-0010

certificate of service

I, Antonio Gordon certify I have served Petitioner's Rule 59(c)  
S.C. R. Civ. Proc. Rule 59(c) motion on opposing counsel at:

Attorney General office

Ashley Anne McMahan

P.O. Box 11549

Columbia, SC 29211-1549

by depositing a copy in the mail this <sup>17<sup>th</sup></sup> ~~18<sup>th</sup>~~ day of MAY 2015 with sufficient postage.

Antonio Gordon

4848 Goldmine Hwy  
Kershaw, SC 29067

DID GENERAL SESSION COURT LACK JURISDICTION IN ACCEPTING PETITIONER GUILTY PLEA, WHERE JURISDICTION HAD NOT BEEN RELINQUISHED BY THE FAMILY COURT.

Attachment (c)

The Supreme Court directed that, prior to transfer, a hearing must be held in which certain rights are afforded to juvenile. In an appendix to its opinion in Kent, The Supreme Court quoted, with approval, a District of Columbia policy memorandum which recited eight factors to be considered by the Juvenile Court in making a transfer decision. Although the Supreme Court did not explicitly hold that these factors must be followed by lower courts. In Patton v. Toy, 867 F.Supp.356 (D.S.C.1994), at 362 the court held, this court believes that these factors provided excellent general guidance quoting the eight factor's in Kent.

However, a juvenile waiver hearing must measure up to the essential of Due Process and Fair Treatment. Application of Gault, 387 U.S. 1, 30, 87 S.Ct.1428, (1967), Quoting from Kent v. United States, 86 S.Ct.1045 (1966). "Kent and Gault make it unquestionably clear that Juvenile Court proceedings that effect a young person's substantial rights must measure up to the essential of Due Process and fair treatment. Kempen v. Maryland, 428 F.2d.172 (4th Cir.1970). However, in Shaw, 274 S.C. 534, 265 S.E.2d.522 (1980), the Court encourages Family Court judges in South Carolina to apply the principles of the Kent case when making the decision of whether to transfer a child to adult court. The objective of the Family Court is to provide measures of guidance and rehabilitation for the child and to protect society, not to fix criminal responsibility, guilt or punishment. Each "child" is entitled to Due Process a transfer to adult court, and reviewing court must ensure that each "child" receives such process.

In the case at bar the petitioner was sixteen years of age and was tried as an adult without the ability to go before a Family Court Judge, to determine whether petitioner would be waived up to be tried as a Juvenile or an adult. Petitioner further contends that he received violation of his Due Process right where jurisdiction had not been relinquished in favor of another court. Petitioner was sixteen years of age with only one charge that could carry the penalty of fifteen years or more in which that was burglary 2nd degree.

Therefore, for the forgoing reasons petitioner received violation of his Due Process right.

**RECEIVED**

JUN 03 2015

SC Court of Appeals

Dear Clerk:

Please find enclosed A motion to  
to proceed in forma pauperis opposing  
Counsel has been served.

Antonio Galan

May 28, 2015

Antonio Gordon, # 259798

Kershaw S.I. OAK B Room 46

4848 Goldmine Hwy

Kershaw, SC 29067

South Carolina Court of Appeals

P.O. Box 11629

Columbia, SC 29211

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