

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS

JUN 25 2015

JOHN C. HAYES, III, PRESIDING JUDGE

S.C. SUPREME COURT

APPELLATE CASE NO.: 2015-001014

LOWER COURT CASE NO.: 2000CP461414

Antonio Gordon,

Petitioner,

v.

State of South Carolina,

Respondent.

EXPLANATION PURSUANT TO RULE 243(C)
AND PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE GROUNDS

- 1..WHETHER THE LOWER COURT ERRED WHEN IT FOUND PETITIONER DID NOT FILE HIS MOTION WITHIN A REASONABLE TIME UNDER RULE 60(B) WHEN HE ASSERTED A ODOM V. STATE, 523 S.E.2d 753 (1999) CLAIM?

- 2..WHETHER THIS COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION BECAUSE OF THE UNUSUAL PROCEDURAL HISTORY OF THE UNDERLYING CRIMINAL MATTER AND POSTCONVICTION MATTER AND DETERMINE IF PETITIONER IS ENTITLED TO HAVE A SECOND PCR UNDER § 17-27-90?

- 3..WHETHER THE LOWER COURT ERRED WHEN IT FOUND PETITIONER DID NOT FILE HIS RULE 60(B) MOTION WITHIN A REASONABLE TIME WHERE HE PRESENTED RELIABLE EVIDENCE THE FRAUD UPON HIM AND THE COURT HAD RECENTLY CAME TO LIGHT AND THAT HE ACTED WELL WITHIN DUE DILIGENCE IN DISCOVERING THE FRAUD IN LIGHT OF HIS LIMITED I.Q IN THAT HE HAVE BEEN CONSISTENTLY PURSUING HIS RIGHTS AND FILED HIS MOTION WITHIN A REASONABLE TIME AFTER DISCOVERING THE FRAUD?

- 4..WHETHER JUDGE HAYES HAD THE AUTHORITY TO ISSUE AN ORDER IN THE INSTANT CASE WHERE HE SIGNED A ORDER PREVIOUSLY IN *the* CASE RECUSING HIS SELF AND CHANGING VENUE TO *Richland* COUNTY?

STATEMENT OF THE CASE

On July 23, 1998 the Petitioner was "[s]ixteen" years of age taken into custody. See Fn1 On July 27, 1998 he was served arrest warrants for two counts of attempted arm robbery, possession of a weapon during the commission of a violent crime, possession of a pistol by a person under twenty-one and criminal conspiracy.

On October 15, 1998 the York County Grand Jury indicted the petitioner as charged. On July 16, 1999 he plead guilty in General Sessions without "[f]irst" being provided with a "detention hearing within 48 hours after being taken into custody, Notice of initiation of juvenile proceedings, Hearing, Full investigation, Access to materials considered by the court, A statement of reason and a "[O]rder" issued from family court relinquishing its exclusive original jurisdiction to general sessions court, 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. On July 19, 1999 the Honorable John C. Hayes, III, sentenced Gordon to a term of imprisonment of forty years.

The Petitioner filed his first post-conviction relief application June 1, 2000. Antonio Gordon v. State, 2000-cp-46-1414. In the application Gordon stated as a ground for relief (Ineffective assistance of counsel pursuant to family court matters). During the pendency of (1414) he filed a second post-conviction application. Antonio Gordon v. State, 2001-cp-46-1866. See Fn2 In the application Gordon asserted as a ground for

Fn1 Gordon was not "[c]harged" with violating any criminal law when he was taken into custody but was eventually charged with murder approx 6 to 8 hour after being taken into custody.

Fn2 The two application was merged together and Tara D. Shurling was appointed to represent Gordon. The two applications will be referred to as (1414).

relief General sessions lacked subject matter jurisdiction namely,"(General sessions was without jurisdiction in accepting his guilty plea because family court had not relinquished its jurisdiction)." See Appendix page 409. The petitioner amended the application to assert a "[c]onstitutional challenge to S.C. Code Ann § 20-7-6605(1)(Supp.1998) Titled Define "[C]hild" statutory.See Appendix pages 420-426.

The Respondent made its return on MAY 2,2001.See Fn3 An evidentiary hearing into the matter was convened on July 29,2003, at the Richland County Courthouse. The parties agreed to change venue signed by Honorable "[J]ohn C. Hayes,III",due to conflicts with the judges in the sixteenth judicial circuit, this case was transferred to the Fifth Circuit in order to conduct the PCR hearing in a more timely manner. The Respondent was represented by Jeanette Van Ginhoven of the South Carolina Attorney General Office.

During the hearing PCR counsel Tara Shurling represented to the PCR Court:

Your Honor,My client also alleges that his indictment is faulty in that he was indicted by the Court of General Sessions and tried as an adult without trial counsel having—and this is actually more of a "[s]ixth" amendment argument" although my client has couched it in terms of subject matter jurisdiction—that trial counsel never made a concerted effort as an advocate to convince the solicitors office to exercise its discretion under section 20-7-6605 to have his case remanded to the family court.

See Appendix page 444 line 15-24. Then at page 445 line 23 through page 446 line 1,PCR counsel further inform the Court:

And it is his position,Your Honor,"Although he has once again in his amendments he has asked me to present,he couch this in terms of subject matter jurisdiction,but it is really a sixth amendment argument."

Fn3 The Respondent did not respond to the jurisdiction claim in its return.

At the conclusion of the hearing the PCR Judge instructed the Respondent to prepare an order of dismissal. The respondent in its Order prepared the Order to state under the sixth amendment claim counsel presented to the court at appendix page 446 line 15-24:

PURSUANT TO S.C. CODE ANN § 20-7-6605, A PERSON SIXTEEN YEARS OF AGE OR OLDER WHO IS CHARGED WITH A CLASS A, B, C, OR D FELONY AS DEFINED IN SECTION 16-1-20 OR A FELONY WHICH PROVIDED FOR A MAXIMUM TERM OF IMPRISONMENT OF FIFTEEN YEARS OR MORE MAY BE REMANDED TO THE FAMILY COURT FOR DISPOSITION OF THE CHARGE AT THE DISCRETION OF THE SOLICITOR. THE APPLICANT WAS SIXTEEN YEARS OLD WHEN HE COMMITTED THE CRIMES FOR WHICH HE WAS INDICTED AND THE CRIMES COMMITTED WERE CLASS A, B, C OR D FELONIES. THEREFORE, GENERAL SESSIONS COURT HAD JURISDICTION. THE DECISION TO REMAND THE CASE TO FAMILY COURT WAS WITHIN THE DISCRETION OF THE SOLICITOR'S DISCRETION.

See Appendix page 500 claim five jurisdiction claim addressed under sixth amendment analysis in PCR Order dated August 18, 2003 filed August 20, 2003. See Fn4 PCR Counsel filed a Notice of Appeal in this Court which became final August 8, 2005. See Fn5

Petitioner filed a SCRPC Rule 60(b) motion dated March 23, 2015. The grounds raised in the petition to the Court was:

- (1).. PCR ~~COUNSEL~~ action constituted Extrinsic fraud upon him and the court
- (2).. Due to PCR counsel conduct he was deprived his first amendment right to petition the state and court for redress of grievance
- (3).. Petitioner was deprived his one full bite at the apple as those similarly situated in violation of his fundamental rights.

Fn4 Due to PCR Counsel inadequately raising the jurisdiction claim Gordon's constitutional challenge to §20-7-6605(1) was excluded and was not addressed in the order of dismissal.

Fn5 This is not all of petitioner's filing history on the jurisdiction claim and history on his criminal conviction.

Before the Respondent could respond to the Rule 60(b) motion Honorable John C. Hayes, III issued an order denying with prejudice on the basis petitioner did not file his motion within a reasonable time. Order dated April 20, 2015 filed April 24, 2015. See Fn6

Fn6 The Respondent in a letter dated April 24, 2015 addressed to judge Daniel D. Hall indicated this case has been fully adjudicated, Gordon had a second post-conviction hearing and does not intend to respond to Gordon's motion because it was not filed within a reasonable time and asked the court to restrict Gordon from future filing to prevent frivolous and abusive filing. See APPENDIX PAGE 591

ARGUMENT

The lower court erred when it found petitioner did not file his Rule 60(b) motion within a reasonable time under Rule 60(b) when he asserted a Odom v. State, 523 S.E.2d 753 (1999) claim.

The lower court found petitioner did not file his motion within a reasonable time under Rule 60(b) SCRPC. See Order Appendix page 590 Petitioner avers this finding is inconsistent with Odom and is controlled by an error of law where this court held in Odom the "one year statute of limitations required by S.C. Code Ann § 17-27-45(a), does not apply" to petitioner's belated appeal claim. This same principle apply to SCRPC Rule 60(b) motions when Odom is asserted for the basis of reopening the post-conviction judgment because he was deprived his procedural right to "[o]ne full bite at the apple" as those similarly situated pursuant to Odom. Thus at page three (3) of his motion he asserted a ground under Odom when he alleged "PCR counsel's conduct deprived him of his one full bite at the apple as those similarly situated", when she in the middle of the record without his consent "[w]aived" his jurisdiction claim that was amended to assert a constitutional challenge to § 20-7-6605(1), which in fact deprived him of his "one full bite at the apple where he was deprived judicial and appellate review on the claim.

However, this court has never held Odom apply to a situation as in the case sub judice nor have this court ever held Odom could not be asserted on a Rule 60(b) motion to reopen the PCR judgment where the PCR Applicant had an appeal, but was not afforded his full bite at the apple due to PCR counsel inadequately raising the claim thereby depriving him judicial and appellate review on that particular claim. Petitioner asserts his Odom claim that he was deprived his full bite at the apple can be raised on a Rule 60(b) motion because he's attacking

the procedures and not the conviction or sentence. In Winestock, 340 F.3d at 203-207 the court held a motion under Rule 60(b) directly attacking the prisoner's conviction or sentence will usually amount to a successive application, while a motion under Rule 60(b) seeking a remedy for some defect in the collateral review will generally be deemed a proper motion to reconsider. Federal Rule 60(b).

In the instant case petitioner is not attacking his conviction or sentence, See Fn1 he is attacking the procedures during the course of his post-conviction hearing. And even though his case is inopposit then Odom, his case is some what similar as well. In Odom he was deprived "appellate" review on his entire post-conviction because counsel failed to seek an appeal at his request. However, in the instant case petitioner was deprived "judicial and appellate" review on a particular meritious claim he asked his counsel to present that was attached to his "original and amended" application, but instead counsel "waived" the claim in the middle of the record without his consent, however, because Gordon was deprived judicial and appellate review on a materious claim, he sit in the same position that of Odom and Austin v. State, 409 S.E.2d 395 (1991) and because his "one full bite at the apple" come with him having that particular claim adjudicated in the lower court and if he did not receive a favorable ruling, he could have appealed to the appellate court under S.C. Code Ann §17-27-80-100 Austin Therefore, because Gordon sit in the same position as Odom and Austin his belated appeal on his jurisdiction claim that was amended to assert a constitutional challenge to §20-7-6605(1), does not require him filing his motion within a reasonable time under Rule 60(b) or the statute of limitations. Therefore the lower court erred.

Fn1 Petitioner's Odom claim is not successive under §17-27-90 because he is not attacking the conviction or sentence. See S.C. Code Ann §17-27-20(e)(1)-(6) Al-Shabazz, 527 S.E.2d at 749 where this court held (In General, PCR is a proper avenue of relief "[o]nly" when the applicant mounts a "collateral attack challenging the validity of his conviction or sentence."

This court should exercise its original jurisdiction because of the unusual procedural history of the underlying criminal matter and post-conviction matter and determine if Petitioner is entitled to have a second PCR under §17-27-90

In the instant case petitioner was sixteen years of age taken into custody where the police found probable cause he had violated the criminal laws of this State. See Appendix pages 44 line 16 through page 45 line 23 (Charles Cabin testimony) pages 283 line 13 through page 284 line 11 of appendix (John Thickens testimony) with pages 342 line 14 through page 343 line 4 (which demonstrate the police only found probable cause to take Gordon into custody and charged him approx 6 to 8 hours after being taken into custody).

However, upon taking Gordon into custody Family Court exclusive original jurisdiction attached pursuant to S.C. Code Ann §20-7-7205(a)(supp.1998) Titled "Taken into Custody", which states in relevant part:

When a "[c]hild" found violating a criminal law or ordinance is taken into custody, the taken is not an arrest. The jurisdiction of the court attaches from the time of taken into custody.

See Fn2 Once the jurisdiction of the court attaches, the general rule is that it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance, Butler v. White, 95 S.E.2d 496 (1958) (Jurisdiction, once acquired, is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance); Kinross-Wright v. Kinross-Wright, 102 S.E.2d 469, 476 (1958) (same).

Applying this principle to the proceeding and the instant case it is apparent family court acquired jurisdiction over the subject matter of the proceedings and Gordon's "[p]erson" as those "similarly situated" less than seventeen years of

Fn2 Petitioner should have been afforded a detention hearing within 48 hours after being taken into custody as those similarly situated pursuant to S.C Code Ann §20-7-7215(a) supp.1998).

age found violating a criminal law taken into custody and or less than seventeen years of age charged with a class A,B,C or D felony as defined in section 16-1-20, where the legislature has held the court will acquire jurisdiction upon taken of the "child" into custody. §20-7-7205(a), supra.

Petitioner asserts the Respondent cannot rely on S.C. Code Ann §20-7-6605(1)(supp.1998) Titled Defined "[C]hild" statutory to [o]ust family court exclusive original jurisdiction without first obtaining an order from family court. See Fn3 Pursuant to §20-7-6605(1) plain and ordinary meaning Gordon was a "[c]hild" as those "similarly situated" less than seventeen years of age until "[CHARGED]" with a class A,B,C, or D felony as defined in section 16-1-20. See Fn4 Therefore, pursuant to the "Rule of Lenity and Penal Statute" doctrine in Sections 20-7-7205(a), 20-7-7215(a), 20-7-6605(1) and 20-7-400(a) and (3)(supp.1998) Titled "Exclusive original jurisdiction of family court", must be construed strictly against the State and in favor of Gordon. See William v. State, 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).

Fn4. Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. epstein v. Coastal Timber Co, 711 S.E.2d 912,917 (2011). Therefore, the court's are bound to give effect to the expressed intent of the legislature. Thus, we must follow the plain and unambiguous language in a statute and have no right to impose another meaning. Grier v. AMISUB of S.C., Inc, 725 S.E.2d 693,695 (2012).

Fn3 Pursuant to §20-7-6605(1) "Child" means: "[C]hild" means a person less than seventeen years of age. "Child" does not mean a person sixteen years of age or older who is "CHARGED" with a class A,B,C, or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more. However, a person sixteen years of age who are charged with a class A,B,C, or D felony as defined in section 16-1-20 or a felony which provide for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

Petitioner asserts because he was not charged with any criminal offense upon being taken into custody in that any ambiguity in the Children Code of Laws must be construed in his favor pursuant to the "rule of lenity" in conjunction with {20-7-6605(1) being penal in nature and must be construed strictly against the State, and in favor of him, he must be considered a "[c]hild" and a "[p]erson" under family court exclusive original jurisdiction as those "similarly situated" less than seventeen years of age found violating a criminal law and taken into custody, and before he could lawfully plead guilty in General Sessions Court as an adult, Family Court [must] have [first] relinquished its exclusive original jurisdiction over Gordon's "[p]erson" pursuant to State v. England, 245 S.E.2d 608 (S.C.1978) (Defendant was a person under family court 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}). See Fn5

Thus, because family court never relinquished its exclusive original jurisdiction over Gordon's [p]erson in which it acquired jurisdiction over the subject matter upon taking Gordon into custody, General Sessions lacked subject matter jurisdiction and jurisdiction over Gordon's person to accept his guilty plea, therefore, the guilty plea judgment is a "nullity void ab initio" pursuant to State v. England, supra. See Fn

Fn5..§14-21-620 was repealed and §20-7-400 was in effect when Gordon was taken into custody and plead guilty, which provide in relevant part: (A) Except as otherwise provided herein, the court shall have exclusive original jurisdiction and shall be the sole court for initiating action: (3) Concerning any child seventeen years of age or over, living or found within the geographical limits of the court's jurisdiction, alleged to have violated any State or Local law or Ordinance prior to having become seventeen years of age such person shall be dealt with under this chapter relating to childrens.

Fn..Gordon also asserts his guilty plea judgment is a "nullity void ab initio" because he was not provided with "Notice of initiation of juvenile proceeding, Hearing, Full investigation, counsel, access to materials considered by the court and a statement of reason 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. In violation of Gordon's fundamental right to due process and equal protection of the law under Art I., §3 and the 14th amendment of the United States Constitution.

Assuming arguendo §20-7-6605(1), 20-7-7205(a), 20-7-7215(a) and 20-7-400(a) and (3) is not ambiguous and penal in nature and must not be construed strictly against respondent. Petitioner asserts General Sessions lacked subject matter jurisdiction and jurisdiction over his person in accepting his guilty plea and sentencing him to a term of forty years imprisonment due to §20-7-6605(1) being unconstitutional under the due process and equal protection clauses of the 14th amendment of the United States Constitution and Art I., §3 of South Carolina Constitution.

Section 20-7-6605(1) is arbitrary and unreasonable because it arbitrarily "[e]xclude" (sixteen) year old children charged with a class A, B, C, or D felony as defined in §16-1-20 from the definition of being a "[c]hild" or a "[p]erson" under family court 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 §16-1-20." This is inconsistent with rudimentary demands of justice and renders the provision "[v]oid" and constitutionally defective as there is no justification for singling out (sixteen) year old children charged with with a class A, B, C, or D felony by excluding them from the definition of a "child" and a "person" under family court 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 §16-1-20. Thus in violation of the equal protection and due process clauses under S.C. Const Art I., §3 and the 14th amendment of the United States Constitution, as well in violation of Gordon's fundamental right to equal protection and due process of law. See Long v. Robinson, 316 F.Supp.22 (1970) where the court found a similar statute unconstitutional. But See Barbier v. Connolly, 113 U.S. 27 (1885) (All persons similarly circumstance shall be treated alike); Marley v. Kirby, 245 S.E.2d 604 (S.C.1978) (Same).

Petitioner asserts this unconstitutional provision deprived the York County Grand Jury and General Sessions of its subject matter jurisdiction and jurisdiction over Gordon's person as a matter of constitutional law thereby rendering his indictments and conviction a "nullity void ab initio" and should be vacated de jure. England.

The petitioner ask this court to take judicial notice that in the instant case he attached to his "original and amended application" the jurisdiction claim and constitutional challenge to §20-7-6605(1), however, PCR counsel in the initial review collaterla proceeding at appendix page 444 line 15-24 in the middle of the record "[w]aived" Gordon" statutory right to assert his jurisdiction claim and constitutional challenge to §20-7-6605(1) under S.C. Code Ann § 17-27-90 as those similarly situated and "[w]aived" Gordon's jurisdiction claim and constitutional challenge to section 20-7-6605(1) without his consent. See Fn6 Its clear Gordon did not waive his statutory right to assert his claim and neither did he voluntarily, knowing and intelligently waive his claim under section 17-27-90, nor did he waive appellate review on the claim as the record demonstrate counsel informed the PCR court that Gordon asked her to present the claim. See Appendix page 445 line 23 through page 446 line 1. See fn7

Furthermore, PCR counsel's egregious conduct also deprived Gordon his fundamental right to petition the court and the State of South Carolina for a redress of grievance. See Thorne v. Bailey, 846 F.2d at 244 (4th Cir. 1988) (The petition clause of the first amendment guaranteed "the right of the people...to petition the Government for a redress of grievance." Historically in the 1689 Bill of Rights exacted from William and Mary, the right to petition is cut from the same cloth as other guarantees of [the first] amendment. McDonald v. Smith, 472 U.S. 482, 105 S.Ct 2787, 2789-90 (1985). Petitioner asserts he should not be bound by PCR counsel's egregious conduct pursuant to United

Fn6 Petitioner avers PCR counsel's egregious conduct deprived him of his fundamental right to due process and equal protection of the law under S.C. Const Art I., §3 and the 14th Amendment of the United States Const. namely (Gordon was deprived the opportunity to be heard fully as those similarly situated)

Fn7 Petitioner asserts the PCR Court too failed as a matter of constitutional ^{law} to obtain a knowing, voluntary and intelligent waiver on the record pursuant to Roddy v. State, 528 S.E.2. 421 (S.C.2000).

States Supreme Court case law in Humphrey v. Cady, 92 S.ct.1048 (1972) (The waiver of a State court remedy must be the product of an understanding and knowing decision by the Petitioner's himself, who is not necessarily bound by the decision or default of his counsel.

It's clear petitioner was deprived post-conviction remedy on his claim, deprived his one full bite at the apple, deprived appellate review on his claim, deprived the right to petition the court and State for a redress of grievance, and deprived the right to be heard as those similarly situated all at the hands of counsel. PCR counsel's performance clearly conflict with Rule 71.1. Which the system has failed Gordon and it would be cruel and unusual punishment under the Eight amendment to deprived Gordon judicial review and appellate review on his claim due to counsel's egregious performance. This court in Aice, 409 S.E.2d. at 394 (1991) held, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See Butler v. State, 397 S.E.2d 87 (1990) that a successive PCR can be obtained. Petitioner's case fit into this narrow exception. Aice.

Furthermore, petitioner asserts pursuant to the miscarriage of justice exception petitioner should be excused of any procedural and time bars where one of the most compelling miscarriage of justice sit before the court where (1) PCR counsel committed constructive extrinsic fraud upon him and the court, (2) waived petitioner's statutory right under §17-27-90 to present his claim in his original and amended application, (3) deprived petitioner appellate review on a meritorious claim, (4) waived petitioner's jurisdiction claim without first consulting him and then presented a sixth amendment claim to the court that was totally in contradictory with the jurisdiction claim he asked her to present to the PCR court and (5) deprived Gordon the opportunity to be heard on his claim and (6) deprived Gordon his right to petition the court and the State of South Carolina for a redress of grievance on that particular claim.

In the instant case it was very important that PCR Counsel assisted petitioner in protecting his statutory right to ~~Present~~ his claim and constitutional rights and help him frame his argument in the right format to achieve the appropriate review by the court where his limited I.Q. of 68 and reading level at a third grade level was made aware to her in that petitioner received help from jail house lawyers in preparing his post-conviction. Thus petitioner sit in the same position that of Case v. State, 289 S.E.2d 413 (1982). Therefore, this court should cure this manifest unjust and miscarriage of justice and reopen the PCR judgment and or grant petitioner a second PCR pursuant to Odum and 17-27-90-100 so Gordon can receive his procedural right to "one full bite at the apple" where PCR counsel inadequately raised his jurisdiction claim.

The lower court erred when it found petitioner did not file his Rule 60(b) motion within a reasonable time where he presented reliable evidence the fraud upon him and the court had recently came to light and that he acted well within due diligence in discovering the fraud in light of his limited I.Q. in that he have been consistently pursuing his rights and filed his motion within a reasonable time after discovering the fraud

The lower court found petitioner did not file his motion within a reasonable time pursuant to SCRPC Rule 60(b). See Order Appendix page 590 This finding is erroneous as a matter of law where the petitioner asserted on page 7 of his motion and page 576 of the appendix that "extrinsic fraud upon him and the court" had recently came to light when "no" court would adjudicate the claim on the merits he asked counsel to present to the PCR court. See fn8 the petitioner did not discover the

fn8 On January 2, 2014 the petitioner filed a petition in this court pursuant to Rule 245 and this court dismissed February 24, 2014 and on December 30, 2013, the petitioner filed a motion to vacate/withdraw void guilty plea in the General Sessions court and Judge Hayes, III instructed the clerk of court to place the motion in Gordon's General sessions file. See Exhibit (a) attached to the Rule 60(b) motion and page 587 of appendix (letter from clerk).

fraud upon him and the court until "[a]fter" judge Hayes and this court dismissed his writ of mandamus in which Gordon filed his motion within (14) months after this court's last ruling. The reasonable time begin after Gordon discovered the fraud upon him and the court. At least one court has ruled the reasonable time does not begin until "after" discovery of the mistake. See Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992) (Whether motion was made within a reasonable time after discovery of mistake is within the sound discretion of the trial judge).

There is nothing in the record that indicates petitioner unreasonably delayed filing his motion after discovering the fraud upon him and the court. On the contrary, the record conclusively show that his motion was filed within a reasonable time after discovering the fraud upon him and the court, especially in light of his limited I.Q. of 68 and reading level at a third grade level. Petitioner asserts he acted well within due diligence in discovering the fraud upon him and the court by consistently pursuing his rights in attempt to discover the fraud upon him and the court. See Rule 60(b) motion pages 5-7 at appendix pages 577-576.

Matter of fact the petitioner request this court take judicial notice to the facts of the evidence that was presented to the lower court of petitioner's limited I.Q. of 68 and reading level at a third grade level, with him being very suggestible. See appendix 304 line 4 through 305 line 22 (Doctor Jonathan Venn testimony) in conjunction with guilty plea testimony at appendix pages 474 line 21-23 and page 475 line 18-20. This clear and convincing evidence clearly demonstrates Gordon was "[i]gnorant" of the facts on this extrinsic fraud upon him and the court during the PCR hearing and after the PCR judgment was entered, especially where its on the record PCR counsel questioned Gordon as to whether she had raised all of his claims and he answered (yes). See Appendix page 455 line 5 through page 456 line 2. But in actuality PCR counsel

had already "[w]aived" his claim in the middle of the record without his consent and then inadequately raised it as a sixth amendment claim at appendix 444 line 15-24. This solid evidence show exactly what guilty plea counsel and Doctor Jonathan Venn testified to are true and correct.

Petitioner asserts the lower court made a manifest error when it disregarded the credible evidence in the record of Gordon's I.Q and reading level in considering whether he filed his motion within a reasonable time, disregarded Gordon filed his motion within a reasonable time after discovering the fraud upon him and the court, disregarded the fact Gordon has been consistently pursuing his rights and disregarded he acted well within due diligence in discovering the fraud upon him and the court. The Order of dismissal is controlled by error of law and based upon factual conclusion which is without evidentiary support. Thompson v. Hammond, 382 S.E.2d 900, 902-903 (1989). Therefore, the assigned error requires reversal of the lower court's judgment to cure a gross miscarriage of justice. See Fn9

Judge Hayes did not have the authority to issue an order in the instant case where he signed a order previously in the case recusing his self and changing venue to Richland County

In PCR hearings, a judge shall upon motion, recuse himself or herself if he or she was the judge who presided at the guilty plea, criminal trial, or probation revocation proceeding for which relief is being sought. Floyd v. State, 303 S.C. 298, 400 S.E.2d 145 (1991). However, judge Hayes was the guilty plea judge in the instant case and has previously signed an order in this case changing venue due to conflicts with the judges in the Sixteenth Circuit. See appendix page 508. Thus this

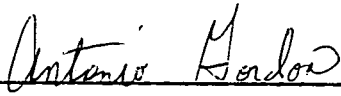
FN9 Petitioner asserts when PCR counsel inadequately raised his jurisdiction claim, she committed constructive fraud upon him and the court, because he was deprived the opportunity to be fully heard on his claim, in which the respondent prepared the order to state General Sessions had jurisdiction under the very statute he asserted was unconstitutional.

remain law of the case because Gordon are still seeking review under the same case number he signed indicating he was a conflict of interest in. Therefore, he was without the authority to issue an order in this case in violation of Floyd. The Order is controlled by an error of law and should be reversed.

Conclusion

It is respectfully asked that this Honorable Court grant his writ of certiorari to answer important questions of law and grant petitioner a second PCR in the interest of justice.

This 22 day of June, 2015


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June 22, 2015

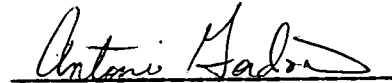
JUN 25 2015

RE: Antonio Gordon v. State
Appellate Case No.: 2015-001014
Lower Court Case No.: 2000CP461414

S.C. SUPREME COURT

Dear Clerk:

Please find enclosed my explanation pursuant to Rule 243(c) and petition for writ of certiorari with appendix. The opposing counsel has been served with the same. Thanks.



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