

Calvin Tyler, #258233  
Kershaw Correctional Institution  
4848 Goldmine Highway  
Kershaw, South Carolina 29067

August 11, 2015

**RECEIVED**

AUG 14 2015

Daniel E. Sherouse, Clerk of Court  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: Tyler v. State, App. No. 2015-000254  
Petition for Writ of Certiorari

**S.C. SUPREME COURT**

Dear Honorable Sherouse:

Enclosed, please find one original Petitioner's Petition for Writ of Certiorari and Response to Johnson Brief as well as Supplemental Appendix for filing with your office. Please be aware that Respondent was served simultaneously as indicated by the enclosed Certificate of Service.

Please clock stamp the extra copy of this cover and return in the SASE provided for that purpose.

Your assistance is greatly appreciated.

Respectfully yours,

Calvin Tyler

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

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**RECEIVED**

AUG 14 2015

**S.C. SUPREME COURT**

Calvin Tyler,

Petitioner,

v.

State of South Carolina,

Respondent.

---

Appellate Case No.: 2015-000254

Supplemental Appendix

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J. Rutledge Johnson, Esquire  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

Calvin Tyler  
Kershaw C.I.  
4848 Goldmine Hwy.  
Kershaw, SC 29067

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

205

IN THE FAMILY COURT OF THE  
NINTH JUDICIAL CIRCUIT  
DOCKET NO.: 98-JU-10-508  
98-JU-10-509  
98-JU-10-510  
98-JU-10-511

IN THE INTEREST OF:  
CALVIN TYLER,  
A Minor under the age of  
Seventeen (Age: 15)

ORDER TRANSFERRING  
JURISDICTION TO THE  
COURT OF GENERAL  
SESSIONS

A JUVENILE

Hearing Judge:  
Hearing Date:  
Assistant Solicitor:  
Juvenile:  
Department of Juvenile  
Justice:  
Court Reporter:

Gerald C. Smoak, Jr.  
April 30, 1998  
Melissa Rice Wicker  
Ashley Pennington and Anne Seymour  
Charlie Agee  
Brenda Cooley

This matter comes before the Court pursuant to a Petition for Transfer filed with the Charleston Family Court by the Solicitor's Office for the Ninth Judicial Circuit on March 9, 1998. The juvenile, Calvin Tyler, is charged with Murder, 98-JU-10-0508; Armed Robbery, 98-JU-10-0509; Illegal Possession of a Pistol, 98-JU-10-0510; and Possession of a Firearm During Commission of a Violent Crime, 98-JU-10-0511. A waiver hearing was held April 30, 1998.

Present at the hearing were Calvin Tyler; his counsel, D. Ashley Pennington and Anne B. Seymour; his mother, Darlene Tyler; Charlie Agee of the Department of Juvenile Justice; and Melissa R. Wicker and Matthew J. Modica, Assistant Solicitors.

Based on the testimony and evidence presented, the Court finds that jurisdiction over the within cases and Calvin Tyler should be transferred to the Court of General Sessions for the Ninth Judicial Circuit. In arriving at this decision, the Court has carefully weighed testimony and evidence regarding both probable cause and waiver. The Court has reviewed applicable law, S.C. Code Ann. §20-7-7605(6) (1976, as amended), Kent v. United States, 383 U.S. 541, 86 S.Ct 1045, 16 L.Ed.2d 84 (1966), relevant state law and other factors as discussed below.

The Court finds there is evidence to support a finding of probable cause on all charges. Tyler and two co-defendants were latecomers to a conspiracy to beat and rob the victim that was developed by two other co-defendants. Both Tyler and the only other eyewitness, co-defendant Paffen, gave statements placing the gun in Tyler's hand when the victim was shot and killed. According to the statements, the victim tried to run to his home around the corner while pleading not to be shot. His wallet was taken after he was killed. Tyler's co-defendants, all adults, already have been indicted by the Grand Jury on murder and armed robbery charges.

The Court also has considered the serious nature of the crime, the circumstances

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surrounding it, and the interests and protection of the community. With regard to Tyler's history, maturity and amenability to rehabilitation, the Court notes Tyler has failed to cooperate in a number of particulars with the prior efforts of the Department of Juvenile Justice while on probation both here and in North Carolina.

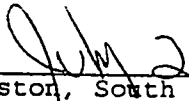
Having carefully weighed all relevant issues, the Court finds that the State's petition to transfer jurisdiction over the within defendant and charges to the Court of General Sessions for the Ninth Judicial Circuit should be granted.

NOW THEREFORE based upon the foregoing,

IT IS ORDERED that jurisdiction over the within defendant and charges is waived by this Court and transferred to the Court of General Sessions for the Ninth Judicial Circuit pursuant to S.C. Code Ann. §20-7-760-7605(6).

AND IT IS SO ORDERED.

  
GERALD C. SMOAK, JR.  
FAMILY COURT JUDGE

 , 1998  
Charleston, South Carolina.

ATTEST: A TRUE COPY  
JULIE J. ARMSTRONG (SEAL)  
CLERK, FAMILY COURT

  
KATHY C. HART  
DEPUTY CLERK

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Calvin Tyler,

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STATE OF SOUTH CAROLINA

RESPONDENT.

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Appellate Case No.: 2015-000254

petitioner's pro se brief for writ of certiorari  
and Response to Johnson Brief

---

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CALVIN TYLER  
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ISSUES PRESENTED

Whether the judge erred in dismissing Petitioner's Odom v. State, 523 S.E.2d 753 (1999); Austin v. State, 409 S.E.2d 395 (1991) belated appeal as being successive pursuant to S.C. Code Ann §17-27-90?

Whether Petitioner is entitled to a belated appeal on his juvenile waiver hearing due to counsel's in family court ineffectiveness in failing to inform him he could have appealed the waiver order as a matter of statutory law?

Whether counsel in family court rendered ineffective assistance when he failed to object to family court judge waiving Petitioner up to general sessions court without first conducting a full investigation as a matter of statutory law?

Whether Petitioner's guilty plea counsel rendered ineffective assistance when counsel allowed Petitioner to plea to charge in General sessions court that was erroneously waived up by family court, which tainted entire guilty plea?

STATEMENT OF THE CASE

On August 3, 1998, the Charleston County Grand Jury indicted Petitioner Calvin Tyler for murder and armed robbery. App. 201-204. On April 23, 1999, Petitioner appeared before The Honorable J. Derham Cole. D. Ashley Pennington represented Petitioner and Matthew J. Modica represented the State. App. 1. The State alleged that on the night of February 22, 1998, Petitioner and a codefendant robbed at gunpoint a man walking down the street and then shot and killed him. App. 71, line 19-App. 73, line 3. During this period of his life, Petitioner was only fifteen and was drifting because his parents were absent. App. 138, line 16-App. 143, line 21. Pursuant to a deal for negotiation sentence, Petitioner pled guilty to voluntary manslaughter and strong armed robbery. App. 52, line 4-App. 53, line 5. The court accepted the plea and sentenced Petitioner to thirty years incarceration for manslaughter and ten years consecutive suspended to five years of probation for the robbery charge. App. 167, lines 2-22.

On March 27, 2000, Petitioner filed his first application for post-conviction (PCR) claiming ineffective assistance of plea counsel. ~~App. 182-183~~ He attended an evidentiary hearing on September 26, 2001, and the PCR court denied his claim on November 30, 2001. Petitioner then filed a pro se motion to reconsider and motion to relieve PCR counsel. The PCR court denied both motions on July 3, 2003. On May 7, 2002, Petitioner filed a second PCR application, which he later sought to withdraw. The PCR court agreed to dismiss the application without prejudice. App. 182-App. 183.

On September 21, 2010, Petitioner filed a successive PCR application. App. 172-App. 180. The application stated, "My attorney failed to advise me of an appeal of my conviction." App. 173. It also stated that his previous PCR counsel was ineffective. App. 179. See Enl The State filed a return and motion to dismiss on October 29, 2013 asking the PCR court to summary dismiss the application because no right exists for ineffective assistance of PCR counsel. App. 181-App. 188. On November 4, 2011, the PCR court issued a

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Enl The family court waived/transferred Petitioner to General Sessions without first conducting a "[f]ull investigation as required by statutory and federal law. Attorney's Ashley Pennington and Anne B. Seymour failed to inform Petitioner he could appeal the waiver order.

conditional order of dismissal instructing Petitioner to provide "specific reasons, factual or legal, why the Application should not be dismissed in its entirety." App.188-App.195. On December 27, 2013, Petitioner filed a response to the conditional order of dismissal. App.199. The response stated, "I also applicant would like to let the court know that Due Process of law was violated when Applicant not knowingly and intelligently [sic] enter his plea, making plea null and void." It also stated, "applicant just want to show the court how (P.C.R.) counsel ineffectiveness deprived him of his right to a "full bite at the apple.".....App.197

On January 6, 2015, the PCR court issued a final order of dismissal, which stated, "This Court finds this application is successive and the Applicant's response to the conditional order of dismissal does not raise any claims which could not have been raised in the Applicant's first two applications for post-conviction relief." App.199-App.200.

### ARGUMENT

Whether the judge erred in dismissing Petitioner's Odom v. State, 523 S.E.2d 753 (1999); Austin v. State, 409 S.E.2d 395 (1991) "Belated Appeal" as being successive pursuant to S.C. Code Ann §17-27-90?

07 The PCR judge erred when it dismissed Petitioner's PCR application as being successive because the response to the conditional order of dismissal set forth a valid PCR claim and a reason that he did not raise the specific claim in a previous application. First Petitioner will point out that even though he did <sup>not</sup> cite Austin and Odom in his brief, his claim clearly fall under those two analysis because Petitioner asserted he was deprived his "full bite at the apple" because of ineffective assistance of PCR counsel in the initial review collateral proceeding when counsel did not appeal the first PCR judgment. App.197 and second when he allege counsel failed to ensure that all grounds were raised. Thus violated Petitioner's State created right to effective assistance of counsel pursuant to S.C.R.Civ.Proc Rule 71.1 and Turner v. State, 682 S.E.2d 792 (2009) (Our holding today does not alter our PCR jurisprudence regarding claims of ineffective assistance of PCR counsel, nor should it be interpreted as creating additional rights to PCR applicants. Indeed, this court has granted relief based on "ineffective assistance of PCR counsel" despite the fact that "[r]ight" to PCR counsel

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arises from Rule 71.1 SCRCP, and not from the constitution. See Washington v. State, 478 S.E.2d 833 (1996) (Granting PCR where the defendant alleged ineffective assistance of PCR Counsel due to so many procedural irregularities).

However, as a matter of statutory construction Petitioner's Odom and Austin "Belated Appeal" CANNOT be successive under S.C. Code Ann §17-27-90 because he is not attacking his "[c]onviction or [s]entence" pursuant to S.C. Code Ann §17-27-20(a), (1)-(6) - Al-Shabazz, 527 S.E.2d at 749 (S.C. 2000) (PCR applicant's must be mounting a collateral attacking their conviction/sentence before they are entitled to file for post-conviction relief). Matter of fact to apply §17-27-90 successive analysis to the present case would totally conflicting with this court reason of not applying the one year statute of limitations pursuant to S.C. Code Ann §17-27-45(a) in Odom where this court specifically stated because Odom was not attacking his conviction or sentence the statute of limitation does not apply. The court went on to state in Odom that Austin "Belated Appeal's" are used to rectify unjust procedural error. Therefore, because Petitioner is not mounting a collateral attack on his conviction the lower court erred in finding that his application was successive. Odom.

Petitioner is entitled to a Belated Appeal on his Juvenile Waiver hearing due to Counsel's in Family Court ineffectiveness in failing to inform him he could have appealed the waiver order as a matter of statutory law

Petitioner asserts his counsel's in family court rendered ineffective assistance when they failed to inform him that he could have appealed the family court order as a matter of statutory law. The Family Court judge waived petitioner to general sessions pursuant to S.C. Code Ann §20-7-7605(6) on his armed robbery and murder charge. Supplement Appendix App.206. Section 20-7-7605(6) provides:

Within thirty days after the filing of a petition in family court alleging the child has committed the offense of murder or criminal sexual conduct, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding

against the child as a criminal rather than as a child coming within the purview of this chapter. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may "[a]ppeal" within five days to the circuit court.

Informing Petitioner he could have appealed the judge decision in this case were crucial were the judge order is controlled by an error of law. The waiver of the appeal was not knowing, voluntarily, or intelligently waived by petitioner and he should be is entitled to a belated appeal on his juvenile waiver order. Davis v. State, 342 S.E.2d 60 (1986); White v. State, 208 S.E.2d 35 (1974)-20-7-7605(6) (supp.1998).

Counsel in family court rendered ineffective assistance when she failed to object to the family court judge waiving Petitioner up General sessions court without first conducting a "[f]ull investigation as a matter of statutory law and federal constitutional law

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In the instant case the court alleged in arriving at his decision, the court has carefully weighed testimony and evidence regarding both probable cause and waiver. The court has reviewed applicable law. S.C. Code Ann § 20-7-7605(6) (1976, as amended); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045 (1966), relevant state law and other factors as discussed below.

Thus the court found evidence to support a finding of probable cause on all charges, Petitioner's 2 co-defendant's were adults and had already been indicted, serious nature of the crime, the circumstances surrounding it, and the interest and protection of the community. With regard to Petitioner's history. Maturity and amenability to rehabilitation.

However, the court did consider Petitioner's "maturity", the court did not and failed as a matter of South Carolina statutory law and federal constitutional law to conduct a "[f]ull investigation" into petitioner's sophistication as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. Patton v. Toy, 867 F.Supp.

363 (D.S.C. 1994) quoting Kent. Juvenile waiver hearings must measure up to the essentials of due process and fair treatment. Application of Gault, 387 U.S. 1, 30, 87 S.Ct 1428 (1967). Upon review of the transfer order, the order does not reveal that the family court carefully considered the matter. The order here is totally lacking in any degree of specificity which would allow this court to undertake a meaningful review as to whether Petitioner could or could not be rehabilitated. The record only demonstrates that there was no full investigation as required by both S.C. Statutory and federal constitutional law. Toy, at 364 supplemental Appendix App.205, Therefore, counsel in family court rendered ineffective assistance when it failed to object to family court judge waiving him up to general sessions without first conducting a full investigation.

Petitioner's guilty plea counsel rendered ineffective assistance when counsel allowed Petitioner to plea guilty to charges in General Sessions court that was erroneously waived up by family court, which tainted entire guilty plea

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Petitioner asserts General sessions was without jurisdiction in accepting his guilty plea on his arm robbery charged because general sessions does not have jurisdiction over charges which are not within the ambit of statute providing for waiver into adult system. Austin v. State 352 S.C. 473, 575 S.E.2d 547 (S.C. 2003).

\_\_\_ Petitioner was fifteen years old when he committed the offense to which he plead guilty. At the time §20-7-7605(6) provided:

Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of "[m]urder or "[c]riminal sexual conduct", the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this article.

Armed robbery is not specifically enumerated in §20-7-7605(6). The only offenses specifically enumerated in §20-7-7605(6) may be waived up to the

court of general sessions. Johnson v. State, 312 S.C. 556, 437 S.E.2d 20 (1993) (The court of general sessions does not have jurisdiction over charges which are not within the ambit of the statutory that waived juvenile). Because the offense of armed robbery may not be waived up under section 20-7-7605(6), the circuit court was without jurisdiction over the charge. Austin v. State, supra.

Furthermore, petitioner asserts because this armed robbery plea was negotiated with the murder charge, this tainted the entire guilty plea as a matter of constitutional law. Therefore, plea counsel rendered ineffective assistance when he failed to inform petitioner that family court could not waive his arm robbery charge to general sessions under section 20-7-7605(6), failed to inform petitioner that the arm robbery charge could not have been apart of the negotiated sentence with the murder charge, and failed to object to general sessions sentencing him on the arm robbery charge where the charge was not properly before the court. Strickland v. Washington, 466 U.S. 668 (1984).

#### Conclusion

it is respectfully asked that this court deny counsel Johnson petition and order counsel to address these issues, both factual and legal, and or grant petitioner's pro se brief for writ of certiorari.

This 11 day of August, 2015

s/ Cal: Tylh

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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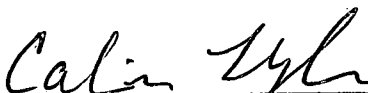
Respondent.

\_\_\_\_\_  
Appellate Case No.: 2015-000254

CERTIFICATE OF SERVICE

\_\_\_\_\_  
I hereby certify that a copy of this pro se brief for writ of certiorari and supplemental appendix in the above captioned case has been served upon the party below by depositing a copy of the same in the United States Mail postage prepaid on this 11 day of August, 2015.

J. Rutledge Johnson, Esquire  
Office of the Attorney General  
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Columbia, SC 29211

  
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Cc: File