

STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Case No: 2011-CP-23-6133

Timothy D. Davis, #291299, Petitioner,

v.

State of South Carolina, Respondent.

PCR CASE FILE APPENDIX

Timothy Davis, #291299
Perry C.I. / Q4B-222
430 Oaklawn Road
Pelzer, SC 29669

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FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF **GREENVILLE**)

TIMOTHY D. DAVIS, #291299,
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2011-CP-23-06833

APPLICATION FOR

POST-CONVICTION RELIEF

COUNSEL & HEARING REQUESTED

SEP 14 2 1

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention PERRY CORRECTIONAL INSTITUTE; 430 OAKLAWN RD.; PELZER, SC
2. Name and location of Court which imposed sentence COURT OF GENERAL SESSIONS
305 EAST NORTH STREET; GREENVILLE, SC 29601
Name(s) of co-defendant(s) (if any) _____
4. ^{N/A} The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2002-GS-23-2623 MURDER
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MARCH 5, 2003 LIFE WITHOUT PAROLE
 - (b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty XXX

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Conviction Affirmed

ii. Certiorari Denied

iii. _____

(c) the date of each such result:

i. February 1, 2005

ii. November 1, 2006

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. DAVIS v. STATE, Opinion No: 2005-UP-152

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: **** Will further amend at later date ****

- (a) Newly Discovered Evidence, pursuant to SC Code, § 17-27-45(C)
- (b) Fraud Upon the Court and Sham Legal Process
- (c) Prosecutorial Misconduct

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

** Will further amend at later date **

- (a) Statutory law provides procedure for subsequent PCR action
- (b) Applicant's indictment fraudulently obtained by sham legal process
- (c) In effecting extrinsic fraud, Solicitor committed perjury

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a)(b) the specific nature thereof:

- i. First PCR application and Rule 59(e) Motion
- ii. Appeal from first PCR action
- iii. Second PCR application and Rule 59(e) Motion
- iv. Appeal from second PCR action

(b) the name and location of the Court in which each was filed:

- i. Court of Common Pleas - Greenville, SC
- ii. S.C. Supreme Court - Columbia, SC
- iii. Court of Common Pleas - Greenville, SC
- iv. S.C. Supreme Court

(b) the disposition thereof:

- i. DENIED / DENIED
- ii. PENDING
- iii. DENIED / DENIED

iv. DISMISSED

(d) the date of each such disposition:

i. January 21, 2009 / March 10, 2009

ii. PENDING

iii. April 20, 2011 / May 23, 2011

iv. July 19, 2011

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

ALL UNKNOWN

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

ALL N / A

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

ALL N / A

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Because this results from discovery of new evidence

(b) Extrinsic evidence unknown and recently discovered

(c) Extrinsic evidence unknown and recently discovered

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES & NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Timothy Sullivan; 100 Williams St.; Greenville, SC
 - ii. Robert Dudek; SCCID-Appellate Defense; Columbia, SC
 - iii. Elizabeth Wiggul; 101 Whitsett St.; Greenville, SC (Relieved)
 - iv. Robert Pachak; SCCID-Appellate Defense; Columbia, SC
- (b) the proceedings at which each such attorney represented you:
 - i. Arraignment, Trial, Sentencing
 - ii. Direct Appeal
 - iii. First PCR (later relieved as counsel)
 - iv. Appeal from second PCR

19. State clearly the relief you seek in filing this application:

Set-aside or vacate judgement of conviction & sentence

20. Are you now under sentence from any other court that you have not challenged?

NO

* NOTE * Please see Exhibits A & B and Sworn Affidavit attached herewith.

STATE OF SOUTH CAROLINA)
)
County of **GREENVILLE**)

VERIFICATION

I, Timothy Davis, #291299, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Timothy Davis

SWORN to and subscribed before me this 6th
day of September, 2011.

Henry T. McCarty (L.S.)
Notary Public

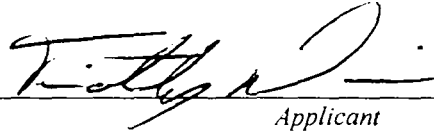
My Commission Expires: June 7, 2016

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Timothy Davis, #291299

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
6th day of September, 2011.



Notary Public

My Commission Expires: September 7, 2016

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

13th Judicial Circuit

Timothy Davis, #291299,

C/A No: 2011-CP-23-6133

Applicant,

v.

State of South Carolina,

Respondent.

SWORN AFFIDAVIT
IN SUPPORT OF
PCR APPLICATION

2011 SEP 14 PM 2:21

I HEREBY AFFIRM, upon my oath, that I am the Applicant herein captioned above, and make the following statement, believing the same to be true and accurate to the best of my knowledge:

- (1) That, while participating in legal discussions with various fellow inmates during this past year, I have discovered a potential issue possessing sufficient legal import to make further collateral challenge against my conviction;
- (2) That also, upon investigating matters and processes in my own criminal case and upon research of pertinent statutes and case law regarding those discussions, I then made inquiry with S.C. Court Administration, an arm and/or branch of the S.C. Supreme Court, requesting a "certified true" copy of their published calendar reflecting scheduled terms of court for the month, day, and year my indictment [2002-GS-23-2326] was returned as "True Bill" by the Greenville County grand jury impaneled at that time;
- (3) That on July 14, 2011, I received the requested calendar for the Greenville County terms of court for April - 2002, and upon comparison of the dates shown in the calendar for Courts of General Sessions, to the date printed on my indictment, which indicates when the grand jury convened to

hear evidence and deliberate, an apparent contradiction in the dates is revealed, indicative of fraud, misrepresentation, and perjury;

- (4) And, that discovery of this variance between the dates listed in the calendar and that printed on the indictment, constitutes newly discovered evidence, and as such, forms the basis by which the Applicant now initiates a subsequent post-conviction relief action pursuant to S.C. Code of Law, § 17-27-45(C).

AFFIANT further sayeth naught.

Date: September 6, 2011
Greenville County

Timothy Davis
Timothy Davis, #291299
Perry C.I. / Q4B-222
430 Oaklawn Road
Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this
6th day of September, 2011

Steven P. Melantely

Notary Public for South Carolina

My Commission Expires: November 7, 2016

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS)

COUNTY OF GREENVILLE)

13th Judicial Circuit)

Timothy Davis, #291299,)

C/A No: 2011-CP-23-6133

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**AFFIDAVIT OF
SERVICE BY MAIL**

SEP 14 PM 2:21

1. I am the Applicant in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served/filed one (1) copy each of the foregoing document(s); PCR Application along with a Sworn Affidavit, and Exhibits A & B in the above-captioned matter upon the following person(s) by depositing same in the United States Mail, postage prepaid:

Hon. Paul B. Wickensimer
 Clerk of Court
 305 East North Street
 Greenville, SC 29601

Date: September 6, 2011
 Greenville County

Timothy Davis
 Timothy Davis, #291299
 Percy C.I. / Q4B-222
 430 Oaklawn Road
 Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this

6th day of September, 2011

Steven T. McLaury

Notary Public for South Carolina

My Commission Expires: January 7, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Timothy Davis, #291299,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

COURT OF COMMON PLEAS
 13th Judicial Circuit

C/A No: 2011-CP-23-6133

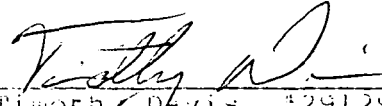
NOTICE AND MOTION TO
 SET ASIDE/VACATE JUDGEMENT

FILED
 CLERK OF COURT
 GREENVILLE COUNTY
 SOUTH CAROLINA
 NOV 17 AM 10:36

PLEASE TAKE NOTICE that Applicant captioned herein above, would respectfully move, pro se, this Honorable Court to issue an order setting aside and/or vacating Applicant's judgement of conviction/sentence entered in Greenville County, March 5, 2003, Docket Number: 2002-GS-23-2623. This Motion is properly before the Court pursuant to Rule 71.1, SCRPC and S.C. Code Ann., § 17-27-80. Accordingly, this motion is incorporated with and further amended to Applicant's above-referenced PCR process pending.

THEREFORE, being based upon said "Fraud Upon the Court," Applicant hereby moves, pro se, pursuant to Rule 60(b)(3), SCRPC, to have the March 5, 2003, judgement of conviction/sentence entered against him, set aside and/or vacated due to facts and law shown regarding this fraud and other violations complained of within his supporting Memorandum of Law and Exhibits attached herewith and set out below:

Date: October 21, 2011
 Date: Greenville County


 Timothy Davis, #291299
 Pecky C.I. / Q4B-222
 430 Oaklawn Road
 Pelzer, SC 29669

Copy mailed to
 Attorney General / Applicant
 on NOV 17 2011

[11]

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
13th Judicial Circuit

Timothy Davis, #291299,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

C/A No: 2011-CP-23-6133

MEMORANDUM OF LAW

FILED STATE OF COURT
GREENVILLE CO. S.C.
NOV 17 2011

NOV 17 AM 10:36

NOW COMES the above-captioned Applicant, presenting the foregoing Memorandum of Law with Supporting Exhibits A, B, & C. Pursuant to Rule 15(a), SCRPC, this Memorandum of Law, with Exhibits A, B, and C, are hereby amended to, and in support of the previously filed Post-Conviction Relief application, of September 14, 2011, under the above-referenced civil action number.

The Memorandum and Exhibits attached herewith are properly before the Court pursuant to statutory law and rules of court, and are therefore set out below:

T A B L E O F C O N T E N T S

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4702

STATEMENT OF CASE

Pursuant to commitment orders, Applicant/Petitioner (Davis) is currently incarcerated within the South Carolina Department of Corrections (SCDC) at Percy Correctional Institute (Percy) located in Pelzer, South Carolina.

Davis was indicted [Indictment No: 2002-GS-23-2623] and convicted for murder during a jury trial convened at Greenville County - Court of General Sessions, March 4-5, 2003. He was sentenced thereafter, to life without parole, by presiding judge, the Honorable, C. Victor Pyle, Jr., J. The Greenville County, Assistant Solicitor, Mr. Howard Steinberg, Esq., represented the State, while Davis was represented by, Mr. Timothy Sullivan, Esq., of the Greenville County Public Defense Office. Davis then filed timely Notice of Appeal.

The SC Court of Appeals affirmed Davis' conviction/sentence, February 1, 2005. [Op. No: 2005-UP-152] Davis then filed Petition for Rehearing which was thereafter denied, June 22, 2005 with certiorari being denied November 1, 2006. During appeal, Davis was represented by, Mr. Robert M. Dudek, Esq., of the SC Commission on Indigent Defense (SCCID). Respondent was represented by the SC Office of Attorney General.

Davis next timely filed his first Post-Conviction Relief (PCR) application [C/A No: 2007-CP-23-6216] in the Greenville County, Court of Common Pleas on September 21, 2007. Whereupon, December 21, 2008, a final evidentiary hearing was held before the Honorable, Edward W. Miller, J., who subsequently, dismissed the PCR and signed the Order of Dismissal, January 21, 2009, denying Davis PCR relief. Thereafter, Davis timely filed Motion to Alter/Amend Judgement [SCRCP, Rule 59(e)] which was also denied by the PCR Court, March 10, 2009. Initially, Davis was represented by, Mrs. Elizabeth Wiygul, Esq., who was relieved as counsel at the hearing. Reappointment and continuance was denied; the Court compelling Davis to act pro se. The Respondent was represented by, Ms. Karen C. Ratigan, A.A.G., of the SC Office of Attorney General.

Davis timely filed Notice of Appeal which is currently pending in the SC Supreme Court. He is represented by, Mr. Robert M. Pachak, Esq, of SCCID-Appellate Defense who, consequently has filed a "no-merits" Johnson petition for writ of certiorari. Davis then filed intermediate motions and his own petition for writ of certiorari, pro se, as provided for by the SC Supreme Court.

Within one year after the establishment of new precedent, Davis filed a subsequent PCR application, pursuant to SC Code of Law, § 17-27-45(B), [C/A No. 2010-CP-23-8436] whereby he prays relief by application of a new rule of law or right previously unavailable during his trial. The second PCR was ultimately dismissed summarily, without hearing, based upon alleged procedural default. The Honorable, Robin B. Stilwell, J., signed the Final Order of Dismissal on April 20, 2011.

Thereafter, Davis timely filed Motion(s) to Strike & Alter/Amend Judgement [SCRCP, Rule(s) 12(f) & 59(e)] which were later signed, May 25, 2011, by the Honorable D. Garrison Hill, J., summarily denying the two motions. Once again, Davis was without the aid of counsel and compelled to act pro se, while Respondent was represented by, Karen C. Ratigan, A.A.G., Davis timely filed Notice of Appeal to the SC Supreme Court wherein the PCR Court's ruling was upheld without review of the merits. The Honorable, Jean H. Toal, C.J., signed the order summarily dismissing Davis' appeal on July 19, 2011.

On September 14, 2011 Davis next filed his third, subsequent PCR application based upon Newly Discovered Evidence pursuant to SC Code of Law, § 17-27-45(C).

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ARGUMENT

A. Davis asserts and argues, inter alia, that although subject matter contained in the charging instrument upon which he was tried and convicted appears to be correct, he was nevertheless tried and convicted without a PROPER and/or lawfully VALID indictment, in violation of his right to due process of law pursuant to U.S Const. Amend(s). V & XIV., § 1 and S.C. Const., Act. I, § 3.^[fn.1] That is to say, Davis was tried and convicted with an indictment, consequently, void of power; a nullity, and technically, non-existent in violation of S.C.C.A., § 17-19-10, infra. See, State v. Funderbuck, 259 S.C. 256, 191 S.E.2d 520 (1972) (Where the defendant was tried and convicted upon an indictment which was a nullity, it follows that he was convicted in violation of this section.")

Moreover, Davis asserts and argues, that the indictment returned, April 2, 2002, by the Greenville County Grand Jury, upon which he stands convicted, first of all, was NOT "lawfully issued" as defined by statutory criminal law. And secondly, the ex parte procedure upon which said indictment was obtained was fraudulent, and had by "sham legal process" as defined by the same criminal statute, S.C.C.A. § 16-17-735, et seq, consequently, in violation of additional procedural/criminal statutes as will be shown, infra. S.C.C.A., § 16-17-735 states in pertinent part:

(B) "It is unlawful for a person falsely to assert authority of state law in connection with a sham legal process. A person violating the provisions of this subsection is guilty of a misdemeanor....

(E)(3) "For purposes of this section: "sham legal process" means the ISSUANCE, display, DELIVERY, distribution, RELIANCE on as lawful authority, or other use of an INSTRUMENT that is NOT LAWFULLY ISSUED, whether or not the instrument is produced for inspection or actually, exists, which purports to:

(b) assert jurisdiction or authority over or determine or adjudicate the legal or equitable status, rights, duties, powers, or privileges of a person or property; or

(c) require or authorize the search, seizure, indictment, arrest, trial, or sentencing of a person or property." (emphasis added)

Facts stated above and other violation of law, which will be proven herein, in all fairness, would render Davis' indictment fatally defective or a nullity altogether! See, Evans v. State, 343 S.C. 495, 611 S.E.2d 510 (2005) "...[A]n indictment or "notice document" issued by a grand jury which is established or constituted illegally is deemed a nullity. An indictment which is a nullity would be insufficient as a matter of law, to give the required notice to a defendant."

- B. It is fundamental and well established that citizens accused of felonious, or otherwise infamous crimes, may only be tried upon indictments returned ["True Bill"] by a grand jury. Essentially, this mandate originates from the U.S. and S.C. Constitutions, and state statute, S.C.C.A., § 17-19-10, which states:

"No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in the following cases:

- (1) Prosecution by information is expressly authorized by statute;
- (2) In proceedings before a police court or magistrate; and
- (3) In proceedings before courts martial."

Logically therefore, it stands to reason that any such indictment(s), in order to be valid, must be obtained through **LAWFUL PROCESS**. In other words, without a **PROPERLY** obtained indictment, the court -- in this case, the Court of General Sessions -- is deprived the power to try the accused; it simply does not have, 'in personam jurisdiction', as distinguished from 'subject matter jurisdiction'. See, U.S. Const., Amend V, S.C. Const., Art. I, § 11. [fn.2]

Published for our learning and understanding, is Black's Law Dictionary, in which, are defined several types of jurisdiction as follows:

- Jurisdiction - 1. A governments's general power to exercise authority.... 2. A court's power to decide a case...;
- ↳ In Personam Jurisdiction - A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights....; and
- Subject Matter Jurisdiction - Jurisdiction over the nature of the case and the type of relief sought.... (emphasis added)

"[T]he burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury or its proceedings is predicated. (emphasis added) E.g., State v. Jackson, 240 S.C. 238, 243, 125 S.E.2d 474, 477 (1962)."; Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

Now therefore, Davis would carry his burden in proving the facts supporting his challenge and the distinct jurisdictional differences to which one may argue and make reference. See, State v. Funderbuck, 191 S.E.2d 520 (1972)

"[I]t is elementary that lack of jurisdiction of the cause OR subject matter can be raised at any time...." (emphasis added) Cf. State v. Gentry, 610 S.E.2d 494 (2005)

DISCUSSION ON FACTS & LAW

I. Fraud Upon the Court

- A. For reasons of jurisprudence and fairness in keeping with due process protections, the ordained policy makers of our court system recognized matters pertaining to fraud upon the courts of this state. Exercising their keen foresight, they saw fit by the S.C. Rules of Civil Procedure to create and implement provisions to set-aside and/or vacate judgements due to fraud upon the court. [fn.3]

In general, extrinsic fraud upon the court can be defined as "... [A] fraud perpetrated by Officers of the Court so that the judicial machinery cannot perform in the usual manner, it's impartial task of adjudging cases that are presneted for adjudication." See, Evans v. Gunter, 294 S.C. 525, 529, 366

S.E.2d 44, 46 (1988) (quoting H. Lightsey, J. Flanagan, S.C. Civil Procedure, 408 (2nd Ed. 1985))

- B. Assistant Solicitor Steinberg was able to perpetrate "extrinsic" fraud upon the court in two ways; first by giving the ex parte grand jury process an appearance of being legally and properly conducted; and secondly, the false indictment information operated in such a manner as to improperly mislead Davis and the trial court wherein the criminal matter was ultimately heard, causing both to falsely believe the ex parte grand jury process whereby the indictment was obtained, was conducted and supervised by the proper court in compliance with statutory law when it was not. Thus, consequently depriving Davis opportunity to make an informed, contemporaneous objection as required by S.C.C.A., § 17-19-90 [fn.4] because there were no apparent defects in the indictment or the proceeding. See, State v. Richardson, 149 S.C. 121, 146 S.E. 676 (1928) "This section applies only where the defect appears on the face of the indictment."
- C. In fact, because grand jury proceedings wherein jurors receive evidence and process indictments are secretly held as ex parte hearings, the very reliance of those proceedings to be held in a lawful and ethical manner can only be presumed. Neither defendant nor his attorney are allowed in attendance to ensure this, and therefore, are not made privy to what goes on within. Accordingly, this type of "extrinsic" fraud causes further harm to Davis and the integrity of our judicial process because it is conducted behind the scenes, quite possibly without a presiding judge, which would obviously allow the Solicitor unchecked influence over grand jurors.

II. Sham Legal Process

- A. It must first be noted that the "True Bill" indictment returned against Davis, charging him with murder within its body, prints in pertinent part that:

"At a Court of General Sessions, convened on April 2, 2002, the Grand Jurors of Greenville County present upon their oath:..."

The body of the grand jury's sworn presentment also bears the signature of the Greenville County Assistant Solicitor, Mr. Howard Steinberg. Moreover, a "True Bill" stamp is affixed to the face, [title page] of the indictment bearing the signature of the grand jury foreman. See, Exhibit(s) A-1.1 & A-1.2 (Indictment)

Secondly, the statutory and/or court sanctioned calendar schedule for the thirteenth judicial circuit court terms, published by the S.C. Supreme Court / Administration, irrefutably demonstrates that NO Court of General Sessions had been scheduled or open on April 2, 2002 as printed in Davis' indictment. Cf. Exhibit(s) B-1.1 & B-1.2 with A-1.2 (Court Order & Calendar with Indictment)

Therefore, prima facie evidence shown therein conclusively proves, that contrary to the information printed by Assistant Solicitor Steinberg in Davis' indictment, the Greenville County Grand Jury DID NOT convene at a Court of General Sessions, in violation of procedural, statutory law because none were open on April 2, 2002. S.C.C.A., § 14-9-210 states in pertinent part:

"The county solicitor shall prepare and, through the presiding judge of the court of general sessions, submit to the grand jury, while in attendance upon the court of general sessions, bills of indictment in all cases pending in the county court in which the punishment may exceed a fine or one hundred dollars or imprisonment for thirty days.... The grand jury shall act thereon and report its actions to the presiding judge of the court of general sessions.... All cases in which bills of indictment are so found shall stand for trial...."

Demonstrated therefore, is the fact that false information is contained within the State's sworn indictment returned against Davis not only in violation of statutory laws such as S.C.C.A., §§ 16-17-735 & 16-9-10, "Sham Legal Process" and "Perjury", but also, in violation of Davis' due process rights protected by the U.S. and S.C. Constitutions. [fn.1]

- B. Further noted, is the fact, that pursuant to S.C.C.A., § 14-9-210, supra, Mr. Howard Steinberg, acting on behalf of the elected county solicitor, Mr. Robert Aciail, was the one, responsible for the preparation, processing, and presentment of Davis' indictment to the grand jury at a qualified Court of General Sessions. Presumably, it is this ex parte proceeding whereby criminal jurisdiction is legally established, and therefore, concomitant with the trial court to which Davis' was bound over. "The jurisdiction of a grand jury is co-extensive with the criminal jurisdiction of the court in which it is impaneled and for which it is to make inquiry." (emphasis added) Id. Funderburk, supra.

The facts, therefore, are clear, and cannot be disputed; false court term information is contained in Davis' state/federal required indictment, which was knowingly presented somewhere other than a Court of General Sessions as required by law. These acts were knowingly perpetrated by Assistant Solicitor Steinberg, possibly in collusion with the clerk's office, whose responsibility it is to PROPERLY convene ex parte grand jury proceedings.

- C. This illegally obtained indictment was then transferred to the trial court, supposedly conferring jurisdiction to it. But instead thereof, it rendered both, the ex parte grand jury proceeding and the criminal court whereupon the matter was tried, as "sham legal process" by acting on the illegally obtained indictment, again, in violation of S.C.C.A., § 16-17-735, supra. "[T]he court must strike down the indictment when a defendant demonstrates the grand jury which

indicted him is a nullity...." Evans, supra.

Finally, wherever, and by whatever means, the grand jurors did convene with the Assistant Solicitor Steinberg for process, presentment, and issuance of Davis' indictment as "True Bill", it was an illegal assembly as a matter of law, pursuant to S.C.C.A., § 14-9-210. And as such, the indictment itself **WAS NOT** a "lawfully issued", state required indictment, causing the document itself to become a nullity, pursuant to S.C.C.A., § 16-17-735(E)(4), which states:

(E)(4) "Lawfully issued" means adopted, ISSUED or rendered IN ACCORDANCE with the applicable statutes, rules, regulations, and ordinances of the United States, a state, an agency, or a political subdivision of a state."

III. Perjury and Subornation

- A. Davis asserts and argues that facts and evidence presented herein demonstrate, that by subscribing his name to Davis' state indictment, Assistant Solicitor Steinberg violated his oath of office, committing perjury, because he signed the indictment used to convict Davis knowing it contained false court term information and was obtained by an unlawful process.
- B. Furthermore, Assistant Solicitor Steinberg, consequently, committed subornation of perjury, in that he, caused grand jurors to present upon their oath the same false court term information contained within Davis' indictment; unwittingly participating in the sham legal process from which the indictment was obtained.

By his conduct, a prima facie case is shown against Assistant Solicitor Steinberg in violating a criminal statute, to suborn the Greenville County grand jurors to unwittingly commit perjury, S.C.C.A., § 16-9-10, "Perjury Against Public Justice".[fn.5] Importantly, our Supreme

Court in Chewning held that, "[T]he subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). Accordingly, Davis has demonstrated further harm done to his case and the judicial process thereupon.

IV. Prosecutorial Misconduct

A. Fundamentally, it should be understood that Assistant Solicitor, Howard Steinberg, while acting on behalf of the county solicitor was required to know and abide by the laws and rules of this State, having special responsibilities to see that justice was done, pursuant to SCACR, Rule 407, Rules of Professional Conduct, Rule 3.8 (comment). "... He [prosecutor] must see that no conviction takes place except in strict conformity with the law, and that the accused is not deprived of any constitutional right or privilege." (insert in original) State v. King, 222 S.C. 108, 71 S.E.2d 793, 798 (1952); see also, State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); and State v. Dudden, 264 S.C. 86, 212 S.E.2d 581 (1975).

Obviously, Assistant Solicitor Steinberg knew he was participating in an ex parte grand jury proceeding which was not being held at a Court of General Sessions in accordance with law, and in violation of several other state procedural and criminal statutes. Consequently, his behavior must be viewed as "willful" and "deliberate". And therefore, his actions were indicative of gross misconduct which contributed to Davis being deprived fair and impartial criminal judicial proceedings, beginning with this critical stage of the adversarial process. SCACR, Rule 407, §§ 8.4(b) & (d) states:

Rule 8.4 - It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (d) engage in dishonesty, fraud, deceit, or misrepresentation;

Logically, observance and practice of the above-mentioned principles of Professional Conduct and jurisprudence would be of even greater importance for an Officer of the Court such as Assistant Solicitor Steinberg.

- B. It may further be shown that similar problems have existed in both the recent and distant past regarding questionable and/or unlawful ex parte grand jury indictment proceedings. This has not been a new or unique problem. For example, the Solicitors' offices in Spartanburg and Greenville Counties of South Carolina have been under investigation and shown in the news regarding their "assembly-line style" practice of processing indictments, wherein, only a few scant seconds were allowed to review and/or consider evidence before returning indictments as "True Bill". In fact, these proceedings have even been referred to as "rubber stamp" sessions. See Exhibit(s) C-1.1 thru C-1.3)

Further noteworthy is the fact, that in Kentucky, whose statutory laws governing ex parte grand jury proceedings are very similar to ours here in South Carolina, their courts have experienced the very same problems of grand juries being convened unlawfully and in violation of statutory terms of court. "An indictment returned by grand jury when no court was in session was void." See, U.S.C.A., Const. Amend. 14, §1; and "Failure of defendant to move to have indictment set aside, because returned when no court was in session, was immaterial, since the indictment being void, there could be no waiver." Beach v. Lady, 262 S.W.2d 837 (Ky. 1953).

FOOTNOTES

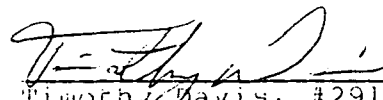
- [1] **DUE PROCESS** - S.C. Const., Art. I, § 3, reads in pertinent part; "... nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."
U.S. Const., Amend(s). V & XIV, § 1, reads in pertinent part(s);
[Amend. V] "No person shall... be deprived of life, liberty, or property, without due process of law...."
[Amend. XIV, § 1] "No State shall deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
- [2] **INDICTMENTS** - S.C. Const., Art. I, § 11, reads in pertinent part; "No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed...."
U.S. Const., Amend. V, reads in pertinent part; "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...."
- [3] **Rule 60(b)(3)** provides that; "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: (3) fraud, misrepresentation, or other misconduct of an adverse party;"
- [4] SC Code Ann., § 17-19-90; "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."
- [5] SC Code Ann., § 16-9-10(A)(2), "Perjury", reads thus; "It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this State.
S.C. Code Ann., § 16-9-10(C) regards subornation and reads thus; "A person may be convicted under this section if he induces, procures, or persuades another person to commit perjury or if he commits perjury by his own act, consent, or agreement."

CONCLUSION

HEREIN ABOVE, it has been shown, by presentation of facts and analysis of law, that Davis was tried, convicted, and sentenced upon an indictment obtained by illegal ex parte procedures, and therefore, void of jurisdiction, in personam, and said to be a "nullity". It has further been shown that this prosecutorial misconduct came about when Assistant Solicitor, Howard Steinberg deliberately interfered with the administration of justice in a manner that not only caused injury to Davis, but also undermines public confidence in our State's judicial system; the proper functioning of which is a topic of great and fundamental interest. "Every South Carolinian has a vital interest in the fair administration of justice." Quattlebaum, supra. Assistant Solicitor Steinberg's intentional acts of engaging in a "sham legal process", "fraud upon the court", and "subornation" was most egregious because it was directed at the judicial process itself.

THEREFORE, in the matter of Davis' indictment, it is his earnest prayer that in order that justice be vindicated and restored, this Honorable Court, upon due consideration of facts and law presented, grant him the post-conviction relief he seeks by reversing the judgement of conviction/sentence and demand the matter for new trial based upon this newly discovered evidence. In the alternative, this Honorable Court, upon due consideration of facts and law presented, could vacate or set-aside Davis' judgement of conviction/sentence based upon "extrinsic" fraud upon the Court, pursuant to SCRPC, Rule 60(b)(3) in accordance with SC Code of Law, § 17-27-80 and SCRPC, Rule 71.1.

Date: October 21, 2011
Greenville County



Timothy Davis, #291299
Percc/ C.I. / Q4B-222
430 Oaklawn Road
Pelzer, SC 29669

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
13th Judicial Circuit

Timothy Davis, #291299,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

C/A No: 2011-CP-23-6133

**AFFIDAVIT OF SERVICE
BY MAIL**

1. I am the Applicant in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served/filed one (1) copy each of the foregoing document(s); **Motion to Set Aside Judgement and Memorandum of Law w/Exhibits A, B, & C** in support of the above-captioned matter upon the following person(s) by depositing same in the United State Mail, postage prepaid:

Greenville County Courthouse
Paul B. Wickensimer - Clerk
305 East North Street
Greenville, SC 29601

SC Office of Attorney General
Karen C. Ratigan, A.A.G.
Post Office Box 11549
Columbia, SC 29211

Date: October 24, 2011
Greenville County

Timothy Davis
Timothy Davis, #291299
Perry C.I. / Q4B-222
430 Oaklawn Road
Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this
24th day of Oct, 2011
[Signature]
Notary Public for South Carolina

My Commission Expires: JAN 28, 2018

RECEIVED

OCT 24 2011

MAILROOM

[29]

WITNESSES
J. A. GUTHRIE /s/ *[Signature]*
GREER PD
09/04/01

ARREST WARRANT NUMBER
G-687634

ACTION OF GRAND JURY
TRUE BILL
[Signature]
FOREMAN GRAND JURY
Foreperson of Grand Jury

VERDICT
Guilty

Johnny A. Woods 3-5-03
Foreperson of Petit Jury Date:

DOCKET NO. 2002-GS-2002623
HLS
The State of South Carolina
County of Greenville

COURT OF GENERAL SESSIONS
APRIL TERM 2002

GUILTY THE STATE
3-5-03
2-5-02
vs.
TIMOTHY DARRELL DAVIS

✓0116
Indictment for
MURDER
VIOLATION § 16-3-10

A-1
[30]
(EXHIBIT A-1.1)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on APRIL 2, 2002 the Grand
Jurors of Greenville County present upon their oath:

That TIMOTHY DARRELL DAVIS did in Greenville County, on or about the 3rd day of September,
2001, unlawfully and with malice aforethought kill Heath Barnett by means of a stabbing, and that Heath
Barnett died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of
Laws (1976) as amended.

(EXHIBIT A-1.2)

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

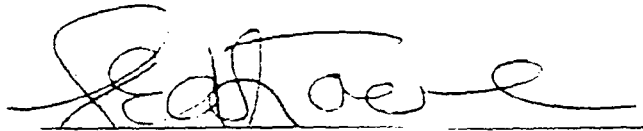
A-2
[31]

The Supreme Court of South Carolina

ORDER

Pursuant to the provisions of S. C. CONST. Art. V, §4, the statutory terms of circuit court set forth in §14-5-620 through §14-5-820, 1976 Code of Laws of South Carolina, as amended, for the period commencing January 7, 2002 and ending June 30, 2002, are hereby canceled.

IT IS ORDERED that the terms of circuit court for the period commencing January 7, 2002 and ending June 30, 2002, shall be as set forth on the attached schedule of terms of circuit court, which schedule is incorporated herein and made a part hereof by reference and attachment. Additional terms of court may be scheduled during this period by subsequent orders. Where a circuit-wide nonjury term is indicated, the Chief Circuit Judge for Administrative Purposes for the circuit shall designate the time and location of the term among the counties within the circuit. A term designated as a circuit wide administrative week (AW) shall also be held at such times and locations within the circuit as designated by the Chief Circuit Judge for Administrative Purposes assigned to that term.



Jean Hoefler Toal
Chief Justice

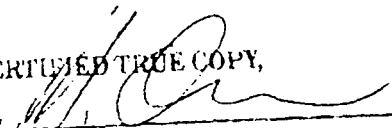
September 5, 2001
Columbia, South Carolina

(EXHIBIT B-1.1)

B-1 [32]

**Terms of Circuit and Family Court
April 2002**

Circuit Number	4/1/2002	4/8/2002	4/15/2002	4/22/2002	4/29/2002
13	Common Pleas Greenville Few, John JOHNSON	Common Pleas Non-Jury 9, 10 Patterson, Larry DIGIROLAMO 9, 10	General Sessions Greenville Kittredge, John KOFFSKEY	General Sessions Greenville Few, John JOHNSON	Common Pleas Greenville Kittredge, John HERRON
	Common Pleas Greenville Kittredge, John THOMAS	General Sessions 12 Greenville Watson, Joseph	General Sessions Greenville Watson, Joseph	General Sessions Pickens Kittredge, John	Common Pleas Non-Jury/PCR Few, John JOHNSON
	Administrative Week Patterson, Larry DIGIROLAMO	THOMAS 12 General Sessions 12 Greenville Patterson, Larry	HUDGINS 16, 17, 18, 19 THOMAS 15 Common Pleas Greenville Pyle, C.	KOFFSKEY General Sessions Greenville Patterson, Larry	Common Pleas Pickens Patterson, Larry DIGIROLAMO
	Common Pleas Non-Jury Watson, Joseph JENKINS	DIGIROLAMO 12	HERRON General Sessions Greenville Pyle, C.	DIGIROLAMO Common Pleas Non-Jury Watson, Joseph	Common Pleas Greenville Watson, Joseph HUDGINS 29, 30, 1 am JENKINS 1 pm
	General Sessions 5 Greenville Simmons, Charles HERRON 5			JENKINS	HUDGINS 2, 3

CERTIFIED TRUE COPY,
By 
South Carolina Court Administration

(EXHIBIT B-1.2)

B-2 [33]

Grand jury pace draws criticism

Panel typically weighs 900 indictments per day; questions raised over its effectiveness

STAFF WRITER
palongj@greenjournal.com

Each time the Greenville County grand jury meets, it considers about 900 indictments in a single day.

The group of 18 citizens went through 7,321 charges from Jan. 1 to Aug. 31 and returned indictments on all but one, according to the Greenville County Clerk of Court's Office.

The grand jury system was set up as a check against prosecutorial vendettas and hasty indictments. But with the grand jury blazing through so many cases, some have raised questions about how effective the panel can be.

Furman University political science professor Don Alesi called the grand jury a "rubber stamp" for the Solicitor's Office. "The system isn't working," he said. "It has not functioned effectively as any kind of buffer."

Thirteenth Circuit Solicitor Bob Ariail said the grand jury hears about two-thirds of the cases that pass through his office. The panel rarely refuses to indict because solicitors weed out the weak cases and dismiss them, he said.

"We don't take junk to the grand jury," Ariail said.

The grand jury's job is to hear the state's evidence and decide if there is probable cause to hold a trial. Unlike most hearings in the criminal justice system, the defendant has no right to be present, have counsel or introduce evidence.

The Solicitor's Office doesn't oversee the grand



"We don't take junk to the grand jury."

— Bob Ariail
13th Circuit Solicitor

jury. The panel reports to Chief Administrative Judge Gary Hill, who declined comment, citing judicial ethics.

Defense attorney Stephen Henry said he has been arguing in some cases that indictments should be quashed because of how many cases are run through the system. But the grand jury is a secret process, he said, making his argument tough to prove.

"If I could bring in one grand jury foreman to testify under oath, I think all this would be over," Henry said.

The county's grand jury meets once a month. Panel members start hearing cases at 9 a.m. and usually finish by 6 p.m., although they wrapped up at about 3:45 p.m. last month, Ariail said.

The grand jury has given solicitors specific instruc-

See JURY on page 3A

JURY FROM PAGE 1A

tions on what it wants to know, Ariail said. Solicitors have communicated those instructions to law enforcement officers who present cases to the grand jury, he said.

In DUI cases, for example, the jury may want to hear only about "where the stop took place, what the bad driving was and what the Breathalyzer is," Ariail said.

"Bam, bam, bam — you're talking three seconds to present these cases," he said.

The U.S. Constitution guar

antees defendants a grand jury hearing in federal cases, but the U.S. Supreme Court has said that states can use a different system, said Andrew Siegel, assistant law professor at the University of South Carolina.

Even with the option, there often is little support for eliminating grand juries at the state level, he said.

Solicitors like them because they are friendly to the prosecution, Siegel said. Defense attorneys see grand juries as a check on prosecutorial power, at least in some cases, and there is no guarantee they would be replaced with anything better, he said.

you treat the grand jury as archaic and do away with it," Siegel said, "or take steps to reinvigorate the grand jury."

State Sen. Ralph Anderson, D-Greenville, pledged in an interview with *The Greenville News* to learn more about the grand jury and consider legislation before the Legislature reconvenes in January.

Until he was contacted by *The News*, he didn't know about the grand jury's workload or the high percentage of indictments it returns.

"It can't be fair," said Anderson, a member of the Senate Judiciary Committee.

Paul Alongi can be reached at 298-

(EXHIBIT 1.1)

CF [34]

through

SECRET

By TOM LANGHORNE
Staff Writer

Twenty-two seconds. Actually, slightly less than 22 seconds.

That's how much time, on average, that Spartanburg County grand jurors had to devote to each of the 1,404 cases presented to them by 7th Circuit prosecutors over eight and a half hours on Tuesday.

The mass indictments come six weeks after a two-day grand jury session during which Solicitor Holman Gossett's office presented slightly fewer than 1,800 cases for indictment.

Jurors had just under 22 seconds to spend on each case, drawing strong criticism from Gossett's successor and a reading "legal ethics expert."

Before that session, the highest number of charges Gossett's office had presented for indictment at any one time in the past two years had been 968.

Gossett did not return telephone messages seeking comment as has been the case since his June loss to Trey Gowdy in the Republican primary.

Attempts to reach South Carolina Attorney General Charlie Condon were unsuccessful.

A spokesman for Gossett said last month that mass indictments were necessary in light of Circuit Judge John Kittredge's recent decision to fine 13th Circuit Solicitor Bob Ariail for not complying with South Carolina Rules of Criminal Procedure.

Ariail didn't comply with Rule 3(c), which states that prosecutors must take action on a given arrest warrant within 90 days after receiving the warrant from the clerk of court.

The fine was eventually dropped.

Indicting thousands of old and new cases en masse does not add to the statistical backlog that Gowdy will face when he takes office in January. Unindicted cases are already counted in the backlog as South Carolina Court Administration reports it.

But Gossett's mass indictment strategy does create a large pool of indicted cases that Gowdy can't be sure have been scrutinized first.

"It looks to me like the policy we used to have of reviewing cases to see if they have a basic degree of merit before sending them for indictment has been abandoned," said Spartanburg



NO MORE: Da County quiet counting



A demonstrator waves the American flag that the canvassing board voted u

Campaign

[35]

BUY ONE GET ONE FREE

OF EQUAL OR LESSER VALUE

OSCAR MAYER MEAT BOLOGNA, SALAMI OR WIENERS. Excludes beef, fat free or cheese. 1.6 oz.



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LAND-O-FROST THIN-SLICED MEATS
All varieties. 2.5 oz.



BUY ONE GET ONE FREE

OF EQUAL OR LESSER VALUE

CAROLINA GROUND TURKEY
Frozen .48 oz

(EXHIBIT 1.2)

CRAND... continued on 11


INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2158
Judge Code

11/30/2011
Date

For Clerk of Court Office Use Only

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Timothy Darrell Davis,)
S.C.D.C. No. 291299,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
2011-CP-23-6133

RETURN AND MOTION TO DISMISS

In response to the post-conviction relief (PCR) application filed September 14, 2011, the Respondent would show this Court:

I.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the April 2002 term of the Greenville County Grand Jury for murder (2002-GS-23-2623). He was represented by C. Timothy Sullivan, Esquire.

After the State called the case to trial, the Applicant was found guilty. On March 5, 2003, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to life imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Davis, Op. No. 2005-UP-152 (S.C. Ct. App. filed March 4, 2005). The South Carolina Supreme Court denied the Applicant's petition for writ of certiorari on November 1, 2006.

2007-CP-23-6216

The Applicant filed a PCR application on September 21, 2007 (2007-CP-23-6216). The Applicant raised the following issues:

1. Ineffective assistance of trial counsel:
 - a. “[R]efused and has failed in thorough investigations, not preparing for trial, not challenging false allegations and failing to make objections during trial.”
 - b. “[R]efused and failed to interview and subpoena witnesses, records, and by not demanding complete discovery material.”
 - c. “[I]ll advising client on myriad of legal matters pre-trial and during trial.”
 - d. “[R]efused and failed to develop and present effective defense strategies.”
2. Prosecutorial and law enforcement misconduct:
 - a. Assistant solicitor Steinberg, Lt. Hamby, and Sgt. Guthrie “conspired to commit and did commit perjury.”
 - b. Assistant solicitor Steinberg “violated comports of Brady v. Maryland in that certain discovery materials have been withheld.”
3. Ineffective assistance of appellate counsel:
 - a. “[C]ounsel refused and has failed at communicating with Petitioner, providing documents from reasonable requests and overlooking mandates of statutory law.”
4. U.S. and S.C. Constitutional rights violations:
 - a. Violation of First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

An evidentiary hearing was convened on December 11, 2008 at the Greenville County Courthouse. After the Applicant successfully moved to relieve his appointed counsel, he proceeded pro se. The Honorable Edward W. Miller denied and dismissed the PCR application by order filed January 27, 2009.

The Applicant filed a notice of appeal. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of a Johnson¹ petition and the

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

Applicant submitted a pro se petition. The South Carolina Supreme Court denied the petition for writ of certiorari on October 20, 2011.

2010-CP-23-8436

The Applicant filed a PCR application on October 13, 2010 (2010-CP-23-8436). The Applicant raised the following issue:

1. "Substantial change in law and rights regarding conflicting jury instructions in violation of State and Federal Constitutions."

The Respondent filed a return and motion to dismiss, arguing the application was untimely and successive. The Honorable Robin B. Stilwell issued a conditional order of dismissal dated February 22, 2011 and filed February 28, 2011. Judge Stilwell issued a final order dated April 20, 2011 and filed April 29, 2011. Though the Applicant filed a motion to alter or amend judgment, pursuant to Rule 59(e), SCRCPP, the Honorable D. Garrison Hill denied the motion by order dated May 23, 2011 and filed May 25, 2011.

The Applicant filed a timely notice of appeal. The South Carolina Supreme Court required the Applicant – pursuant to Rule 243(c), SCACR – to show an arguable reason why the denial of his application was improper. In an order of dismissal dated July 19, 2011, the Supreme Court found the Applicant failed to meet his burden in this regard.

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (4:11-3263-DCN-TER). The Respondent has received an extension in which to file its motion for summary judgment. As such, the matter is currently pending before the District Court.

II.

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Newly Discovered Evidence, pursuant to SC Code, § 17-27-45(C)."
2. "Fraud Upon the Court and Sham Legal Process."
 - a. The court of General Sessions was not convened when the Grand Jury returned the true-billed indictment.
3. "Prosecutorial Misconduct."

For the purpose of this Return, the Respondent incorporates the Greenville County Clerk of Court records, the South Carolina Department of Corrections' records, and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense he challenges in this application on March 5, 2003 and the South Carolina Supreme Court denied the Applicant's petition for writ of

certiorari on November 1, 2006. The Applicant was therefore required to file his application before November 1, 2007. This application was filed on September 14, 2011, which was after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

IV.

The Court should also summarily dismiss the current Application because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a “sufficient reason” why new grounds for relief were not raised or were

not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications, the Respondent moves for a summary dismissal of the application because it is successive.

V.

The Respondent submits the Applicant’s claim of newly- or after-discovered evidence is without merit. For an applicant to be granted a new trial based on after-discovered evidence, he must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citation omitted).

The Applicant has not shown that the alleged evidence meets any of the requirements for after-discovered evidence. Most importantly, the “new evidence” offered by the Applicant is not material to the issue of guilt or innocence, and probably would not change the result if a new trial was had. See id. The Respondent submits the Court should summarily dismiss this allegation.

VI.

The Applicant’s argument that the Grand Jury was not scheduled to convene when his

indictments were signed is without merit. While terms of court are technically prescribed by statute, the Respondent argues general sessions matters may be transacted during common pleas terms of court and vice versa. See S.C. Code Ann. §§ 14-5-410, -420 (Supp. 2003).

VII.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VIII.

WHEREFORE, the Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

March
~~February~~ 12, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
TIMOTHY DARRELL DAVIS, 291299)
)
Applicant,)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

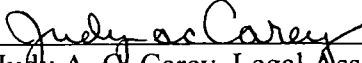
2011-CP-23-6133

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Timothy Darrell Davis, 291299
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

DATED this 12th day of March, 2012.



Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Timothy Darrell Davis,)
 S.C.D.C. No. 291299,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2011-CP-23-6133

CONDITIONAL ORDER OF DISMISSAL

SEP 20 10 30 AM '11
 CLERK OF COURT
 GREENVILLE COUNTY
 SOUTH CAROLINA

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 14, 2011. The Respondent made its Return, requesting the application be summarily dismissed.

I.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the April 2002 term of the Greenville County Grand Jury for murder (2002-GS-23-2623). He was represented by C. Timothy Sullivan, Esquire.

After the State called the case to trial, the Applicant was found guilty. On March 5, 2003, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to life imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Davis, Op. No. 2005-UP-152 (S.C. Ct. App. filed March 4, 2005). The South Carolina Supreme Court denied the Applicant's

petition for writ of certiorari on November 1, 2006.

2007-CP-23-6216

The Applicant filed a PCR application on September 21, 2007 (2007-CP-23-6216). The Applicant raised the following issues:

1. Ineffective assistance of trial counsel:
 - a. “[R]efused and has failed in thorough investigations, not preparing for trial, not challenging false allegations and failing to make objections during trial.”
 - b. “[R]efused and failed to interview and subpoena witnesses, records, and by not demanding complete discovery material.”
 - c. “[I]ll advising client on myriad of legal matters pre-trial and during trial.”
 - d. “[R]efused and failed to develop and present effective defense strategies.”
2. Prosecutorial and law enforcement misconduct:
 - a. Assistant solicitor Steinberg, Lt. Hamby, and Sgt. Guthrie “conspired to commit and did commit perjury.”
 - b. Assistant solicitor Steinberg “violated comports of Brady v. Maryland in that certain discovery materials have been withheld.”
3. Ineffective assistance of appellate counsel:
 - a. “[C]ounsel refused and has failed at communicating with Petitioner, providing documents from reasonable requests and overlooking mandates of statutory law.”
4. U.S. and S.C. Constitutional rights violations:
 - a. Violation of First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

An evidentiary hearing was convened on December 11, 2008 at the Greenville County Courthouse. After the Applicant successfully moved to relieve his appointed counsel, he proceeded pro se. The Honorable Edward W. Miller denied and dismissed the PCR application by order filed January 27, 2009.

The Applicant filed a notice of appeal. Robert M. Pachak, Esquire of the South Carolina

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[48]

Office of Appellate Defense perfected the appeal in the form of a Johnson¹ petition and the Applicant submitted a pro se petition. The South Carolina Supreme Court denied the petition for writ of certiorari on October 20, 2011.

2010-CP-23-8436

The Applicant filed a PCR application on October 13, 2010 (2010-CP-23-8436). The Applicant raised the following issue:

1. "Substantial change in law and rights regarding conflicting jury instructions in violation of State and Federal Constitutions."

The Respondent filed a return and motion to dismiss, arguing the application was untimely and successive. The Honorable Robin B. Stilwell issued a conditional order of dismissal dated February 22, 2011 and filed February 28, 2011. Judge Stilwell issued a final order dated April 20, 2011 and filed April 29, 2011. Though the Applicant filed a motion to alter or amend judgment, pursuant to Rule 59(e), SCRPC, the Honorable D. Garrison Hill denied the motion by order dated May 23, 2011 and filed May 25, 2011.

The Applicant filed a timely notice of appeal. The South Carolina Supreme Court required the Applicant – pursuant to Rule 243(c), SCACR – to show an arguable reason why the denial of his application was improper. In an order of dismissal dated July 19, 2011, the Supreme Court found the Applicant failed to meet his burden in this regard.

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (4:11-3263-DCN-TER). The Respondent has received an

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

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[49]

extension in which to file its motion for summary judgment. As such, the matter is currently pending before the District Court.

II.

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Newly Discovered Evidence, pursuant to SC Code, § 17-27-45(C)."
2. "Fraud Upon the Court and Sham Legal Process."
 - a. The court of General Sessions was not convened when the Grand Jury returned the true-billed indictment.
3. "Prosecutorial Misconduct."

III.

This Court finds this matter should be summarily dismissed because the Applicant has failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). Specifically, South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense he challenges in this application on March 5, 2003 and the South Carolina Supreme Court denied the Applicant's petition for writ of certiorari on November 1, 2006. The Applicant was therefore required to file his application before November 1, 2007. This application was filed on September 14, 2011, which was more than three (3) years and ten (10) months after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. Of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”

IV.

This Court further finds the current application should also be dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of

showing that the allegations could not have been raised previously. Id.

As the Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications, the application is dismissed.

V.

This Court finds the Applicant's claim of newly- or after-discovered evidence is without merit. For an applicant to be granted a new trial based on after-discovered evidence, he must show the evidence: (1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citation omitted).

This Court finds the Applicant has not shown that the alleged evidence meets any of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not material to the issue of guilt or innocence, and probably would not change the result if a new trial was had. See id. This allegation is dismissed.

VI.

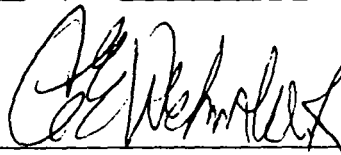
This Court finds the Applicant's argument that the Grand Jury was not scheduled to convene when his indictment was signed is without merit. While terms of court are technically prescribed by statute, this Court notes general sessions matters may be transacted during common pleas terms of court and vice versa. See S.C. Code Ann. §§ 14-5-410, -420 (Supp. 2003).



VII.

Based upon its review of the pleadings in this matter, this Court expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final by filing any reasons he may have with the Clerk of Court for Greenville County, South Carolina, and also by filing a copy of his reasons with the Office of the Attorney General, Attn: Karen C. Ratigan, Post Office Box 11549, Columbia, South Carolina, 29211.

AND IT IS SO ORDERED this 14th day of March, 2012.



G. Edward Welmaker
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

File 1008

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE	)	13th Judicial Circuit
)	
Timothy D. Davis, #291299,	)	C/A No. 2011-CP-23-6133
)	
Applicant,)	
)	
v.	)	REPLY AND OBJECTION
	)	TO RESPONDENT'S RETURN
State of South Carolina,	)	AND MOTION TO DISMISS
)	
Respondent.)	
)	

2012 APR -9 PM 4:34
 CLERK OF COURT
 JUDICIAL CIRCUIT

I.

PROCEDURAL HISTORY

On, or about, **March 4-5, 2003**, at a Greenville County - Court of General Sessions, Applicant (Davis), while represented by, **Mr. Timothy Sullivan, Esq.**; Greenville County Public Defense Office, was convicted of murder [2002-GS-23-2623] during a jury trial held before the Honorable **C. Victor Pyle, Jr.** Judge Pyle imposed a life sentence without possibility of parole. Davis' attorney filed for appeal to the SC Court of Appeals who, consequently, affirmed the conviction/sentence, **March 4, 2005** [State v. Davis, Op. No. 2005-UP-152]; rehearing and certiorari denied **June 22, 2006** and **November 1, 2006**, respectively.

On **September 21, 2007**, Davis filed his first application for post-conviction relief (PCR) [2007-CP-23-6216], pursuant to SC Code of Law, Ann., §. 17-27-45(A). On **September 24, 2008**, an initial evidentiary hearing was held before the Honorable **Carmen T. Mullen**, wherein Applicant testified that he had been denied access to his trial transcript and moved to relieve PCR counsel. Hearing was deferred until next term of court for PCR proceedings.

Between hearings, Davis filed formal Motion(s) to Relieve Counsel -- requesting reappointment -- and for Continuance. After a hearing on Davis' ancillary motions, a second evidentiary hearing was held, **December 21, 2008**, before the Honorable **Edward**

W. Miller. During the motions hearing, Judge Miller relieved PCR counsel for cause, but denied Applicant's Motion for Continuance and reappointment of counsel, compelling Applicant to represent, pro se.

That afternoon, the PCR evidentiary hearing was held, wherein, Davis testified along with Respondent, Timothy Sullivan and, Mr. Howard Steinberg, Assistant Solicitor, both being represented by, Ms. Karen C. Ratiyan, Assistant Attorney General. Judge Miller, orally denied Davis' post-conviction relief on record, dismissing the matter by formal order January 21, 2009. Davis timely filed Motion to Alter/Amend Judgement [SCRCP, Rule 59(e)], which the Court also denied, March 10, 2009.

Davis then timely filed Notice of Appeal. Mr. Robert M. Pachak, Esq.; SCCID - Appellate Defense, was appointed to represent Davis. Soon thereafter, pursuant to Johnson v. State, 364 S.E.2d 201 (1988), appellate counsel filed a "no merits" Petition for Writ of Certiorari and Motion to be Relieved, along with an incomplete Appendix. In response, pro se, Davis filed Motion to Supplement Record -- requesting that appellate counsel be directed to bring Appendix into compliance -- of which, the SC Supreme Court granted, February 17, 2010.

After the Appendix was brought into conformity, Davis filed Petition for Writ of Certiorari, pro se, October 28, 2010, for the Court's consideration, wherein, Davis raised seven (7) issues with eighteen (18) arguments. On October 20, 2011, the SC Supreme Court denied appellate counsel's, "no-merits", Johnson Petition for Writ of Certiorari without consideration of the merits contained within Davis' pro se petition; Rehearing, en banc, procedurally denied in error, August 5, 2011.

When Davis filed Notice of Appeal from the first PCR, and during its pendency, he timely filed a second PCR application, October 6, 2010, pursuant to statutory provision of SC Code of Law, Ann., § 17-27-45(B) [2010-CP-23-8436], based upon "newly established rule of law or right, previously unavailable," See, State v. Belcher, 612 S.E.2d 802 (Oct. 2009). Davis was denied appointment of counsel and evidentiary hearing. Consequently, of

Order dated April 20, 2011, the PCR action was then summarily dismissed by the Honorable Robin B. Stilwell, due to Respondent's misrepresentation of facts and reliance upon inapplicable conclusion of law; that Davis' second PCR application was untimely and successive. Davis further filed ancillary motions and objections, including, Motion to Alter/Amend Judgement [SCRCP, Rule 19(e)], which were further denied, May 25, 2011 by the Honorable, D. Garrison Hill.

Afterwards, Davis timely filed Notice of Appeal regarding the second PCR. However, pursuant to SCACR, Rule 243(c), Davis was required by the SC Supreme Court to show cause for the appeal, to which he responded with a motion, pro se, titled, 'Cause of Action.' Wherein, he cited the supporting facts and legal authorities his claim relied upon. Apparently, and without review on the merits, the Honorable Jean H. Toal, Chief Justice of the SC Supreme Court, summarily dismissed Davis' appeal, July 19, 2011, without providing any findings of fact, or conclusion of law.

On September 14, 2011, Davis filed a third, PCR application along with supporting Affidavit, Memorandum of Law, and Exhibits A, B, & C, pursuant to statutory provision of SC Code of Law, Ann., § 17-27-45(C); "newly discovered evidence" [2011-CP-23-6133], wherein, he alleged further prosecutorial misconduct. In addition to the PCR application, Davis also filed Motion to Set-Aside/Vacate Judgement [SCRCP, Rule 60(b)(3)], alleging "fraud upon the court" resulting from the misconduct. The Court, upon its own initiative and without explanation, issued a Form-4 Order, November 30, 2012, signed by Judge Stilwell, denying the '60(b) Motion' without any findings of factual, or conclusion of law.

Then, on November 22, 2011, and pursuant to the "Anti-terrorist & Effective Death Penalty Act" (AEDPA), and its one (1) year statute of limitations, Davis filed a petition for Writ of Habeas Corpus application, pursuant to U.S.C. 28, § 2254, before resolution of the pending state PCR action. After state's highest court denied certiorari on his first PCR action,

Davis was required by law to file for federal habeas corpus relief within one (1) year after the conviction became final (minus time taken in filing first PCR); only forty (40) days remained for which Davis could file for federal habeas corpus relief.

So, because Davis' federal habeas corpus application is a "mixed petition" containing exhausted and unexhausted claims, he was further required to file Motion to Amend original federal habeas corpus application; which he did on January 3, 2012, requesting that "Ground Five", containing matters within the third PCR, now pending in state court, be temporarily suspended and/or withdrawn. Within his amendment, and pursuant to Rose v. Lundy, Davis further requested the habeas corpus action be stayed and/or held in abeyance pending outcome of the state PCR.

Thereafter, on February 3, 2012 Respondent filed Motion for Extension of Time for which to file Return against the federal habeas corpus application, the U.S. District Court granted. Respondent further filed Response in Opposition to Petitioner's Amendment, February 29, 2012, then filed their Return, Memorandum and Motion for Summary Judgment against Petitioner's habeas corpus application, March 5, 2012.

Within both federal responses, Respondent argues against matters contained within the PCR action, pending in, and which properly belongs to, the state court until those matters have been fully heard and adjudicated at the state's highest court. In fact, Respondent just recently filed their Return to Petitioner's state PCR application on March 12, 2012, ninety (90) days out of time in violation of statutory law and rules of procedure. The U.S. District Court found Respondent's pleading in opposition to Petitioner's amendment as "moot" and granted Petitioner time to file an amended Petition for Habeas Corpus application as a matter of course, citing procedural allowances under FRCP, Rule 15(a).

II.

REPLY & OBJECTION

This Reply and Objection is before this Court in response to Respondent's Return and Motion to Dismiss against Applicant's above-referenced PCR action, to which Applicant would show the following:

A. Applicant first objects to any consideration being given to Respondent's untimely Return. Respondent has just recently filed their Return approximately ninety (90) days out of time, six (6) months after Applicant filed his initial pleading. Applicant submits that pursuant to SCRCPC, Rule 12(a), Respondent was only allowed ninety (90) days to file Return to the PCR application wherein they were required to raise all defenses, of which they failed to execute.

Second, neither did Respondent motion the Court for extension of time, nor did the Court formally grant, sua sponte, Respondent additional time to file their Return. By operation of law and procedure, this Court should ignore Respondent's defensive pleadings and grant Applicant relief he seeks by Default Judgement as matter of course and in the interest of justice.

B. Assuming arguendo that Applicant may not be entitled to or granted Default Judgement based upon Respondent's untimely return, this Court should nonetheless deny Respondent's Motion to Dismiss, appoint counsel, and schedule an evidentiary hearing. Because, contrary to their assertions, Applicant's PCR application is not successive and presents genuine issues of material fact and law in controversy, which are of constitutional magnitude;

1. Applicant contends that due to secret nature of ex parte, grand jury procedures employed to conduct presentment, review, and deliberate evidence, neither Applicant nor his attorney, were able to discern the legality or procedural correctness of the ex parte proceeding. Therefore, the

defense would not have known to challenge the jurisdiction and/or legality of the indictment prior to trial or on appeal; there were no apparent defects on, or within the indictment, causing the question to arise in the first instance. See, State v. Richardson, 146 S.E. 676 (1928)

Nor did the Applicant ever "knowingly, voluntarily, or intelligently waive" the issue(s) of jurisdiction and/or legality as would also be required by SC Code of Law, § 17-27-90. In deed, there would have been no apparent reason for anyone to challenge or make inquiry on the subject because it is presumed that ex parte proceedings are regular and conducted within conformity and allowance of statutory laws. See State v. James, 472 S.E.2d 38 (1996) ("Absence of evidence to the contrary, regularity and legality of proceeding before grand jury is presumed.") (emphasis supplied) Cf. Weathers v. State, 459 S.E.2d 838 (1995); see also, State v. Thompson, 409 S.E.2d 420 (Ct.App. 1991).

2. Applicant asserts he was unable to raise or act upon this new evidence and claim of due process violation until he was able to verify his allegations through legal research and inquiry with the SC Court Administration regarding the terms of court ordered by the SC Supreme Court. It is clearly shown by Applicant's exhibits, filed with the PCR application & Memorandum of Law, that within one year of Applicant's discovery of the actual dates of general sessions court for April - 2002, he filed a Sworn Affidavit affirming as much; that he recently found this information, and of his belief^{10/97} it constitutes and qualifies as "newly discovered evidence." (See & Cf., date @ bottom/right of Exhibit "B-1.2" [court calendar] w/ filing date of PCR application)

3. Applicant further points out that in his supporting Memorandum of Law, he presented the Court with statutory laws which mandate and govern the procedures for convening the grand jury; specifically, how, where, and when those ex parte

proceedings are to be held.

4. Contrary to Respondent's argument that Applicant's "new evidence" is not material to issue of guilt or innocence, Applicant contends that because they were unlawfully convened, if convened at all, the grand jury had no lawful authority to receive and deliberate upon any evidence or return a "true bill" in the first instance. This fact alone makes the issue of guilt or innocence moot, since the trial court lacked jurisdiction, in personam, to try the Applicant upon an unlawfully obtained indictment in the first place. See, Evans v. State, 611 S.E.2d 510 (2005)

C. In their Return and Motion to Dismiss, Respondent's only other defense is that pursuant to SC Code of Law, §§ 14-5-410, -420, "general sessions matters may be transacted during common pleas terms of court and vice versa." This tenuous defense presents arguable issues of fact and law;

1. Applicant respectfully points out that Respondent concedes the legal conclusion; that terms of court are prescribed by statutory law, albeit "technical." However, in the instant case, and pursuant to statutory allowance, the SC Supreme Court canceled those original statutory terms, ordering an independent schedule of weekly terms for the month of April - 2002. (See previously filed exhibits; B-1.1 & 1.2)

2. Although Applicant concedes that SC Code of Law, §§ 14-5-410, -420, in fact, ^{do} allow both courts, general sessions and common pleas, to transact matters within each other's jurisdiction, he respectfully contends that, "technically," this provision only applies to non-jury matters, i.e., pre-trial hearings, suppression hearings, competency hearings, etc., and, therefore, cannot be the basis of Respondent's defense. Fundamentally, it should be logically understood that, ex parte, indictment proceedings

are held before juries where evidence is heard, inquiries made, and deliberation takes place.

3. From a purely jurisdictional stand point, Applicant further contends that this Court and the Respondent have an ethical duty and obligation to acknowledge and follow all applicable laws regarding process and procedure, and not to do so, results in fundamental violation of due process and equal protection of law; SC Const., Art. I, § 3. If the grand jury did indeed meet -- somewhere other than the Court of General Sessions -- to receive and deliberate evidence so solicitor could obtain a "true bill" against Applicant, they were nonetheless required, by "technical" operation of law, to convene during "Court of General Sessions," not "Court of Common Pleas," not "Family Court," or just any "circuit court,". One of the reasons for this, inter alia, is that Courts of Common Pleas do not have jurisdiction over criminal matters. State v. Funderbuck, 191 S.E.2d 520 (1972).

4. Applicant hereby challenges the incongruent disparity regarding the State's procedural irregularities^Y of its grand jury proceedings^Y for obtaining his criminal indictment. The plain and ordinary meaning of the language employed within statutes governing the ex parte grand jury and indictment process has been systematically misconstrued to mean something it does not; i.e., that the term, "general sessions court" is synonymous [equal in meaning] with the term, "circuit court," ^{which} ~~is~~ arguable^{reveals} forced construction of the meanings, and contributes to the ongoing violation of Applicant's procedural due process rights in spite of dictum in State v. Gentry, 610 S.E.2d 494 (2005).

III.

CONCLUSION

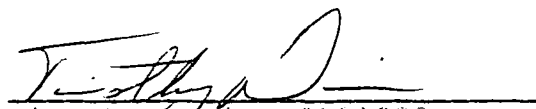
Therefore, and based upon considerable degree and magnitude

the

of ~~the~~ controversy regarding the material fact and law presented herein, Applicant respectfully requests and would move this Court to deny Respondent's Motion to Dismiss and either, appoint counsel for Applicant and schedule an evidentiary hearing, thereby making allowance for full hearing on the matter and further the discovery process. Or, in the alternative, this Court may grant Applicant relief by Default Judgement for Respondent's failure to timely comply with and follow statutory law and procedure.

Respectfully submitted,

Date: March 26, 2012
Greenville county


Timothy Davis, #291299
Perry C.I. / 14B-222
430 Oaklawn Road
Pelzer, SC 29669

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

THE COURT OF COMMON PLEAS
13th Judicial Circuit

Timothy D. Davis, #291299,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

C/A No. 2011-CP-23-6133

SWORN AFFIDAVIT OF
SERVICE BY MAIL

FILED - CLERK OF COURT
GREENVILLE CO., S.C.
2012 MAR 27 10 34 AM

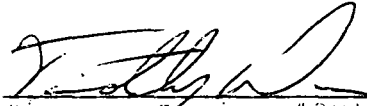
2012 MAR 27 9 34 AM

1. I am the Applicant in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day filed/served the foregoing document(s); **Reply and Objection** to Return and Motion to Dismiss, upon individuals below by depositing copies of the same in the U.S. Mail, postage prepaid, addressed as follows:

Greenville County Courthouse
Paul B. Wickensimer, Clerk
305 E. North Street
Greenville, SC 29601

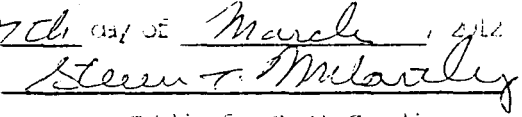
SC Attorney General Office
Karen C. Ratigan, A.A.G.
Post Office Box 11549
Columbia, SC 29211-1549

Date: March 27, 2012
Greenville County



Timothy Davis, #291299
Perry C.I. / 048-222
450 Oaklawn Road
Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this

27th day of March, 2012


Notary Public for South Carolina

My Commission Expires: November 7, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2011-CP-23-6133
COUNTY OF GREENVILLE)	
)	
Timothy Darrell Davis,)	
S.C.D.C. No. 291299,)	
)	
Applicant,)	
	)	FINAL ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 14, 2011. The Respondent made its return on March 12, 2012, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed March 14, 2012 and filed March 30, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated April 18, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Reply and Objection to Respondent's Return and Motion to Dismiss" and filed April 9, 2012, the Applicant argues he is entitled to a default judgment. The Applicant argues this is not a successive PCR application. The Applicant argues his

[65]

understanding of the “secret nature of ex parte, grand jury procedures” is new evidence. The Applicant argues he has suffered a violation of equal protection and due process because the Grand Jury was not convened at the appropriate time to return the indictment in his case.

This Court has reviewed the Applicant’s response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant was convicted and sentenced on March 5, 2003, the South Carolina Court of Appeals affirmed on March 4, 2005, and the South Carolina Supreme Court denied the subsequent petition for writ of certiorari on November 1, 2006. As this action was filed on September 14, 2011, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-27-45(a) (Supp. 2003). This is the Applicant’s third application for post-conviction relief. This Court notes that successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first PCR application on December 11, 2008. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“[A]n applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’”).

This Court finds the Applicant’s claim that the trial court lacked subject matter jurisdiction is without merit. Indictments are not jurisdictional in nature, they are merely notice documents. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). This Court finds the indictment for murder (2002-GS-23-2623) was true-billed and clearly adequate to provide notice of the charge the Applicant was facing. This Court finds the Applicant has failed to articulate

how the term of court in which the indictment was true-billed was both improper and served to deprive the trial court of jurisdiction in this case.

This Court finds the Applicant's allegation of newly-discovered evidence is without merit. This Court finds the Applicant's alleged evidence has failed to prove any of the five (5) required elements of newly-discovered evidence. See State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). The argument that the Applicant only recently learned about the statutory and legal authority related to his Grand Jury/subject matter jurisdiction issue is untenable. See Gregory v. Gregory, 292 S.C. 587, 589-90, 358 S.E.2d 144, 146 (1987) ("The legal axiom that ignorance of the law is no excuse has long been the law of this nation and state."); South Carolina Wildlife & Marine Res. Dep't v. Kunkle, 287 S.C. 177, 179, 336 S.E.2d 468, 469 (1985) ("[I]t is a well-settled maxim that ignorance of the law is no excuse.").

This Court finds default judgment on behalf of the Applicant is not appropriate. Compliance with the time limits prescribed by S.C. Code Ann. §17-27-70(a) (2003) is discretionary with the court. Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973). Absent a showing of prejudice by the Applicant, the failure to file the Return and Motion to Dismiss within authorized time limits does not warrant granting the relief requested in the application. Kneece v. State, 269 S.C. 177, 236 S.E.2d 746 (1977). This Court finds the Applicant has failed to show any prejudice resulted from the filing of the Return and Motion to Dismiss beyond the authorized time limits.

IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's Conditional Order of Dismissal, the PCR application is hereby denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

AND IT IS SO ORDERED this _____ day of _____, 2012.

G. Edward Welmaker
Chief Administrative Judge
Thirteenth Judicial Circuit

_____, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Timothy Davis, #291299,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN COURT OF COMMON PLEAS
 13th Judicial Circuit
 C/A No. 2011-CP-23-013
 MOTION TO ALTER/AMEND
 JUDGEMENT OR GRANT
 DECLARATORY JUDGMENT

FILED
 CLERK OF COURT
 GREENVILLE CO. S.C.
 2012 JUN -9 PM 1:15

COMES NOW the Applicant, in the above-styled case, and respectfully moves this Court to consider issuing either, declaratory judgment or an order to alter or amend judgment rendered in its Final Order in the above-referenced action. Said order was signed, June 12, 2012; filed, June 25, 2012; and received by Applicant, June 29, 2012. This motion is properly before the Court pursuant to Rule(s) 57 & 59(e), SCRPC; SC Code of Law, § 17-27-80; Marlar v. State, 653 S.E.2d 266 (2001); Humbert v. State, 548 S.E.2d 862 (2001); and Pruitt v. State, 423 S.E.2d 127 (1992). Applicant's reasons for filing this motion are herein, set forth below:

FACTS

The Court seems to have partially reached the merits upon issues raised in this action, making its findings of fact and conclusions of law regarding only three (3) points, two of which were procedural defenses; (1) that Applicant is barred because discovery of State's unlawful practice does not constitute "new evidence", (2) that Applicant is barred because issue was not raised within one year statute of limitations as prescribed by SC Code of Law, § 17-27-45(A), and (3) that indictments are not jurisdictional in nature.

[69]

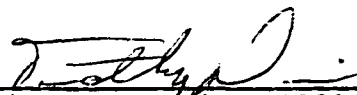
However, the Court has not fully reached the merits upon all matters raised in the action, failing to properly rule by findings of fact and conclusions of law, as prescribed by law, regarding whether or not the Greenville County Office(s) of Solicitor and Clerk of Court did in fact violate state constitutional and statutory laws in its procedure and practice regarding which court's jurisdiction, and upon what dates, those responsible, schedule and convene grand juries to conduct ex parte, proceedings for presentment and process of state criminal indictments, specifically, Applicant's Murder indictment (2002-GS-23-2623).

CONCLUSION

For purposes of preserving the overlooked matters for appeal, and based upon the facts set forth above; that the Court's ruling fails to fully address the merits and/or adjudicate all issues raised in the post-conviction action, Applicant hereby respectfully requests this Court's reconsideration of its ruling and to either make appropriate changes thereto, or render declaratory judgment on the matters in question.

Respectfully submitted,

Date: June 30, 2012
Greenville County



Timothy Davis, #291299
Perry C.I. / @4B-222
430 Oaklawn Road
Pelzer, SC 29669

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

Timothy Davis, #291299,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN COURT OF COMMON PLEAS
13th Judicial Circuit

C/A No. 2011-CP-23-5133

SWORN AFFIDAVIT OF
SERVICE BY MAIL

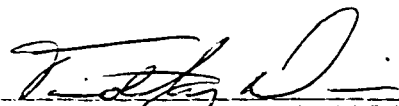
I, the Applicant in the above-captioned matter, first, being duly sworn upon my oath, affirm to be true the following:

1. Regular communication by mail exists throughout the state of South Carolina, that this is a proper circumstance of service by mail.
2. I have this day filed/served the foregoing document, **Motion to Alter/Amend Judgment**, upon the individual(s) listed below by depositing copies of the same in the U.S. Mail, postage prepaid, for delivery to their last known address as follows.

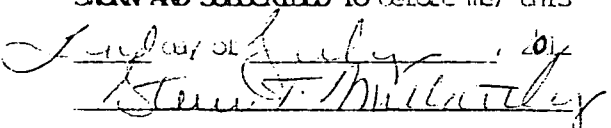
Hon. G. Edward Delaney, Judge
13th Judicial Circuit
Post Office Box 899
Pickens, SC 29571

SC Office of Attorney General
Karen C. Ratigan, A.A.G.
Post Office Box 11549
Columbia, SC 29211

Greenville County Courthouse
Paul B. Wickensinger - Clerk
305 E. North Street, Rm. 224
Greenville, SC 29601



Timothy Davis, #291299
2007 C.T. / 04B-222
450 Oaklawn Road
Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this

Notary Public for South Carolina
My Commission Expires: March 7, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2011-CP-23-6133
COUNTY OF GREENVILLE)	
)	
Timothy Darrell Davis,)	
S.C.D.C. No. 291299,)	
)	
Applicant,)	
	)	RETURN TO MOTION TO ALTER OR
v.	)	AMEND THE ORDER OF DISMISSAL
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

Respondent, by and through undersigned counsel, making Return to Applicant’s “Motion to Alter/Amend Judgement or Grant Declaratory Judgment” dated June 30, 2012, would respectfully show unto this Court:

1. The matter is before the Court by way of a post-conviction relief (PCR) application that was filed on September 14, 2011.
2. Respondent submitted a return on March 12, 2012, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.
3. Respondent also submitted a conditional order of dismissal for review by the Chief Administrative Judge for the Thirteenth Circuit.
4. The conditional order of dismissal was thereafter signed by the Honorable G. Edward Welmaker on March 14, 2012 and filed March 30, 2012. The conditional order of dismissal was personally served upon Applicant on April 18, 2012.
5. After Applicant filed a documents captioned “Reply and Objection to Respondent’s Return and Motion to Dismiss,” Respondent submitted a proposed final order to.

[12]

This final order was signed by Judge Welmaker on June 12, 2012 and filed on June 25, 2012.

6. Applicant moves this Court to alter or amend the final order of dismissal, stating the order does not address the merits of all issues raised.

7. Respondent submits the application was untimely because the statute of limitations begins from the date of conviction or date of direct appeal decision.

8. Respondent submits this is the Applicant's third PCR application and all issues related to his conviction should have been raised at the hearing on the first PCR application.

9. Respondent submits the final order incorporated all of the specific findings set forth in the conditional order of dismissal.

10. Respondent submits this Court fully reviewed and properly ruled upon all issues and the "Motion to Alter/Amend Judgement or Grant Declaratory Judgment" should be denied.

Respectfully submitted,

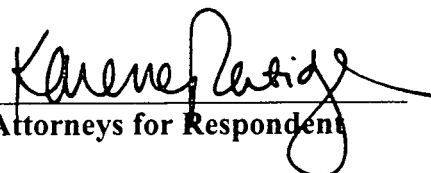
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

July 10, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
TIMOTHY DARRELL DAVIS, 291299)
)
Applicant,)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

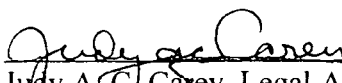
2011-CP-23-6133

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Motion to Alter or Amend the Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Timothy Darrell Davis, 291299
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

DATED this 10th day of July, 2012.



Judy A.C. Carey, Legal Assistant
For Respondent

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2306133

2012 JUL 30 PM 4:19
FILED-CLERK OF COURT
GREENVILLE CO. S.C.
MELBA WATKINS

Timothy D Davis 291299 vs. South Carolina State Of

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: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

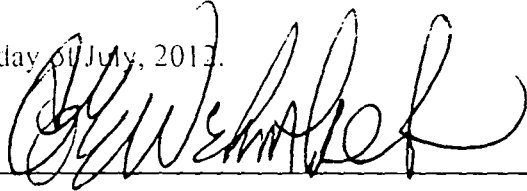
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

The Court has fully reviewed the applicant's Motion to Alter/Amend the Judgment or to Grant a Declaratory Judgment, along with the State's return thereto. In addition, the Court has again reviewed the entire file, including pleadings and prior orders. Upon such examination, the Applicant's Motion is respectfully DENIED.

Dated at Greenville, South Carolina, this 25th day of July, 2012.

Court Reporter:



PRESIDING JUDGE - G Edward Welmaker

This judgment was entered on the 25th day of July, 2012, and a copy mailed first class this 30th day of July, 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Timothy D Davis 291299 Perry Corr Instit/Q4B 222
430 Oaklawn Rd Pelzer, SC 29669

Karen Christine Ratigan PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)