

Attachment (A)

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

IN THE COURT OF COMMON PLEAS A.P.P 1

06-CP46-010

PETITIONER FOR WRIT OF HABEAS CORPUS
F-763891, F-763897, F-763898, F-763901, F-763902
F-763914

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

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

JURISDICTION

The Supreme Court of South Carolina held that relief pursuant to a writ of habeas corpus, is appropriate when there has been a violation, which, in the setting constitutes a denial of fundamental fairness shocking to the universal sense of justice, Butler v. State 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). "The general and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention". Butler, 468 at 302 S.C. 88 397 S.E.2d (Quoting Walker v. Wainwright, 390 U.S. 335, 88 S.Ct. 1954, 19 S.Ct. 1215 (1968)).

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC
2006 JAN 27 AM 10:21
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QUESTION PRESENTED

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

STATEMENT OF CASE

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

INVOLUNTARY GUILTY PLEA(A)

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

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

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

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

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

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

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reduced by $1\frac{1}{2}$ years. Involving as it does, a liberty interest, the court should scrutinize the transcript closely to determine if Gordon's constitutional rights were violated.

INVOLUNTARY GUILTY PLEA(B)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ap. P 27

CONCLUSION

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

Respectfully Submitted

/s/ Antonio Gordon

A. Gordon #259798

December 16, 2005

Ap. P. 28

MEMORANDUM OF LAW

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

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

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

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

SWORN TO AND SUBSCRIBED BEFORE

ME. THIS 16th DAY OF December 05

NOTARY: [Signature]

EXP: MAY 5, 2008

157 Antonio Gordon



06CP46 - 10 11

CLERK OF COURT'S OFFICE

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

January 30, 2006

Attachment (b)

Ap. P 29

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

Re: Petition for Habeas Corpus

Dear Mr. Gordon:

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

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

Sincerely,

Lisa Bennefield
Associate Deputy Clerk

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Antonio Gordon, #259798
☒ Plaintiff

v.

State Of S.C.
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2006-CP-46-010

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Attachment (c) Ap.P.

Plaintiff's Attorney:
Pro Se, Bar No.
Address:

phone: fax:
e-mail: other:

Defendant's Attorney:
Julie M. Thames, Bar No.
Address:

P.O. Box 11549
Columbia, SC 29211
phone: fax:
e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: ☐ YES / ☐ NO

- ☐ Written motion attached
☒ Form Motion/Order

SECTION II: Motion/Order Type

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

April 28, 2006
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

Date Filed:

- ☐ MOTION FEE COLLECTED:
☐ CONTESTED - AMOUNT DUE:

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Antonio Gordon, SCDC No. 259798,

Petitioner,

v.

State of South Carolina,

Respondent.

Ap.P 31

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

RETURN AND MOTION TO DISMISS
PETITION FOR WRIT OF
HABEAS CORPUS

This matter comes before the Court by way of a document filed January 3, 2006, and captioned "Petitioner for Writ of Habeas Corpus." The Respondent submits the petition should be summarily dismissed because it fails to support the requested relief.

I. PROCEDURAL HISTORY

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

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

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

The Petitioner subsequently filed his first PCR application on June 19, 2000.¹ (2001-CP-46-1414). The Respondent made its return on May 4, 2001, and an evidentiary hearing was convened at the Moss Justice Center in York County on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by Order dated August 19, 2003.

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

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

The Applicant also has a pending petition for writ of habeas corpus in federal court (2:05-3327-MBS-R). This petition was filed on December 12, 2005.

For the purpose of this return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections records, and petition for writ of habeas corpus. The Respondent reserves the right to amend this return upon receipt of any relevant materials.

II. APPLICABLE LAW

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

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

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

Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. Gibson, supra. PCR is not rendered "unavailable or inadequate" merely because the petitioner's application might be dismissed as successive. In fact, any matter which is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (1976 & Supp. 1995), may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts of this State. Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998) (emphasis added); Gibson, supra; Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998). The Uniform Post Conviction Procedure Act (the Act) is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. Gibson, supra. A petitioner may even allege constitutional violations in PCR proceedings, unless the issue could have been raised by direct appeal. Id.; Keeler v. Mauney, supra. Thus, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application." Keeler v. Mauney, supra. "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court. S.C. Const. Art. V, § 5." Id.²

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

Ap. P 34

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

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

WHEREFORE, having made its Return and Motion to Dismiss, the Respondent requests that the matter be summarily dismissed.

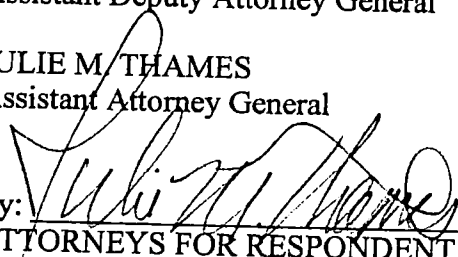
Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JULIE M. THAMES
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina
4/28, 2006.

Ap. P 35

) IN THE COURT OF COMMON PLEAS

2006-CP-46-010

1) AFFIDAVIT OF SERVICE BY MAIL

VS

AFFIDAVIT OF SERVICE BY MAIL

1) AFFIDAVIT OF SERVICE BY MAIL

- Antonio Gordon, #259798
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899


Gianandrea A. Maoli, Legal Assistant
For Respondent

(Attachment (d))

STATE OF SOUTH CAROLINA
COUNTY OF YORK

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

Ap. P 36

2007 JUN -1 AM 8:40

Antonio Gordon, #259798,

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

v.

ORDER OF DISMISSAL
WITH PREJUDICE

State of South Carolina,

Respondent.

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

I. PROCEDURAL HISTORY

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

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

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

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

The Petitioner subsequently filed his first PCR application on June 19, 2000¹ (2000-CP-46-1414). Tara D. Shurling, Esquire, represented the Petitioner. The Respondent made its return on May 4, 2001, and venue was changed due to judicial conflicts. An evidentiary hearing was convened in Richland County on July 29, 2003. The application was denied and dismissed by the Honorable J. Ernest Kinard by Order dated August 19, 2003.

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

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

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

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

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

Ap. P 38

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

III. CONCLUSION

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

² Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 468, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S. Ct. 442, 112 L.Ed.2d 425 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only issue when there has been a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson, supra; Butler v. State, 302 S.C. 468, 397 S.E.2d 87 (1990); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994).

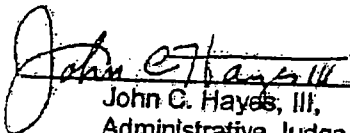
AP. P 40

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED:


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

April 30th, 2007
York, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
Case No.: 2006-CP-46-0010
2007 JUN -1 AM 8:40

Antonio Gordon, #259798,

Petitioner.

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

V.

State of South Carolina,

Respondent.

**ORDER OF DISMISSAL
WITH PREJUDICE**

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

I. PROCEDURAL HISTORY

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[Handwritten signature]

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

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

III. CONCLUSION

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

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

[Handwritten signature]

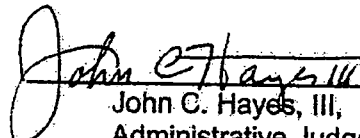
Ap. P 40

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED!


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

April 30th, 2007

York, South Carolina.

State of South Carolina
York County

Antonio Gordon 259798
Applicant

V.

State of South Carolina
Respondent

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

Attachment (e) Ap. P. 41

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

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

History

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

Ap. P 43

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

Statement of facts

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

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

Ap. P 45

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

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

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

Respectfully Submitted

Antonio Gordon

Antonio Gordon 254798

McCorm. Corr. Inst

386 Redemption Way

McCormick, SC 29899

worn to and subscribed before
e this 7 day of Aug 07
story: Phu L. Young
xp: 8/28/2011

State of South Carolina
York County

Antonio Gordon 259798
Applicant

V.

State of South Carolina
Respondent

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

Attachment (e) Ap. p 41

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

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

History

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

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

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

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

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

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

Statement of facts

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

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

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

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

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

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

Ap. p. 45

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

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

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

Respectfully Submitted
by Antonio Gordon

worn to and subscribed before
e this 2 day of April 07
story: John C. Hayes III
XP: 8/28/2011

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

State of South Carolina
County of York

Antonio Gordon 259798
Applicant

State of South Carolina
Respondent

In the Court of Common Plea
Motion for Go B

Affidavit of service by
Mail

Ap. P 46

I, Antonio Gordon 259798, place in the hands of McCormick Correction Institution mail-room hands, one motion for Go B, pursuant to Rule Go B, on August 7, 2001. This is a sworn affidavit and the information enclosed in the motion is to be facts and the truth.

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

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

Attachment (f)
A.P.P 47

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Antonio Gordon, #259798,)

Petitioner,)

v.)

State of South Carolina,)

Respondent.)

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

**RETURN TO APPLICANT'S
SCRCP 60(b) MOTION**

This matter comes before the Court by way of a document filed January 3, 2006, and captioned "Petitioner for Writ of Habeas Corpus." The Order of Dismissal with Prejudice was filed on June 1, 2007. This matter is before the Court by way of Applicant's SCRCP 60(b) Motion filed on or about August 9, 2007.

I.

The movant in a Rule 60(b) motion has the burden of presenting evidence, usually in the form of affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). Further, "[r]elief under this section is within the sound discretion of the trial judge." Mitchell Supply Co., v. Gaffney, 297 S.C. 160, 162, 375 S.E.2d 321, 322 (Ct. App. 1988). The Applicant has presented no evidence that would entitle him to relief from judgment other than to state that the Chief Administrative Judge should recuse himself. Therefore, this motion should be denied.

Also, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application." Keeler v. Mauney, supra. This allegations raised in the Applicant's habeas corpus could have been raised in a PCR application. "Furthermore, if a person is

Ap. P 48

procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court. S.C. Const. Art. V, ' 5." Id.¹ The Circuit Court is not the proper jurisdiction for this habeas corpus petition, and for this reason, the motion should be denied.

II.

WHEREFORE, having made its Return to the Applicant's motion, the Respondent respectfully requests that the Court deny the SCRCF 60(b) motion.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Aug 13th, 2007.

¹ Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972, 111 S. Ct. 442, 112 L.Ed.2d 425 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only issue when there has been a constitutional violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice. Gibson, supra; Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994).

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STATE OF SOUTH CAROLINA

COUNTY OF YORK

ANTONIO GORDON,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

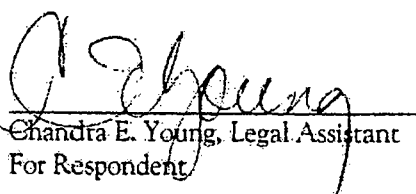
2006-CP-46-0010

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 Applicant's SCRCF 60(b) Motion in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Antonio Gordon, 259798
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

DATED this 15th day of August, 2007.


Chandra E. Young, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)

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

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

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

2006-6 FILED
 11/31/07
 CLERK OF COURT
 YORK COUNTY, SC

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

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

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

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

AND IT IS SO ORDERED.

[Signature], South Carolina
11/31, 2008.

[Signature]
 Roger L. Couch



CLERK OF COURT'S OFFICE

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

Attachment (h) AP. P 51

March 25, 2015

Antonio Gordon 259798
Kershaw Correctional Institute SMU Room 46
4848 Goldmine Highway
Kershaw, SC 29067

Mr. Gordon:

I have enclosed your copies of the documents forwarded to the Clerk of Courts office for filing. You also requested the name of the Court Reporter for January 31, 2008. I have checked with our Court Coordinator and do not find where you were in a hearing, however there was an Order filed February 6, 2008 but there was no court reporter. I have enclosed a copy of the order in question. I hope this has been of assistance to you.

Thank You,

Clerk of Court
Common Pleas Division

A.P. P 52

P.S. Clerk could you please

Inform me who the Court Reporter

WAS on January 31, 2008 In The case of

Gordon v. State, Case No: 2006-CP-46-0018?

Thanks

Ante Gordon

DAVID HARTMAN
C.O.C.P. & G.S.
YORK COUNTY, SC

FILED - RICHMOND
MAR 25 PM 4:07



CLERK OF COURT'S OFFICE

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

Attachment (I)

AP.P. 53

April 9, 2015

Antonio Gordon
Kershaw Correctional Institute
SMU Room 46
4848 Goldmine Highway
Kershaw, SC 29067

Mr. Gordon:

The Clerk of Courts office is in receipt of your letter requesting a copy of your motion which is included with this mailing. In your letter you have also asked us to check to see if you were in a hearing in January 2008. I have asked our Court Coordinator to check the records and we do not show where you were in a hearing during that time frame. Should you need further assistance you will need to contact your court appointed attorney.

Thank You,

Clerk of Court
Common Pleas Division

Antonio Gordon #259798

A.C. I, SMU B242

P.O. Box 1151

Fairfax, SC 29827

February 2, 2015

Attachment (J)

AP.P 54

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

Dear clerk:

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

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

Sincerely,

Antonio Gordon

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

State of South Carolina
County of York

Antonio Gordon #259798,
Petitioner,

vs.

State of South Carolina,
Respondent.

AP.P 55

Attachment (J)

IN THE COURT OF Common PLEAS
Sixteenth Judicial Circuit

Case No: 2006 - CP - 46 - 010

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

FILED-RECEIVED
2016 MAR -9 PM 3:15
DAVID HAMILTON
C.C.C.P. & CIV. S.
YORK COUNTY, SC

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

Statement of the case

The Petitioner filed a statutory habeas corpus January 3, 2006. Gordon v. State, Case No: 2006 - CP - 46 - 010. In the Petition Gordon asserted "General Sessions was without jurisdiction" in accepting his guilty plea because "jurisdiction had not been relinquished by family court". See FN¹ The Honorable John C. Hayes, III, dismissed with prejudice without holding an evidentiary hearing. See Attachment (A) (order of dismissal dated April 30, 2007, filed June 1, 2007).

On August 7, 2007 Petitioner filed a S.C.R.P. Rule 60(b) motion adjourning Honorable John C. Hayes, III, was a conflict of interest and asked that a different Honorable Preside over the Habeas Corpus. See Attachment (b)(1) Page 5 (Rule 60(b) motion). Charles B. Burnette, III, was appointed to represent Gordon. On January 31, 2008, the Honorable Rogers L. Couch issued an order granting the Rule 60(b) motion amending and clarifying Judge Hayes original order. See Attachment (b)(2). Thus the Court did not reach the merits of Petitioner's claim. See FN² Petitioner asked Counsel to file a Rule 59(c) motion and notice of appeal and Counsel failed to do so. See Attachment (c)(1)(2)(3) (Letters written to attorney)

FN¹ In the case sub judice Petitioner was 16 yrs of age with an IQ 68 when he was taken into custody July 23, 1998, for murder, two counts of attempted armed robbery, three counts of Poss of a weapon during the commission of a violent crime, Poss of a weapon by a person under twenty-one and criminal conspiracy. The York County Grand Jury indicted the Petitioner as charged on October 15, 1998. On July 16, 1999, the Petitioner pled guilty in "General Sessions" without "first" being waived to General Sessions jurisdiction as those similarly situated less than seventeen years of age charged with a Class A, B, C, or D felony. On July 19, 1999 the Honorable Court John C. Hayes, III, sentenced the Petitioner to forty years of imprisonment.

FN² Lack of subject matter jurisdiction of the cause or subject matter jurisdiction can be raised at any time. See State v. Funderburk, 191 S.E.2d 520 (1972).

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

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

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

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

- FN 1 A motion to amend and reconsideration is in actuality a Rule 59(e) motion to alter or amend Judgment.
- FN 2 Lack of subject matter jurisdiction may not be waived and should be taken notice of by the Court. Anderson v. Anderson, 382 S.E.2d 897 (1989).
- FN 3 A judgment by a Court without jurisdiction of the subject matter is a nullity and must be so treated by the Court's whenever and for whatever purpose it is presented and relied on. Brown v. Malloy, 546 S.E.2d 195 (2001).
- FN 4 Petitioner's jurisdiction claim was the first time it could be appealed as of right because Post-Conviction relief was unavailable or inadequate because he was entitled to his immediate release.

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

AP.P 57

Petitioner asserts that Section 20-7-6605 (1) (Supp. 1998) statutory define a "child" as a person less than seventeen years of age but arbitrarily "exclude" sixteen year old children's charged with a class A, B, C, or D felony as defined in section 16-1-20 from the definition of being a "child" is penal in nature and must be construed strictly against the state and in favor of him Pursuant to William v. State, 386 S.E. 89, 410 S.E. 2d 563 (S.C. 1991) (When a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant.)

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

Therefore, Petitioner is being illegally held in custody in violation of his due process rights under S.C. Const Art I, § 3 and the 14th Amendment to the United States Constitution and he is entitled to his immediate release de jure. See Gibson v. Bechtold, 245 S.E. 2d 258 (W. Va. 1978) (The juvenile law governs and the Circuit Court was without criminal jurisdiction over the relator, he is being illegally restrained of his liberty.)

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

Petitioner asserts the constitutionality of a statute under which defendant held in custody may be tested on habeas corpus. See EX PARTE Hollman, 60 S.E. 19 (The constitutionality of a statute under which defendant held in custody may be tested on habeas corpus.)

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

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

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

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

Petitioner asserts that Post-conviction Relief is unavailable and inadequate because he is entitled to his immediate release and habeas corpus is his "only" remedy. See McCall v. State, 244 S.C. 15, 145 S.E.2d 719 (1965) (The purpose of habeas corpus is to test the legality of the Prisoner's present detention. The "only" remedy that can be granted is release from custody.)

It is clear Gordon was sixteen years of age and family court did not issue an order relinquishing its exclusive jurisdiction to General Sessions as those similarly situated less than seventeen years of age charged with a class A, B, C, or D felony, its clear section 20-7-600(1) is penal in nature and must be construed strictly against the state, its clear that section 20-7-600(1) is unconstitutional which deprived the York County Grand Jury and the General Sessions of its jurisdiction which entitle Gordon to his immediate release and therefore, renders PCR remedy unavailable and inadequate. Gibson v. State, 495 S.E.2d 426 (1998); McCall v. State, supra.

Conclusion

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

This 2nd day of February, 2015

Respectfully submitted

Antonio Gordon

Antonio Gordon #259798

A.C.I. Smu 8-242

P.O. Box 1151

Fairfax, VA 22031

Antonio Gordon #259798

McCormick Correctional Inst

346 Redemption Way

McCormick, SC 29899

March 13, 2009

AP.P 60

Attachment (c) (2)

Dear Mr. Burnette:

I wrote to you concerning a Rule 54(e) motion and appealing Judge Couch Order Granting the Rule 60(b) motion. As you know I did not wish to have my claims waived. Have you filed the Rule ~~60(b)~~ 54(e) motion and Notice of Appeal. Please write me back. Thanks.

Antonio Gordon

Attachment (c) (3)

AP. P 61

Dear Mr. Burnette:

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

Antoni Gordon

July 18, 2010

LEGAL MAIL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)

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

Antonio Gordon, #259798,

Petitioner,

v.

State of South Carolina,

Respondent.

Attachment (K)

ORDER

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

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

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

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

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

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

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

goh #1

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

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

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

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

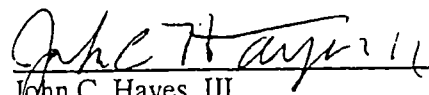
I find that the failure to appeal a ruling, which granted petitioner the relief he sought, resulted in no prejudice to Petitioner. Petitioner asked to and was granted the right to file a Habeas Corpus proceeding in the Supreme Court of South Carolina. Therefore, there existed no grounds upon which an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

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

JEH 2

Ap.P 64

IT IS SO ORDERED.



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

March ^{4th}, 2015
York, South Carolina

#3

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2006CP4600010

Antonio Gordon

John Ozmit
South Carolina State Of

Henry D McMaster

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (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. ☐ See Page 2 for additional information.
- ☐ **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; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: **ORDER**

INFORMATION FOR THE JUDGMENT 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.

s/ John C. Hayes, III.
Circuit Court Judge

2049
Judge Code

3/4/2015
Date

For Clerk of Court Office Use Only

AP.P 64

This judgment was entered on **March 9, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **March 9, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

Anotoio Gordon ACI SMU B 242 PO Box 1151 Fairfax SC
29827

ATTORNEY(S) FOR THE PLAINTIFF(S)

Ashley Anne McMahan PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Antonio Gordon # 259748

Kershaw CI Smu Room 46

4848 Goldmine Hwy

Kershaw, SC 29067

March, 23, 2015

Ap.p 67
Attachment (L)

FILED-RECEIVED
2015 MAR 25 PM 4:02
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

RE: Gordon v. State, CASE NO: 2006-CP-46-0010

Dear clerk:

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

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

Antonio Gordon

State of South Carolina)
County of York)

Antonio Gordon #259798)
Petitioner,)

v.)

State of South Carolina,)
Respondent.)

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

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

AP.P 68

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

Now Comes Antonio Gordon, the Petitioner in the above caption-matter moving in this Honorable Court on a Motion to Reconsider, Alter and Amend Judgment Pursuant To S.C.R. Civ. Proc. Rule 59(e). This motion arises from the Order of dismissal entered by the Court on March 9, 2015 and received by the Petitioner on March 19, 2015.

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

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

Petitioner will point out the difference on the two (2) separate "[Jurisdiction]" claims. Claim "A" in which Gordon asserted Section 20-7-6605(1) is "Penal" in nature and must be construed strictly against respondent are totally inopposit that of Claim "B". Yes claim "A" was attached to the initial habeas but however its obvious that Gordon are asserting in Claim "B" that Section 20-7-6605 (1) is unconstitutional under the equal protection clause of S.C. Const Art I. 13 and the 14th Amendment to the United States Constitution, which the unconstitutional provision deprive York County Grand Jury and General Sessions of its [Jurisdiction] over Gordon's Person and renders his indictments, conviction, and custody all a nullity and void ab initio. See Fm! Its clear from Petitioner's

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

AP.P 69

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

Petitioner will also point out he did ~~not~~ make a claim that the "Constitutionality of a statute" under which a defendant held in "custody" may be tested on Habeas Corpus Pursuant to Ex Parte Hallman, 60 S.E. 19. It's clear Petitioner asserted Section 20-7-6605 (1) was unconstitutional which deprived Respondent of its [custody] and Petitioner also asserted he was entitled to his immediate release. Therefore, it's clear these claims were not in the initial Habeas Corpus.

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

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

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

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

This 23rd day of March 2015.

Respectfully Submitted
Antonio Gordon

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

Ap. P 70

BURNETTE & PAYNE, P.A.

Attorneys at Law

Charles B. Burnette III
Connie H. Payne

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

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

September 11, 2007

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

Attachment B(1)

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

Dear Judge Hayes:

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

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

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

With best wishes, I am

Sincerely,



Charles B. Burnette, III.

CBBIII/jow

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

State of South Carolina
County of York

Antonio Gordon #259798
Petitioner,
V.

State of South Carolina
Respondent,

AP, P 71
In The Court of Common Pleas
Sixteenth Judicial Circuit
Case No: 2006 - ~~46~~^{CP} - 46 - 0010

Certificate of service

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

FILED-RECEIVED
2015 MAR 25 PM 4:02

I, Antonio Gordon, hereby certify that I served Petitioner
S.C. R. Civ. Proc. Rule 54(c) motion on opposing counsel at:

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

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

Antonio Gordon

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

Antonio Gordon,
S.C.D.C. No. 259798,

Petitioner,

v.

State of South Carolina,

Respondent.

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

Attachment (M)

APR 72

ORDER

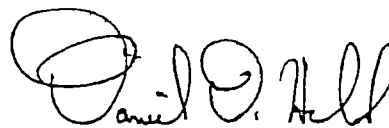
FILED-RECEIVED
2015 APR 20 AM 11:21
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

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

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

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

AND IT IS SO ORDERED.



Daniel D. Hall
Sixteenth Judicial Circuit

April 14, 2015
York, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Antonio Gordon, #259798,

Petitioner,

v.

State of South Carolina

Respondent

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Case No: 2006-cp-46-0010

AP.P 73

MOTION TO RECONSIDER, ALTER AND

AMEND JUDGMENT PURSUANT TO S.C.R.

CIV.PROC.RULE 59(e)

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

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

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

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

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

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

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

Fn2 Petitioner asserts this claim should be considered under S.C. Code Ann § 17-17-10-17-17-200 (supp.2014) pursuant to Hendrick v. State, supra, S.C. Const. Art V., § 4 "subject to the statutory law, the Supreme Court shall make rules governing the practice and procedures in all such courts. Marrochlis, LLC v. Derrick, 682 S.E2d. 301 (2009). A civil procedure may not limit the provisions of a statute. See Hendrick, supra, (Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of SCRPC, the statutory procedure must be followed).

2.

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

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

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

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

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

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

962 (1968).

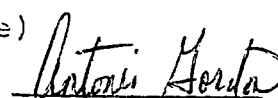
Petitioner asserts failure to hold an evidentiary hearing on his Ex Parte Hollman, supra claim will (1) deprive him of statutory right under §17-17-10-17-17-200(supp.2014) and constitutional remedy pursuant to S.C. Const. Art I., §18-Pennington v. State, 441 S.E.2d 315 (1994), to test the constitutionality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

Therefore, it is asked that this court reconsider its order.

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

Conclusion

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



Antonio Gordon

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

York County
south carolina

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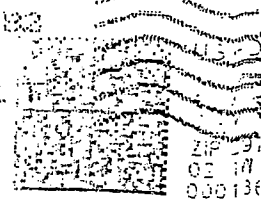
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CLERK OF COURT'S OFFICE

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

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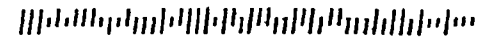
Antonio Gordon #259798
Perry Correctional Institution
430 Oaklawn Road
Pelzer SC 29669

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P.C.I. MAIL

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Attachment (1)

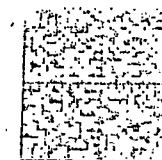
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south carolina

CLERK OF COURT'S OFFICE

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

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NC 282

30 MAR 15



OFFICIAL USE ONLY
DO NOT WRITE IN THESE SPACES

Ap. p 79

Attachment (2)

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MAR 16 2015

Shul 46

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

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MAR 19 2015

KerCI
MAILROOM

29827115151



Antonio Lendon, # 254778

Kershaw, C. I. C.A.K. B. Room 46

4848 Goldmine Hwy

Kershaw, SC 29067

AP.P 80

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SC 290
08 MAY '15
PM 11



Civil

York County Clerk of Court

P.O. Box 649

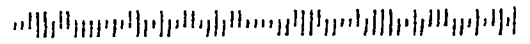
York, South Carolina 29745

SS

Antonio Lendon, # 254778

LEGAL

29745064949



SOUTH CAROLINA DEPART

State of South Carolina
County of York

Antonio Gordon, #259798,
Petitioner,

v.

State of South Carolina,
Respondent.

In The Court of Common Pleas
Sixteenth Judicial Circuit

Case No.: 2006-46-0010

AP. P 81

Attachment
(1) (B)

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

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

- (1) I recieved Judge Hayes order entered March 9, 2015 denying Rule 60 (b) (5) - Austin motion On March 19, 2015 and I filed my Rule 59 (e), motion March 25, 2015.
- (2) I recieved Judge Hall order denying Rule 59 (e), motion on April 30, 2015 and filed my Rule 59 (e), motion on May 7th, 2015.
- (3) I did not discover that Counsel failed to file a notice of appeal until after Gordon v. State, (4951) was complete when I called the S.C. Supreme Court and S.C. Court of Appeals as a concern family member on a cellphone in 2011 and was told there was no appeal on file.
- (4) I did not assent the constitutionality of section 20-7-6605 (1) claim in my original Pleading.
- (5) Judge Hall Order entered April 20, 2015 was mailed to Perry Correctional Institution and recieved on April 23, 2015 when Gordon is Housed at Kershaw Correctional Inst and recieved it on April ~~29~~, 2015 at Kershaw C.I. and Gordon recieved it April 30, 2015.

29

I assent the foregoing is the truth under the Penalty of Perjury.

Sworn to and subscribed before me

this 7th day of May, 2015

Notary: Catherine A. Cline

Exp: My Commission Expires December 22, 2018

Antonio Gordon

Antonio Gordon #259798

State of South Carolina,
County of York

Antonio Gordon, #259798,
Petitioner,

v.

State of South Carolina
Respondent.

In the Court of Common Pleas
Sixteenth Judicial Circuit

AP, P 82

CASE NO: 2006-CP-46-0010

Certificate of Service

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

Attorney General office

Ashley Anne McMahan

P.O. Box 11549

Columbia SC 29211-1549

by depositing a copy in the mail this ^{17th} ~~21st~~ day of May 2015 with sufficient postage.

Antonio Gordon

4848 Goldmine Hwy

Kershaw, SC 29067

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

Attachment (C)

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

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

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

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

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

Attachment (0)

Ag.P 84

TO: Antonio Gordon

FROM: DAVID HAMILTON, YORK COUNTY CLERK OF COURT

RE: POST CONVICTION RELIEF
WRIT OF HABEAS CORPUS

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

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

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

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

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

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

_____ Your PCR was filed on _____ and is being processed.

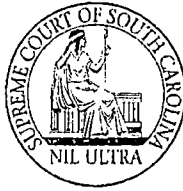
_____ Requires original signature on filings

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

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

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

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



Attachment (P)

Ap.p. 85

South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN W. FRIERSON
DIRECTOR

1220 SENATE STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201

September 11, 2015

Antonio Gordon #259798
KCI
4848 Gold Mine Hwy.
Kershaw, SC 29067

Dear Mr. Gordon:

You have requested a copy of your transcript from proceedings heard in January 2008. Unfortunately, pursuant to Rule 607, court reporters are not required to retain the records from proceedings for more than five years. Enclosed is a copy of that Rule for your review. I'm sorry but our records don't reflect any correspondence from you two years ago. We are sorry that we are unable to assist you further in this matter.

If you have further questions regarding *court reporters and/or transcripts*, please do not hesitate to contact this office again.

Respectfully,

Desiree Allen
Court Reporter Manager

Enclosure

AP.P 86

Attachment (1)

Antonio Gordon, #259798

Kershaw C.I. Oak B 46

4848 Goldmine Hwy

Kershaw, South Carolina 29067

September 7, 2015

RE: Transcript, Antonio Gordon v. State, 2006-CP-46-0010

Dear Ms. Frierson:

I previously wrote to you concerning a transcript from a hearing held in January 2008 and I have yet to hear back from you or your agency which has been over a period of two (2) months. I am requesting the status of the transcript.

Respectfully Submitted

CC:

Ashley Anne McMahan, Esquire

The South Carolina Court of Appeals

Antonio Gordon

Antonio Gordon, #259798

Kershaw C.I. Oak B 46

4848 Goldmine Hwy

Kershaw, South Carolina 29067

Ap. p. 87

Attachment (2)

RE: Antonio Gordon v. State,

Appellate Case No. 2015-001004

Dear Ms. Kitchings:

Please find enclosed a copy of a letter I am writing to Ms. Rosalyn W. Frierson of the South Carolina Court Administration concerning the transcript in the above reference case. This is my second letter addressed to that agency.

Respectfully Submitted

CC:

Ashley Anne McMahan, Esquire

Rosalyn W. Frierson

Antonio Gordon

9-7-2015

Attachment (g)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

AP.P 88

Antonio Gordon, #259798

[Enter the full name of the plaintiff in this action]

Civil Action No. _____

(to be assigned by Clerk)

v.

David Hamilton, John Does, York County

COMPLAINT
State Prisoner

Clerk Of Court, In their individual

capacity

Enter above the full name of defendant(s) in this action

I. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise related to your imprisonment? Yes _____ No ☒

B. If your answer to A is Yes, describe the lawsuit in the space below. If there is more than one lawsuit, describe the additional lawsuits on another piece of paper using the same outline.

1. Parties to this previous lawsuit:

Plaintiff: _____

Defendant(s): _____

2. Court: _____
(If federal court, name the district; if state court, name the county)

3. Docket Number: _____

4. Name(s) of Judge(s) to whom case was assigned: _____

5. Disposition: _____
(For example, was the case dismissed? Appealed? Pending?)

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. PLACE OF PRESENT CONFINEMENT

AP P 89

- A. Name of Prison/Jail/Institution: Kershaw Correctional Institution
- B. What are the issues that you are attempting to litigate in the above-captioned case? First amendment
, Eight Amendment, Fourteenth Amendment
- C. (1) Is there a prisoner grievance procedure in this institution? Yes N/A No N/A
(2) Did you file a grievance concerning the claims you are raising in this matter? Yes N/A No N/A
When N/A Grievance Number (if available) N/A
- D. Have you received a final agency/departmental/institutional answer or determination concerning this matter (i.e., your grievance)? Yes N/A No N/A
- E. When was the final agency/departmental/institutional answer or determination received by you? N/A
If possible, please attach a copy of your grievance and a copy of the highest level decision concerning your grievance that you have received.
- F. If there is no prison grievance procedures in this institution, did you complain to prison, jail, or institutional authorities? Yes _____ No _____
- G. If your answer is YES:
- What steps did you take? See Attachment Complaint
 - What was the result? See attachment complaint

III. PARTIES

In Item A below, place your name, inmate number, and address in the space provided. Do the same for additional plaintiffs, if any.

- A. Name of Plaintiff: Antonio Gordon Inmate No.: 259798
Address: 4848 Goldmine Hwy, Kershaw, South Carolina 29067

In Item B below, place the full name of the defendant, his official position, and place of employment in the space provided. Use Item C for additional defendants, if any.

- B. Name of Defendant: David Hamilton Position: Clerk
Place of Employment: York County Clerk of Court
- C. Additional Defendants (provide the same information for each defendant as listed in Item B above):
John Does, York County Clerk of Court

UNITED STATES DISTRICT COURT
SOUTH CAROLINA DISTRICT

Ap. P 90

Antonio Gordon, #259798

Plaintiff,

v.

David Hamilton, John Does,

York County Clerk of Court,

In their individually capacity

Defendants.

Complaint

Civil Action No.: u

I. JURISDICTION AND VENUE

1. This is a Civil Action authorized by 42 U.S.C. section 1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under section 1331 and 1343(a)(3). Plaintiff Antonio Gordon seeks Declaratory relief pursuant to 28 U.S.C. section 2201 and 2202. Plaintiff Gordon's claim for injunctive relief are authorized by 28 U.S.C. section 2283 and 2284 and Rule 65 of the Federal Rules of Civil Procedure.

2. The South Carolina District is the appropriate venue under 28 U.S.C. section 1391(b)(2) because it is where the events giving rise to these claims occurred.

II. PLAINTIFF

3. Plaintiff Antonio Gordon, is and was at all times mentioned herein a pro se litigant in the Court of Common pleas in South Carolina (York County).

III. DEFENDANTS

4. Defendant David Hamilton is the Clerk of Court personnel in York County South Carolina. He is legally responsible for filing all legal documents in the Record.

5. Defendant John Does is Clerk of Court personnels in York County South Carolina. They are legally responsible for filing all legal documents in the Records.

6. Each Defendant is sued in their individually capacity. At all times mention in this complaint each defendant acted under the color of State law.

IIII. FACTS

7. The Plaintiff filed a statutory habeas corpus dated December 16, 2005 and filed in York County Clerk of Court January 3, 2006. Antonio Gordon v. State, Case No.: 2006-cp-46-0010. In the petition Plaintiff asserted as a ground for relief "General sessions lack jurisdiction in accepting petitioner guilty plea, where jurisdiction had not been relinquished by the family court." See Attachment (1) (habeas Corpus filed by Gordon).

8. The York County Clerk of Court in a letter dated January 30, 2006 signed by Lisa Bennefield Associated Deputy Clerk, informed plaintiff his habeas petition was filed in their court as a post-conviction relief application. See Attachment (2) (Letter from Clerk of Court).

9. The Honorable John C. Hayes, III, issued an order of dismissal with prejudice dated April 30, 2007 filed June 1, 2007. Finding plaintiff had not proven the Gibson v. State, 495 S.E.2d 426 (1998) in that he could not file for habeas corpus pursuant to Keeler v. Mauney, 500 S.E.2d 123 (Ct App. 1998) and that plaintiff could have filed his claims in a post-conviction and to a large extent did file them in his post-conviction relief. See Attachment (3) (Order dismissing habeas corpus with prejudice).

10. Plaintiff filed a SCRPC Rule 60(b) motion dated August 7, 2007. In the motion plaintiff asserted judge Hayes, III was a conflict of interest, judge Hayes failed to inform plaintiff of an appeal, and prayed for relief that judge Hayes recuse his self and a different judge who is not in conflict with the case hear the merits of the habeas petition. See Attachment (4) (Rule 60(b) motion filed by Gordon). See Enl

Enl Judge Hayes signed an order in Gordon v. State, 2000CP461414 asserting he was a conflict of interest. See Attachment (A) (Order changing venue signed by judge Hayes).

11. Plaintiff was court appointed attorney Charles B Burnette, III, of Rock Hill, South Carolina to represent him on the Rule 60(b) motion.

12. Judge Hayes recused himself and a evidentiary hearing on plaintiff Rule 60(b) motion was convened in January 2008. See Fn2 Judge Couch issued an order granting plaintiff relief he did not ask for in a order dated January 31, 2007 filed February 6, 2008. In the order judge Couch "Therefore, I grant the Petitioner's Motion to Reconsider and amend and clarify Judge Hayes Order that the Petitioner is without prejudice to bring a Habeas Corpus Petition in the original jurisdiction of South Carolina Supreme Court." See Attachment (5) (Judge Couch Order issued January 31, 2008 filed February 6, 2008)

13. Plaintiff wrote counsel after receiving the Order granting the Rule 60(b) motion and asked him to file a SCRPC Rule 59(e) motion and a Notice of Appeal. Counsel failed to file the Rule 59(e) and Notice of Appeal at Plaintiff request. See Fn3 It wasn't until Gordon v. State, (4951) was final that Plaintiff found out Counsel failed to honor his request.

14. Plaintiff filed a second Rule 60(b) motion-Austin v. State, 409 S.E.2d 395 (1991) dated February 2, 2015 filed March 9, 2015.

15. In the petition plaintiff asserted that Judge Couch Order should be vacated because he erroneously ruled on plaintiff Rule 60(b) motion as a Rule 59(e) motion and that Judge Hayes Order dated April 30, 2007 filed June 1, 2007 is a nullity and that counsel failed to file a Rule 59(e) motion and a Notice of Appeal of Judge Couch Order at plaintiff request. Plaintiff also asserted two (2) Juvenile Jurisdiction claims, namely,

Fn2 The date of the hearing on the Rule 60(b) motion is unknown to plaintiff.

Fn3 Plaintiff filed a post-conviction relief application after Gordon v. State, (0010). The Respondent/State of South Carolina filed a motion to "RESTRICT PLAINTIFF FROM FILING ANY FUTURE POST-CONVICTION RELIEF APPLICATIONS THAT RAISES THE SAME GROUNDS IN THIS ACTION, ANY GROUNDS RAISED IN A PRIOR ACTION, OR ANY ALLEGATIONS THE APPLICANT COULD HAVE RAISED." Antonio Gordon v. State, 2008CP464951. See Attachment (6) (Pages 24-25 Order restricting plaintiff from filing future "[p]ostconviction applications" signed by Judge Lee Alford filed January 25, 2010).

S.C. Code Ann § 20-7-6605(1)(supp.1998) Titled Define "[C]hild" statutory is penal in nature and must be construed strictly against the state and because §20-7-6605(1) being unconstitutional it deprived the York County Grand Jury and General Sessions of its jurisdiction over Plaintiff person which make his indictments, conviction and custody all a nullity void ab initio. See Attachment (6) (Rule 60(b) motion filed by plaintiff dated Feb 2, 2015).

16. Judge Hayes, JJJ in a Order dated March 4, 2015 filed March 9, 2015 found that he was not a conflict of interest, plaintiff seeking to raise for at least the second time, an issue regarding Family Court/General Sessions jurisdiction and therefore, the current proceeding on this issue is dismissed as it is a subsequent request for relief which has been previously ruled on and unappealed. Plaintiff Austin review must fail because plaintiff was granted relief in which he asked for in his Rule 60(b) motion that resulted in no prejudice to plaintiff. See Attachment (7) (Order dismissing plaintiff Rule 60(b) motion without prejudice dated March 4, 2015 filed March 9, 2015).

17. Plaintiff filed a Rule 59(e) motion dated March 23, 2015 filed March 25, 2015. asking Judge Hayes to Reconsider, alter and amend his judgment and find that he was a conflict of interest, plaintiff did not file the juvenile family court jurisdiction namely, §20-7-6605(1) deprived the York County Grand Jury and the York County General sessions of jurisdiction over his person because that provision are unconstitutional and that jurisdiction claims can be raised at any time, and that he may test the constitutionality of statute under which he held in custody on habeas corpus and that plaintiff should be entitled to a Austin hearing because plaintiff was prejudice by Judge Couch Order. See Attachment (8) (Rule 59(e) motion file March 25, 2015). See Fn4

Fn4 Plaintiff filed a petition for belated appeal and habeas corpus petition dated March 23, 2015 filed March 25, 2015, on Judge Hayes Order dated April 30, 2007 filed June 1, 2007. See Attachment (9) (Petition for belated appeal pursuant to Austin v. State, Odom v. State, 523 S.E.2d 753 (1999); bray v. State, 620 S.E.2d 743 (2005) and Habeas Corpus pur to §17-17-10-200(supp.2014).

18. Judge Hayes recused himself and Judge Daniel D. Hall presided over the case. In a Order dated April 14, 2015 filed April 20, 2015 Judge Hall found that the case was fully adjudicated, complete with an Order granting a Rule 60(b). Plaintiff then had a second PCR action, complete with a full evidentiary hearing (2008CP464951). Plaintiff request the Court reconsider "for at least a second time" the jurisdictional issues previously brought before the court. The issues have been litigated and Orders issued. Also per S.C.R.Civ.P. 59(e) mandates, the motion must be made "no later than 10 days after the receipt of the written notice of entry of judgment". Since "these" issues have been previously heard and ruled on, and since "these" issues are untimely, the Defendant's motion are DENIED. See Attachment (9) (Order issued from Judge Hall on Rule 59(e) motion filed April 20, 2015)

19. Plaintiff received Judge Hall Order on April 30, 2015 and he filed a second Rule 59(e) asking Judge Hall to reconsider, alter and amend his judgment and find that Plaintiff was entitled to a Austin review because he did not found out counsel failed to file an appeal at his request until after (2008CP464951) complete and final, that plaintiff should be entitled to an evidentiary hearing on his Ex Parte Hollman, 60 S.E. 19 1908) claim, that he did not raised the unconstitutionality of §20-7-6605(j) deprived the York County Grand Jury and General sessions of its jurisdiction over his person therefore his indictments, conviction and custody all is a nullity and void ab initio, that his jurisdiction claim could be raised at any time and that plaintiff did file his Rule 59(e) motion filed March 25, 2015 timely. See Attachment (10) (Plaintiff second Rule 59(e) motion dated May 7, 2015 with Attachment (1) envelope dated April 29, 2015 showing receipt date of Judge Hall Order and Attachment (2) envelope dated March 19, 2015 from York County clerk of court showing receipt of Judge Hayes Order dated March 4, 2015 filed March 9, 2015 and attachment (1)(b) affidavit of plaintiff in support of Rule 59(e) motion dated May 7, 2017).

*

19(A). Plaintiff filed a "Notice of Appeal from judge Hall Order filed April 20,2015 and received April 30,2015 by plaintiff and informed the South Carolina Supreme Court that plaintiff had a "second" Rule 59(e) motion pending.See Attachment (G) (Notice of Appeal dated May 6,2015)Antonio Gordon v. State, Appellate Case No.:2015-001004

Ap. P 96

20. On May 18, 2015 Plaintiff received returned back to him in the mail his second Rule 59(e) motion with a letter from Defendant David Hamilton indicating Plaintiff previously filed the same type of "motion" and an order was signed denying that motion, "furthermore an Order Restricting Future Filing is in place therefore our office is returning your motion." See Attachment (11) (Letter from Defendant David Hamilton undated but see attachment (b) envelope dated May 18, 2015 letter and motion was returned in with attachment (c) (envelope plaintiff mailed motion in dated May 8, 2015).

21. Plaintiff attempted to file a Motion for summary judgment on his petition for belated appeal that was filed March 25, 2015 and the Defendant David Hamilton a second time return plaintiff motion for summary judgment refusing to file the motion. In its letter undated Defendant David Hamilton blaim his unconstitutional action on a motion to restrict plaintiff from future filing. See Attachment (12) (motion for summary judgment and attachment (13) (letter from Defendant David Hamilton stating he will not file plaintiff motion for summary judgment because a motion to restrict future filing is in place. But See Attachment (d) (envelope plaintiff motion mailed in and attachment (e) envelope plaintiff receive his motion back from Defendant David Hamilton which would be dates June 9, 2015 mailed to Defendant and June 15, 2015 Received from Defendant)

V. LEGAL CLAIMS

22. Defendant David Hamilton acted outside his "jurisdiction and judicial capacity and deliberate indifference when he failed to file plaintiff SCRCF Rule 59(e) motion and Motion for Summary Judgment based upon a motion that "[o]nly" Restricted Plaintiff from filing any "Future post-conviction applications that raises the same grounds in case 2008CP464951 PCR, any grounds raised in a prior action, or any any allegations the applicant

could have raised." In violation of plaintiff First amendment fundamental constitutional right to access the courts.

23. Defendant David Hamilton acted outside his jurisdiction and judicial capacity and acted with deliberate indifference when he failed to file plaintiff SCRCP Rule 59(e) and Motion for Summary Judgment based upon a motion that "[o]nly" Restricted Plaintiff from filing any "Future post-conviction applications that raises the same grounds in case 2008CP464951 PCR, any grounds raised in a prior action, or any allegations the applicant could have raised." In violation of plaintiff First amendment fundamental constitutional right to petition the court ~~and~~ and State of South Carolina for a Redress of Grievance.

24. Defendant David Hamilton acted outside his jurisdiction and judicial capacity and acted deliberate indifference when he failed to file plaintiff motion for SCRCP Rule 59(e) and motion for summary judgment based upon a motion that "[o]nly" Restricted Plaintiff from filing any "Future post-conviction applications that raises the same grounds in case 2008CP464951 PCR, any grounds raised in a prior action, or any allegations the applicant could have raised." In violation of Plaintiff Eight amendment right to cruel and unusual punishment.

25. Defendant David Hamilton acted outside his jurisdiction and judicial capacity and acted deliberate indifference when he failed to file Plaintiff SCRCP Rule 59(e) motion and Motion for Summary Judgment based upon a motion that "[o]nly" Restricted Plaintiff from filing any "Future post-conviction applications that raises the same grounds in case 2008CP464951 PCR, any grounds raised in a prior action, or any allegations that applicant

could have raised." In violation of Plaintiff Fourteenth amendment fundamental constitutional right to be heard.

26. Defendant David Hamilton acted outside his jurisdiction and judicial capacity and acted with deliberate indifference when he failed to file plaintiff SCRCF Rule 59(e) motion and Motion for summary judgment based upon a motion that "[o]nly" Restricted Plaintiff from filing any "Future post-conviction applications that raises the same grounds in case 2008CP464951 PCR, any grounds raised in a prior action, or any allegations the applicant could have raised." In violation of plaintiff fourteenth amendment right to equal protection of the law where the plaintiff was deprived access to the court, deprived an opportunity to petition the court and state for a redress of grievance and the opportunity to be heard as those similarly situated.

V. RELIEF

Ap. p 99

State briefly and exactly what you want the court to do for you.

Plaintiff pray for injunctive relief that defendant David Hamilton
discontinue violating plaintiff rights immediately and perform his

judicial duties by accepting plaintiff Rule 59(e) motion and Summary
judgment motion for filing because they are not "[p]ost-coviction

applications."

Plaintiff pray for relief of declaratory judgment that the acts constituted
by Defendant David Hamilton violate plaintiff fundamental constitutional
rights.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this _____ day of _____, 20_____.

Signature of Plaintiff

Attachment (3) App 100

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Antonio Gordon, #259798)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2008-CP-46-4951

ORDER OF DISMISSAL

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

2010 JAN 25 AM 11:56

FILED-RECEIVED

This matter comes before the Court by way of an application for post-conviction relief filed January 9, 2009 and amended on May 19, 2009. The Respondent made its return and motion to dismiss on July 27, 2009. An evidentiary hearing into the matter was convened on December 1, 2009 at the Moss Justice Center in York County. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Jennifer A. Kinzler represented the Respondent.

At the hearing, counsel for both parties presented argument to the Court. The Court also had before it copies of the records of the York County Clerk of Court regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections; the transcript from the motion to suppress hearing and guilty plea; the briefs from the direct appeal; the South Carolina Court of Appeals opinion dismissing the Applicant's appeal; the remittitur from the direct appeal dated January 9, 2001; the application for post-conviction relief (PCR) filed June 20, 2001 (2000-CP-46-1414)¹; the amendment to the application dated May 8, 2003;

¹ The Respondent notes that the Applicant filed a second PCR application on August 21, 2001 (2001-CP-46-1366),

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the Respondent's return to the first PCR action; the consent order changing venue; the transcript of the hearing held respecting the first PCR action; the order filed August 20, 2003 dismissing the first PCR action with prejudice; the order filed December 15, 2003 denying the Applicant's motion for a rehearing and/or motion for reconsideration of the facts; the Johnson petition for writ of certiorari filed on appeal from the denial of the first PCR action; the South Carolina Supreme Court order denying the petition; the remittitur of the appeal from the denial of the first PCR action dated August 9, 2005; the second PCR application filed July 6, 2004 (2004-CP-46-1700); the Respondent's return and motion to dismiss the second PCR action; the conditional order of dismissal filed December 30, 2004 with respect to the second PCR action; the final order filed May 20, 2005 denying and dismissing the second PCR action; the records and documents related to the Applicant's federal petition for writ of habeas corpus (2:05-3327-MBS-RSC) filed on December 22, 2005; the Applicant's state petition for writ of habeas corpus (2006-CP-46-010) filed on January 3, 2006; the Respondent's return and motion to dismiss the state habeas corpus petition; the Applicant's "complaint on unlicensed psychology/psychologist" filed January 23, 2006; an amendment to the state habeas corpus action filed January 23, 2007; the order filed June 1, 2007 dismissing the state habeas corpus action; the Applicant's Rule 60(b) motion to amend and clarify; the Respondent's return to the Rule 60(b) motion; the order granting the Applicant's Rule 60(b) motion to clarify and amend; the current PCR application and amended PCR application (2008-CP-46-4951) including two written statements attached as exhibits to the current PCR application; the Respondent's return and motion to dismiss the current PCR application; the conditional order of dismissal filed August 24, 2009; and the Respondent's

but that it was merged with 2001-CP-46-1414.

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motion to restrict future filings filed on November 19, 2009.

PROCEDURAL HISTORY

The Applicant is currently incarcerated in the South Carolina Department of Corrections. He was indicted in October 1998 by the York County Grand Jury for Murder (1998-GS-46-2847), three counts of Possession of a Firearm During the Commission of a Violent Crime (1998-GS-46-2847-A; 1998-GS-46-1949-A; 1998-GS-46-1950-A), two counts of Attempted Armed Robbery (1998-GS-2849, 1998-GS-46-2850), Criminal Conspiracy (1998-GS-46-2851), and Possession of a Pistol by a Person Under Twenty-One (1998-GS-46-2852). Daniel D'Agostino, Esquire, represented the Applicant.

A hearing on the Applicant's motion to suppress was held on July 12, 14, and 16, 1999.

~~On July 16, 1999, following the suppression hearing, the Applicant pled guilty as indicted. On~~
July 19, 1999 the Honorable John C. Hayes, III sentenced the Applicant to confinement for thirty (30) years for Murder; five (5) years for Possession of a Firearm During the Commission of a Violent Crime; five (5) years for Criminal Conspiracy; five (5) years for Possession of a Pistol by a Person Under Twenty-One; all to run concurrently; and ten (10) years for Attempted Armed Robbery, running consecutive to the thirty (30) year sentence for Murder. This was a negotiated guilty plea to a cumulative forty (40) years confinement.

The Applicant filed a timely notice of appeal and an Anders brief was submitted on his behalf pursuant to Anders v. California, 386 U.S. 738 (1967). Of note to the present action, the Applicant filed a *pro se* brief in which he raised the issue of probable cause to arrest based on an "informant's" statement to law enforcement allegedly given without being advised of her rights.²

² The "informant" to whom the Applicant is referring is Chyneca Dixon, his girlfriend at the time he committed and

The Applicant also contended that both he and the informant were under age and should not have been questioned by law enforcement outside the presence of a parent or attorney. As a result, he argued, the informant's statement was inadmissible because it was obtained illegally and could not have established probable cause for his arrest. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Gordon, 2000-UP-747 (S.C. Ct. App. Filed December 6, 2000). The remittitur was issued on January 9, 2001.

The Applicant subsequently filed a PCR application originally dated June 20, 2001 and amended on May 8, 2003 (2000-CP-46-1414). An evidentiary hearing was held on July 29, 2003. Tara D. Shurling, Esquire, represented the Applicant, who was present at the hearing. Jeanette C. Vanginhoven, of the South Carolina Attorney General's Office, represented the Respondent. Of note to the present action, the Applicant alleged his guilty plea was involuntary and that defense counsel was ineffective for failing to discuss with him evidence of a palm-print found on the victim's car door. The Applicant specifically contended that defense counsel failed to investigate or discuss with him "the fact that the palm print on the victim's car door was unidentified until the time of pre-trial," and that the South Carolina Law Enforcement Division (SLED) never tested the palm print. On August 20, 2003, the Honorable J. Ernest Kinard issued an Order denying and dismissing the application. The Applicant subsequently made a "Motion for Rehearing/Motion for Reconsideration of the Facts" on December 9, 2003. The Honorable J. Ernest Kinard dismissed the Applicant's motion by written Order filed December 15, 2003.

The Applicant filed a petition for writ of certiorari appealing the Order dismissing his

pled guilty to the crimes.

first PCR action.³ On July 21, 2005, the South Carolina Supreme Court issued an Order denying the petition. The remittitur was issued on August 9, 2005.

On July 6, 2004, while his appeal from the denial of his first PCR action was still pending, the Applicant filed a second PCR application (2004-CP-46-1700). The Applicant raised issues previously raised in his first PCR action, including allegations that his guilty plea was involuntary and that defense counsel was ineffective. On December 30, 2004, the Honorable Lee S. Alford issued a conditional order of dismissal in which he expressed the intent to summarily dismiss the application because the Applicant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted the Applicant twenty (20) days to show why the order should not become final. ~~The Applicant did not respond to the~~ conditional order of dismissal. Thereafter, by Order dated May 20, 2005, the Honorable Lee S. Alford denied and dismissed the Applicant's second PCR action.

The Applicant then filed a federal petition for writ of habeas corpus on December 22, 2005 (2:05-3327-MBS-RSC) and an amendment to his federal habeas corpus action on April 14, 2006. On October 16, 2006, Federal Magistrate Judge Robert S. Carr entered his Report and Recommendation that habeas relief should be denied. On October 30, 2006, the Applicant filed an "Objection to Report and Recommendation of Magistrate Judge." Pertinent to this action, the Applicant raised the probable cause issue regarding his arrest. Specifically, the Applicant contended that his warrantless arrest was unlawful because law enforcement only found probable cause to arrest him based on statements given to them "by a minor whoes [sic] parents were not

³ Assistant Appellate Defender Robert M. Dudek filed a Johnson brief on behalf of the Applicant on July 19, 2004.

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present during questioning."⁴ In essence, he asserted that law enforcement's reliance on Chyneca Dixon's statement to establish probable cause led to an unlawful arrest that violated his Fourth Amendment rights. He also claimed that defense counsel was ineffective for failing to advise him that by pleading guilty he waived his right to challenge the lawfulness of his arrest or the statements he made to law enforcement after he was arrested. On February 16, 2007, the Honorable Margaret B. Seymour entered an Order dismissing the Applicant's petition without prejudice to permit him to exhaust all State remedies.

Subsequently, the Applicant filed a state petition for writ of habeas corpus on January 3, 2006 (2006-CP-46-0010). He then filed an amendment to the state habeas corpus action on January 23, 2007 to which he attached Chyneca Dixon's two statements given to law enforcement on July 23, 1998. ~~As it relates to this action, the Applicant alleged that law~~ enforcement did not have probable cause to arrest him because the police relied on Chyneca Dixon's statement to law enforcement that she gave as a result of being threatened outside the presence of her parents. The Applicant asserted that the police should not have questioned Chyneca Dixon ("the minor") outside the presence of her attorney or parents, and that because she was the "probable cause provider," both of their statements to law enforcement, as well as the Applicant's arrest, were all unlawful. The Honorable John C. Hayes denied and dismissed the Applicant's state habeas corpus petition with prejudice by written order dated April 30, 2007 and filed on June 1, 2007.

The Applicant then filed a Rule 60(b) motion in which he alleged a conflict of interest with the Honorable John C. Hayes, III, who was original sentencing judge at the Applicant's

⁴ The Applicant raised this issue in his "Objection to Report and Recommendation of Magistrate Judge." The

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guilty plea. The Applicant also claimed that the order dismissing his state habeas corpus action did not advise him of right to appeal the order. On January 31, 2008 the Honorable Roger L. Couch granted the Applicant's Rule 60(b) motion to reconsider, amend, and clarify, and issued a written order finding that the Applicant was without prejudice to bring a petition for writ of habeas corpus in the original jurisdiction of the South Carolina Supreme Court.

On January 9, 2009, the Applicant filed his third PCR application currently pending before this Court. He amended the application on May 19, 2009. The Applicant attached to his current application two written statements given by Chyneca Dixon (hereinafter "Chyneca") and her mother, Geraldine Dixon (hereinafter "Ms. Dixon"), on January 20, 2008. The statements were given to an investigator who interviewed them on behalf of the Applicant. The Applicant alleges in his current application that he is being held in custody unlawfully for the following reasons:

1. Newly Discovered Evidence;
2. Ineffective Assistance of Trial Counsel;
3. Prosecutorial Misconduct;
4. Brady Violation;
5. Involuntary Guilty Plea;
6. Defense counsel failed to challenge applicant's statement's on the ground that there was no probable cause for the arrest and that "Applicant statement's was [sic] the fruit of the poisonous tree" with regard to the illegal arrest; and
7. Personal Jurisdiction.

"minor" to whom the Applicant refers is Chyenca Dixon.

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The Respondent made its return and motion to dismiss on July 27, 2009 asserting that the application must be summarily dismissed as an improper successive action and as having been filed after the expiration of the applicable statute of limitations. The Honorable John C. Hayes, III issued a conditional order of dismissal on August 24, 2009, in which Judge Hayes expressed the intent to summarily dismiss the application because the Applicant failed to comply with the filing procedures of the Post-Conviction Procedure Act as set forth in S.C. Code Ann. §17-27-45(A) and §17-27-90, and because the application was an improper successive action, but granted the Applicant twenty (20) days to show why the order should not become final. The Respondent also filed a motion to restrict future filings on November 19, 2009 pursuant to In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996). The Applicant did not file a response to the conditional order of dismissal. A hearing into the Respondent's motion for summary dismissal was convened on December 1, 2009. At the hearing, the State proceeded on a motion to dismiss all of the Applicant's claims as procedurally barred by the statute of limitations and successiveness.⁵ The State also argued that the two written statements included with the application were not newly discovered evidence, and that any alleged newly discovered evidence was nonetheless barred by the statute of limitations. The State also made a verbal motion to restrict the Applicant from filing another PCR application in the future under In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

At the hearing, the Applicant, through counsel, acknowledged that he filed a lengthy

⁵ Section 17-27-45(A) imposes a one-year statute of limitations on any ground for post-conviction relief. Section 17-27-90 also requires all grounds for relief be raised in the original PCR application, and provides that any ground for relief finally adjudicated, or not so raised or waived, may not be alleged in a subsequent [or successive] application absent a court finding sufficient reason. Under Aice v. State, 305 S.C. 448, 409 S.E.2d 392, an Applicant cannot maintain a successive application alleging ineffective assistance of post-conviction relief counsel (1991).

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application in this case, and that he was only proceeding at the hearing with the newly discovered evidence claim and with an issue regarding the palm print found on the victim's car.

Specifically, the Applicant asserted that he discovered new evidence that law enforcement coerced and threatened Chyneca into giving her initial statements, outside the presence of her mother, and that those statements implicated him in the crimes. He contended that because Chyneca's statements were threatened and coerced, they could not have established probable cause to arrest him. Therefore, the Applicant asserts, his arrest was unlawful, and any incriminating statements he gave to law enforcement subsequent to his arrest were the "fruit of the poisonous tree."

The Applicant also raised an issue in his current application regarding the palm print obtained from the victim's car. He claimed that he has attempted to obtain certain documents from SLED regarding the palm print that allegedly show he was "not necessarily" the shooter, but that he has been unable to obtain those documents partly as a result of ineffective assistance of PCR counsel during his first PCR action. The Applicant also maintained that defense counsel was ineffective because he never had the palm print tested by his own expert. The Applicant also claimed that he attempted to raise this issue during his first PCR hearing, but he was "coerced into waiving this issue" at his first PCR hearing by PCR counsel.

At the hearing, the Applicant proffered the testimony of two witnesses, Chyneca Dixon and Geraldine Dixon, in support of his newly discovered evidence claim. The State offered the testimony of Mr. W. William ("Willy") Thompson, the Chief Deputy Solicitor for York County, and Daniel D'Agostino, Esquire, as rebuttal witnesses to the proffered testimony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This Court has had the opportunity to review the record in its entirety and has heard the argument of counsel presented at the hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. section 17-27-80 (2003).

First, the Applicant proffered the testimony of Chyneca Dixon. She testified that she is twenty-six years old now and currently lives in Lancaster County. She stated that she was involved in the Applicant's criminal case, and that she gave two statements to law enforcement in July 1998 regarding his case. She stated she was fourteen years old at the time she gave her initial statements. Chyneca testified that a police officer came to her house on the night of the murder, and asked her to come with him to the police station. She testified she agreed to go with him. When PCR counsel asked whether she felt free to leave at that time, Chyneca answered "no." When PCR counsel asked whether she had been escorted by police officers, she answered affirmatively.

Chyneca testified that her interview with law enforcement occurred at the police station in an office with a window, and that she was there for "a long time." She testified that an officer asked her questions and typed her answers as she gave them. She stated that officers kept "going back and forth" until one "finally said 'well, I'm getting kind of tired of this. You know more than you say.'" Chyneca stated that an officer told her she could not go home until she told them exactly what she knew. She testified that she told them she did not know much, but that Antonio Gordon was her boyfriend and that the car involved in the crime belonged to her. Chyneca testified that at that point, she was just saying anything she could to go home. When counsel asked her whether she was allowed to leave after she gave her statements, Chyneca responded affirmatively.

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PCR counsel then asked Chyneca whether she had any further involvement with law enforcement. Chyneca testified that she was trying to get visitation for her and her baby, but that she was told she and her baby could not have any contact [with the Applicant].⁶ She testified that she believed it was because of her age, that she "called and called" but that calling "didn't go no where," so after a while she felt like everything was "done" and "just gave up." Chyneca further testified that after she "gave up," she "was real popular and it was all over the place, everybody knew," so she left. She said she did not want to stay in York County any more, and that she only came back one time to try to get child support.

Chyneca testified that she did not have any further contact from law enforcement, the Solicitor's Office, or the Applicant's defense counsel about the case. She also testified that she was not aware that she would have been called as a witness for the State to testify against the Applicant if the case had gone to trial, and that she did not even know the case went to trial. Chyneca explained that the reason she had not come forward before now was because she left after it all happened. She testified her family stayed in York County, but that she stayed in Lancaster County and Charleston County. She then stated that the only time she came back here (York County) is when her grandfather passed away, but that she otherwise tried to avoid York County as much as possible. She stated that she has not seen the Applicant in almost nine years.

When counsel asked whether Chyneca would have testified for the Applicant at his Jackson vs. Denno hearing about her statements, she answered affirmatively. Chyneca also testified that she was never contacted by Ms. Shurling regarding the Applicant's first PCR action, and that she never received any subpoenas or any other document asking her to come to court. She testified that she got

⁶ PCR Counsel clarified that the Applicant is the father of Chyneca's baby, and was a few months old at the time of

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back in touch with the Applicant recently because the Applicant talked with her mother. She testified that she was at her mother's house one day when the Applicant called, and that she started talking to him on the phone. Chyneca testified that after speaking with the Applicant, she agreed to give a statement to an investigator who came to her house on January 20, 2008.

When counsel asked if there was anything else she wanted to tell the Court during her proffer, she stated that "since that time [she has] grown up and [she] realized that someone was hurt and that cannot be changed." She further stated that she feels like over time "anybody can change," and now when she talks to the Applicant sometimes, she "can see how he has changed." She stated that she regrets any of these events ever happened, that she and the Applicant were young and that as a result, she had to take responsibility of their son by herself. Chyneca stated that she knew someone was hurt, but at the same time she felt "like the judge's sentence should also be fixed for so called witnesses and people who wanted to come forth to help in this situation, but at the same time they get—[she couldn't] find the same word for it." Chyneca also told the Court that she was grateful for the opportunity to say that "some parts of York County justice system is [sic] broken," and that the night she was interviewed by law enforcement "lost [her] faith in the justice system."

On cross-examination, Chyneca testified that her correct date of birth is December 12, 1982, and agreed that she gave her first statement to police under the name Tawanda Burris with a December 10, 1976 date of birth. She agreed that she testified on direct examination that she was fourteen at the time she gave her statement.⁷ Chyneca further agreed that in her first statement to the officer, she said she had been drinking that day and fell asleep around 6:30 p.m. and that she told police officers "Terrance shot the boy," "Terrance said he was driving," and

the murder.

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"Terrance says [sic] he shot the driver in the shoulder."⁸ Chyneca also agreed that she did not identify the Applicant as the shooter or driver of the car in either of her statements to law enforcement.

Chyneca testified that after giving her statements to the police, she walked to her grandmother's house by herself. She testified that after giving her initial statements, she was "never spoken with any more about this case" until the Applicant's investigator came to get another statement from her in January 2008. Chyneca agreed that the substance of her January 20, 2008 statement to the Applicant's investigator is that at the time she gave her initial statements, she was at the police station for a long time, that she was threatened, and that the officers told her she could not leave until she gave them a statement. Chyneca also testified that she was never charged with a crime in association with the Applicant's case.

The Applicant then proffered the testimony of Geraldine Dixon, Chyneca's mother. Ms. Dixon testified that Chyneca was not at home the night the police came to take her down to the station to give her statement, and that no one called her to let her know Chyneca was at the police department. She testified that she did not know Chyneca was taken to the police department for questioning during the early morning of July 23, 1998 until later that morning when the Applicant's aunt called to tell her. Ms. Dixon also testified that she went to the police station, and that when she tried to talk to the police they "shunned [her] off." She stated they would not give her any information, and that she told them they had no right to question Chyneca without a parent or attorney present. Ms. Dixon further stated the police told her they "had just turned her loose, not to worry about it."

⁷ Chyneca would have been fifteen years old at the time she gave her first statements to police.

Ms. Dixon testified that she later picked Chyneca up at her "grand mamma's," and that the police never contacted her or told her anything else. She testified that she had concerns about her daughter being questioned without her being present. She stated that she was never contacted by any attorney for any of the Applicant's co-defendants, the Applicant's defense attorney, law enforcement, or the Solicitor's Office.

On cross-examination, Ms. Dixon confirmed that she did not know Chyneca was taken to the police department until the next morning. She also testified that she did not see any of the boys involved in what happened that night, and that she did not see anything regarding what happened that night. She agreed that all she knew about the case was that her daughter was questioned by law enforcement and that they never called her. Ms. Dixon then testified that the next time she saw Chyneca was at her "grand momma's" and that was when Chyneca told her what happened. She stated that up until that point, she had not spoken to Chyneca "or the law, or nobody else." Ms. Dixon also testified that the only person who contacted her about the case after that morning was the investigator that came to get her January 2008 statement.

Ms. Dixon then denied to this Court that she gave a sworn statement on January 20, 2008 in which she stated she got a call from the police department, and that she went down to the police department to pick her daughter up. She said that could not be true to her knowledge because the police never contacted her. This Court presented her with her January 2008 statement. Ms. Dixon agreed that it was her signature on the statement, and that it did say she went to pick her daughter up after someone from the police department called her. However, Ms. Dixon testified that she must have "got it wrong then" because she did not pick Chyneca up at

⁸ The witness was referring to Terrance McCreary, one of the Applicant's co-defendants.

the police station.

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The State called Mr. Willy Thompson, Chief Deputy Solicitor for the York County Solicitor's Office, to testify as a rebuttal witness to the Applicant's proffered testimony. He testified that has worked at the York County Solicitor's Office since 1992, and that he and Assistant Solicitor John Anthony prosecuted the Applicant for his underlying criminal charges. He stated that he was present during Chyneca's testimony at the hearing in which she testified that no one from the Solicitor's Office ever contacted her regarding the Applicant's case.

Mr. Thompson was shown a document that he identified to be a copy of the subpoena that his investigator at the time, Chuck Neal, personally served upon Chyneca on July 8, 1999. Referring to the subpoena, he stated that Chyneca was served at 362 Workman Street in Rock Hill, South Carolina, and that the subpoena was issued to "Chyneca Dixon a/k/a Tawanda Burris." The subpoena was entered into evidence as Respondent's Exhibit 1.

Mr. Thompson testified that he personally met with Ms. Dixon on July 14, 1999, after she was subpoenaed, and that he took notes during their meeting. He testified that at the meeting, he and Chyneca talked about what her testimony would be in this particular case, because the State was going to call her as a witness to testify against the Applicant if the case went to trial.

Mr. Thompson was shown a copy of his notes that he took during his meeting with Chyneca on July 14, 1999. He identified them as a fair and accurate copy of his original notes and confirmed that the notes were written in his handwriting. He testified that the notes from his meeting with Chyneca indicate that she was interviewed in the Solicitor's Office conference room, that it is a large room with a table and chairs, and that he and his investigator were the only people present during the meeting.

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Mr. Thompson further testified that Chyneca told them about the night of the murder. He testified that Chyneca told him on the night of the murder, when the Applicant came back with the other boys, "everyone was hyped up," but that the Applicant did not say anything at first. He stated that Chyneca told him the Applicant had a look on his face that she could not explain, and that when she and the Applicant went in the back bedroom he told her "I killed someone" but "I don't know who."

Mr. Thompson testified that as he and Chyneca continued to talk, he asked her about any coercion when she gave her statements to law enforcement. He testified that she described her interview with law enforcement as "the officers laying a guilt trip on her" by talking about things "like the fact that someone was killed," and that she "wouldn't want this to happen to [her] family," but that she did not describe it to him as coercion. Mr. Thompson's notes from his July 14, 1999 meeting with Chyneca were then admitted into evidence as Respondent's Exhibit 2. Mr. Thompson further testified that it was his understanding if the case went to trial, Chyneca would testify.

Mr. D'Agostino, the Applicant's defense counsel, testified that he has been practicing law since 1992. He testified that he could not swear under oath that he or his investigator spoke with Chyneca Dixon, but that based on his recollection of the case and his reading of the transcript from the Jackson vs. Denno hearing, he felt confident that he or one of his investigators spoke to Chyneca. Defense counsel identified a document presented by PCR counsel that indicated his investigator billed him for serving Chyneca with a subpoena on July 14, 1999. He testified that his investigator billed him for three hours of work and for the twenty five (25) miles he traveled to serve her with the subpoena. The investigator's bill was admitted into the record as

Applicant's Exhibit 1.

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Defense counsel testified that he made several motions to suppress statements and evidence, and that the issues about the voluntariness of Chyneca Dixon's statements were thoroughly explored during the Jackson vs. Denno hearing, but that Judge Hayes ruled against him on all of them. He stated that if he had called Chyneca Dixon to testify at the Jackson vs. Denno hearing, her testimony would have had no impact on the outcome of hearing. Defense counsel further testified that he vigorously cross-examined Captain Charles Cabiness regarding the circumstances surrounding Chyneca's statements to law enforcement.

Defense counsel testified that all three of the Applicant's co-defendants pled guilty on the same day, and that they all agreed to testify against the Applicant at trial. He also testified that he could not have put the Applicant on the stand if the case proceeded to trial because the Applicant confessed to him that "he did it." He further stated that he hired a psychologist to interview the Applicant, and as a result of the psychologist's findings, a mental deficiency defense was never an option.

Counsel testified that he could not put Chyneca on the stand, because her testimony would not have helped the Applicant. Counsel stated that because the Fourth and Fifth Amendment rights that were allegedly violated when she gave her statements to law enforcement were not the Applicant's rights to assert, her testimony would not have helped the defense. He also testified that the Applicant chose to plead guilty that day, after his three co-defendants pled guilty and agreed to testify against him, and after all of the statements made to law enforcement were ruled admissible. Defense counsel testified the Applicant chose to plead guilty, in light of the evidence against him, because he realized by doing so he had a chance of getting out of jail

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before he died. Finally, counsel testified that in his opinion, the Applicant would have been found guilty had he proceeded to trial, which made pleading guilty the best option for the Applicant, and that was his opinion regardless of any testimony Chyneca could have ever given, particularly because the Applicant said he did it.

First, this Court finds that the proffered testimony and evidence admitted during this PCR hearing have no real significance to the Applicant's case. This Court finds that Geraldine Dixon's testimony is not credible. She previously gave a sworn statement that directly contradicted her testimony given under oath at the PCR hearing. One of her statements that she gave under oath must necessarily be false. Regardless, this Court finds that Geraldine Dixon's testimony is irrelevant and immaterial to anything related to the Applicant's case.

Secondly, to the extent the Applicant relies upon an allegation of newly discovered evidence to show good cause for permitting him to pursue this successive application for post-conviction relief, this Court finds that the Applicant failed to make the requisite showing that the matter constitutes newly discovered evidence. There was no new evidence presented in this case that was not available to the Applicant through his prior applications where the allegations could have been fully explored.

Third, with regard to Chyneca Dixon's testimony, this Court heard her testimony about how she was treated by law enforcement when she gave her statements, and notes its concern about making sure the justice system is fair to everyone, including victims. Nevertheless, this Court also finds that Chyneca Dixon was available to the Applicant during the time he filed his prior PCR applications and state and federal habeas corpus actions. Chyneca Dixon testified at the hearing under oath that no one ever contacted her about testifying at trial, or about anything related to this

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case. This Court finds her testimony to be false, particularly in light of Solicitor Thompson's testimony. The Solicitor subpoenaed Chyneca Dixon for trial. Chyneca Dixon also came to the Solicitor's Office to give information to Solicitor Thompson, and she was prepared to testify at trial. The subpoena and Solicitor's Thompson's notes from the meeting with Chyneca Dixon were admitted as part of the record and testified to by the Solicitor. The Applicant was not misled as to the availability of Chyneca Dixon or as to the circumstances under which her statement was obtained.

Fourth, this Court finds that the Applicant's allegation regarding the palm print is not material or relevant. The Applicant has presented no evidence showing how this evidence is material to the Applicant's guilt or innocence, particularly in light of the Applicant's decision to plead guilty.

Finally, this Court finds that defense counsel's testimony is credible. According to Mr. D'Agostino, the Applicant pled guilty because all three of his co-defendants gave statements admitting their guilt, pled guilty, and agreed to testify against him. At the Jackson vs. Denno hearing, the court ruled the Applicant's statements would be admissible at trial. The Applicant had knowledge of all of this evidence against him at the time he pled guilty. Notably, Chyneca Dixon's statements, whether obtained through coercion, intimidation, or otherwise, were not self-incriminating and did not identify the Applicant as the shooter, although she later told Solicitor Thompson that the Applicant admitted to her that he shot someone. Therefore, any coercion or intimidation that may have accompanied Chyneca Dixon's statements to law enforcement was not a significant factor in the Applicant's decision to plead guilty.

Mr. D'Agostino testified that his investigator served a subpoena on Chyneca Dixon regarding

the trial, and thus he had no trouble finding her. Chyneca Dixon was certainly available and has been available, and the Applicant has failed to show any reason why he could not have called Chyneca Dixon as a witness at his prior PCR hearings.

Therefore, this Court finds that the current application for post-conviction relief must be summarily dismissed, first, because it is successive to the Applicant's prior applications for post-conviction relief and other action challenging the conviction and sentence. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, 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.

Successive applications are disfavored, especially when the grounds raised could have been raised in the initial application; Tilley v. State, 334 S.C. 24, 432 S.E.2d 689 (1999); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. at 448, 409 S.E.2d at 392; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). The prohibition against successive actions includes federal habeas corpus petitions or "any other proceeding taken to secure relief." Id.

An Applicant requesting a new trial based on after discovered evidence must establish that the evidence:

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(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. State v. Mercer, 381 S.C. 149, 672 S.E.2d (2009); State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985).

This Court finds that the Applicant has already presented this newly discovered evidence claim that Chyneca Dixon's statement to law enforcement was given without her mother present as a result of coercion and threats by law enforcement. The Applicant has also already raised the allegation that the palm print lifted from the victim's car does not identify him as the shooter. The Applicant continues to repeatedly pursue these claims which long ago ceased to constitute newly discovered evidence within the definition of the term and which have been decided adversely to him in previous actions. No item of evidence has been discovered since those earlier proceedings that could not have been discovered at the time of the Applicant's first PCR action. Under the rules governing state post-conviction relief actions, the Applicant is foreclosed from relitigating this claim that has been decided previously. Tilley v. State, 334 S.C. 24, 432 S.E.2d 689 (1999); Aicc v. State, 305 S.C. 448, 409 S.E.2d 392 (1992).

Therefore, this Court finds the Applicant has not provided sufficient reason why he should be able to litigate the newly discovered evidence claim or any of the other allegations presented in this third application for post-conviction relief. The application for post-conviction relief must be dismissed because it is improperly successive to the prior applications or actions and is barred by S.C. Code Ann. §17-27-90.

This Court finds that this application for post-conviction relief must also 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.

S.C. Code Ann. §17-27-45(A) (2003) 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.

Also, S.C. Code 17-27-45 (C) (2003) provides:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. 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 in July 1999. The Supreme Court's decision was filed, after the Applicant's unsuccessful appeal. The remittitur was issued on January 9, 2001. The Applicant was therefore required to file his application before January 9, 2002. This Application was filed on January 9, 2009 and amended on May 19, 2009, which is more than seven years after the expiration of the statutory filing period.

Moreover and to the extent the Applicant contends that newly discovered evidence should permit him to pursue this untimely post-conviction relief action, this Court finds that S.C. Code Ann. §17-27-45(C) requires that all newly discovered evidence claims be raised within one year after the actual date of discovery of the facts giving rise to the claim by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. This Court finds that,

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based upon the record before it, the Applicant was aware of and has pursued the basis for this claim beginning in July 1999. This Court finds, alternatively, that upon the exercise of due diligence, the Applicant could have ascertained the facts well in excess of one year prior to filing this current application. He has not presented an item of new evidence and has not established that he could not have ascertained the matter in a timely manner. This Court finds that newly discovered evidence has not been timely asserted in this current application for post-conviction relief, and that the allegation provides no basis to permit the applicant to pursue the current action.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) 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, this Court summarily dismisses the application for post-conviction relief for successiveness, and for failure to file within the time mandated by the Post Conviction Procedure Act. This Court also finds that there is no newly discovered in this case.

This Court further finds that the Applicant has had ample opportunity to present his case. The Applicant has already litigated or had the opportunity to litigate all the claims he presents in this application. The Applicant continues to raise the same groundless claims by repeated collateral attacks on his conviction. The public interest in finality of judgments requires that litigation must eventually come to an end. As a result and pursuant to this Order, the Applicant is prohibited from filing another post-conviction relief application alleging any ground raised in this application, any grounds raised in previous applications, or any allegations that could have been raised previously.

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CONCLUSION

Based on the foregoing, this Court finds and concludes that the application for post-conviction relief must be summarily dismissed because it was filed beyond the applicable statute of limitations, and because it is an improper successive action. Furthermore, the Applicant's allegations and testimony in support of are not newly discovered evidence. Accordingly, the application is dismissed with prejudice.

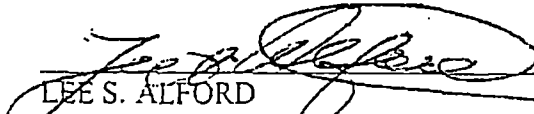
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

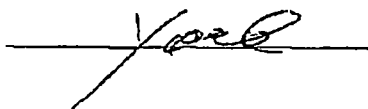
IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief must be dismissed with prejudice;
2. The Applicant is prohibited from filing any future application for post-conviction relief that raises the same grounds raised in this action, any grounds raised in a prior action, or any allegations the Applicant could have raised; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 4th day of January, 2010, 2009.

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LEE S. ALFORD
Presiding Circuit Judge
Sixteenth Judicial Circuit

 , South Carolina

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2-7-81

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

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JUDGMENT IN A CIVIL CASE
CASE NO: 2003CP4604951

Antonio Gordon 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), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court

Order of Dismissal

Dated at York, South Carolina, this 4th day of January, 2010.

Court Reporter:

s/Lee S. Alford

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 25th day of January, 2010, and a copy mailed first class this 25th day of January, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRCP APP-24/FORM 4

David Hamilton - Clerk of Court