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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
Appeal From York County
Common Pleas Court
Daniel D. Hall,Presiding judge

Appellate Case No.:2015-001004
Lower Court Case no.:2006-cp-46-0010

Antonio Gordon, Appellant,

v.

State of South Carolina, Respondent.

MOTION FOR BELATED APPEAL ON JUDGE HAYES ORDER

In the instant case Appellant was sixteen years of age apprehended July 23,1998,at approx 9:30am-10:30am and taken into custody without an arrest warrant based upon probable cause and. Approx 6 to 8 hours after being taken into custody Appellant appeared before a magistrate judge and was issued an arrest warrant for murder. On July 27,1998,Appellant was issued arrest warrants for two counts of attempted armed robbery,possession of a weapon during the commission of a violent crime,possession of a pistol by a person under twenty-one and criminal conspiracy.

On October 15,1998,the York County Grand Jury Charged Appellant with murder,two counts of attempted armed robbery,three counts of possesion of a weapon during the commission of a violent crime and criminal conspiracy by returning true bill indictments. On July 16,1999,without family court relinquishing its exclusive original jurisdiction to general sessions Appellant plead guilty as charged. On july 19,1999,the Honorable John C. Hayes,III,sentenced Appellant to Respondent= custody to a term of forty years.

Appellant filed a habeas corpus petition dated December 5,2005,filed January 3,2006,Antonio Gordon,Case No.2006-cp-46-0010,alleging he was entitled to his release from unlawful confinement.See Attachment (a),

In the petition Gordon asserted as a ground for relief that "General Sessions lacked jurisdiction in accepting his his guilty plea where jurisdiction had not been relinquished by the family court. Attachment (a) page 24, The York County Clerk of court filed the petition as a "[p]ost-conviction relief application". Attachment (b), The Respondent filed their Return dated May 28,2006.

Without providing Appellant an evidentiary hearing on his jurisdictional claim and a opportunity to reply and explain why the order should not become final,the Honorable John C. Hayes,III,in a order dated April 30,2007,filed June 1,2007,issued an order dismissing Appllant's post-conviction relief application/habeas petition with prejudice without informing Appellant with an IQ 68 that he could have appealed his decision. Attachment (d),

Appellant did not appeal judge Hayes decision but instead filed a Rule 60(b),SCRCP motion dated August 7,2007. Attachment (e),

In the motion Appllant asserted as a ground to have the judgment "[r]eopen" that judge Hayes failed to inform him of his appeal rights. Attachment (e), and that judge Hayes was a conflict of interest. Attachment (e), and asked for relief in the form that judge Hayes be recused and a different judge who was not in a conflict with the case decide the habes on the merits. Attachment (e),

The Respondent filed a return to Appellant's Rule 60(b),SCrCP motion. Attachment (f), The Appellant was court appointed Charles B. Burnette,III,to represent him on his Rule 60(b) motion. In January of 2008 an evidentiary hearing was held.See Fn1 The Respondent was represented by Ashley Anne McMahan,esq of the South Carolina Attorney General Of

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Fn1 The transcript of that proceeding was destroyed and this court denied Appellant's motion to reconstruct the record.

Judge Couch presided over the evidentiary hearing and granted Appellant's Rule 60(b),motion finding:

"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 in the original jurisdiction of the Supreme Court".

Attachment (g), See Fn2 Appellant wrote his counsel several letters requesting him to file a Rule 59(e) motion and notice of appeal on judge Couch order. Attachment (c)(1),(c)(2),(c)(3), See Fn3

Argument

Appellant asserts he's entitled to a "Belated Appeal" pursuant to Odom v. State,523 S.E.2d at 755 (1999),because our Supreme Court gave all PCR judges a directive to advise pro se applicants of both their right to appeal,and also their right to apellate counsel. Here in the instant case Judge Hayes did not inform Gordon acting pro se he could have appealed his decision. Therefore,he should be granted a "belated appeal'. Id

Secodly,Appellant asserts he's entitled to a "Belated Appeal" pursuant to State v. Bray,620 S.E.2d 743 (2005),because counsel in the Rule 60(b) setting failed to inform Appellant he could have appealed judge Hayes order once judge Couch granted his Rule 60(b) motion. Therefore,by counsel failing

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Fn2 The Respondent asserts in a motion to restrict future filing that judge Hayes dismissed Appellant's habeas without prejudice.See Attachment (1) (Motion to restrict future filing). Therefore,it is respectfully asked that this Court clarify whether judge Couch dismissed Appellant's habeas without prejudice.

Fn3 Counsel never informed Gordon he could have appealed judge Hayes order since its alleged in judge Couch Order he amended judge HAyes order.

to inform Appellant he could have appealed judge Hayes order once judge Couch granted his Rule 60(b) motion. Therefore,by counsel failing to inform Appellant he could have appealed judge Hayes order after the granting of the 60(b) motion despite time had restarted to appeal,he is entitled to a belated appeal.

Third,Appellant asserts he's entitled to a "belated appeal" pursuant to Austin v. State,409 S.E.2d 395 (1991) because counsel should have perfected an appeal on judge Hayes order even though Appellant asked Counsel to appeal judge Couch order,Counsel should have known Apellant wanted both Orders appealed,therefore,Appellant is entitled to a belated appeal.Austin,supra.

Likewise it was extremely important that judge Hayes informed Gordon with 68 IQ could appeal his decision because he later come back in a order in 2015 and deprive Gordon review stating he failed to appeal his previously decision and (2) Appellant was entitle to judicial review on his claim because he was entitled to his speedier and immediate release from confinement. Appellant will show the court the following:

In construing statutory language,the statute must be read as a whole and sections which are apart of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase.S.C. State Ports Auth v. Jasper City,629 S.E.2d 624,629 (2006). Appellant asserts family court acquired jurisdiction when he was found violating a criminal law and taken into custody pursuant to S.C. Code Ann.§20-7-7205(a)(supp.1998) Title Taking into custody,release,notification",which provides in relevant part:

When a child violating a criminal law or ordinance is taken into custody,the taking into custody is not an arrest. The jurisdiction of the court attaches from the time of taking into custody.See Fn4

Fn4 Pursuant to S.C. Code Ann. §20-7-6605(2)(supp.1998) Title Define Child statutory the "[c]ourt" means the "[f]amily court".

Construing §20-7-7205(a),supra,and S.C. Code Ann. §20-7-6605(1),(2)(supp.1998) Title Define "[C]hild" statutory which provide in relevant part:

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

It is clear the legislature intent is ascertain,that when Gordon was found violating a criminal law or ordinance and taken into custody July 23,1998,approx 9:30am-10:30am,he was a child/person less than seventeen years of age under family court exclusive original jurisdiction as those "similarly situated" because he was not "[charged]" with a class A,B,C, or D felony as defined in section 16-1-20 or felony which provide for a maximum term of imprisonment of fifteen years or more under §20-7-6605(1),prior to being found violating a criminal law and taken into custody.See Fn5

It is argued by Gordon that when the York County Grand Jury "[c]harged" him with one of the class felonies under §20-7-6605(1) providing general sessions its subject matter jurisdiction and the solicitor the authority to remand the case to family court,constituted a "[s]ubsequent event" that could [not] operate to "[o]ust" family court **first** attached exclusive original jurisdiction over the subject matter and Appellant's person pursuant to

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Fn5 Because there is no case law in South Carolina in a juvenile content providing that jurisdiction of the juvenile court attaches from the time the child is taken into custody, Appellant therefore is relying on case law from other jurisdiction that in a juvenile content under statute providing that the jurisdiction of juvenile court attaches from the time the child is taken into custody,it is the time of apprehension that determines which court has jurisdiction and once that jurisdiction attaches it is exclusive original.See D.C.W. v. State,445 So.2d 333 (Fla.1984);In re M.W.,504 S.W.2d 189 Missouri Court of Appeals.1973).

Butler v. Whitt,230 S.C. 279,95 S.E.2d 496 (S.C.1956)(Once the jurisdiction of a court attaches,it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance). "[O]nce jurisdiction of a court attaches it exist for all time until the cause is fully and completely determined".Kinross-Wright v. Kinross-Wright,102 S.E.2d 469,476 (1958). Jurisdiction is not a light bulb which can be turn off or on during the course of a trial. Once a court acquires jurisdiction over an action it retains jurisdiction over the action throughout the proceeding...If the converse of this were true,it would be within the power of any party to preserve or destroy jurisdiction of the court at his own whim.Silver Surprise,Inc v. Sunshine Mining Co,74 Wash.2d 519,523,445 P.2d 334-336-37 (1968);Atlantic Corp. v. United States,311 F.2d 907 (1st Cir.1962).

Therefore,because Appellant was under family court exclusive jurisdiction from the time he was found violating a criminal law and taken into custody,family court had to first have a waiver hearing waiving him up to general sessions,and because there was no transfer hearing held and a order issued relinquishing jurisdiction by family court Appellant's guilty plea judgment is void ab initio pursuant to S.C. Code Ann §20-7-400(a),(3)(supp.1998) Title "Exclusive original jurisdiction of family court" which provide in relevant part:

(a) Except as otherwise provided herein,the Court shall have exclusive original jurisdiction and shall be the sole Court for initiating action:

(3) Concerning any child seventeen years of age or over,living or found within the geographical limits of the Court's jurisdiction,alleged to have violated or attempted to violate any State of local law or municipal ordinance prior to having become seventeen years of age and such person shall be dealt with under the provision of this court relating to children.

See State v. England,245 S.E.2d 608 (S.C.1978) where our Supreme Court held "Defendant was a person less than seventeen years of age under family court

exclusive jurisdiction and since family court had not relinquished its jurisdiction,defendant should have been dealt with under chapter relating to children".

Therefore,General Sessions did not have the authority to exercise its subject matter jurisdiction to convict and commit Appellant to Respondent's custody for a term of imprisonment of forty years because the court lacked personal jurisdiction, and did not have the power to render the particular judgement requested and Appellant was thus entitled to his release when he filed his petition in 2005 because the sentence exceeded the statutory maximum authorized by law under the children code of laws pursuant to Section 20-7-400(b)-Sanders v. State,314 S.E.2d 319 (1984)(Family court jurisdiction cannot extend past twenty first birthday),Appellant was thus entitled to his release de jure because he had pass twenty-one years of age.In Interest of Keith Lamont G,405 S.E.2d 406 (1991).

Even though Appellant's claims was congnizable under the post-conviction relief act S.C. Code Ann. §17-27-20(1)-(6),the relief he requested for was not available because the only remedy available to a prisoner requesting his speedier and immediate release is habeas corpus.See McCall v. State,145 S.E.2d 419 (1965) (The purpose of habeas corpus is to test the legality of the prisoners present detention.The only remedy that can be granted is release from custody);Carmardo v. Walker,794 F.Supp.65 (1992)(When a state prisoner is challenging the very fact or duration of his physical imprisonment,and the relief he seeks is the determination that he is entitled to immediate or speedier release from that imprisonment,his sole remedy is a writ of habeas corpus).

Furthermore,Appellant asserts granting him a belated appeal and remanded the case to the lower court for a belated appeal on judge Hayes order will not result in a time barred application because our Supreme Court has held in Odom v. State,523 S.E.2d 753 (1999) that the statute of limitation under

the post conviction relief act will not be applied to belated appeals.

Appellant also contends a remand would not result in a successive application under section 17-27-90 because he is not mounting a collateral attack on his conviction or sentence under section 17-27-20(a),(1)-(6). Our Supreme Court in William v. State,662 S.E.2d 615 (2008) held "PCR relief is a proper avenue of relief "[o]nly" when the applicant mounts a collateral attack challenging validity of his conviction or sentence. The only exceptions are claims,specifically listed in PCR Act,that an applicants sentence has expired,or that an Applicants probation,parole,or conditional release has been unlawfully revoked.Code 1976 §17-27-20(a)-Al-Shabazz v. State,527 S.E.2d 742,749 (2000)

To be exact the Supreme Court reason of not applying the statute of limitation in Odom v. State,supra,is because Odom was not mounting a collateral attack on his conviction or sentence. Here that same reason apply because Appellant is not mounting a collateral attack on his conviction or sentence but instead requesting a belated appeal challenging the procedures instituted on judge Hayes order. Therefore,because Appellant is not mounting a collateral attack on his conviction or sentence his case is inopposit than Aice v. State,409 S.E.2d 392 (1991) and section 17-27-90 does not apply.

CONCLUSION

It is respectfully asked that this Court remand the lower court for a belated appeal on judge Hayes order and or allow Appellant proceed in this Court on Belated Notice of Appeal in this Court on Judge Hayes Order where merits has been shown.

Respectfully Submitted.

Antonio Gordon,#259798
Kershaw CI P-B#35
4848 Goldmine Hwy
Kershaw,South Carolina 29067

Antonio Gordon
May 27, 2016

Attachment (A)

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS AP.P 1
COUNTY OF YORK)	06-CP46-010
Antonio Gordon,#259798)	PETITIONER FOR WRIT OF HABEAS CORPUS
Petitioner,)	F-763891,F-763897,F-763898,F-763901,F-763902
Vs.)	F-763914
John Ozmit)	
Director of the)	
South Carolina Dept.)	
of Corrections and the)	
Henry D. McMaster,)	
Attorney General of)	
South Carolina)	

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DAVID HAMILTON
C.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 arguements 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 appropiate when there has been a violation, which, in the setting constitutes a denial of fundemental 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. 962,19 L.Ed.1215 (1968).

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

QUESTION PRESENTED

Ap. P 2

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 withdrawn 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 then plea guilty??
5. Petitioner was denied due process where he was allowed to plea guilty under unambigous 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 licenses as a psychologist under South Carolina law and regulation?

STATEMENT OF CASE

On October 15,1998,the York County Grand Jury indicted the petition 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 6,20000).

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 involement 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 surpressed 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 surpressed due to the police did not have probable cause to arrest.

Counsel requested that petitioner be evulated 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 minmum 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 minmum sentence of thirty years without the possibility of earning "good behavior" and "work credits",rendered the plea invalid.The mandatory minmum was only mention in passing by the judge.

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

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

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

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

INVOLUNTARY GUILTY PLEA(B)

The petitioner contends that his guilty plea was involuntary and unintelligently made,and in violation of due process due to the fact that petitioner suffered from a psycological 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 psycological check indicate borderline functional IQ's,1995 psycological shows an IQ 68.Dr. Venn IQ examination shows IQ 68,he is a individual that's easly lead around.

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

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

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

PETITIONER WAS DENIED DUE PROCESS, PETITIONER PLED GUILTY WITHOUT THE ABILITY TO 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 offense 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 then 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 beleive that the phrase "the same offense" should be interpreted to mean one thing for purposes of the prohibtion 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 punshment 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 possession of a weapon during the commission of a violent crime.A State has wide latitude to define crime and prescribe the pnishment 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,aState cannot be allowed to convict a defendant two,three or more times simple 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 arguement 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 aquittal 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 involuntar 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. Frnklin,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 arguement 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 proceedin

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 suceeding 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 sacrified 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 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 a 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 cannon and deeming the cannon 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 Cannon] is obvisiously not something which the defendant alone can waive."

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

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

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

Footnote 35 to the Miranda opinion and the lawyer's right to assist a "cleint" 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 footenote 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 UNAMBIGOUS 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 guidence 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 Kemplen 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 guidence in assisting the Family Court judge to present records which a review court can consider in a meaningful manner.

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

is to provide measures of guidence 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" recieves 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 allege offense,it is the duty of the circuit court immediately to transfer the case,together with all the papers,documents,and testimony connected with it,to the Family Court of competent jurisdiction,"However,under the same statutory subsection (10) authorize waiver on the basis of ages fourteen years or older is charged with an offense which,if committed by an adult,provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which,if committed by an adult,committed magistrate shall bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.For purpose of this item,an adjudication or conviction is considered a second adjudication or conviction only if the date of the commission of the second offense occurred subsequent to the imposition of the sentence for the first offense.

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

where petitioner is entitled to a juvenile waiver hearing under due process of law,and S.C. statutory.The arguement that the petitioner was sixteen years of age and committed the offense's murder and several other felonies is ambigous 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 then 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 guidlines 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(I) give no set guidlines 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 beleives 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. Kemplen 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 asa Juvenile or an adult. Petitioner f- urther 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 comptence 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 opion 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 there 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 Psychologis from Columbia,South Carolina who testified that the petitioner was competent to stand trail 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 pratice 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 license 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 forgoing reason's petitioner due process right to the United States Constitutional and South Carolina Constitution where violated.

For the forgoing reason's the petitioner should receive a new trial and afforded a new evaluation.

App. 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

MEMORANDUM OF LAW

Gordon argues that a decision by a Court not to entertain a request is not a final judgement on the merits.Ratherit 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 it's original jurisdiction,this Court's primary function is to act as an appellate Court to review appeals from the trial courts.In rule 229,SCACR,this Court indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State.Only when there is an extraordianary reason such as eastion 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 siginicant 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

/S/ Antonio Gordon

06CP46 - 10

10

CLERK OF COURT'S OFFICE

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

Attachment (b)

App. P 29

January 30, 2006

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

Re: Petition for Habeas Corpus

Dear Mr. Gordon:

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

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

Sincerely,

Lisa Bennefield

Lisa Bennefield
Associate Deputy Clerk

(Attachment (d)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE 16TH JUDICIAL CIRCUIT
COUNTY OF YORK) Case No.: 2006-CP-46-0010
)
Antonio Gordon, #259798,)
)
Petitioner,)
)
v.)
) **ORDER OF DISMISSAL WITH PREJUDICE**
State of South Carolina,)
)
Respondent.)

FILED/RECEIVED
2007 JUN -1 AM 8:40
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

App. P 36

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

App. P 37

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] (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-RJ) 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.

App. 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,

App. P. 39

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).

App. 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
Respondant

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

Attachment (e) Ap. P. 41

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

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 arolina Department of Corrections pursuant to orders of ommitments of the Clerk of Court for York County. On october 16, 998, the York County Grand Jury indicted the applicant for urder, two counts of Attempted Armed robbery, three counts f Possession of a weapon during the commission of a violent rime, Possession of a weapon by a person under twenty-one, d Criminal Conspiracy.

App. 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 summerily 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 of an adverse party has been brought before the court, specially where such a judgement has been imposed through conflict of Interest upon the court. such conflict upon the court places the judiciary's integrity into serious question and jeopardizes the machinery of Judicial decision-making by causing it to become unfair and fundamentally flawed; See: Downing V. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (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., but 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 259798
McCorm. Corr. Inst
386 Redemption Way
McCormick, SC 29899

worn to and subscribed before
e this 28 day of Aug 07
tary: Phyllis L Young
xp: 8/28/2011

Attachment (f)

App. p 47

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT Case No.: 2006-CP-46-0010
Antonio Gordon, #259798, Petitioner, v. State of South Carolina, Respondent.	**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

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 SCRCP 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: Ashley A. McMahan
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).

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS
ANTONIO GORDON, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	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 SCRCP 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)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT
) 2006-CP-46-010

Antonio Gordon, SCDC No. 259798,

Petitioner,

v.

State of South Carolina,

Respondent.

Attachment (9) AP.P 50

ORDER GRANTING RULE 60(b) MOTION

Attachment (9)

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.

Spartanburg, South Carolina

1/31, 2008.

Roger L. Couch

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

February 21, 2008

App. P 59

RE: Antonio Gordon #254798 v. State of South Carolina
Case No: 2006-CP-46-0010

Attachment (c)(1)

Dear Mr. Burnette:

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

Antonio Gordon

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

APP 60

March 13, 2009

Attachment (C)(2)

Dear Mr. Burnette:

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

Antonio Gordon

Attachment (c) (3)

App. 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.

Antonio Gordon

July 18, 2010

LEGAL MAIL

RECEIVED
JUN 03 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
DANIEL D. HALL, PRESIDING JUDGE

Antonio Gordon, Appellant,

v.

State of South Carolina, Respondent

CERTIFICATE OF SERVICE

I, Antonio Gordon, hereby certify that I did serve a copy of Appellant's motion for belated appeal on judge Hayes order filed June 1, 2007, and Appellant's initial brief and Designation of matter on:

Attorney General Office
Ashley Anne McMahan, Esquire
P.O Box 11549
Columbia, South Carolina 29211

by depositing a copy in the mail with sufficient funds this 27 day of May, 2016.

Antonio Gordon

Antonio Gordon
4848 Goldmine Hwy
Kershaw, SC 29067

Antonio Gordon#259798
Kershaw CI P-B-35
4848 Goldmine Hwy
Kershaw,South Carolina 29067

May 27,2016

RE:Gordon v. State

Appellate Case No.2015-001004

Lower Court Case No. 2006-cp-46-0010

Dear Clerk:

Please find Appellant's initial brief, designation of matter and a motion for a belated appeal on Judge Hayes order I am filing. The opposing Counsel has been served with the same.

Respectfully Submitted

Antonio Gordon
May 27, 2016