STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from York County
Court of Common Pleas
Daniel D. Hall, Circuit Court Judge

Appellate Case No.:2015-001004

Antonie Gordon, Appellant,

v.

State of South Carolina, Respondent.

Appellant's Reply Brief

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STATEMENT OF THE GROUNDS

Whether the circuit court was without jurisdiction over the subject matter and Appellant because family court acquired first jurisdiction over the subject matter and his person upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)(Supp.1998) Title "Taken into custody"?

Whether Judge Couch Order is void?

Whether the lower court abused it discretion and committed error of law when it found Appellant's Austin rreview must fail because he was not prejudice because he was granted the relief contemplated in his pleading?

Whether the lower court committed error of law and abused it discretion when it found Appellant had previously raised his jurisdiction issue that the unconstitutionality of §20-7-6605(1) deprived the YOrk County Grand Jury and General Sessions of its jurisdiction to indict and accept his guilty plea in the initial filing and that it had been heard and ruled on,untimely and could have been raised in (PCR) 2008-cp-46-4951?

Statement of the case

July 23,1998,Rock Hill City police in York County made a warrantless arrest of Antonio Gordon.See Appendix volume one pages 80 line 16-pg 83 line 16,page 88 line 24-page 89 line 10 (Detective John Thickens testimony)-with Appendix volume page 208 line 19-24 (Captain Charles Cabiness testimony). Gordon was apprehended and taken into custody at approx 9:30am-10:30am.Appendix volume one page 208 line 19-page 209 line 12 (Charles Cabiness testimony).See Fn1

Approx 6 to 8 hours after the Appellant was apprehended and taken into custody he appeared before a magistrate judge and singed a arrest warrant for murder. and had a bond hearing.See Appendix volume one page 89 line 13-pg 90 line 12-Appendix volume one page 101 line 1-24 (John Thickens testimony). Gordon was "[b]ooked" into the city jail at apprx 15:57pm.See Appendix volume one pages 211-213.

On July 27,1998,Gordon was issued arrest warrants for two counts of attempted armed robbery,possession of a weapon during the commission of a violent crime,criminal conspiracy and possession of a pistol by a person under twenty one.See Appendix volume one pages 222-224.

October 15,1998,the York County Grand Jury indicted Appellant 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 pistol by a person under twenty one and criminal conspiracy without family court binding Gordon over to the court of general sessions.See Appendix volume one pages 225-247

On July 16,1999,after a Jackson v. Denno hearing Appellant plead guilty in general sessions and had not been given a detention hearing,served with a juvenile petition,notice,hearing,full investigation,counsel,access to

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Fn1 Gordon was "[s]ixteen" years of age with an IQ 68 when he was taken into custody.

materials considered by the court and a statement of reason in family court as those "similarly situated" less than seventeen years of age found violating a criminal law and taken into custody. On July 19,1999,the Honorable John C. Hayes,III, sentence Gordon to a forty year life sentence.

Appellant filed his first post-conviction relief application June 20,2000.Antonio Gordon v. State,2000-cp-46-1414. In the application he asserted as a ground for relief that counsel was ineffective pursuant to family court matters.Appendix volume one pages 248-252.Appellant filed a second PCR while (1414) were pending.Antonio Gordon v. State,01-cp-46-1866. In the application Gordon asserted "lack of subject matter jurisdiction" (family court never relinquished its jurisdiction,general sessions was without jurisdiction to accept the plea).See Appendix volume one page 254-257. Gordon amended his application to and raised a second subject matter jurisdiction issue,namely,because S.C. Code Ann. §20-7-6605(1)(supp.1998) Title "Define Child" statutory was unconstitutional general sessions was without jurisdiction to convict and impose sentence.See Appendix volume one pages 268-274.See Fn2

At an evidentiary hearing convened on July 29,2003,court appointed Counsel Tara Shurling,esq inadequately raised Appellant issues as ineffective assistance of counsel (failure of counsel to make a concerted effort to convince the solicitor's office to remand case to family court).See Appendix volume one page 285 line 15-24,page 286 line 23-pg 287 line 1. The PCR Court did not make specific finding of fact and conclusion of law on the jurisdictional issues in its order.See Appendix volume one pages 348-358

Gordon filed a second PCR application and filed a subject matter jurisdiction issue (failure to have waiver hearing).Antonio Gordon v.

Fn2 Appellant asked his counsel to present both jurisdiction issues to the post-conviction court. Counsel failed to present the issues as requested by Appellant.

State,2004-cp-46-1700 The application was dismissed as being successive.Appendix volume one page 372-405

Appellant then filed a petition for writ of habeas corpus in York County.antonio Gordon v. State,2006-cp-46-0010. In the application he asserted two issues relating to him being tried as an adult.See Appendix volume one page 425-427,429.See Fn3 The Respondent filed a return and motion to dismiss petition for writ of habeas corpus.Appendix page 435-439 The Honorable John C. Hayes,III,issued an order of dismissal with prejudice dated April 30,filed June 1,2007.Appendix volume one page 440-444 Judge Hayes did not inform Gordon he could appeal. 90 days later Gordon filed a Rule 60(b) motion alleging judge Hayes was a conflict of interest and asked that he recuse himself and a different judge who is not a conflict with the case hear it on the merits.Appendix volume one pages 441-449. Judge Couch in a order dated January 31,2008,filed February 6,2008,granted Appellant's motion "amending" judge Hayes order to state Appellant was without prejudice to file a Habeas Corpus in the South Carolina Supreme Court.Appendix volume one page 450.

In 2015 February 2,2015,Gordon filed a second Rule 60(b),(5)-Austin v. State,409 S.E.2d 395 (1991) review alleging counsel failed to file a notice of appeal at his request and that Judge Couch granted him relief he did not ask for and considered his first Rule 60(b) motion as a Rule 59(e) and attached two juvenile jurisdiction issues.Appendix volume one pages 451-453. Judge Hayes in a order dismissed the motion without prejudice finding he was not a conflict of interest,appellant had already raised the juvenile jurisdiction issue and appellant was not entitled to an Austin review because he was granted relief asked for in his motion.Appendix volume one pages

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Fn3 The issues he presented was (1) he was allowed to plea guilty under ambiguous children code of laws,(2) General Sessions lack jurisdiction over his person because there was no waiver hearing conducted in family court.

459-463 Appellant received Judge Hayes order on March 19,2015,and filed his Rule 59(e),SCRCP on March 25,2015,asking the court to reconsider,alter and amend his judgment to find he was a conflict of interest,Appellant's jurisdiction claim (b) was not previously raised and that he was entitled to an Austin review.Appendix volume one pages 464-468 The Respondent in a letter dated March 31,2015,informed Judge Hall it does not intend to respond to Appellant's motions.Appendix volume two page 71

Judge Hayes recused himself a second time and Judge Hall presided over the matter and made specific finding of fact and conclusion of law denying Appellant's motions on several procedural grounds: (1) Appellant had previously raised the jurisdiction issues,(2) the issues have been previously heard and ruled on,(3) the issues were untimely,(4) and Appellant failed to file his Rule 59(e) motion timely.Appendix volume one 269. Appellant attempted to file a "second" 59(e) motion but the clerk refused to file based upon an order that restricted Gordon from filing any future psot-conviction relief application.See Appendix volume two page 59-70

ARGUMENT

The Circuit Court was without jurisdiction over the subject and Appellant because family court acquired first jurisdiction over the subject matter and his pedrson upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a) (Supp.1998) Title "Taken into custody,Release,Notification"

Appellant objects to Respondent procedural argument relating to his jurisdiction argument. The Respondent alleges Appellant's jurisdiction argument is the same as previously raised and that it has been adjudicated on the merits,but alleges Gordon jurisdiction argument is different in nature because he now asserts General Sesions Court lacked jurisdiction over him because family court acquired "[f]irst" jurisdiction over him.

However,Appellant asserts the Respondent has failed short in asserting Appellant's position and argument to this Court which is,Gordon asserted for the **first** time that family court acquired "[**first**]" jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody at approx 9:30am-10:30am,July 23,1998,pursuant to S.C. Code Ann §20-7-7205(a)(Supp.1998),supra and because family court never relinquished its jurisdiction,Appellant's guilty plea is void ab initio and he's entitled to his sppeedier and immediately release from unlawful confinement.See Fn1

Fn1 Appellant asserts the Respondent reliance on claim five (5) of PCR judgment Antonio Gordon v. State,(1414),at appendix page 354-355,to support its position that Gordon's jurisdiction argument that's currently before this court has been adjudicated on the merits and is therefore barred by res judicata and collateral estoppel doctrines is wholly without merits for reason: (1) The PCR Court did not decide whether family court acquired the first jurisdiction over the subject matter and Appellant upon him being found violating a criminal law and taken into custody pursuant to §20-7-7205(a), supra;(2) PCR Appointed Counsel Tara D, Shurling,esquire,inadequately raised Appellant's jurisdiction claim in the middle of the record without first consulting him,thereby,depriving Appellant of his statutory right to have all issues heard in one PCR under S.C. Code Ann §17-27-90 and also infringed on Appellant's due process rights to one full fair bite at the apple because Appellant was not provided with judicial review or appellate review on his claim and its clear he did not wish to waive the claim.See Appendix Volume one page 285 line 15-pg 287 line 1. As a result of PCR Counsel "recharacterizing and inadequately raising" Appellant jurisdiction claim he was prevented the full and fair opportunity to litigate the issue,thereby depriving Appellant his fundamental constitution right to due process of

As to Appellant's other filings, Appellant ask the court to take judicial notice that in (1700) nor (0010) did he raise and neither was the claim adjudicated on the merits, whether because family court acquired first jurisdiction over the subject matter and Appellant, general sessions jurisdiction is void because family court never relinquished its jurisdiction. Appellant asserts Brown v. State, 540 S.E.2d 846 (S.C.2001) is directly on point with his position. The South Carolina Supreme Court was faced with a similar situation when Brown made several different subject matter jurisdiction arguments relating to the code section inside his indictment. In the Supreme Court on writ certiorari Brown for the first time raised another subject matter jurisdiction claim relating to the code section inside his indictment. Our Supreme Court found because the nature of the jurisdiction argument Brown raised it was different and thus his first time raising and could be raised at any time and res judicata did not bar the claim from being heard on the merits. Therefore, the Respondent argument Appellant raised his current jurisdiction claim previously is without merit because Gordon has never alleged general sessions was without jurisdiction over the subject matter and him because family court acquired the "first" jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody pursuant to §20-7-7205(a). Appellant claim is properly before this Court. Brown v. State, supra.

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of law under the 14th amendment to the United States Constitution, the opportunity to be heard in a meaningful manner and meanful way; (3) When PCR Counsel brought the subject matter jurisdiction claim to the PCR Court attention, the PCR Court too failed to take notice of the jurisdiction claim and allowed PCR Counsel action of recharacterizing Gordon's claim as ineffective assistance of counsel, constituted a waiver of the claim which is clearly in violation of Anderson v. Anderson, 382 S.E.2d 897,900 (1989) where our supreme court has haeld subject matter jurisdiction cannot be waived even by consent of the parties and should be taken notice of by the court. For the herein stated reason the PCR jurdment in (1414) is void and res judicata does not apply. Watts v. Thompson, 116 F.3d 220 (7th Cir.1997). It is further asserted by Appellant if this court to find res judicata does apply he's entitled to have an evidentiary hearing on his claim pursuant to §17-27-90 and Odom v. State, 523 S.E.2d 753 (1999), because PCR Counsel inadequately raised his claim, thereby, depriving him of his one full fair bite at the apple on his original application.

The Respondent addressed Appellant's jurisdiction argument alleging general sessions had jurisdiction pursuant to §20-7-6605(1) because Gordon was a person sixteen years of age 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 imprisonmen fifteen years or more and could have only been handled in family court if the solicitor used his discretion and remanded the case to family court. The Respondent alleges Appellant mistakenly believes that any time a child is taken into custody,the family court and only the family court may exercise exclusive jurisdiction.

Appellant asserts the Respondent is asking this court to deviate from fundamental priciples of law and construe one part of the children code of laws §20-7-6605(1) in a isolated phrase without construing §20-7-7205(a) and §20-7-400(a),(3) (supp.1998) Title "Exclusive original jurisdiction of family court",which are apart of the same general law together and each one given effect.S.C. State Ports Auth v. Jasper,629 S.E.2d 624,629 (2006)(When terms of a statute are clear and unambiguous,the court must apply them according to their literal meaning.Furthermore,in construing a statute,words must be given their plain and ordinary meaning without resort to subtle or force construction to limit or expand the statute's operation. In construing statutory language,the statute must be read as a whole and **section which are apart of the same general law must must be construed together and each one given efect.** A statute should not be construed by concentrating on an isolated phrase.S.C. State Ports Auth v. Jasper,supra. Thus,the Respondent mistakenly believes that §20-7-6605(1) is supposed to be construed in a isolated phrase in assuming General Sessions possesses first jurisdiction over the subject matter and Appellant,but however,Respondent has not countered or cited to no authority to refute Appellant's argument that family court acquired first jurisdiction over the subject matter and Appellant upon him being found violating a criminal law and taken into custody pursuant to §20-7-7205(a) and once family court jurisdiction attached it became exclusive original jurisdiction and shall be the sole court for initiating action pursuant to §20-7-400(a),(3).

However,it was written by the General Assembly that when a Child is found violating a criminal law and taken into custody family court jurisdiction attached from the time of taking into custody.§20-7-7205(a) and the only way Appellant could have been excluded from family court jurisdiction he had to **first** be charged with one of the class felonies

under §20-7-6605(1) prior to being taken into custody because to allow the State to look over and completely skip over §20-7-7205(a) as if the General Assembly never written that section will be directly violating our Supreme Court case law.

Appellant asserts that jurisdiction over the subject matter and him In Family Court started when he was taken into custody pursuant to §20-7-7205(a). Appellant is relying on case law from our sister circuits that in a juvenile content family court acquired first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody. See Gerrick v. State,451 N.E.2d 327 (July 27,1983) where the Supreme Court of Indiana found in a similar situation that reading the juvenile statutes in its entirity,it is clear the juvenile court jurisdiction over the child attachedes as soon as the child has been taken into custody by law enforcement oficers acting with probable cause to believe the child has committed an act that would be a felony if committed by an adult. Therefore,this particular subject matter jurisdiction argument under §20-7-7205(a) has not been adjudicated and can be raised for the first time on appeal.Brown v. State,supra.

Finally,Appellant asserts because family court acquired first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody,family court should have first relinquished its jurisdiction before general sessions could exercise its autority over the Appellant and the subject matter,and because family court jurisdiction has now terminated over him he should be released from unlawful confinement immediately.

JUDGE COUCH ORDER IS VOID

The Respondent in its initial brief does not contest that judge Couch order is void but instead asserts because judge Hayes found in his order Appellant was bared from bringing a Writ of Habeas Corpus action in the circuit court pursuant to Keeler v. Mauney,330 S.C. 568,571,500 S.E.2d 123,124 (Ct.App.1998)(holding "[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).See Fn 1 judge Couch order actually helps Appellant by making sure he is aware that he has every oportunity to bring a State Habeas action in the original jurisdiction of the South Carolina Supreme Court.

Appellant asserts the Respondent has mistakenly assumed Appellant position to be he would be denied the opportunity to file a State Habeas in the South Carolina Supreme Court but failed to look to the fact Appellant in his motion did not request to have judge Hayes order filed June 1,2007,**reconsidered, amended and clarified**,but instead **"[r]eopen"** and when judge Couch granted Gordon relief for which he did not ask for deprived Appellant judicial review and Appellate review on judge Hayes order.See Fn 2 However,the Respondent is now asking this Court to overlook fundamental principle of law that **due process requires a litigant to be placed on notice of the issues which the court is to consider.**See Bass v. Bass,249 S.E.2d 905 (1978) because judge Hayes found in his Order filed June 1,2007,Appellant was procedural barred from petitioning the circuit for a habeas corpus. Thus,the Respondent does not contest or refute Appellant's contention that he was not given **"[n]otice"** in advance on the issue the court considered. Therefore,because judge Couch did not give Gordon notice inadvance of the issues the court was to considere the judgment is void.Bass,supra.

Furthermore,the Respondent asserts Appellant has not submitted any

Fn1 Even though Appellant labled his petition as a habeas it was filed as a post-conviction relief application.See Appendix volume one page 434

Fn2 Appellant asserts his habeas was properly before the circuit court because he seeked his immedisately release on his jurisdiction claim and habeas corpus was his sole and only remedy pursuant to McCall v. State,145 S.E.2d 419 (S.C.1965)(Inquiry in habeas corpus is limited to legality of prisoner present detention,and the only remedy which can be granted is released from custody);Young v. Nickols,413 F.3d 416 (4th Cir.2005)(Habeas is the exclusive remedy for state prisoner who challenges the fact or duration of his conefinment and seeks immediate or speedier release),therefore,PCR was unavailable and inadequate under Gibson v. State,495 S.E.2d 426 (S.C.1998) standard.

authority,that judge Couch lacked jurisdiction to Rule on his 60(b) motion. Appellant asserts judge Couch in his ruling on his Rule 60(b) motion specifically addressed language under South Carolina Rules of Civil Procedure Rule 59(e) when he held,"**Therefore,I grant the Petitioner's motion to amend judge Hayes order.**See Appendix volume one page 450. It is argued by Appellant because his Rule 60(b) motion was filed 90 days after judge Hayes order was filed,judge Couch could not **amend** judge Hayes order to state "[I] grant the Petitioner's Motion to amend judge Hayes order that Petitioner is without prejudice to bring a habeas corpus petition in the original jurisdiction of the South Carolina Supreme Court" because pursuant to Rule 59(e) itself judge Hayes order could have only been amended if Appellant filed his Rule 60(b),motion within ten days of receiving judge Hayes order. In Heins v. Heins,543 S.E.2d 224 (CT.App.2001),this Court held that a family court judge lacked jurisdiction to sua sponte alter a judgment more than 10 days after it was issued. Although trial judge retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e),SCRCP motion is filed, after ten days that jurisdiction is lost. Id. 543 S.E.2d at 229-30. Here in the instant case judge Couch sua sponte **amended** judge Hayes order more than ten days after Appellant received it. Judge Couch order is void as to this matter and should be vacated and judge Hayes order should be reopen to grant Gordon the relief he requested in the interest of justice.

The lower Court committed error of law and abused it discretion when it found Appellant had previously raised his jurisdiction issue that the unconstitutionality of §20-7-6605(1) deprived the York County Grand Jury and General Sessions of its jurisdiction to indict and accept his guilty plea in the initial filing and that it had been heard and ruled on,untimely and could have been raised in (PCR) 2008-cp-46-4951

Appellant asserts the Respondent has misapplied the facts of this particular argument and alleges its the same jurisdiction claim that's currently before this Court. Respondent claim this jurisdiction argument has been presented three (3) different ways but has not stated what three ways. It is argued by Appellant that this jurisdiction argument is a different cause of action which has never been addressed by any court. What the Respondent is asking this Court to find Appellant cannot challenge the constitutionality of a statute under which he's held in custody. However,our Supreme Court in Brown v. State,supra.if its a different cause of action then the subject matter jurisdiction advanced by Petitioner is not barred

as being res judicata. Respondent mistakenly assuming that once Appellant raised one jurisdiction claim he is barred from raising any other jurisdiction claim regardless if theydifferent cause of action. It's clear no PCR Order addresses Appellant's constitutionality of §20-7-6605(1) claim.

However,since its the Respondent's position Appellant has raised this particular jurisdiction claim previously,Appellant ask the Court to take judicial notice that in Antonio Gordon v. State,(1414),Appellant **amended** his original PCR application to assert this constitutional challenge to § 20-7-6605(1),but PCR Counsel Tara D. Shurling,esquire,in the middle of the record and without first consulting with Appellant informed the PCR Court Gordon asked her to present his jurisdiction claim when she stated to the Court:

And it is his position,Your Honor,although he has once again in his **amendments** that he asked me to present, he couches this in terms of subject matter jurisdiction,but it is really a Sixth Amendment argument.

See Appendix volume one pages 286 line 23-pg 287 line 1. But then recharacterized his claim as ineffective assistance of counsel thereby inadequately raising his claim,which deprived Appellant of his statutory right under § 17-27-90 to have his application amended,deprived Appellant judicial and appellate review and constitute a deprivation of Appellant's procedural right to one full fair bite at the apple pursuant to Odom v. State, 523 S.E.2d 753 (1999). In any event Appellant is entitle to have his Claim heard in a meaningful way and in a meaningful manner

pursuant to due process of law. Here what the Respondent is asking this Court to do is disregard Appellant's fundamenatal constitutional rights to due process of law to be heard in a meaningful manner and in a meaningful way if this court find that the claim has been peviously raised and ruled on. Therefore,the lower court was not correct in finding the issue has been previously heard and ruled on because no court has addressed this precise challenge.

THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED ERROR OF LAW WHEN IT FOUND APPELLANT'S AUSTIN REVIEW MUST FAIL

The Respondent alleges Austin is inapplicable to this current situation because Appellant was not denied the opportunity to file an appeal to his 2006-cp-46-0010 State Habeas or the corresponding Rule 60(b),motion.See Fn 1

Appellant asserts the Respondent's argument that he was not denied the opportunity to file an appeal to his 2006-cp-46-0010 State Habeas or corresponding Rule 60(b),motion is without merit because Appellant in his Rule 60(b),motion at appendix volume one page 448 alleged judge Hayes failed to inform him of his Appeal rights.See Fn 1 And far as Respondent asserting Appellantwas granted relief he sought,resulted in no prejudice,is completely bogus and the record speaks for itself because Appellant was not granted the relief he sought in his pleading.See Appendix volume one page 447 Appellant never asked to be granted the right to file a habeas corpus proceeding in the Supreme Court of South Carolina. Appellant argue that relief was not sought by him and such relief unrequested prejudice him. Therefore,the lower court erred when it found appellant was not entitled to an Austin review of judge Couch order.

Conclusion

It is respectfully asked that this Honorable Court reversed the lower Court order and or whatever this Court deemed necessary and good in law.

Respectfully Submitted

This 31,day of July,2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from York County
Court of Common Pleas
Daniel D, Hall, Circuit Court Judge

Antonio Gordon, Appellant,

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State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Anotion Gordon, hereby certify that I did serve a copy of Appellant's Reply in opposition to Respondent's Petition to relax Rule 243(g), and Extention of Time, Appellant's Reply brief to Respondent's initial brief, and Appellant's motion requesting a belated appeal on Judge Hayes order on:

Attorney General Office
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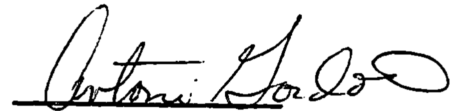
by depositing a copy in the mail with sufficient funds in the mail this 31 day of July, 2016



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