STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Daniel D. Hall,Presiding Judge
Appellate Case No: 2015-001004

ANTONIO GORDON, Appellant,

v.

State of South Carolina, Respondent.

Amended Final Brief of Appellant

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Statement of the case

July 23,1998,Rock Hill City police in York County made a warrantless arrest of Antonio Gordon.See (ROA) Appendix volume one pages 80 line 16-pg 83 line 16,page 88 line 24-page 89 line 10 (Detective John Thickens testimony)-with (ROA) Appendix volume page 208 line 19-24 (Captain Charles Cabiness testimony). Gordon was apprehended and taken into custody at approx 9:30am-10:30am.(ROA) 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 (ROA) Appendix volume one page 89 line 13-pg 90 line 12-(ROA) Appendix volume one page 101 line 1-24 (John Thickens testimony). Gordon was "[b]ooked" into the city jail at apprx 16:57pm.See (ROA) 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 (ROA) 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 (ROA) 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 (ROA) 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 (ROA) 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 (ROA) 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 (ROA) 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 (ROA)

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 444-449. 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. (ROA) (ROA) (ROA) (ROA) (ROA)

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 (ROA) (ROA)

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.(ROA) 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.(ROA) 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.(ROA) 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.(ROA) See Appendix volume two page 59-70

ARGUMENT

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 §20-7-7205(A)(SUPP.1998) TITLE "TAKEN INTO CUSTODY,RELEASE,NOTIFICATION"

The jurisdiction of a court over the subject matter of a proceeding is fundamental.Anderson v. Anderson,299 S.C. 110,115,382 S.E.2d 897,900 (1989). "Lack of subject matter jurisdiction may not be waived,even by consent of the parties,and should be taken notice by this court".Id It is well-settled that issues related to subject matter jurisdiction may be raised at any time,including for the first time on appeal in this court.Carter v. State,329 S.C. 355,495 S.E.2d 773 (1998);State v. Funderburk,259 S.C. 256,191 S.E.2d 520 (1972). Furthermore,the acts of a court with respect to a matter as to which it has no jurisdiction are void.Funderburk,259 S.C. at 261,191 S.E.2d at 522.

It is important to present Appellant's filing history to the court before proceeding with argument on his issue. Appellant "did not" raise the herein asserted subject matter jurisdiction argument in Antonio Gordon V. State,(1414);Antonio Gordon v. State,(1700);Antonio Gordon v. State,(0010);Antonio Gordon v. State,(4951). In each of those pleadings he either argued the trial court lack subject matter jurisdiction and or personal jurisdiction because he was not bind over from family court to general sessions under different sections of the children code of laws.See (ROA) Appendix volume one pages 256,262-274,374-384,407,425-427,429-with (ROA) Appendix volume two pages 2-8.

Even assuming arguendo this court find the jurisdiction issue was raised in Appellant's numerous pleadings. Appellant argue that a South Carolina court has never issued a final order order adjudicating the issue on the merits,namely,general sessions lack jurisdiction over the subject matter and Appelant because family court acquired first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into

custody. Res judicata,therefore,does not apply to bar the subsequent suit on the merits.Garris,333 S.C. 432,511 S.E.2d 48 (noting restraint in the application of the doctrine of res judicata is warranted when prior action was dismissed on procedural grounds).

While it is true Appellant did raise in the lower courts "subject matter and personal jurisdiction issues related to different code sections of the children code of laws,no court has addressed the precise challenge now at issue whether **the plea court lack the authority and jurisdiction over the subject matter and Appellant to accept his plea and sentence him under the criminal code of laws when 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 S.C. Code Ann. §20-7-7205(a)(Supp.1998) Title "Taken into custody,release,notification". Since subject matter jurisdiction is an issue which is fundamental and may be raised at anytime,it would be an error of law to decline review of this issue on procedural grounds pursuant to Brown v. State,540 S.E.2d at 849 (S.C.2001).Turning to the merits of the argument.

It is argued by Appellant that when he was found violating a criminal law and taken into custody approx 9:30am-10:30am,July 23,1998,he was not "[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 under S.C. Code Ann. §20-7-6605(1)(Supp.1998) Title "Definition" and that because he was not "[charged]" with one of the class felonies under §20-7-6605(1),family court acquired the **"[f]irst"** exclusive original 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) which provide in relevant part:

When a "child" found violating a criminal law or ordinance is taken into custody,the taking into custody is not an arrest. "The **jurisdiction** of the "[c]ourt" attaches from the time of the taking into custody.See Fn1

Fn1 Pursuant to §20-7-6605(2) Title "Definition" statutory the [court] means the family court.

Section 20-7-6605(1)(supp.1998) Title Define "[C]hild" statutory provide in relevant part:

"[C]hild" 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.See Fn2 However,a person sixteen years of age who "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 of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor.

First and foremost,a penal statute must be construed strictly against the State and in favor of the defendant.Williams v. State,306 S.C. 89,91,410 S.E.2d 564 (1991). "The rule that penal laws are to be construed strictly...is founded...on the plain principle that the power of punishment is vested in the legislative,not in the judicial department. It is the legislature,not the court,which is to define a crime,and ordain its punishment"...(quoting United States v. Witbergen,(18 U.S.) 5 Wheaton 76,95-96 L.Ed 37,42 (1820).

The Court's primary function in interpreting a statute is to ascertain the intent of the legislature.State v. Blackmon,304 S.C. 270,273,403 S.E.2ed 660,662 (1991). When terms of a statute are clear and unambigous,the Court must apply them according to their literal meaning.Id Furthermore,"in construing a statute,words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation".Id. In construing statutory language,the statute must

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FN2 Persons seventeen years of age are ultimately "excluded" from the definition of a "child" and family court exclusive jurisdiction as the statute define a child as a person less than seventeen years of age.

be read as a whole and sections which are apart of the same general 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,629 S.E.2d 624,629 (2006).

Construing sections 20-7-7205(a) and 20-7-6605(1),(2),as a whole and together,according to their literal meaning,without resort to subtle or force construction to limit or expand the statute's operation and without concentrating on an isolated phrase,it is clear the legislature intent is ascertain that family court exclusive jurisdiction attached over the subject matter and Appellant soon as he was found violating a criminal law or ordinance and taken into custody.§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 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 or local law or municipal or ordinance **prior to having become seventeen years of age** and such person shall be dealt with under the provision of this chapter relating to children.

However,pursuant to the plain,ordinary and unambiguous language in §20-7-6605(1),the only way Appellant could have been "[e]xcluded" from the definition of a "child" statutory and "family court exclusive original jurisdiction",he had to "[f]irst" be "[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 of fifteen years or more by bill of information or

grand jury indictment "prior to being taken into custody".See Fn3 But here in the instant case the police made a warrantless arrest of Appellant based upon probable cause. In Gerrick v. State,451 N.E.2d 327 (July 27,1983) Indiana Supreme Court found in a similar situation that reading the juvenile statute in its entirety,it is clear the juvenile court jurisdiction over the child attaches as soon as the child has been taken into custody by law enforcement officer who is acting with probable cause to believe the child has committed an act that would be a felony if committed by an adult. In D.C.W. v. State,445 So.2d 333 (Fla.1984) Florida Supreme Court also was faced with a similar situation when it found "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". Here,this same legal principles apply to the instant case.

Thus,once family court exclusive original jurisdiction attached over the subject matter and Appellant upon him being found violating a criminal law and taken into custody,it could not be [o]usted by later subsequent events,this is true even when events are of such a nature that they would have prevented jurisdiction from attaching in the first instance.See Fn4 Butler v. Whitt,230 S.C. 279,95 S.E.2d 496 (S.C.1956)(Once the jurisdiction of a court attaches,the general rule is that 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

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Fn3 Appellant contends there are certain instance a person can be "charged" with a crime prior to being arrested. (1) When a State or County Grand Jury return a true bill indictment prior to being arrested and (2) When a police receive an arrest warrant signed by a judicial officer prior to arresting a person and tell them what they are charged and arrested for.

Fn4 Appellant asserts because he was not [charged] with a class A,B,C, or D felony which provide for a maximum term of imprisonment of fifteen years or more prior to being taken ino custody 9:30am-10:30am,July 23,1998,any time thereafter he was "[c]harged" constituted a "subsequent event" rather it been when he was told of the formal accusation against him and signed arrest warrants before a judicial officer and or by bill of information or grand jury indictment.

instanced). "[O]nce Jurisdiction of a court attaches it exist for all time until the cause is fully and completely determine".Kinross-Wright v. Kinross-Wright,248 N.C. 1,11,102 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 that 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);United States Fidelity and Guaranty Co v. Miller Mutual Fire Insurance Co of Texas,396 F.2d 569 (8th Cir.1968).See Fn5

Because family court acquired first jurisdiction over the subject matter and Appellant upon him being found violating a criminal law and taken into custody and proceedings under the children code of laws had commenced by law enforcement officers,proceedings under the children code of laws should have **"[f]irst"** been instituted and a **"[O]rder"** issued relinquishing its jurisdiction pursuant to S.C. Code Ann. §20-7-7605(4),(6),(10)(supp.1998) Title "Transfer of Jurisdiction", before the Grand Jury could have exercise its authority in returning a true bill indictment because at that particular time jurisdiction over the subject matter and Appellant still belonged to the exclusive original jurisdiction of family court pursuant to §20-7-400(a)(3); §20-7-400(b);§20-7-7605(4),(6) and (10). Therefore because jurisdiction still belonged to family court, Appellant's indictments is absolutely a nullity and void ab initio because the circuit court lack jurisdiction.See McClure v. State,289 S.E.2d 138 (1982)("No indictments may be true billed by grand jury when the circuit court lacks jurisdiction").Appellant also asserts his guilty plea judgment entered July 16,19,1999,in general sessions court is absolutely a nullity and void ab initio and should be vacated because the court did not have the authority to exercise its jurisdiction over the subject matter and Appellant pursuant to §20-7-400(a),(3);State v. England,245 S.E.2d 609 (S.C.1978)("Defendant was a person less than

Fn5 Appellant contends proceedings under the children code of laws had commenced in the instance case when the police complied with §20-7-7205(a) of notifying Appellant's parents of him being taken into custody.See Appendix (ROA) volume one page 144 line 15-page 146 line 19.

seventeen years of age under family court jurisdiction and since family court had not relinquished its exclusive original jurisdiction,defendant should have been dealt with under the chapter relating to children").Appellant should be released immediately from unlawful confinement because family court exclusive jurisdiction has now terminated over him pursuant to §20-7-400(b);Sanders v. State,314 S.E.2d 319 (1984).

JUDGE COUCH ORDER IS VOID

For purpose of applying rule authorizing a trial court to grant a party relief from a void judgment,a court may grant a party relief from a void judgment,a void judgment is one that,from its inception,is a complete nullity and is without legal effect,the definition of void under the rule only encompasses judgment from courts which failed to provide proper due process;or judgments from courts which lack subject matter jurisdiction or personal jurisdiction.Ware v. Ware,404 S.C. 1,743 S.E.2d 817 (June 12,2013).

In the instant case Appellant filed a state habeas corpus in York County South Carolina. Judge Hayes dismissed the habeas with prejudice in a order dated April 30,2007,filed June 1,2007.(ROA) Appendix volume one pages 406-440. Approx 90 days later Appellant filed a Rule 60(b),SCRCp motion alleging judge Hayes was a conflict of interest.(ROA) Appendix volume one page 447 Appellant asked for relief in the form that judge Hayes recuse himself and that a different judge who are not in conflict with the case hear the pending habeas.(ROA) Appendix volume one page 448.See Fn6 However,judge Couch in his order states; "Antonio Gordon,requested an amendment and clarification of Judge John C. Hayes,III's Order dated April 30,2007,filed June 1,2007" Therefore,I grant the Petitioner's Motion to Reconsider and amend and clarify Judge Hayes Order that Petitioner is without prejudice to bring a Habeas Corpus

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Fn6 Judge Hayes recused him self a second time in relation to Appellant's PCR filings.

Petition in the original jurisdiction of the South Carolina Supreme Court".Appendix (ROA) volume one page 450.

Appellant asserts he was not given adequate notice in advance and opportunity to be heard that (1) the court was recharacterizing his motion to reopen judge Hayes order as a motion to "amend" judge Hayes order under Rule 59(e),SCRCp and (2) that he was awarding Appellant relief not contemplated by Appellant in his pleading. The appellate courts of this State have said many times that ordinarily a party may not receive relief not contemplated in his pleadings.Gainey v. gainey,279 S.C. 68,301 S.E.2d 763 (1983);Ingram v. Ingram,273 S.C. 113,254 S.E.2d 680 (1979);Bass v. Bass,272 S.C. 177,249 S.E.2d 905 (178). As stated in Bass,supra;

While it is true that pleadings in the family court must be liberally construed,this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider.

Here in the instant case,the Court did not give Appellant notice of the issues which the court considered,therefore,the judgment is void and should be vacated.Bass v. Bass,supra.

Furthermore,judge Couch order should be vacated as being void because the court lacked jurisdiction over the subject matter to "amend" judge Hayes order because Appellant's 60(b) motion was filed far beyond the 10 days to request the court to have judge Hayes order amended pursuant to Rule 59(e).

Issues related to subject matter jurisdiction may be raised at anytime and should be taken notice by this court or on its own motion.Bunkum v. Manor,321 S.C. 95,99,100,467 S.E.2d 758,761 (Ct.App.1996). In heins v. heins,344 S.C. 146,543 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. at 157,543

S.E.2d at 229-30.

Here in the instant case judge Couch sua sponte **amended** judge Hayes order more than 10 days after Appellant received it. Judge Couch order is void pursuant to Rule 59(e) and should be vacated and judge Hayes order be reopen to provide Appellant the relief he asked for in his original 60(b) motion dated August 7,2007.

THE LOWER COURT ABUSED IT DISCRETION AND COMMITTED ERROR OF LAW WHEN IT FOUND APPELLANT'S AUSTIN REVIEW MUST FAIL BECAUSE HE WAS NOT PREJUDICE BECAUSE HE WAS GRANTED THE RELIEF CONTEMPLATED IN HIS PLEADING

The lower court found in its order that Appellant attached copies of letters from him to prior counsel regarding an appeal of judge Couch's order which granted Appellant the relief he sought in his Rule 60(b),SCRCp motion.As stated above,the relief was acknowledgment that Appellant could file a habeas corpus proceeding in the South Carolina Supreme Court. This order is the law of the case and is not a ruling which would appear to generate an appeal by the prevailing party. However,to the extent Petitioner has been denied his right to an appeal,the undersigned has conducted an Austin review.

I find that the failure to appeal a ruling,which granted the relief he sought,resulted in no prejudice to Appellant. Appellant asked to and was granted the right to file a habeas corpus proceedings in South Carolina Supreme Court. Therefore,there existed no grounds upon which an appeal favorable to petition could be predicated.Appendix (ROA) volume one page 462.

However,Appellant filed a Rule 59(e),SCRCp motion and asked the Court to reconsider,alter and amend its judgment to find that "nowhere" in Appellant's first 60(b) motion he asked to have judge Hayes order "amended,clarified" and that judge Couch granted relief for which Appellant did not ask.Appendix (ROA) volume one page 466. Judge Hayes recused himself a second time and judge Hall presided over the matter. Judge Hall issued an order denying Appellant's Rule 59(e) motion and did not make specific finding

of fact and conclusion of law on his Austin review.(ROA) Appendix volume one page 469. Appellant attempted to file a "second" Rule 59(e) motion on Judge Hall order but the Clerk of Court refused to file the motion based upon an order that only restricted Appellant from filing any future post-conviction relief application.(ROA) Appendix volume two pages 59,61,70.See Fn7

Appellant asserts hew was prejudiced by judge Couch order because he granted Appellant relief he did not request in his pleading which violated his due process rights,especially where the found in 2015 Appellant failed to appeal an order and the court failed to inform him he could appeal. Prejudice is also presume because the relief judge Couch granted "amending" judge Hayes order beyond the ten day limitation outlined in Rule 59(e),instead of reopening judge Hayes order as requested,these claims of error of law could have been appealed because had judge Couch reopen judge Hayes order Appellant could have appealed that decision of the court if he did not receive a favorable ruling. Therefore,the lower courts erred when it found Appellant was not entitled an Austin review and the order should be reversed.

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

The lower court found in its order,this case was fully adjudicated,complete with an order granting a Rule 60(b). The Appellant then had a second PCR action,complete with a full evidentiary hearing (2008-cp-46-4951) and an appeal.

The court proceeded on to find,this handwritten motion requests that

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Fn7 This Court denied Appellant's motion to remand to lower court for an evidentiary hearing on his "second" 59(e) motion.

the court reconsider "for at least a second time" the "[j]urisiddtcional issues previously brought before the court". These "[i]ssues" have been litigated and "[o]rders" issued. Since these issues have been previously heard and "[r]uled on", (ROA) and since these issues are [untimely], the Defendant's motions are denied. Appendix volume one page 469.

Appellant asserts the lower court findings resulted in a manifest error. In the instant case Appellant filed his state habeas corpus dated December 5, 2005, filed January 3, 2006. In the petition he raised (two) claims relating to him being tried as an adult in general sessions court. (ROA) See Appendix volume one pages 425 and 429. See Fn8. However, the issue at Appendix volume one page 429 it was alleged because there was no Kent v. united States, 383 U.S. 541, 86 S.ct 1045 (1966) waiver hearing held in family court general sessions was without personal jurisdiction in accepting his plea and that his due process rights were violated. Judge Hayes did not adjudicate the claims on the merits. (ROA) See Appendix volume one page 440-444.

It is obvious the jurisdiction issue that §20-7-6605(1) is unconstitutional under the equal protection clauses of South Carolina Constitution and the 14th Amendment to the United States Constitution raised in Appellant's 60(b) motion are distinguish from the two juvenile jurisdiction issues raised in his initial pleading in this case. See Fn9

Our Supreme Court was faced with the same exact situation in Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (S.C.2001) where Brown raised a subject matter jurisdiction issue relating to a code section in the indictment in his second PCR application and the Supreme Court denied cert. Because of some procedural irregularities in the handling of petitioner's application, the PCR court ordered a hearing after the Supreme Court denied certiorari. At

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Fn8 It can be found the claims are one of the same, the only different between the claims is in one Appellant asserted §20-7-6605(1) were unconstitutional under the due process clause of the United States Constitution. (ROA) Appendix volume one page 427

Fn9 Judge Hayes found the jurisdiction issues was one of the same kind, however, judge Hall after judge Hayes recused him self a third time found the jurisdiction issues was distinguish claims.

the hearing,petitioner again raised a subject matter jurisdiction argument regarding the erroneous code sections in the indictment. The PCR court dismissed the application as successive,and specifically found that the Supreme Court had ruled on the subject matter jurisdiction argument that petitioner raised at the hearing.

Petitioner then filed another petition for certiorari and raised a "new" subject matter jurisdiction argument.For the first time,petitioner questioned whether the trial court lacked subject matter jurisdiction to accept his guilty plea to the three counts of distribution within proximity of a school where the indictment alleged that petitioner distributed crack cocaine while within the grounds of "Anne's" day care center. The court granted the petition on that question.

The Supreme Court held "While it is true that both this court and the PCR court have addressed subject matter jurisdiction arguments related to the code sections in the indictments,neither this court nor the PCr court has addressed the precise challenge now at issue.Since subject matter jurisdiction is an issue which is fundamental and may be raised at any time,we decline to find that our review of this issue is precluded on procedural grounds".

The Supreme Court also found in footnote 1 that res judicata does not apply to issues of subject matter jurisdiction.

Like Brown,Appellant too has asserted subject matter jurisdiction issues under different code sections of the children code of laws,but never presented this precise challenge now at issue. Therefore,the lower court order on this issue is controlled by an error of law because Appellant's subject matter jurisdiction issue can be raised at any time.Brown v. State,and the lower court factual conclusion that the issue was previously raised,heard and ruled on is without evidentiary support. The order should be reversed and or this court should appoint counsel and have oral arguments on the claim. Turning to the merits of the underlying issue.

Appellant asserts because §20-7-6605(1), supra, is unconstitutional the Grand Jury could not indict him for a class A,B,C, or D felony under that section and that because §20-7-6605(1) is unconstitutional general sessions did not have jurisdiction over the subject matter and Appellant to accept his plea. An unconstitutional law is void and is not law. And offense created by it is not a crime. A conviction under it is not merely erroneous, but illegal and void, and cannot be legal cause of imprisonment. Ex parte Siebold, 100 U.S. 371-77 (1879).

Appellant asserts §20-7-6605(1) violates the equal protection clauses of South Carolina Constitution Art 1., §3 and the 14th amendment to the United States Constitution because it create a scheme that treats one class of person less than seventeen years of age found violating a criminal law or ordinance taken into custody and 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 of fifteen years or more, differently then another class of children taken into custody and charged and accused with the same crimes. Appellant define the different "classes" created by the statute as (1) those less than seventeen years of age, (2) sixteen year old persons "[c]harged" with class E and F felonies remaining in the definition of a child and family court exclusive jurisdiction, (3) persons sixteen years of age "[c]harged" with class A,B,C, or D felonies as defined in section 16-1-20 excluded from the definition of a child and family court exclusive jurisdiction when "[charged]" with certain felonies and tried as an adul, (4) persons sixteen years of age [charged] with class A,B,C, or D felonies as defined in section 16-1-20 remanded to family court by the solicitor to be handled as a child, (5) 15,14,13, and 12 year old persons charged with class A,B,C, or D felonies as defined in section 16-1-20 handled as a child under family court jurisdiction.

This arbitrary classification scheme is not reasonably related to any State interest. Appellant argue, because the legislation is devoid of any reason for permitting identical situated children to receive disparate

treatment,resulting in four groups that is eligible for rehabilitation in the juvenile system and another that faces the very different circumstances of the adult system. Appellant argue that no State interest is served by allowing such unreasonable disparity.

Appellant's claim,as set out above,that §20-7-6605(1) of the South Carolina Children Code of LAws,plainly states that four class of children will be treated in one way (remain in family court jurisdiction) and definition of a child while another class of like accused children will be treated in another,singled out when (charged with certain felonies). Appellant contends because he was tried as an adult for the same crimes that some of his peers less than seventeen years of age found violating a criminal and taken into custody for and "charged" handled under the children code of laws,he was treated disparately. The Act treats a certain subclass of children nonuniformly. Children sixteen years of age "charged" with class A,B,C, or D felonies as defined in section 16-1-20 or a felony which provide for a maximum term or imprisonment of fifteen years or more,statutorily indistinguishable from those remaining in family court jurisdiction charged with the same felonies.

By the very terms of the statute,they are accused and charged with the same offenses and fall into the same age range,less than seventeen years of age. There is absolutely nothing in the statute to identify the juveniles to be tried as adults,it describes no distinctive characteristics to set them apart from children in the other statutory class who remain in family court jurisdiction charged with the same felonies. However,there are critically important differences in the treatment of those children sixteen years of age charged with class A,B,C, or D felonies as defined in section 16-1-20 ultimately tried as an adult in general sessions without first being afforded a hearing,full investigation,counsel,access to material considered by the court and a statement of reason in family court compared to those less than seventeen years of age,15,14,13 and 12 year old children charged with the same felonies left in family court exclusive original jurisdiction being afforded a hearing,full investigation,counsel,access to materials considered by the court and a statement of reason in family

court if transferred to adult court.

For instance,cases tried in the family court are considered civil rather then criminal proceedings.See Kent v. United States,86 S.C.t 1045 (1966). This has significant ramification for Appellant's future criminal record. Moreover,any juvenile committed to a secure facility under the children code of laws must be released at age twenty-one pursuant to S.C. Code Ann. §20-7-7810 (supp.1998) Title "Commitment". Therefore,because §20-7-6605(1) applies only to individuals fifteen years of age or less charged with class A,B,C, or D felonies as defined in section 16-1-20,in the statutory class is left in the juvenile system faces a maximum potential sentence of nine years or less.

The foregoing scenario is a dramatic contrast to that facing another juvenile in the same statutory class who is charged as an adult,specifically sixteen year old children charged with the same felonies. The effect of certification is to conduct the proceedings in every way as if the juvenile were an adult.State v. Graham,532 S.E.2d 262 (S.C.2000). Aside from acquiring a permanent criminal record. Appellant received a forty year life sentence,obviously a much greater deprivation of personal liberty than that risked by his counterpart who is tried as a child. Therefore,the statute permits two identical situated children,faced radically different penalties and consequences without any statutory guidelines for distinguishing between them,this amounts to unequal treatment.See Thompson v. S.C. Com'n on Alcohol and Drug Abuse,229 S.E.2d 718,722 (S.C.1976) (The fourteenth amendment to the federal constitution guarantees to everyone within the jurisdiction of a state,the equal protection of the laws. Among other things,this requires that in the administration of criminal justice no person be subjected to a greater or different punishment for an offense than that to which of the same class are subjected);State v. Owens,103 N.M. 121,703 P.2d 898,901 (1984)("[S]tatute which permit the state to subject one person to the possibility of greater punishment than another who has committed an identical act violate the equal protection clauses of the state and federal constitution".).

Assuming arguendo Appellant's class of like are not less than seventeen years of age but that of sixteen year old persons "[C]harged" with 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. Appellant asserts because the statutorily-unfettered grant of authority to the solicitor to decide which persons sixteen years of age "[charged]" with 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 may be remanded to the family court for disposition of the charge at the discretion of the solicitor to be handled as a child under the children code of laws implicates particular concerns about equal protection of the laws under South Carolina Constitution Art 1., §3 and the 14th amendment to the United States Constitution.

For example,if two juveniles sixteen years of age in the same county or in two different counties commit essentially the same class A,B,C, or D felony as defined in section 16-1-20,and are alike in terms of their personal factors,one juvenile is a negro muslim in Lexington County,one is a caucasian christain in York County,the negro muslim in Lexington County could be remanded to family court because he/she is a muslim like the solicitor and the caucasian christain will remain in general sessions because he/she is not a muslim like the negro muslim and solicitor and or vise versa and or because one is a negro from the ghetto he will remain in general sessions when the caucasian from the rich part of town will be remanded to family court to handled under the children code of laws vise versa-depending solely upon the decision or different philosopies of that one solicitor or two different solicitors. This violates our State Constitution uniform operation laws under Art III., §34 and South Carolina Constitution Art 1., §3 and the 14th amendment to the United States Constitution.

The equal protection concerns which arises from such a grant of (statutorily) unreviewable and standardless authority to a prosecuting attorney led the Supreme Court of Utah to hold that a Utah statute which

gave prosecutors the role of determining which minors would be treated as adults in the criminal justice system violated Utah's State Constitution guarantee of uniform of operation of laws.State v. Mohi,901 P.2d 991 (Utah.1995).

The Court in Mohi applied the traditional equal protection reasonable relationship test to the Utah statute. The Court found that the prosecutor's decision as to which juvenile to file adult charges against was arbitrary and standardless and in the sole discretion of prosecutor's who have no guidelines as to how it is to be exercised.Id at 999. The Mohi Court noted that:

It is ironic that the act sets out in thirteen full paragraphs all of the factors that a court must consider to certify a juvenile into adult system...but contains no guideline for a prosecutor who may choose for any reason or no reason to place that juvenile into adult system. Id at 999.

Similarly,§20-7-6605(1) poses no obstacle or guidelines to the solicitor's considering an unrestrained spectrum of personal and other factors about a child sixteen years of age charged with a class A,B,C, or D felony as defined in section 16-1-20,in deciding whether to remand the case of a person sixteen years of age charged with a class A,B,C, or D felony as defined in section 16-1-20 to be handled as a person under the children code of laws or try him/Appellant as an adult and the solicitor's consideration is unreviewable.State v. Mohi,901 P.2d 991 (Utah.1995).

The Court in Mohi also persuasively refutes the argument that the discretion historically afforded to prosecutorial charging decision carries over to the...discretion to choose which juveniles to prosecute in adult rather than in juvenile court..the scope for prosecutor sterotypes,prejudices and bias of all kinds is simply to great. The challenged statute by Appellant §20-7-6605(1) [unconstitutionally] permits solicitors to subject one sixteen year old to the possibility of greater punishment than another

who has been accused and charged with an identical act.See Fn10 This violates equal protection of the laws under the 14th amendment to the United States Constitution and South Carolina Art 1.,§3.Thompson v. S.C. Com'n on Alcohol and Drug Abuse,supra;Barbier v. Connolly,113 U.S. 27 (1885)(All persons similarly circumstanced shall be treated alike). Therefore,Appellant's indictments and guilty plea judgment is predicated upon an unconstitutional statute and is void and cannot be a legal cause of imprisonment.Ex parte Siebold,supra.

THE LOWER COURT ABUSED IT DISCRETION AND COMMITTED ERROR OF LAW WHEN IT FOUND APPELLANT HAD NOT FILE HIS RULE 59(E) MOTION TIMELY PER 59(E)

The lower court found in its order Appellant did not file his Rule 59(e),SCRCP motion timely.(ROA)Appendix Volume one page 469. Appellant asserts this finding is erroneous. A motion to alter or amend judgment shall be served not later than ten (10) after receipt of the written notice of the entry of the order.USSAA Property and Inc v. Clegg,661 S.E.2d 791 (S.C.2008).

In the instant case judge Hayes dismissed Appellant's Rule 60(b),SCRCP motion without prejudice in a order dated March 4,2015,filed March 9,2015.(ROA)Appendix volume pages 459,460.See Fn11 The Clerk Of Court mailed this Order to Allendale Correctional Institution.(ROA)Appendix volume one page 460. Kershaw Correctional Institution received the order on March 19,2015.See (ROA)Appendix volume two page 66. Appellant received this order from Kershaw mailroom personnel ~~provided Appellant with the order~~ on the same day. Appellant Rule 59(e) motion was filed in the York County Clerk Of Court office March 25,2015,six days after Appelant received the order.See (ROA)Appendix volume one page 465. Therefore,the lower court erred in finding Appellant

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Fn10 If two persons sixteen years of age are charged with murder and the solicitor in Lexington remand one to family court to be handle as an ~~adult~~ child and a solicitor in York County try the other one in general sessions,the sixteen year old in Lexington county will receive a total of five years confinement when the one in York County receive 30 to life under the criminal code of laws.

Fn11 Appellant was housed at Kershaw Correctional Institution when judge Hayes dismissed the 60(b) motion.

did not file his motion timely.USAA Property and Inc Co v. Clegg,supra.This part of the lower court order should be reversed.

CONCLUSION

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

Respectfully Submitted

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