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COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Alfonso Ware, Jr. #168464

Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina

IN THE COURT OF (Select one)

☒ GENERAL SESSIONS

☐ FAMILY COURT

JUDICIAL CIRCUIT

APPLICATION FOR
FORENSIC DNA TESTING

ORIGINAL INDICTMENT NO.

90 -GS- 32 - 0056

OR

ORIGINAL PETITION NO.

-JU-

2013 JUL 29 PM 1:39
FILED
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

INSTRUCTIONS - READ CAREFULLY

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

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

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

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

Jury Trial, June 1990 term of Lexington County General

Sessions Court.

2. Give the date of the entry of the judgment and sentence: June 27, 1990.

and current place of incarceration: Broad River Corr. Inst., Columbia, SC.

3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

(a) Direct Appeal; State v. Ware, Op No. 92-400-17 (Ct.App. Filed Feb. 24, 1992).

(b) PCR; denied June 16, 1995; See back of this page for grounds.

(c) Writ of Certiorari to S.C. Supreme Court; denied on Nov. 8, 1996.

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: The alleged murder weapon. Clothing that I wore the day

the murder occurred, which were seized by the police.

Identify the specific type of DNA testing being sought:

Any type that could be used to test any blood found on the weapon and clothing, and that could establish conclusively that I did not commit murder.

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

There was only circumstantial evidence connecting me to the crime, the only evidence the prosecution really had was an alleged confession, which I maintained that I did not make. The murder happened at extreme close range.

If no blood is found on my clothing or the weapon, it would disprove the prosecution's theory about how the murder occurred.

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:

To my knowledge the material was never tested. My attorney did not request

that it be tested, and I do not know if the police tested it or not.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

Because if none of the victim's blood is found on the weapon or my clothing, it would prove that I could not have shot the victim.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:

- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
- (b) The Court may assess the cost of any DNA testing against me;
- (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
- (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Alfonso Ware, Jr.
Print Applicant Name

Alfonso Ware Jr.
Signature of Applicant

STATE OF SOUTH CAROLINA

County of **LEXINGTON**

VERIFICATION

I Alfonso Ware, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Alfonso Ware Jr.
Signature of Applicant

SWORN to and subscribed before me this 11th
day of February, 2013.

Susan H. Dye (L.S.)
Notary Public

My Commission Expires: March 5, 2018

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

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

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

Alfonso Ware Jr.

Signature of Applicant

SWORN to and subscribed before me this 30
day of Jan, 2013

Eugene Kest

Notary Public

(L.S.)

My Commission Expires: My Commission Expires April 4, 2018

January 30, 2013

The Honorable Beth Carrigg, Clerk of Court
205 East Main Street
Lexington, South Carolina 29072

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2013 JUL 29 PM 1:39

FILED

RE: Application for Forensic DNA Testing

Dear Ms. Carrigg:

Please find enclosed for filing an original and two copies of an Application for Forensic DNA Testing. Please return a clock-stamped copy to me for my record.

Your help with this matter is appreciated.

Sincerely,

s/ Alfonso Ware Jr.
Alfonso Ware, Jr.

Mr. Alfonso Ware, Jr., #168464
Broad River Correctional Inst.
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

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ORIGINAL

FILED

2013 JUL 29 PM 1:40

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON.)

IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)

-vs-)

ALFONSO WARE, JR., (#168464),)

Defendant.)

ORDER REGARDING MOTION
FOR DNA TESTING

Indictment Number: 1990GS3200056

The defendant has submitted a motion for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. He was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. Pursuant to the Act, the court directs the following actions.

- WAL #1
- 1) The Clerk of Court is to file the application. The court finds that the applicant qualifies for indigent status under §17-28-60.
 - 2) The application does not indicate a request for appointment of counsel. Under §17-28-60, the applicant is to request counsel in his application. The court is unaware of any ongoing PCR action that falls under the language of 17-28-60. The court will consider appointment of counsel if these proceedings reach a stage where the application is determined to be sufficient to proceed further.
 - 3) Under §17-28-50(A):
 - a. a copy of the documents filed shall be forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.
 - b. The Solicitor's office is responsible for notifying the Attorney General's office.

A TRUE COPY


Lex. Co. C.C.P., G.S. & F.O.

- c. The Solicitor's office is responsible for notifying the custodian of evidence.
- d. The victim's family is to be notified under §16-3-1505, et seq., S.C. Code Ann.

4) Under §17-28-50(B):

- a. The Solicitor and/or the Attorney General shall file a response within 90 days of the date that a copy of the application is forwarded by the Clerk of Court. If additional time is needed, the prosecuting agency or agencies may file a request for an extension of time.
- b. The victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) may file a response within 90 days of the filing of the application or within any time frame permitted by the court.

5) Under §17-28-70:

- a. The Solicitor's office is to forward a copy of this order to any custodian of evidence, and the custodian of evidence is hereby ordered to preserve all physical evidence and biological material related to the underlying murder charge.
- b. The custodian of evidence is further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court.
- c. If the custodian of evidence indicates that the evidence has been lost or destroyed, the custodian must comply with §17-28-70(C).

6) Under §17-28-80, if any physical evidence or biological material has previously been submitted for DNA testing, the Solicitor/Attorney General shall produce all written

WPA
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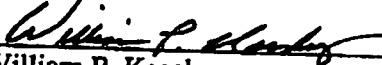
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reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

- 7) The court shall be notified of any issues related to preservation of evidence, with a copy sent to the parties. [See, for example, the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.]

AND IT IS SO ORDERED.

July 26, 2013


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#3

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was found guilty as indicted. The Honorable Hubert E. Long sentenced the Defendant to confinement for a period of life.

On July 3, 1990, H. Patterson McWhirter, Defendant's trial counsel, filed a timely Notice of Appeal on the Defendant's behalf. Robert M. Dudek of the South Carolina Office of Appellate Defense perfected the appeal on the Defendant's behalf. The South Carolina Supreme Court affirmed Defendant's conviction and sentence. *See State v. Ware*, Op. No. 92-MO-17 (S.C. Ct. App. Filed February 24, 1992).

The Defendant subsequently filed a Post-Conviction Relief (PCR) Application on August 21, 1992. The State filed its return on October 9, 1992. On May 2, 1995, the Honorable Daniel E. Martin held an evidentiary hearing. The Defendant was present at the PCR hearing, and Wayne Floyd, Esquire, represented him. By Order dated June 16, 1995, and filed June 21, 1995, Judge Martin denied and dismissed the Defendant's application.

Wayne Floyd, the Defendant's PCR counsel, filed a timely Notice of Appeal on the Defendant's behalf on July 19, 1995, and submitted a Petition for Writ of Certiorari on June 5, 1996. On November 8, 1996, the South Carolina Supreme Court denied the Petition. On December 19, 1996, the Court denied a Petition for Rehearing.

On March 11, 1997, the Defendant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. The Honorable Charles E. Simons, Jr., denied the Petition by Order dated January 14, 1998, and filed January 16, 1998. The Defendant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The Court affirmed the dismissal of the Petition by Order dated June 2, 1998, and filed June 4, 1998.

The Defendant filed a second PCR Application on February 10, 2000, alleging that he had newly discovered evidence that warranted another evidentiary hearing. The State filed its

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Return and Motion to Dismiss on April 13, 2000. The Honorable J.C. Nicholson, Jr., heard the Motion to Dismiss on June 14, 2001. Judge Nicholson denied the Motion to Dismiss by Order dated July 12, 2001, which was filed on July 17, 2001, and by Order dated July 31, 2001, which was filed on August 7, 2001. On August 27, 2001, the Honorable G. Thomas Cooper held an evidentiary hearing. William Rast, Esquire, represented the Defendant. Elizabeth McMahon, Esquire, of the South Carolina Attorney General's Office, represented the State. Judge Cooper denied the application by Order dated October 9, 2001, which was filed on October 26, 2001.

The Defendant filed a third PCR Application on December 6, 2001, alleging that his trial counsel was ineffective for failing to challenge his confession and for failing to object to the trial court's ruling pertaining to the validity of his confession. The Defendant further alleged that he did not knowingly and intelligently waive his right to appeal from the denial of his second PCR Application. The Honorable Marc H. Westbrook held an evidentiary hearing on January 6, 2003. The Defendant was present at the hearing, and Richard Breibart, Esquire, represented him. Allen Bullard, Esquire, of the South Carolina Attorney General's Office, represented the State. The Honorable Marc H. Westbrook denied the application by Order dated January 27, 2003, and filed February 4, 2003.

On August 14, 2003, the Defendant filed a fourth PCR Application against his PCR counsel for failing to appeal his third PCR Application. The State made its Return and Motion to Dismiss on March 31, 2004. The Honorable Clyde N. Davis, Jr., held an evidentiary hearing into the matter on October 21, 2005. The Defendant was present at the hearing, and Tommy A. Thomas, Esquire, represented him. Sabrina C. Todd, Esquire, of the South Carolina Attorney General's Office represented the State. The Honorable Clyde N. Davis, Jr., by Order dated

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November 14, 2005, and filed on November 21, 2005, granted the Defendant's Application, which allowed the Defendant a belated review of the denial of his third PCR Application.

On December 15, 2005, Tommy A. Thomas, Defendant's counsel for his fourth PCR Application, filed a timely Notice of Appeal on the Defendant's behalf and a Petition for Writ of Certiorari for Defendant's third PCR Application. On September 5, 2007, the South Carolina Supreme Court denied the Petition.

Facts

On November 25, 1989, an individual who heard a loud collision outside of his home found Robert Chanon injured in a vehicle on Holmes Street in West Columbia. Law enforcement found a pistol in the vehicle on the passenger's side floorboard, which police later confirmed to be the murder weapon, and money in Chanon's hands. Chanon was incoherent when law enforcement arrived.

Emergency Medical Services (EMS) arrived on the scene and removed Chanon from the car. When EMS removed him, they identified a gunshot wound, and law enforcement found two pieces of crack cocaine in his seat. Chanon stated that someone shot him on crack alley. EMS transported Chanon to the hospital. In the emergency room, he told his girlfriend that an unfamiliar black man shot him.

Three days after the shooting, the police received a tip that the Defendant was involved. An officer located the Defendant and asked him if he knew about the shooting. The Defendant responded that he did, and he voluntarily went to the police station where the police gave him *Miranda* warnings. At this point, the Defendant began talking and gave the officer a confession. An officer typed up the Defendant's statement. Then the Defendant initialed and signed the statement. The Defendant stated that he had shot Chanon after Chanon had stolen his crack and

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money right out of his hand. He also stated that he had thrown the pistol into the car as Chanon drove away.

The day after the Defendant confessed to the shooting, Chanon died from the gunshot wound.

At trial the Defendant testified that the deceased, while in his car, approached him about purchasing crack. He testified that the deceased snatched the crack out of his hand and drove away, and, on cross-examination, the Defendant denied stating that the deceased stole his money as well. He further testified that he threw the gun in the car, but denied intentionally pointing the gun at him or pulling the trigger. He also testified that the gun might have gone off when he threw it in the car.

Material Requested to be Tested

In this current Application for Forensic DNA Testing, the Defendant requests the following material be tested:

1. "The alleged murder weapon."
2. "Clothing that [he] wore the day the murder occurred, which were seized by the police."

Requirements of the Forensic DNA Statute

The Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10 *et seq.*, authorizes a person who is currently incarcerated, who pled not guilty to certain offenses, who was subsequently convicted of the offense, and who asserts he is innocent to apply for forensic testing of his DNA and any physical evidence or biological material related to his conviction.

The Act requires that the Defendant identify the evidence that should be tested. The Act requires that the Defendant specifically articulate the basis for his request for additional testing and the specific testing sought. Further, the Act requires that the Defendant explain why his identity was or should have been a significant issue during the original trial of his case. The Act also requires that the Defendant explain why material to be tested was not previously subjected to testing or why additional testing would provide a substantially more probative result. Finally, the Act requires that the Defendant explain why, if the testing were to produce exculpatory results, the results will constitute new evidence that would change the results of the Defendant's conviction.

The Court shall not order DNA testing of the Defendant's DNA and the physical evidence or biological material until it makes a finding that the Defendant has established each of the following factors by a preponderance of the evidence (S.C. Code Ann. § 17-28-90(B)):

1. the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
2. the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
3. the physical evidence or biological material sought to be tested is material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;

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4. the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;
 5. if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the defendant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;
 6. the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
 7. the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

Failure to Meet the Requirements Set Forth in the Statute

The Defendant has failed to meet the requirements set forth in the statute by a preponderance of the evidence. Specifically, the Defendant has not explained why his identity was a significant issue during the original trial of the case. The Defendant placed himself at the scene of the crime prior to and during the trial. Prior to trial, the Defendant admitted to shooting the deceased after the deceased stole crack and money from him, and he admitted to throwing a gun into the car. The State had the benefit of the Defendant's confession and used it against him during the trial. Moreover, the deceased was found with money in his hand and crack in his seat. A gun also was found in the car. The Defendant provided information to law enforcement that

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only a person at the scene of the crime would have known. Additionally, all of the physical evidence corroborated the Defendant's version of what happened.

Further, the Defendant testified under oath that the deceased approached him, stole from him, and that he threw a gun into the deceased's car. He testified that he did not know if the gun went off. At trial, the Defendant placed himself at the scene; he placed the murder weapon in his own hands. Identity of the Defendant was not a significant issue at the original trial.

This case was properly submitted to the jury to decide guilt or innocence. The trial judge allowed two lesser included verdicts to be submitted to the jury. The jury had the option to convict the Defendant of Murder, Manslaughter, or Involuntary Manslaughter or to find the Defendant not guilty. The jury was the sole finder of fact in this case, and it determined that the Defendant was guilty of Murder after having received all of the testimony and evidence presented during the trial. The Defendant had the opportunity to present his defense at trial. He took the stand and testified on his own behalf. The jury weighed all credible evidence and decided this case.

The Defendant asserts in this Application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred." Whether or not there is blood on the murder weapon or on the Defendant's clothing is inconsequential. Even if DNA results were to demonstrate that the victim's blood was not on the murder weapon or on the Defendant's clothing, that information would not provide evidence inconsistent with the State's theory of the case. The Defendant, through his verbal and written confession, created the State's theory of the case, which was corroborated by the evidence and other witnesses. More importantly, it would not demonstrate evidence that would suggest anyone other than the Defendant was responsible for the murder. The Defendant has failed to describe

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adequately how DNA testing would exclude him to the extent that it would change the outcome of the trial.

Additionally, the murder weapon and the Defendant's clothing cannot be tested because they are no longer available. This murder occurred twenty-four years ago and these items cannot be located.

The Lexington County Clerk of Court does not have any evidence from the trial. On August 24, 1998, the Honorable William P. Keesley signed an Order for Release of Evidence, which ordered that the items in evidence be released from the Clerk's Office to the State for distribution to their rightful owners.

The Lexington County Solicitor's Office does not have any evidence from the trial. On August 22, 2013, Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office contacted Howard Jernigan, an investigator in the Solicitor's Office, who performed a review of the records in the Solicitor's Office. Mr. Jernigan was not able to locate either the evidence or any paperwork relating to the transfer of evidence in this case. Additionally, Mr. Martin contacted Debbie McDaniels, the Solicitor's Office Records Custodian, who informed him that the only files still in existence date back to 1992, because a flood, which was caused by burst pipes, in 1995 destroyed the files stored in the basement of the Solicitor's Office.

The West Columbia Police Department does not have any evidence from the trial. On August 26, 2013, Investigator James P. Sullivan, the Evidence Custodian for the West Columbia Police Department, informed the Solicitor's Officer that a review of West Columbia evidence records revealed that the West Columbia Police Department did not take any property into evidence in reference to this case.

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SLED does not have any evidence from the trial. On September 10, 2013, Sharon Hunt, SLED/Forensic Services, provided the Solicitor's Office with copies of its case files. A review of its files revealed that R.M. Freeman picked up the murder weapon and all other evidence tested. He returned the items to the Lexington County Sheriff's Department on January 23, 1990, prior to the trial. SLED records do not indicate that it took possession of the evidence after the trial.

The Lexington Medical Center does not have any evidence from the trial. On September 12, 2013, Wendi C. Knight, MLS (ASCP), the Lab Manager at the Lexington Medical Center, informed the Solicitor's Office in a sworn affidavit that the Lexington Medical Center no longer has any specimens for testing as it relates to this case. She also informed the Solicitor's Office that the lab records do not indicate that any DNA testing was performed at the Lexington Medical Center.

The Lexington County Sheriff's Department does not have any evidence from the trial. On September 17, 2013, Sergeant Douglas A. Novak, the Sergeant of Evidence for the Lexington County Sheriff's Department, informed the Solicitor's Office that after he performed a search of the evidence room and old records, the only item found was an incident report with case number 89-38992 and that no other evidence could be located as it relates to this matter.

Thus, all custodians of evidence have indicated that they do not have in their possession any evidence as it relates to this case.

Conclusion

WHEREFORE, based on the foregoing, the State respectfully requests that the Court deny Defendant's Application for Post-Conviction Forensic DNA Testing because the Defendant has not articulated why DNA testing would prove probative or change the outcome of his trial. Furthermore, it is factually impossible to perform DNA testing, as the evidence no longer exists.

Thus, this Application should be summarily dismissed for its failure to meet each factor required by a preponderance of the evidence.

Respectfully submitted,



Christopher G. Samellas
Senior Assistant Solicitor
Eleventh Judicial Circuit Solicitor's Office
205 E. Main Street
Lexington, South Carolina 29072

October 22, 2013

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ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

STATE,

v.

ALFONSO WARE, JR., #168464,

DEFENDANT.

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No: 1990-GS-32-0056

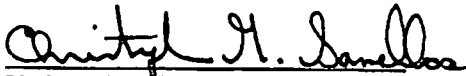
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AFFIDAVIT OF SERVICE BY MAIL

BETH A. GREGG
CLERK OF COURT
LEXINGTON, SC

1. I am an employee of the State 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 State's Response and Motion to Dismiss in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210


Christopher G. Samellas
Senior Assistant Solicitor

October 22, 2013

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State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit

ORIGINAL



COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255

LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. ROOM 309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352

DONALD V. MYERS
Solicitor

October 22, 2013

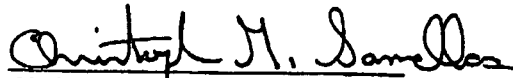
Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

Re: *State v. Ware*, #168464 (1990-GS-32-0056)

Dear Mr. Ware:

Please find enclosed the State's Response to the Defendant's Application for Forensic DNA Testing and Motion for Summary Dismissal.

Sincerely,


Christopher G. Samellas
Senior Assistant Solicitor

cc: The Honorable William P. Keesley
Lexington County Clerk of Court

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA)
(LEXINGTON))

-vs-

ALFONSO WARE, JR., (#168464),
Defendant.

ORDER OF THE INTENTION
TO SUMMARILY DISMISS THE
APPLICATION FOR DNA TESTING
Indictment Number: 1990GS3200056
Warrant Number: C560956

The court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. Based on the record at this point, the court sees no purpose for further proceedings and indicates to the applicant/defendant and the Solicitor that the action will be summarily dismissed for the reasons stated below; unless the applicant/defendant raises questions of fact or law related to the issues addressed in this order and the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach

a stage where the application is determined to be sufficient to proceed further. A copy of the documents filed was forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence has been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

FACTUAL RESPONSE

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS, and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

WPK
#3

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under Miranda, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- WPX
#4
- 1) the weapon and the clothing are not available for testing;
 - 2) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - 3) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - 4) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - 5) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;

- 6) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
- 7) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- 8) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

LEGAL ISSUES IN THE RESPONSE

WAL #5
The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

The court agrees, based on the information currently available, that the application should be summarily dismissed because there are not materials to test. S.C. Code Ann. §17-28-90(B) reads:

- (B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:
- (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
 - (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
 - (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo

contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

WPC
#6
The court finds that there is currently no indication that evidence exists that would allow the applicant to meet the requirements of subsections (B)(1) and (B)(2). As for the other subsections, viewing every conceivable inference in the light most favorable to Mr. Ware, the court cannot determine, without reviewing the transcript or having additional knowledge about the evidence, whether DNA testing might tend to be exculpatory or go to show that the applicant did not commit murder. However, since there is no evidence to test, and no indication of a chain of custody, the court fails to see how the other elements could be proven.

The court acknowledges the State's contention that there is nothing to be gained from a DNA analysis, if it could be performed. It recognizes the State's argument that absence of the victim's blood from the defendant's clothing or the gun would not cast doubt on the State's case. However, without knowing more information about the evidence developed and the specific facts presented to the jury, the court is unwilling to summarily dismiss the application on this

ground.¹ The notification of intention to summarily dismiss the application is based on the absence of proof that any DNA material exists to test.

THEREFORE, IT IS ORDERED that the court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The application will be summarily dismissed unless the court is made aware of some purpose for further proceedings. The applicant/defendant and the Solicitor are hereby notified that the action will be summarily dismissed for the reasons stated above, unless the applicant/defendant raises questions of fact or law related to the issues addressed above and those raised in the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

WPK
#7

IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Assistant Solicitor Christopher G. Samellas, which he shall be responsible for distributing to any victims or other agencies required to have notice by law.

¹ There is no dispute that Mr. Chanon was shot and, presumably, no dispute that he bled. Mr. Ware admits he was there. In the abstract, it is conceivable that the absence of blood on Mr. Ware's clothing could, depending on the circumstances, provide an indication as to the proximity of Mr. Ware to Mr. Chanon when the shot hit the victim. Likewise, blood on the weapon could go to show the proximity of the weapon to Mr. Chanon when he was hit. If Mr. Ware claims that the weapon discharged by accident or by negligent handling of it, then the proximity of the weapon to the victim could, in abstract theory, support doubt as to whether or not the shooting was a murder. A similar argument could be made related to the lack of blood on Mr. Ware's clothing. His version of events is that he was outside the vehicle and Mr. Chanon was inside the vehicle. The court is unaware of any blood spatter evidence. The court does not know, at this point, what evidence was developed or presented that could go to the issue of the proximity of Mr. Ware and the weapon to Mr. Chanon. The court does not know, based solely on the application and Response, whether there was evidence of a close-contact wound. So, without an additional review, the court would not be able to evaluate whether the presence or absence of Mr. Chanon's blood on the gun could exonerate Mr. Ware, cast doubt, or diminish his conduct to something less than murder.

IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Mr. Alfonso Ware, Jr., #168464, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.

AND IT IS SO ORDERED.

May 21, 2014


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 9, 2014

Beth A. Carrigg, Clerk
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

Dear Ms. Carrigg:

Please find enclosed Reply To Proposed Dismissal Of
Application For DNA Testing, and a copy to be stamp-clocked returned
to me within the prepaid S.A.S.E. provided; this is for my records.
My copy has the paper clip on it with the yellow post-it sticker.

I do appreciate your assistance in this matter. Thank you
very much.

Respectfully,

Alfonso Ware Jr.
Alfonso Ware Jr.

31
ORIGINAL
FILED

2014 JUN 13 AM 9:59

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORIGINAL

STATE OF SOUTH CAROLINA)
2014 JUN 13 AM 9:59) IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)
BETH A. CARRIGG)
STATE OF SOUTH CAROLINA) CLERK OF COURT
LEXINGTON SC)
)
)
V.)
)
)
ALFONSO WARE JR. (160464))
)
DEFENDANT)

REPLY TO PROPOSED DISMISSAL
OF APPLICATION FOR DNA TESTING

Indictment Number: 1990GS3200056
Warrant Number: C560956

PROCEDURAL HISTORY.

A timely Notice of Appeal was filed on defendant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed defendant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct. App.) filed February 24, 1992.

D 32

A timely Notice of Appeal was Appeal was filed on the defendants behalf and a petition for Writ of Certiorari was submitted by Wayne Floyd, the defendant PCR Counsel. On November 8, 1996, the South Carolina Supreme Court denied the Petition. A petition for Rehearing was denied on December 19, 1996.

The Applicant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons, Jr., on January 14, 1998. The applicant appealed this decision to the U.S. Court Appeals for the Fourth Circuit. The dismissal of the Applicant's petition was affirmed on June 2, 1998.

The defendant filed yet another PCR Application on February 10, 2000. An Evidentiary hearing was convened on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed defendant to submit another application for Post Conviction Relief. An Evidentiary hearing was held on August 27, 2001, before the Honorable G. Thomas Cooper. Judge Cooper denied the Application. The defendant filed another application for PCR. On December 6, 2001, an Evidentiary hearing into the matter was convened on January 6, 2003, the Honorable Marc Westbrook denied the Application. Defendant filed PCR Application on August 14, 2003, on April 7, 2004, Respondents filed their Return to this Application.

QUESTIONS OF FACT AND LAW

DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN SOUTH CAROLINA CODE ANN. 17-28-320(A) and 17-28-320(C)?

South Carolina Code Annotated §17-28-320(A) States:
A Custodian of the Evidence MUST preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) Murder (§16-3-10)

Fact: Defendant was convicted of Murder.

§17-28-320(C) States: The physical evidence and biological material MUST be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A).

Fact: Defendant since 1990 has been incarcerated.

§17-28-70(C) States: For physical evidence or biological material that the custodian of evidence asserts has been lost or destroyed, the court shall Order a Custodian of Evidence to locate and provide the Applicant and the Solicitor or Attorney General as applicable, with a copy of any document, note, log, report relating to the physical evidence or biological material.

The Solicitor's Office determined that:

- (1) The weapon and clothing are not available for testing.
- (2) The Evidence from trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998.

Who was this Evidence released to?

Why was it released, when defendant was still in litigation and incarcerated?

§6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial.

Who at the Lexington County Sheriff's Dept. took custody of this evidence and the results of SLED Testing? Where is the documentation from that exchange?

While the S.C. Code Ann. §17-28-300 took effect in 2009, a look at the history of this Act shows that in 1990 South Carolina had a Preservation of Evidence Act in place.

This Court is presented with the question of what was the results of the test done by S.L.E.D. in 1990?

From the things determined by the Solicitor's Office, there are questions that are not answered. There are reports and test results not made available, evidence turned over by S.L.F.D. to Lexington County Sheriff Department who in that department? Who was the evidence from the trial released to?

The State has a duty to take affirmative steps to preserve evidence. The defendant has a protected ~~xxxxxx~~ privilege to request and obtain from the State evidence that is material to the guilt of the defendant.

This Honorable Court in its foot note 1. Agree's that in the abstract it is conceivable that the absence of blood on Mr. Ware is very important to the doubt as to support Mr. Ware's verison of the events.

The defendant has raised questions of fact and law related to the issues and the response of the Solicitor filed.

This Court must Order that the defendant is allowed to continue. The Applicant request this Court for an Order for Appoint-ment of Counsel. As is evidence from what has been presented here, this is a complex issue that will require the skills of a trained attorney.

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

Dated: June 9, 2014

FILED

ORIGINAL

STATE OF SOUTH CAROLINA)

2014 JUN 18 AM 9:59

COUNTY OF LEXINGTON)

THE COURT OF GENERAL SESSIONS

BETH A. CARRIGG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
LEXINGTON SC)

V.)

CERTIFICATE OF SERVICE

ALFONSO WARE JR. (168464))

I, Alfonso Ware Jr., the defendant, declares under the penalty of perjury that I mailed a copy of his Reply to Proposed Dismissal of Application for DNA Testing to the parties listed below by placing in the U.S. Mail clearly addressed as follows:

Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Beth A. Carrigg
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

William P. Keesley, Judge
The Circuit Court of the
Eleventh Judicial Circuit
Post Office Box 10
127 Courthouse Square
Edgefield, SC 29824-0010

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Waterloo 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SWORN TO AND SUBSCRIBED BEFORE ME

This 18th day of June, 2014

Susan N. Frye
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: _____

Commission Expires

12-31-2019

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

BETH A. CARRIGGS
CLERK OF COURT
LEXINGTON, SC

2014 JUN 20 PM 1:23

THE STATE OF SOUTH CAROLINA,)

-vs-

ORDER OF SUMMARY DISMISSAL
OF APPLICATION FOR DNA TESTING

ALFONSO WARE, JR., (#168464),)
Defendant.)

Indictment Number: 1990GS3200056
Warrant Number: C560956

By order dated May 21, 2014, the court gave notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The court gave both sides an opportunity to file submissions related to this issue. Mr. Ware sent his response on June 10, 2014. Having reviewed the matter, the court finds no basis for this application to continue and no purpose to be gained by doing so. The motion is summarily dismissed.

WPH
#1

Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach a stage where the application is determined to be sufficient to proceed further. Copies of the documents filed were forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

A TRUE COPY
[Signature]
Lex. Co. C.C.P., G.S. & F.C.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence had been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

FACTUAL RESPONSES

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under *Miranda*, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money

Ware
#3

was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

WPC
#4

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

In response to the May 21, 2014 order, Mr. Ware recites the following questions:

- a) Did the custodian of the evidence follow the mandates set out in South Carolina Code Ann. 17-28-320(A) and 17-28-320(C)?
 - i. He argues that the custodian of evidence was required to maintain physical evidence and biological material.
 - ii. He argues that, even though the code section cited did not take effect until 2009, there was a preservation of evidence act in place prior to that time, though the provides no specifics.
 - iii. He states, "This Court is presented with the question of what was [sic] the results of the test done by S.L.E.D. in 1990?"

Ware
#5

As to these issues, they do not change the basis for the notice of summary dismissal. S.C. Code Ann. §17-28-90(B) provides the basis for having the court order DNA testing. As stated previously, there does not appear to be any biological material to test.

- b) Mr. Ware goes on to argue that "there are questions that are not answered." He objects to the failure of the State to maintain the evidence. He claims that the evidence is material to the question of his guilt. He notes that the court, in its prior order, acknowledged that a question could exist, in the abstract, about whether the

absence of blood on the gun and on Mr. Ware's clothing could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

As to these arguments, Mr. Ware has no indication that there is any evidence to test. His questions and his assertions really seem to be an attempt to go on a fishing expedition to see what might develop. While that is understandable on the part of someone who has been convicted of murder and is serving a lengthy prison term, this application seeks an order directing DNA testing. The court sees no valid purpose in proceeding with consideration of this application, in the absence of any information that biological material is available for testing.

Further, as explained below, the court was trying to give the applicant every benefit of the doubt in allowing the application to proceed this far and to see if any evidence existed for DNA testing. The point is that Mr. Ware is arguing that he should be able to develop evidence to show the absence of biological material.

While the court focused in its prior order on the key issue of the non-existence of anything remaining to test, it seems obvious that Mr. Ware's application and response are questions about the presence or absence of blood, not the source of any blood. He does not seem to even argue that there is a need for DNA testing under the definitions of §17-28-20.

An application under this Act is to include certain things under S.C. Code Ann. §17-28-40.

Those requirements include the following:

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity.

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's

conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching.

As noted in the prior order and in this one, Mr. Ware gave a written statement to police and he testified at his trial. He placed himself at the scene. According to the statement, he shot the decedent in a drug deal. According to another version, the decedent grabbed the gun. In another version, the defendant threw the gun into the decedent's car, but never pointed or presented the gun. There is no question about the identity of Mr. Ware as the person with the gun initially. The only conceivable question would relate to which of the stories to believe and/or whether there is any evidence that would create doubt of guilt.

In addition, as noted in the prior order:

The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

WPA
#7

Presumably, Mr. Ware is asserting that the absence of blood on him, his clothing, and the gun would go to issues of his guilt or, if guilty of anything, whether he should have been convicted of the lesser offense of involuntary manslaughter, which was submitted to the jury. There is no indication from anything provided to the court that there was evidence that Mr. Ware was bleeding. The only known evidence related to the source of blood is that the decedent was the sole person bleeding. So, regardless of whether or not DNA testing would have provided information about the source of blood, the question of whether or not blood was present on Mr. Ware, his clothing, or the weapon is not a new issue. Even if it were established that there was no blood on Mr. Ware, his clothing, or the gun, it is merely impeachment evidence. [See §17-

44

28-40(7)).] It was an issue that one would have known to pursue in the original trial or in any of the multiple PCR applications.

The court has considered the application, the State's response, and the applicant's response. The court finds no purpose in pursuing DNA testing, based on the representations made to the court.

THEREFORE, IT IS ORDERED that the court summarily dismisses the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq.

AND IT IS SO ORDERED.

June 18, 2014



William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

45

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

The Honorable Beth Carrigg
Clerk of Court for Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Ms. Carrigg:

Enclosed for filing is a Notice of Appeal in the above
case.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

46

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

The Honorable Jeanette Barber
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State of South Carolina v. Alfonso Ware Jr.,
Indictment No. 1990GS3200056, Warrant No. C560956. Appellant
appeals denial of his Access to Justice Post-Conviction DNA
Testing Act, S.C. Code Ann. 17-28-10 et seq.

Dear Ms. Barber:

Enclosed for filing is a Notice of Appeal in the above
case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. Copy of the Order.

Also enclosed is a S.A.S.E. to return a clock-stamped copy
for my records. I appreciate your assistance in this matter. Thank
you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attachments

47

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

NOTICE OF APPEAL

Alfonso Ware Jr. appeals the Order of the Honorable William P. Keesley, dated June 18, 2014. Appellant received written Notice of Entry of this Order on June 26, 2014.

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

cc: File

48

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail clearly addressed.

Ms. Jeanette Barber, Clerk
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Mr. Alan Wilson, Attorney General
Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

Ms. Beth Carrigg, Clerk
Clerk of Court, Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

ORIGINAL

19A06532 0056 49
C560956

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

FILED
2014 JUL 23 AM 7:51
BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

Dear Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

ORIGINAL

50

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUL 23 AM 7:51

FILED

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Mr. Myers:

Enclosed for filing is a Notice of Appeal in the above
~~XXXX~~ case. I apologize for the delay.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUL 23 AM 7:51

FILED

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant

PROOF OF SERVICE

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Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, south Carolina 29072

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

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Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

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Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant.

PROOF OF SERVICE

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Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

54

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 28, 2014

South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

RE: Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed you will find the Initial Brief of Appellant to be filed and a copy to be clock-stamped and returned to me for my records with a S.A.S.E. postage prepaid. My copy has the paper clip on it.

I do appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.
Alfonso Ware Jr.

cc: File

RECEIVED

JUL 29 2014

SC Court of Appeals

0
RECEIVED

JUL 29 2014

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LEXINGTON COUNTY
Court of General Session**

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

INITIAL BRIEF OF APPELLANT

**ALFONSO WARE JR.
Appellant
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210**

55

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

INITIAL BRIEF OF APPELLANT

ALFONSO WARE JR.
Appellant
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

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17-28-320(C)
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STATEMENT OF ISSUES ON APPEAL

**DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN
SOUTH CAROLINA CODE ANN. §§ 17-28-320(A) and 17-28-320(C)?**

STATEMENT OF THE CASE

The Appellant is presently confined in South Carolina Department of Corrections pursuant to Order of Commitment of the Clerk of Court Lexington County. The Appellant was indicted at the January 1990 Term of the Grand Jury for Lexington County for Murder (90-GS-32-0056). Appellant was represented by Thomas Bellinger, on June 25-27, 1990, Appellant ~~when~~ went to trial by Jury, found guilty as indicted. He was sentenced by the Honorable Hubert E. Long to Life.

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed Appellant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct App. filed February 24, 1992).

The Appellate subsequently filed an Application for PCR on August 21, 1992, the State filed its Return on October 9, 1992. On May 2, 1995, an Evidentiary hearing was held before the Honorable Daniel E. Martin at which the Appellate was present and was represented by Wayne Floyd. By Order dated June 16, 1995, Judge Martin denied and dismissed the Appellant's Application.

A timely Notice of Appeal was filed and a petition for Writ of Certiorari was submitted by Wayne Floyd. On November 8, 1996, the S.C. Supreme Court denied the petition. A petition for rehearing

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was denied on December 16, 1996.

The Appellant filed a Petition for Writ of Habeas Corpus in the U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons Jr. on January 14, 1998. The Appellant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The dismissal of the Appellant's petition was Affirmed on June 2, 1998.

The Appellant file another PCR Application of February 10, 2000. An Evidentiary hearing was held on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed Appellant to submit another Application for PCR. An Evidentiary hearing was held on August 27, 2001, before the Honorable Thomas G. Cooper. Judge Cooper denied the Application. The Appellant filed another PCR Application on December 6, 2001, an Evidentiary hearing was held on January 6, 2003, the Honorable Marc Westbrook denied the Application. Appellant filed PCR Applications on August 14, 2003, and April 7, 2004.

By Order of the Court the Clerk of Court filed this Application for DNA Testing on July 26, 2013. On October 22, 2013, the Solicitor's Office filed a Response and Motion for Summary Dismissal. On June 16, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the Application for DNA Testing. Appellant filed a timely Response to the Order of the Court.

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ARGUMENTS

DID THE COURT ERR, WHEN IT DENIED APPELLANT'S APPLICATION FOR D.N.A. TESTING WITHOUT REQUIRING THE SOLICITOR'S OFFICE AND THE CUSTODIAN OF THE EVIDENCE TO FOLLOW THE STATUTE?

17-28-70(C)(D)

"For physical evidence or ~~bx~~ biological material that the custodian of evidence asserts has been lost or destroyed, the Court shall Order a Custodian of Evidence to locate and provide the Appellant and the Solicitor or Attorney General, as applicable with a copy of any document, note, log or report relating to the physical evidence or biological material.

The Solicitor's Office determined the following:

- (1) The weapon and the clothing are not available for testing
- (2) The evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998
- (6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Dept. on January 23, 1990 which was prior to the trial.

The Court in its Order of intention to Summarily Dismiss the Application for DNA Testing. Factual response state "The response recites the procedural history of the Appellant's murder conviction, including four (4) PCR Application and various appeals."

Clearly from this statement from the Court the evidence should have been preserved, beyond the January 1998 date that the Court claims to have released the evidence from the trial. There is a record of the evidence being released, however, the Solicitor's Office does not indicate who the evidence was released to. 17-28 -70(C) in part states "A copy of any document, note, log, or report relating to the physical evidence or biological material" by not providing the Appellant with the name of the person who the evidence was released to or what was released. Just as important who determined and by what method that the evidence should be released.

Office of the Custodian of the Evidence or the Solicitor have not followed the requirements of the statute in their investigation. This Application should not have been denied.

The Solicitor's Office states that "S.L.E.D. does not have any evidence from the trial as the weapon and evidence tested" were returned to the Lexington County Sheriff Dept. January 23, 1990, prior to the trial. Again it is clear that S.L.E.D. tested the weapon and evidence, prior to the trial. What are the results of those test? What was tested? Who at S.L.E.D. tested it? Who was this evidence turned over to? These questions are available at S.L.E.D.! Results of their work was retained in their records.

Appellant has claimed from the beginning that he did not fire the gun that killed the victim and as stated by the Court it is conceivable that this is true; See footnote 1 of Order of Intention to Summarily Dismiss.

When the State fails to preserve evidence which might have exonerate the Appellant, the Court must determine both. Whether the evidence was constitutionally material of apparent exculpatory value, and incomparable. Lost or destruction of relevant evidence by the government not only ~~raz~~ raises general questions of the fundamental fairness of a criminal trial, but may also deny the Appellant the right to compulsory process. It is the manifest duty of the to vindicate guarantees of confrontation compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced 94 S.Ct 3090.

It must be established that the law concerning this issue has been followed, and before we can say with certainty that there is no evidence to be tested we must be satisfied that all of the statute is complied with. To protect the rights and interest of the Appellant.

That is not the case here. We are not certain of the existence of any evidence or the results of any test done (S.L.E.D.). If the Custodian of the Evidence or the Solicitor had followed the commands of the statute we may be sure of the existence of the evidence. As long as the dictates of the law is not been applied equally then the Appellant right to due process in his application. As long as the Chain of Custody, the log, notes, and records that have not been produced we will never know with certainty the existence of any evidence, in fact the record reflect more in favor of there being evidence than not, (S.L.E.D. tested and turned over prior to trial), if the Custodian of the Evidence conducts a

search then we will know for certain.

The law is a two-edge sword that cuts both ways. It not be applied to the Appellant and not the Respondents, they must be made to make a thorough search following the guide-lines already set-out, in the statute §17-28-80, find those records, notes, logs, and Chain of Custody.

This Application is to important to settle on conclusory statements and not fact.

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CONCLUSION

The question present by the Appellant remains unanswered. Appellant pray that this Court will Order the Respondents to comply with the law as it applies to this issue (Preservation of Evidence Act).

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

66

RECEIVED

JUL 29 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

SC Court of Appeals

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

CERTIFICATE OF SERVICE BY MAIL

I, Alfonso Ware Jr., declare under the penalty of perjury that I have served the Initial Brief of Appellant by depositing a copy of it in the U.S. Mail, postage prepaid, to all parties listed below and clearly addressed.

South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Solicitor, Eleventh Judicial Cir.
Donald V. Myers, Solicitor
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Clerk of Court, Lexington County
Ms. Beth Carrigg, Clerk
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Attorney General's Office
Alan Wilson, Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

July 28, 2014

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

RETURN TO MOTION TO DISMISS APPEAL WITHOUT PREJUDICE

 This matter comes before the Court by a "in the "Motion to dismiss without prejudice and with leave to appeal again" dated July 28, 2015. In the motion in this DNA application denial appeal, the petitioner, Alfonso Ware, Jr., requests the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called "S.L.E.D evidence that was not considered by Judge Keesley." Respondent opposes the motion to dismiss without prejudice.

A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court and Judge Keesley to consider is a response he received to an Freedom of Information Act request he received on February 4, 2015 which he presented o this Court in an earlier motion to "motion for relief from Judgment ...' received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matter on appeal from the denial of a DNA application by Judge Keesley nor authorize the

matter for DNA testing to be open below. Neither of the items of S.L.E.D. records from 1990 attached to the June 3 motion do not reflect that there is any trace evidence that was available for DNA testing which is the purpose of the DNA application.

In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- 
- a) the weapon and the clothing are not available for testing;
 - b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-5. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5.

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X3
The material Petitioner attached does not assert any newly discovered evidence that trace evidence, the gun or clothing or other items exist for DNA testing that he is seeking. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations and conclusions in 2013 and 2014 that evidence for DNA testing exists that he seeks to be tested.

In an abundance of caution, Respondent attaches the following documents:

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.

4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Exhibits 1-5 Attached.

The similar request was before the Court when on July 10, 2015, it interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to “stay proceedings in this Court.”). The same request is now converted to a motion to dismiss the appeal without prejudice and allow refiling. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed this motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, it shows that SLED released a “box” in January 1990, a matter that is not in dispute on whether the items remain in the custody to the Lexington County Sheriff Department.

Apparently, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. . However, it is neither, but a limited procedure.

The Petitioner has made an inadequate showing to allow a dismissal without prejudice

II.

Wherefore having made Response to the “Motion to Dismiss Without Prejudice and with

Leave to Appeal Again", the Respondent requests that the motion be dismissed."

Respectfully submitted,

Respectfully submitted,

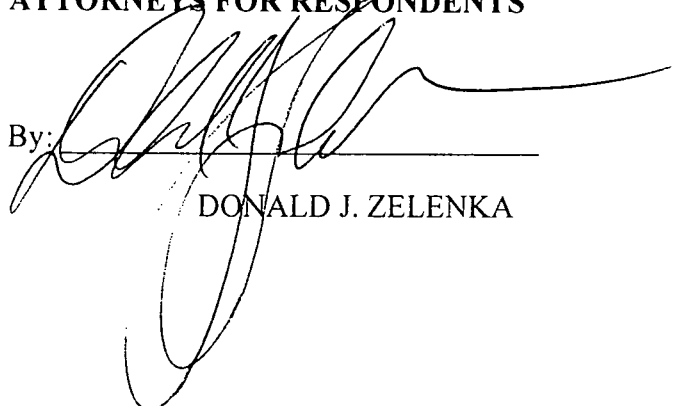
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

By: 

DONALD J. ZELENKA


August 14, 2015

ATTACHMENTS

1. Copy of an Order for Release of Evidence dated August 24,1998 by the Honorable William P. Keesley.
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4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17,2013.

1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
	)	
THE STATE	)	ORDER FOR RELEASE OF EVIDENCE
VS.	)	
	)	
Alfonso Ware Jr.	)	90-GS-32-56
DEFENDANT.	)	

It appears that the above-captioned action was tried before the Court of General Sessions of Lexington County on June 27, 1990, and that more than ten (10) days have now elapsed since the conclusion of said action. It also appears that no appeal has been perfected with regard to said action.

The following items were introduced into evidence:

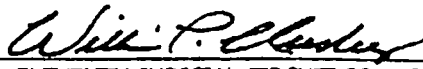
No Sheet Available

1998 AUG 24 P 4:40
 CLERK OF COURT
 LEXINGTON SC

Since the retention of said items by the Clerk of Court no longer serves any judicial purpose,

IT IS THEREFORE ORDERED that said items be released to the state for distribution to their rightful owners.

AND IT IS SO ORDERED.


 ELEVENTH JUDICIAL CIRCUIT COURT JUDGE

Lexington, South Carolina
 August 24, 1998

2

ELEVETH CIRCUIT SOLICITOR'S OFFICE

Donald V. Myers, Solicitor



205 EAST MAIN STREET #309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352 FAX: (803) 785-8431



Matthew W. Martin-Chief Investigator
(803) 785-2201

Matthew W. Martin

To: Assistant Solicitor Christopher Samellas

Date: August 26, 2013

Re: State v. Alphonso Ware (90-GS-32-56)

After speaking with you on Thursday, August 22, concerning the appeal on the above mentioned case, I took the following actions. First, I contact Howard Jernigan from our office. Mr. Jernigan has been the liaison between the Lexington Clerk of Court's Office and our office since the early 1990's. Mr. Jernigan completed an intense search of the files in his possession relating to the transfer of evidence from the Clerk's Office back to law enforcement. Mr. Jernigan could find no paperwork related to the above listed case.

I next contacted Debbie McDaniels from our office. Ms. McDaniels is our in-house records custodian. Ms. McDaniels informed me that the only files from our office that still exist start at 1992. She stated that before Lexington County had a central records management storage area, the files for the Lexington County Solicitor's Office were stored in the basement of the office. These files were destroyed by a flood in 1995.

To that end, I am unaware of any other avenue for our office to take to locate any records that would have remained in our care, custody or control. Please do not hesitate to contact me should any further follow up be desired or assistance needed.

3

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City of West Columbia
Bridging Past, Present and Future

POLICE DEPARTMENT
CHIEF DENNIS K. TYNDALL

To: Lt. Bruce Wade, Chief of Detectives
Cc: Maj. Matt Edwards, Deputy Chief of Police

From: Inv. James P. Sullivan

Ref: State v. Alfonso Ware Jr.

Date: 08/26/2013

On 08/09/2013, Mr. Christopher G. Samellas, Senior Assistant Solicitor, 11th Judicial Circuit Solicitor's Office, pursuant to a Motion for DNA testing requested a review of any and all evidence concerning the State v. Alfonso Ware Jr. The incident took place in the jurisdiction of Lexington County; however, a City of West Columbia Officer did provide assistance. A check of West Columbia evidence records revealed that the City of West Columbia did not take any property into evidence in reference to the aforementioned case.

Sincerely

A handwritten signature in black ink, appearing to read "James P. Sullivan". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Inv. James P. Sullivan
Evidence Custodian

4



2720 Sunset Boulevard
West Columbia, SC 29169
803-791-2000

Affidavit of Wendi C. Knight, MLS (ASCP)

On August 7, 2013, I, Wendy C. Knight, MLS (ASCP), received from Christopher G. Samellas, Senior Assistant Solicitor for the Eleventh Judicial Circuit in South Carolina a copy of a Court Order regarding a Motion for DNA Testing in the case of *State v. Alfonso Ware, Jr.* Pursuant to the Court Order, our lab was required to locate the biological material and review the lab records in this case.

I am a licensed Medical Laboratory Scientist who currently works as a Lab Manager at Lexington Medical Center. I possess a board certification from the American Society for Clinical Pathology (ASCP). Additionally, I have an Associate's Degree and a Bachelor's degree. I have extensive professional knowledge regarding laboratory data, policy, and procedure, including but not limited to, the way our lab records are maintained and how to access our lab records. I have been in my current role of Lab Manager at Lexington Medical Center since May of 2011. However, I have been working in this field since 2004.

I have reviewed our lab records from 1990 as it relates to the case of *State v. Alfonso Ware, Jr.*, and I found that we no longer have any specimens for testing. I also determined that our lab did not perform any DNA testing and I do not know if another agency was involved that could have requested DNA testing. Since we did not have a lab computer system in 1990, all of the lab records from that time period are on paper and are attached to one another. Based on our records, I do not believe that the lab can be of any assistance in this matter.

Sincerely,

Wendi C. Knight, MLS (ASCP)
Medical Laboratory, Lab Manager
Lexington Medical Center

SWORN AND SUBSCRIBED before me

This 12th day of September, 2013.

Brenda Rochelle L. Pro
Notary Public for the State of South Carolina

My commission expires on My Commission Expires December 28, 2015.

5

James R. Metts, Ed. D.

LEXINGTON COUNTY SHERIFF'S DEPARTMENT

September 17, 2013

Senior Assistant Solicitor Chris Samellas
Eleventh Judicial Circuit
205 E. Main St.
Lexington, South Carolina, 29072

Re: State of South Carolina v Alfonso Ware, Jr.

Pursuant to the court order in reference to State of South Carolina vs Alfonso Ware, Jr., a search of the evidence room and old records was performed. The only item found was an incident report with case number 89-38992 which was forwarded to the Solicitors Office. No other evidence could be located in reference to this case.



Sergeant Douglas A Novak
Sergeant of Evidence
Lexington County Sheriff's Department

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LEXINGTON COUNTY SHERIFF'S OFFICE

INCIDENT REPORT

[illegible]

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

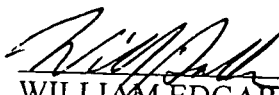
Appellate Case No. 2014-001470

PROOF OF SERVICE

I, William Edgar Salter, III, on behalf of Donald J. Zelenka, Senior Assistant Deputy Attorney General, certifies that on the 14th day of August, 2015, he served two (2) copies of Respondent's Return to Motion to Dismiss Appeal Without Prejudice, with attachments on Petitioner by depositing same in the United States Mail, first class, postage prepaid, addressed as follows:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello 242
4460 Broad River Road
Columbia, South Carolina 29210

August 14, 2015.


WILLIAM EDGAR SALTER, III
Attorneys for Respondent

8/

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
NOV 25 2015
SC Court of Appeals

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record
Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esq.
Post Office Box 11549
Columbia, SC 29211

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

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CERTIFICATE OF COUNSEL**Certificate of Counsel**

Appellant certifies that the South Carolina Court of Appeals issued an Order denying appellant Motion to dismiss without prejudice on October 16, 2015 and received by the Appellant on October 29, 2015.

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QUESTION PRESENTED

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

STATEMENT OF THE CASE

An Application for DNA testing was filed in the Lexington County Clerk of Court on July 26, 2013. On October 22, 2013, the Solicitor's Office of Lexington County filed a response and Motion for Summary Dismissal. On May 21, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the application for DNA testing. On May 13, 2014 filed Reply to Judge Keesley Order of Intention to Dismiss.

On June 18, 2014, the Court filed an Order of Summary Dismissal of Application for DNA Testing. A timely notice of appeal was filed. On July 29, 2014, Appellant filed his Initial Brief with the South Carolina Court of Appeals and the State responded.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. On February 4, 2015, the Appellant received from SLED a response to the F.O.I.A. request. On June 2, 2015, Appellant filed with the S.C. Court of Appeals Motion For Relief from Judgment.

On July 28, 2015, Appellant filed with S.C. Court of Appeals Motion to Dismiss Appeal Without Prejudice. On August 14, 2015, the State filed it's Return to Appellant Motion to Dismiss Without Prejudice. On October 16, 2015, the S.C. Court of Appeals issued an Order denying Appellant Motion to Dismiss without Prejudice. This Petition for Writ of Certiorari follows.

ARGUMENT

DID THE SOUTH CAROLINA COURT OF APPEALS ERR WHEN THE COURT DENIED APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE?

This matter comes before this Court by a denial by the S.C. Court of Appeals (on October 19, 2015, and received by the Appellant on October 29, 2015) of Appellant's motion to dismiss without prejudice and with leave to appeal again dated July 28, 2015.

The Appellant request the Court of Appeals to dismiss the matter without prejudice, based upon the receipt of evidence from the State Law Enforcement Division that was not consider by Judge Keesley in his decision prior to denying Appellant's Application for DNA Testing.

In his May 13, 2014, Order conditionally denying the application, Judge Keesley concluded upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that: After the Application was sent to the Solicitor's Office the following things were determined:

- a) The weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998;
- c) On August 22, 2013, the Solicitor's Office of the 11th Judicial Circuit assigned investigators to review records

and search for evidence and found no paperwork or evidence from the trial;

- d) The Solicitor's Office of the 11th Judicial Circuit instructed its Record Custodian to search for files related to this case and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the solicitor's staff;
- e) The West Columbia Police Department does not have any evidence from the trial, as confirmed by the Evidence Custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were ~~return~~ returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

The Court in its Order of the Intention to Summarily Dismiss

footnote 1: the Court acknowledges that question could exist in the abstract about whether the absence of blood on the gun and on Mr. Ware, could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

X The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a request under the Evidence Preservation Act have not been followed by any of the Custodians of the Evidence involved in this case and this is evident.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. As a result of the request the attached documents were provided by SLED:

1. Official Report of SLED Laboratory File No. L89-11725, December 4, 1989.
2. SLED Disposition of Evidence Form dated January 23, 1990 3:10pm

The fact that this evidence was available to the Appellant through his request to SLED proves that the Custodian of the Evidence and the Office of the Solicitor in their response to the Application for DNA Testing were not as thorough as they should have been in their search for evidence related to this case.

According to the documents provided by SLED, there was testing done by SLED, the results of which was not made available to the Appellant. The question is what are the results of the testing?

South Carolina Code Ann. §17-28-70(c) state: in part "provide the Appellant and the Solicitor with a copy of any document, note,

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log, report relating to the physical evidence" the Custodian of the Evidence has failed to follow the requirement of the statute.

The Respondent nor the Custodian's of the Evidence through their own pleading prove that the S.C. Code Ann. §17-28-10 through 320 has not been followed.

The Appellant through motion to dismiss without prejudice and leave to appeal again moved the Honorable South Carolina Court of Appeals to dismiss Appellant's appeal without prejudice to allow Appellant an opportunity to file a motion with Judge Keesley, informing him of the discovery of the SLED documents. And giving Judge Keesley a chance to consider this evidence in conjunction with the fact the record before the Court proves that the criteria of the statute (17-28-10 thru 320) was not followed, and the investigation was not thorough. By any standard the Appellant was not given a fair opportunity under the Criteria of the Preservation of Evidence Act.

The South Carolina Court of Appeals erred when they denied Appellant's motion to dismiss without prejudice, in light of the facts presented by the Appellant that support the need for further investigation. As well as documented fact that the Custodian of the Evidence and the Respondent did not do a thorough investigation or follow mandatory criteria set-out in the statute (§17-28-10 thru 320). The Court should have in the interest of justice and fairness have allowed the Appellant the opportunity to motion Judge Keesley with the evidence from SLED.

CONCLUSION

There is one thing that is clear and not denied by the Respondent. The statute concerning the Preservation of the Evidence Act was not followed. The Appellant as a result is being denied his fair opportunity in this matter; despite the facts and the evidence presented by the Appellant the South Carolina Court of Appeals has reached a decision to deny Appellant's motion. This is a clear err and this Court must exercise its power and correct what the record before this Court demonstrates is an err by the Court of Appeals. For the reasons stated, Appellant asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

~~110~~
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,,

Respondent.

APPENDIX

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210
Pro se, Appellant

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

Attorney for Respondent

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Forensic Sciences Request, Additional 13

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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2015

Alfonso Ware, Jr., 168464
Broad River Correctional Institution
4460 Broad River Road
Columbia SC 29210

Re: Alfonso Ware, Jr. v. The State
Appellate Case No. 2014-001470

Dear Mr. Ware:

This Court issued an order on October 16, 2015 denying your motion to dismiss without prejudice. Therefore, this appeal is to proceed on with the filing of the petition for writ of certiorari and appendix. You must file and serve the petition for writ of certiorari and appendix within thirty days of the date of this letter or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
Donald V. Myers, Esquire
Donald J. Zelenka, Esquire

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Alfonso Ware Jr.
BRCI/Monticello 242; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SLED FOIA Office

Date Received 12-09-14

Due Date 01-05-15

2014-942

December 3, 2014

South Carolina Law Enforcement Division
4400 Broad River Road
Post Office Box 21398
Columbia, South Carolina 29221

RE: State v. Alfonso Ware Jr.
Indictment No.: 1990GS3200056
Warrant No.: C560956

Dear Sir/Ma'am:

Please send to me a copy of any reports done from testing, on any evidence related to the above indictment. Copy of any Chain of Custody concerning this evidence, when this evidence was received from Lexington County and when this evidence was returned to Lexington County and who it was returned to. Any information in your custody relating to this case please send it to me as soon as possible.

Respectfully,

Alfonso Ware, Jr.
Alfonso Ware Jr.

cc: File

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

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NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

February 4, 2015

Alfonso Ware, Jr., #168464
Broad River C. I. / Monticello 242
4460 Broad River Road
Columbia, SC 29210

RE: Freedom of Information Act Request #2014-942
SLED Lab No.: L89-11725

Dear Mr. Ware:

This letter is to confirm that we are in receipt of your money order in the amount of \$22.00. I am enclosing the information provided to me by our Forensics Lab regarding your request dated December 3, 2014.

Sincerely,

Agent Thomas W. Berry
Freedom of Information Coordinator

TWB/mcp



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FORM: CHEM-004
OCTOBER, 1988

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Date _____

Received By _____ Date _____

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DISPOSITION OF EVIDENCE

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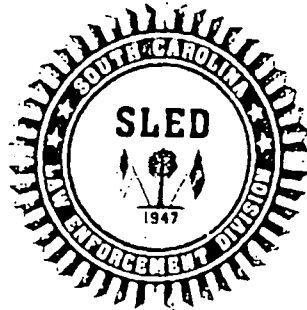
[illegible]

TO: R. M. Green R. M. FREEMAN 1-27-90 3:10pm
SIGNATURE NAME PRINTED (8) DATE TIME

FROM: Carolyn W. Reese CAROLYN W. Reese 1/23/90 3:10 pm
SIGNATURE NAME PRINTED DATE TIME

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor



ROBERT M. STEWART
Chief

4400 Broad River Road (I.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone: 803-737-9000
December 4, 1989

TO: E. Hite
Lexington County Sheriff's Department
PO Box 639
Lexington, SC 29072

LABORATORY FILE NO: L89-11725

SUBJECT(S): Alphonso Ware

VICTIM(S): Robert Channon

This is an official report of the South Carolina Law Enforcement Division Criminalistics Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

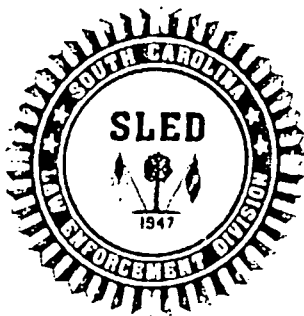
1. Packet containing cotton tipped swabs from the victim.
2. Packet containing cotton tipped swabs from the suspect.

RESULTS OF EXAMINATION(S)

1. The quantity of metals detected in samples submitted for Robert Channon is insufficient to determine the presence of gun primer residue.
2. The quantity of metals detected in samples submitted for Alphonso Ware is insufficient to determine the presence of gun primer residue.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor



Page 2
L89-11725

ROBERT M. STEWART
Chief

4400 Broad River Road (J.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone: 803/737-9000

Chemical Analyst(s)

Joseph D. Powell

12-4-89

Date _____

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY

ROBERT M STEWART
CHIEF



Trace Department

June 25, 1990

SLED Lab No: L89-11725

Amended Report

Your Case No: 8938992

Incident Date: 11-25-89

(S) Alphonso Ware

(V) Robert Channon

E. Hite
Lexington County Sheriff's Office
P.O. Box 639
Lexington, SC 29072

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Sample of red paint from victim's automobile.
2. Sample of red paint from automobile owned by Betty Willson.

RESULTS OF EXAMINATION(S)

Item #1 is not consistent with item #2 in physical nor chemical characteristics; however, the red layer of paint in item #1 is consistent with item #2 in physical and chemical characteristics.

Chemical Analyst(s)

Jeffrey M. Hollifield
Jeffrey M. Hollifield

6/25/90

Date

SLED

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

FORM: CHEM-003
OCTOBER, 1988

Name of Investigating Officer <u>E. Hite</u>	Deputy Sheriff	Rank
Department <u>Lexington County Sheriff's Department</u>	<u>359-8251</u>	Telephone Number
Street Address or Post Office Box <u>P.O. Box 639</u>		
City <u>Lexington</u>	S.C.	29072
State		Zip Code
CC:		
Sled Lab No. <u>L89-11725</u>		
Contributing Agency ORI <u>SCO 320000</u>		
Contributing Agency Case No. <u>8938992</u>		
County <u>Lexington</u>		
Incident Date <u>25 Nov., 1989</u>		
New Case <u>XX</u> Additional Evidence		
Related Lab No.		

Subject #	Victim # <u>XX</u>	Sex: M <u>XX</u> F	SID/FBI
Last Name <u>Channon</u>		First Name <u>Robert</u>	Middle Name
DOB:		Race: Cau <u>XX</u> Blk Other	
Subject # <u>XX</u>	Victim #	Sex: M <u>XX</u> F	SID/FBI
Last Name <u>Ware</u>		First Name <u>Alphonso</u>	Middle Name
DOB:		Race: Cau Blk <u>XX</u> Other	
Subject #	Victim #	Sex: M F	SID/FBI
Last Name		First Name	Middle Name
DOB:		Race: Cau Blk Other	
Subject #	Victim #	Sex: M F	SID/FBI
Last Name		First Name	Middle Name
DOB:		Race: Cau Blk Other	

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

- (1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____
(2) Possession or Distribution of Illegal Drugs or Controlled Substances _____
(3) Criminal Sexual Conduct _____
(A) Adult victim _____ (B) Child victim _____
(4) Homicide _____
(A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison: _____
(5) Suicide _____
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____
(6) Accidental Death _____
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocution _____
(7) Natural Death _____
(A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____
(8) Traffic Accident Fatality Victim--Meets criteria of Section 17-7-80 Yes _____ No _____
(A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____
(9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____
(11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____
(15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harrassment _____
(20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____
(24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed:	Blood _____	Urine _____	Ocular Fluid _____	Other _____
Examination Requested:	Blood Alcohol _____	Drug Screen _____	CO _____	Blood Type _____ Other _____
Autopsy Performed:	Yes _____ No _____	Findings _____		
*Drugs Suspected:	Yes _____ No _____	Type of Drugs _____		
*Drugs Found at Scene:				

(12)

Comments:

Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____
THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RMF

R.M. Freeman

29 Nov. 89

Additional

JMH-330 accept:5

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

FORM: CHEM-003
OCTOBER, 1988

Name of Investigating Officer <u>E. Hite</u>		Rank <u>Deputy Sheriff</u>	Sled Lab No. <u>L89-11725</u>
Department <u>Lexington County Sheriff's Department</u>		Telephone Number <u>359-8251</u>	Contributing Agency ORI <u>SCO 320000</u>
Street Address or Post Office Box <u>P.O. Box 639</u>			Contributing Agency Case No. <u>8938992</u>
City <u>Lexington</u>	State <u>S.C.</u>	Zip Code <u>29072</u>	County <u>Lexington</u>
CC: _____			Incident Date <u>25 Nov. 1989</u>
			New Case <u>Additional Evidence XX</u>
			Related Lab No. _____

Subject # _____	Victim # <u>XX</u>	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Channon</u>		First Name <u>Robert</u>	Middle Name _____
Subject # <u>XX</u>		Victim # _____	Sex: M <u>XX</u> F _____
Last Name <u>Ware</u>		First Name <u>Alphonso</u>	Middle Name _____
Subject # _____		Victim # _____	Sex: M _____ F _____
Last Name _____		First Name _____	Middle Name _____
Subject # _____		Victim # _____	Sex: M _____ F _____
Last Name _____		First Name _____	Middle Name _____
Subject # _____		Victim # _____	Sex: M _____ F _____
Last Name _____		First Name _____	Middle Name _____

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

(1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____

(2) Possession or Distribution of Illegal Drugs or Controlled Substances _____

(3) Criminal Sexual Conduct _____

(A) Adult victim _____ (B) Child victim _____

(4) Homicide _____

(A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison _____

(5) Suicide _____

(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____

(6) Accidental Death _____

(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocutation _____

(7) Natural Death _____

(A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____

(8) Traffic Accident Fatality Victim--Meets criteria of Section 17-7-80 Yes _____ No _____

(A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____

(9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____

(11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____

(15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harrassment _____

(20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____

(24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed: _____	Blood _____	Urine _____	Ocular Fluid _____	Other _____
Examination Requested: _____	Blood Alcohol _____	Drug Screen _____	CO _____	Blood Type _____ Other _____
Autopsy Performed: Yes _____ No _____	Findings _____	Type of Drugs _____		
*Drugs Suspected: Yes _____ No _____				
*Drugs Found at Scene: _____				

Comments: _____ (13)

Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____

THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RMF

R.M. Freeman

[Signature]

Lab Number

Sheet # 2 of 12

104

[illegible]

(14)

Delivered By (Sign) R. M. Green

6 Dec
~~25 Nov.~~ 1989
Date

Received By _____ Date _____

Received By _____ Date _____

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
Forensic Science Laboratory
Intradepartmental Change of Custody

LAB CASE NO. L 87-11725

DATE & TIME 11/19/70 4:00 PM

RE: CASE NO.(S) _____

ITEM NO.(S)	NOTES(e.g. sub-item #'s used)
<u>1 sealed box</u>	<u>Evid. Returned</u>
_____	<u>1/23/90</u>
_____	<u>3:10 PM</u>
_____	<u>RP2</u>
_____	<u>Richard Freeman</u>
_____	_____
_____	_____
_____	_____

The above evidence was

RECEIVED FROM:

Jerry M. Hollfield

RECEIVED BY:

Carolyn W Reese

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

106
RECEIVED

NOV 25 2015

SC Court of Appeals

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

CERTIFICATE OF SERVICE

Appellant, Alfonso Ware Jr., declares under the penalty of perjury that he mail a copy of his Appendix and Petition for Writ of Certiorari, by placing in the U.S. Mail addressed clearly as below.

S.C. Court of Appeals
Jenny A. Kitchings, Clerk
Post Office Box 11629
Columbia, SC 29211

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211

Eleventh Circuit Solicitor's Office
Donald V. Myers, Solicitor
205 East Main Street, Suite 309
Lexington, SC 29072

November 24, 2015
COLUMBIA, SOUTH CAROLINA

Alfonso Ware, Jr.

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

107
Alfonso Ware Jr.
BRCI/Montecello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

S.C. Court of Appeals
Jenny A. Katchings, Clerk
Post Office Box 11629
Columbia, SC 29211

RECEIVED

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SC Court of Appeals

RE: Alfonso Ware Jr., v. The State
Appellate Case No. 2014-001470

Dear Ms. Katchings:

Enclosed you will find the original Petition for Writ of Certiorari and Appendix with the six copies of the petition with two copies of the appendix. And also enclosed is a copy for my records to be clock-stamped and returned in the S.A.S.E.

All parties have been served with their copies of the appendix and petition with the certificate of service attached.

I appreciate your assistance in this matter greatly. Thank you very much, and have a blessed thanksgiving.

Sincerely,


Alfonso Ware Jr.

cc: Alan Wilson, Esquire
Donald J. Zelenka, Esquire
Donald V. Myers, Esquire
File

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
1990-GS-32-0056

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

**RETURN TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL
APPENDIX TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI**

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The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
 - b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
 - c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.
- A. WHY RESPONDENT CONTENDS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURSDICTION. 14
- B. FAILURE TO INCLUDE ANY PORTION OF THE RECORD OF THE LOWER COURT AS ORDERED BY THE COURT OF APPEALS AND ONLY INCLUDING MATTERS ORDERED EXCLUDED FROM THE APPENDIX

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PETITIONER'S QUESTION PRESENTED FOR REVIEW

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. When the notice of appeal in a DNA application case is served upon the Solicitor's Office more than ten (10) days after receipt of the entry of the final order, the Court of Appeals lacks subject matter jurisdiction and the appeal must be dismissed with prejudice for that reason, even though the Petitioner mistakenly sent a copy of the notice of appeal to the Attorney General who was not involved in the action before Judge Keesley.
2. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 257.
3. The Court of Appeals did not err in denying the motion to dismiss the appeal *without prejudice* based upon a desire to relitigate whether trace evidence exists to be tested where the supplemental evidence received does not undermine the findings that the requested items in the original application are not available for testing.

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RESPONDENT'S STATEMENT OF THE CASE

The matter before this Court arises from Alfonso Ware Jr.'s application for DNA testing on July 26, 2013. **Respondent's Supplemental Appendix, pp. 1-5.**¹ On July 26, 2013, the Honorable William P. Keesley, Presiding Judge entered an Order directing the Clerk of Court to file the application and directed procedures pursuant to the DNA Act. *Order Regarding Motion for DNA Testing*, July 26, 2013. Supp. App. 7-9. On October 22, 2013, the Solicitor's Office of the Eleventh Circuit filed a response and motion for dismissal. Supp. App. 10-22.

On May 21, 2014, the Honorable William Keesley conditionally dismissed the application. Supp. App.p. 23-30. In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records

¹ As noted within the argument and Respondent Counter-Statement of Issues on appeal, Respondent asserts that the appeal from the denial of the application for forensic DNA testing must be dismissed for a number of separate reasons. One reason is that the Petitioner's Appendix to his petition for writ of certiorari does not comply with SCACR Rule 247 because it does not contain the lower court record or the orders of Judge Keesley that are on appeal. Respondent has prepared a Respondent's Supplemental Appendix to the Return to the Petition for Writ of Certiorari which contains the lower court record. This will be referred to throughout the Return as "Supp. App." This Supplemental Appendix to the Return will include the following from the lower court: Alfonso Ware Jr.'s application for DNA testing on July 26, 2013 (Supp.App. 1-5); Order Regarding Motion for DNA Testing, July 26, 2013, by Judge Keesley (Supp.App. 7-9); "Response to Defendant's Application for DNA Testing and Motion for Summary Dismissal," by Eleventh Circuit Solicitor's Office, filed October 22, 2013 (Supp.App. 10-22); "Order of Intention to Summarily Dismiss the Application for DNA Testing," dated May 21, 2014, filed May 22, 2013, by Judge Keesley (Supp.App. 23-30); "Reply to Proposed Dismissal of DNA Application." By Alfonso Ware Dated June 10, 2014, filed June 13, 2014 (Supp.App. 31-36); "Order of Summary Dismissal of Application for DNA Testing," by Judge Keesley, dated June 18, 2014, filed June 20, 2014 (Supp.App. 37-44); Initial "Notice of Appeal" dated June 30, 2014 (Supp.App. 45-48); "Notice of Appeal" certificate of service upon Solicitor dated July 21, 2014 (Supp.App. 49-54).

- custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;
 - g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
 - h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 21, 2014, p. 4-5.² Supp. App. 26-27. Ware was given until June 13, 2014 in which to reply to the proposed dismissal. Order, p. 7. Supp. App. 29.

On June 10, 2014, filed June 13, 2014, Ware made written "Reply to Proposed Dismissal of DNA Application." Supp. App. 31-36.

On June 18, 2014, Judge Keesley entered his Order of Summary Dismissal of Application for DNA Testing. Supp. App. 37-44.

The Late Notice of Appeal on the Solicitor's Office

On June 30, 2014, Ware mailed a notice of appeal to Attorney General Alan Wilson concerning the matter which he contends he received written notice of on June 26, 2014. Supp.App. 45-48. *It was not properly served upon the Eleventh Circuit Solicitor's Office or Deputy Solicitor Christopher Samellas who was the only party representative in the action.*

After an inquiry by letter from the Clerk's Office of the Court of Appeals by letter of July

² This was restated again in the *Order of Summary Dismissal of Application for DNA Testing*, filed June 20, 2014, p. 4-5. Supp. App. 40-41.

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15, 2014 about providing a proof of service on the solicitor's office concerning the notice, on July 21, 2014, filed July 23, 2014, Ware served for the first time his notice of appeal by mail upon the Solicitor's Office. Supp.App. 49-54.

Further Proceedings in the Court of Appeals

On July 28, 2014, Petitioner improperly made a *pro se* Initial Brief of Appellant which the Clerk of Court of the Court of Appeals received as correspondence in its docket. The Court made inquiry of the status of a request for a transcript of the proceedings on October 21, 2014. On November 6, 2014, Respondent State of South Carolina responded that the matter should proceed as a petition for writ of certiorari with a copy of the record from the lower court and that Respondent had not been served with such documentation. On November 24, 2014, the Clerk of this Court returned the Initial Brief of Appellant and advised the Petitioner to proceed under Rule 247 of the South Carolina Rules of Appellate Procedure and directing the matters be served within 30 days since there was no hearing in the lower court. Another letter was sent from the Clerk's office on December 12, 2014 concerning the transcript issue again and requested proof of service of the request or proof of an agreement to proceed without the transcript and a supplemental request whether there was an agreement to proceed without a transcript on January 28, 2015.

On February 6, 2015, Respondent, through below-signed counsel, by letter response, advised the Court upon information and belief there was no evidentiary hearing in the matter before Judge Keesley which proceeded on pleadings. Respondent further noted that the matter was subject to dismissal because the Petitioner had failed to timely serve a notice of appeal on the Solicitor's office after he received written notice of entry on June 26, 2014 and served the Solicitor's Office by mail on July 23, 2014 – more than ten days later.

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On March 4, 2015, the Clerk's Office of the Court of Appeals advised that it was allowing the case to proceed since no transcript was necessary or in existence. However, the Clerk also concluded that was allowing the appeal to proceed under SCACR Rule 247 because there was proof of service on the Attorney General (who was not involved in the lower court case) on June 30, 2014 according to a proof of service that had accompanied the notice of appeal. The Clerk further stated again that it was returning the Initial Brief of Appellant received July 29, 2014 and directed the petition and appendix be served within 10 days by March 14, 2015.

The Petitioner next filed a document styled "Leave to Make Motion" pursuant to Rule 60(B) on March 19, 2014. Petitioner contended in his motion that on February 4, 2015, he had received 10 pages of materials from the South Carolina Law Enforcement Division which he claimed was evidence that was not previously before the hearing judge and asserted that "the custodian of the evidence in pleading stated there was no evidence, however, this evidence supports petitioner's claims of innocence." On May 15, 2015, the Court of Appeals, through Associate Justice Stephanie McDonald entered an order denying the request and directing that a copy of the appendix and petition of writ of certiorari within twenty (20) days of the order (by June 4, 2015). In particular, the Court stated:

After carefully considering Petitioner's March 19, 2015 "Leave to Make Motion," it appears Petitioner requests permission to include ten pages in the appendix that were not presented to the circuit court during its review. Petitioner's request is denied. . .

Ware v. The State, Appellate Case No. 2014-001470, Order (S.C. CT. App. May 15, 2015). However, in violation of the May 15, 2015 Order, the Petitioner has included the 10 pages in his Appendix at Appendix pages 4-15.

Pertinent to the issue raised in the certiorari petition before this Court, the Petitioner next made a motion to dismiss the appeal without prejudice and with leave to appeal again dated July

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28, 2015. On August 14, 2015, Respondent, through undersigned counsel responded to the motion in opposition. Petitioner made a Reply on August 27, 2015. On October 16, 2015, the Court of Appeals, through Chief Judge John Few entered an order that the motion to dismiss without prejudice was denied. See App.p. 3.

Subsequently, on October 19, 2015, the Clerk of Court wrote Petitioner and advised him that pursuant to the October 16, 2015 order the matter was to proceed and directed that Petitioner file and serve the petition for writ of certiorari within thirty days (November 15, 2015) or it would be dismissed.³ App.p. 3.

On November 24, 2015, Petitioner finally made his Petition for Writ of Certiorari. However, in his petition, he asserts as his sole question:

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

Ware v. State, Petition for Writ of Certiorari, p. 4,6. This Return follows.

PRIOR STATE COURT PROCEDURAL HISTORY

The Petitioner, Alfonso Ware, Jr., #168464, was indicted at the January 1990 term of the Court of General Sessions for Lexington County for murder. He was represented by Thomas Bellinger and H. Patterson McWhirter of the Lexington County Bar. A jury trial was held on June 25-27, 1990, at the conclusion of which the Petitioner was found guilty of the indicted offense. He was sentenced by the Honorable Hubert E. Long to confinement for a period of life.

³ According to the records of the Clerk of Court for Lexington County, on November 4, 2015 in a motion dated October 23, 2015, the Petitioner, pro se, made a "Motion for Relief from Judgment Or Order Pursuant to Rule 29, 17-23-110 and Rule 60(b)(2), (b) (3), (b)(4) and (b)(5)" asserting the documents he received from SLED prove the criteria of Section 17-28-10 have not been followed, there is a need to appoint counsel and fund an investigator. See Lexington County Eleventh Judicial Circuit Public Index (Online), *The State of South Carolina v. Alfonso Ware Jr.* ; Case No. C560956, 1990GS32000056. This is a similar document to the proffered motion that the Court of Appeals denied leave to file in its order May 15, 2015 and the denial to "stay the proceedings in this matter" on July 10, 2015.

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The Petitioner filed a timely Notice of Intent to Appeal, and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense asserting four (4) issues. Following the submission of briefs by both sides, the Supreme Court of South Carolina affirmed the conviction pursuant to Rule 23 of the Rules of Practice of that Court. State v. Ware, Memo. Op. No. 92-MO-17 (filed February 24, 1992).

First PCR Proceedings – 1992.

The Petitioner filed an application for post-conviction relief dated August 21, 1992. The Respondents made Return on October 9, 1992. An evidentiary hearing into the matter was convened on Tuesday, May 2, 1995, at the Lexington County Courthouse. The Petitioner was present at the hearing and was represented by Wayne Floyd of the Lexington County Bar. The State was represented by Teresa Cosby of the South Carolina Attorney General's Office.

Following the hearing, the Honorable Daniel E. Martin issued his Order dated June 16, 1995, denying relief and dismissing the application in its entirety.

First PCR Appeal

The Petitioner appealed to the Supreme Court of South Carolina from the denial of state post-conviction relief. On appeal, he was represented by his post-conviction relief counsel, Wayne Floyd. On June 5, 1995, the Petitioner made a Petition for Writ of Certiorari raising the following six (6) questions:

1. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to object to statements of the solicitor in closing argument?

2. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate the Petitioner's reading ability and school record?
3. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate the circumstances under which the Petitioner gave his statement?
4. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to interview Petitioner's witnesses?
5. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate any intervening causes of death?
6. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate inconsistencies in ballistics testimony?

Respondents made Return to the Petition on July 12, 1996. On November 8, 1996, the Supreme Court of South Carolina entered its letter Order denying the Petition for Writ of Certiorari. Rehearing was denied on December 19, 1996.⁴ [Respondent requests the Court to take appellate judicial notice of the records of the South Carolina appellate courts.⁵]

⁴ Petitioner Ware also made a federal habeas corpus petition in proceeding in March 1997. *Ware v. Bessinger*, C/A No. 5:97-574-6JL. In that proceeding, he raised the following allegations:

1. Trial counsel's failure to contemporaneously move for a mistrial, following improper and prejudicial comments by solicitor, together with trial court failure to give curative instructions following solicitor improper comments, combined to deny petitioner a fair trial in violation of the due process clause of the Fourteenth Amendment.
2. Trial counsel were ineffective in failing to conduct an adequate investigation into the petitioner's reading ability and school record.
3. Trial counsel were ineffective in not moving for mistrial where trial court fail to provide petitioner with a full and fair suppression hearing on the voluntariness of his confession. Thus, trial counsel were ineffective in failing to adequately investigate the circumstances under which petitioner gave his statement.
4. Trial counsel were ineffective in failing to interview witness Jody Taylor. If counsel had interviewed Jody Taylor, counsel would have develop evidence that Jody Taylor was not the confidential

Second PCR Proceedings

Petitioner filed a second PCR application on February 10, 2000 (2000-CP-32-0345.) Following a hearing on Respondent's motion to dismiss, the Honorable J.C. Nicholson, Jr. denied Respondent's motion and granted Petitioner an evidentiary hearing. Following an evidentiary hearing on Petitioner's claim of after-discovered evidence, the Honorable G. Thomas Cooper denied and dismissed his second PCR application with prejudice. (Supp. App. pp.22-28.) There was no appeal from this application.

Third PCR Application.

Petitioner filed his third PCR application on December 6, 2003 (2001-CP-32-3661). Following a January 6, 2003 hearing, the Honorable Marc. H. Westbrook dismissed Applicant's application generally on the grounds it was filed outside the statute of limitations and was

informant and that Jody Taylor had only relayed information to investigators, information which the informant had told Jody Taylor. By not interviewing Jody Taylor, trial counsel did not preserve for trial the opportunity to object to trial judge admission of hearsay testimony by detective Charlie Jones, testimony that Jody Taylor had received information from confidential informant that petitioner had committed the crime.

5. Trial counsel were ineffective in failing to conduct an adequate investigation into any intervening causes of death?

6. Trial counsel were ineffective for failing to investigate inconsistencies in ballistics testimony?

The petition was denied by United States District Judge Simons on January 16, 1998. *Ware v. Bessinger*, No. CA-97-574-S-06JI (D.S.C. Jan. 16, 1998). An appeal to the United States Court of Appeals for the Fourth Circuit was denied on June 2, 1998. *Ware v. Bessinger*, 145 F.3d 1328 (4th Cir. 1998).

A second federal habeas action was dismissed on January 4, 2008 by the Honorable P. Michael Duffy. *Ware v. Warden, Broad River Corr. Inst.*, No. CIV.A. 9:07-3799-PMD, 2008 WL 68635, (D.S.C. Jan. 4, 2008). An appeal to the 4th Circuit was dismissed. *Ware v. Warden*, 272 F. App'x 247 (4th Cir. 2008).

⁵ See, e.g., *Colonial Penn Ins. Co. v. Coll*, 887 F.2d 1236, 1239 (4th Cir.1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"); *Mann v. Peoples First Nat'l Bank & Trust Co.*, 209 F.2d 570, 572 (4th Cir.1954) (approving district court's taking judicial notice of prior suit with same parties: "We think that the judge below was correct in holding that he could take judicial notice of the proceedings had before him in the prior suit to which Mann and the Distilling Company as well as the bank were parties."); and *Long v. Ozmint*, 558 F.Supp.2d 624, 629 (D.S.C.2008) (" 'The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time. Once was sufficient.'").

successive. Regarding Petitioner's claim that he did not knowingly and intelligently waive his right to appeal the denial of his second PCR application, Judge Westbrook found, based on the fact that Petitioner had previously had appealed his conviction, the denial of his first PCR, and the denial of his federal writ of habeas corpus, that his testimony that he was unaware of his right to appeal was not credible. Judge Westbrook acknowledged the Austin claim was not barred by the doctrine against successive applications, but found it nevertheless meritless.

Fourth PCR Application

Petitioner filed his fourth PCR application on August 14, 2003 (2003-CP-32-3045). Following a hearing held on October 21, 2005, the Honorable Clyde N. Davis, Jr. issued an order granting Petitioner relief, finding he is entitled to receive an Austin v. State review of the denial of his third PCR application.

The Petitioner made an appeal to the South Carolina Supreme Court. After review of the Austin petition and petition for writ of certiorari, the Court denied certiorari on September 5, 2007.

ARGUMENTS

The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
- b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
- c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.

A. WHY RESPONDENT CONTENTS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The notice of appeal was untimely served upon the Solicitor's Office on July 21, 2014 which is more than 10 days after Petitioner received of the order on June 26, 2014. Supp. App. P. 49-54. It is untimely and this Court lacks jurisdiction based upon the late service. SCACR Rule 247 (b) ("The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order.") (emphasis added).

Respondent's appellate counsel notified the Clerk of Court of the Court of Appeals concerning the lack of timely service upon the Solicitor's Office and that it was subject to

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dismissal by letter dated February 6, 2015. On March 4, 2015 by letter, Ware and counsel for Respondent were advised by the Clerk of Court because the Attorney General (not the Solicitor's Office who was handling the case) was served on June 30, 2013, the appeal was allowed the appeal to proceed. See Supp.App.p. 45-48.

The Clerk did not address how or why the Attorney General either the proper person to serve or the sole proper party for service of a notice of appeal in the lower court pursuant to S.C. Code Ann. § 17-28-50 (B). It was the Solicitor's Office who represented the State in the matter before Judge Keesley to the exclusion of the Attorney General by statute:

(B) Within ninety days after the forwarding of the application, or upon any further time the court may fix, **the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case**, shall respond to the application. Within ninety days after the docketing of the application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The court may proceed with a hearing if the **solicitor or Attorney General, as applicable**, or the victim does not respond to the application.

S.C. Code Ann. § 17-28-50 (B). Under this theory, the Solicitor would never have to be served with a notice of appeal under SCACR Rule for jurisdiction as long as the Attorney General received a copy of the notice for some unknown reason. Here, the Attorney General was an improper representative to be served since he was not involved in the representation of the State. Pro-SE
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Since the Attorney General did not prosecute the case against Mr. Ware in 1990, by statute, he was never the proper statutory party respondent representative in Court of General Sessions for the DNA application. Simply put, the Attorney General had made no appearance in the action (and did not even become involved in the appeal until requested by the Solicitor's Office). As such, as with any criminal conviction that the Attorney General is not involved, service upon the Attorney General of a notice of appeal is not adequate service upon the Solicitor's Office under SCACR Rule 203(b)(2) and Rule 247(B). By statute, the Attorney

General involvement was limited to those cases that he or his office actually prosecuted. Since Mr. Ware was not prosecuted by the Attorney General, service of the notice rested exclusively upon the Solicitor's Office of the Eleventh Circuit or Deputy Solicitor Samellas in particular as under Rule 247(b) as "the notice of appeal shall be served on all respondents within ten(10) days after receipt of the written notice of entry of the final order." It was belatedly served on July 21, 2014.

Because the Court lacks subject matter jurisdiction, the matter should be dismissed with prejudice. See Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Canal Insurance Co. v. Caldwell, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct.App.1999) (providing that the failure of a party to serve the notice of appeal within thirty days after receiving written notice of the entry of the order divests this court of jurisdiction and requires the dismissal of the appeal); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Allison v. W.L. Gore & Assocs., 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) (stating "an appellate body may not extend the time to appeal"); Wells Fargo Bank, N.A. v. Fallon Properties

S. Carolina, LLC, 413 S.C. 642, 646-47, 776 S.E.2d 575, 577-78 (Ct. App. 2015) (same).

B. FAILURE TO INCLUDE ANY PORTION OF THE RECORD OF THE LOWER COURT AS ORDERED BY THE COURT OF APPEALS AND ONLY INCLUDING MATTERS ORDERED EXCLUDED FROM THE APPENDIX REQUIRES DISMISSAL UNDER SCACR RULE 247.

A review of the Appendix attached to the Petition made on November 24, 2014 is non-compliant because it includes no material from the "lower court record" as required under SCACR Rule 247 (E). It does not include the application for forensic DNA Testing filed July 29, 2013; the initial "Order Regarding DNA testing" filed July 29, 2013; the Response to the Application for Forensic DNA Testing by the Eleventh Circuit Solicitor's Office filed October 22, 2013; the Order of Intention to Summarily Dismiss the Application for Forensic DNA Testing dated May 21, 2014; Petitioner Ware's written Reply to Proposed Order of Dismissal filed June 13, 2014; Order of Summary Dismissal filed June 20, 2014. Simply put, he includes **none** of the lower court records in his Appendix.

The Petitioner has only included in his Appendix: 1) a copy of the letter from the Clerk of Court dated October 19, 2015 concerning the October 16, 2015 order denying his motion to dismiss and directing the filing of the petition and appendix within 30 days and 2) the materials from a Freedom of Information Act request of December 3, 2014 after the lower court decision that this Court directed not be included in the Appendix by Order dated May 15, 2015.

Respondent respectfully submits that since the Court's Order of May 15, 2015 was not complied with the inclusion of these improper items this Court ordered excluded in the Appendix, the certiorari appeal should be dismissed with prejudice as a sanction. Additionally, certiorari should alternately dismissed because Ware failed to include any "lower court records" or the "copy of the final order entered in the proceedings" in the Appendix as required by SCACR Rule 247(e)(1)(2). Since the orders of this Court dated May 13, 2015 and October 19,

2015 were not complied with it, the appeal should be dismissed.

STATUTE AND STANDARD BEFORE THE LOWER COURT

*

S.C. Code Ann. § 17-28-90 sets forth the factors to be proved at an application hearing:

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:

- (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
- (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
- (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
- (4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
- (5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is

granted and is not merely cumulative or impeaching;

- (6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
- (7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

HOW THE PETITIONER'S CURRENT CERTIORARI ISSUE HAS BEEN PRESENTED BEFORE TO THIS COURT AND DENIED.

The Petitioner again re-litigates in his Petition whether this Court properly denied his motion to dismiss his appeal without prejudice to allow him to file and pursue another application for a forensic DNA examination based upon his receipt of certain materials from SLED after a Freedom of Information Act request. The Court of Appeals denied the request by Order dated October 16, 2015. In his present petition, Ware is not directly challenging anything about the rulings by Judge Keesley on his DNA application. *Importantly, he did not even include those rulings in his Appendix before this Court.* It appears that he has abandoned any claim that is properly before this Court arising from the rulings of Judge Keesley.

Instead, he is reasserting a collateral issue raised and denied by the Court in the earlier "Motion to dismiss without prejudice and with leave to appeal again" dated July 28, 2015. In the earlier motion, Ware requested the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called "S.L.E.D evidence that was not considered by Judge Keesley." Respondent opposed the motion to dismiss without prejudice in its response August 14, 2015. The Court of Appeals denied the request to dismiss without prejudice on October 16, 2015.

A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court to re-consider and Judge Keesley to consider is a response he received to a Freedom of Information Act request that he received on February 4, 2015 which he presented to this Court in his earlier motion to "motion for relief from Judgment ..." received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matters which would be properly on appeal from the denial of a DNA application by Judge Keesley (but abandoned in his certiorari petition) nor authorize the matter for DNA testing to be re-opened below. None of S.L.E.D. records from 1990 attached to the June 3, 2015 motion reflect that there is any trace evidence that was or is available for DNA testing which is the purpose of the DNA application nor dispute the findings set forth in Judge Keesley's orders. App. 5-15. Supp.App. 42-44.

In his initial May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- ~~a)~~ **b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;**
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,

h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-

5.⁶ Supp.App. 26-27. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5. Supp.App. 40-41.

The recent material Petitioner attached to his motion and his improper Appendix does not reflect that any newly discovered evidence exists for testing or that desired trace evidence, the gun or clothing or other items exist for DNA testing that he is now seeking in his certiorari petition. App.p. 5-15. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations made in the lower court and conclusions in 2013 and 2014 that any evidence for DNA testing exists that he seeks to be tested.

The similar request was initially before the Court of Appeals on July 10, 2015 when the Court interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to "stay proceedings in this Court."). The same request was then converted by Ware to a motion to

⁶ In its Return to Motion to Dismiss Appeal Without Prejudice on August 14, 2015, the State included the following attachments to this Court which this Court can take judicial notice of its own records.

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.
4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Return to Motion to Dismiss Appeal Without Prejudice, August 14, 2015. attachments 1-5.

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dismiss the appeal without prejudice and allow refileing. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed a motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, the additional SLED documents only show that SLED released a "box" on January 23, 1990, at 3:31 PM to the Lexington County Sheriff's Department - a matter that is not in dispute. App.p. 8, 15. The actual issue before Judge Keesley was whether the items currently remain in the custody to the Lexington County Sheriff Department in 2013-2016.

Additionally, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. However, it is neither, but it is a limited procedure to determine the existence of proper materials for DNA testing (at this time), what tests to run, and whether favorable results from the identified and available materials would lead to change the result of the conviction and not merely impeach the evidence. S.C. Code Section 17-28-50 (C). The request must be denied.

JUDGE KEESLEY PROPERLY DENIED THE APPLICATION WHERE THE REQUESTED ITEMS WERE NOT AVAILABLE, BUT PETITIONER ABANONED ANY CHALLENGED TO THE DECISION OF THE LOWER COURT IN HIS PETITION

In his original application for forensic DNA testing, Ware asserted he wanted "the alleged murder weapon⁷" and clothing that Ware wore the day the murder occurred tested.⁸

⁷ A pistol found on the floorboard of a vehicle of the victim was introduce without objection at trial in June 1990 as State Exhibit 5. See *Ware v. State*, PCR Appeal South Carolina Supreme Court, PCR App. p. 108. Also, PCR App. 107-108, 117, 125, 211-212, 319 (Ware claims he threw the piston into the car in a statement after firing three or four times); 261-264 (weapon testing and comparison by SLED Agent Parnell); 304-305 (admission of statement by

~~130~~
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Application, Section 4, p. 2. Supp.App. 2. He claimed the material was never tested prior to trial and that his attorney did not request that it be tested and that he did not know if it could be tested. He asserted that the DNA testing might include exculpatory results "because if none of the victim's blood is found on the weapon or my clothing, it would prove that I could not have shot the victim." Supp.App.p. 3.

The Petitioner is correct that Judge Keesley did not consider the particular documents that Petitioner subsequently received from SLED pursuant to his post-order freedom of information act request. Petition, p. 6, ¶2. He contends that these documents prove that "testing⁹" was done by SLED and claims that the results were not made available to the Appellant after his application for DNA testing was made. Petition, p. 8, ¶ 4. He asserts that this proves the DNA Act had not been followed because it is a report relating to physical evidence that he claims was not disclosed earlier pursuant to § 17-28-10 through 320. However, although none of the newly proffered SLED documents suggest that DNA testing was ever done, these "new" documents instead refer to gunshot residue testing of GSR swabs from the victim and suspect (taken after his arrest days later) and red paint chip comparison. None of these materials are the requested materials concerning trace evidence for blood from either the revolver nor Petitioner's clothing which he contends were the subject of the forensic DNA testing request.

Ware had a .22 weapon in hand and when victim attempted to take the crack cocaine Ware stuck gun in car and pulled the trigger 3 or 4 times). Defense counsel at the PCR confirmed the state asserted at trial that the weapon belonged to Ware and that it fired the fatal bullet. PCR App.p. 610-611.

⁸ The shooting occurred Saturday night the 25th. On Monday morning the 27th, Investigator Hite was canvassing the crime scene area and ran into Ware who 11 am. Later, on the 28th, Investigator Hite saw Ware at the Sheriff's Department before Ware was arrested. PCR App.p. 172-175. Also, PCR App.p. 292-298 (West Columbia Patrolman Jones sees Ware on Tuesday November 28 in the Holmes Street area who he knew for over 20 years) At the Jackson v. Denno hearing, Ware testified about being picked up on November 28. PCR App.p. 193-194. There is no indication in the record that the clothes he was wearing at the time of his arrest are the same clothes he had on at the time of the incident on Saturday night. It is unclear whether the clothing that was worn by the Petitioner on the night of the shooting was actually seized from a review of the trial records before this appellate courts.

⁹ There is nothing in the new reports that suggest that DNA testing was done previously or the material from State Exhibit 5 included any trace material that would be subject to DNA testing.

~~RTJ~~ 131

Judge Keesley appropriately granted summary dismissal of the request pursuant to § 17-28-50(B). Judge Keesley, consistent with the DNA Act ordered the preservation of evidence pursuant to § 17-28-70 contemporaneous with the filing of the application. Supp. App. 7-9. The Solicitor's Office surveyed the critical evidence custodians and reported those matters to Judge Keesley in making their motion to dismiss. The Petitioner has abandoned any assertions raised in his reply to the motion to dismiss before Judge Keesley where he sought to use the Act to determine what tests may have been done. Simply put, the evidence before this Court supports the findings of Judge Keesley that there are presently none of the requested items available for testing for DNA which could satisfy the DNA Act.

CONCLUSION

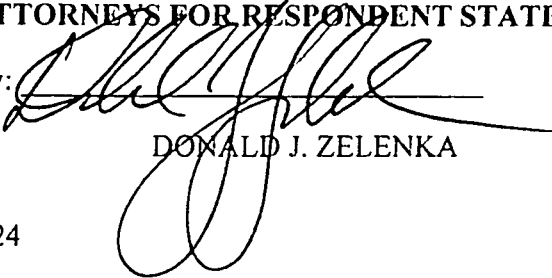
WHEREFORE, having made Return, the Respondents request that the appeal be dismissed for lack of jurisdiction due to untimely service upon the Solicitor's Office of the Eleventh Circuit. Respondent further assert that the matter be dismissed for failing to present a proper appendix pursuant to SCACR Rule 247. Further, Respondent submits that the petition be dismissed for the additional reasons set forth above because the Petitioner abandoned any issue related to the Orders of Judge Keesley in dismissing the application.

Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT STATE

By: 

DONALD J. ZELENKA

February 29, 2016

The South Carolina Court of Appeals

Alfonso Ware, Jr., Petitioner,

v.

The State, Respondent.

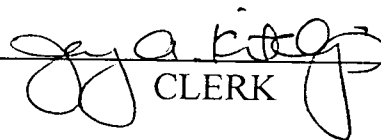
Appellate Case No. 2014-001470

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for forensic DNA testing under the Access to Justice Post-Conviction DNA Testing Act.¹ Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Alfonso Ware, Jr., 168464

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

John W. McIntosh, Esquire

FILED

November 14, 2016 J.O.

¹ S.C. Code Ann. § 17-28-10 to -120 (2014).

THE SOUTH CAROLINA COURT OF APPEALS

Alfonso Ware, Jr.	)	
Petitioner,	)	
	)	
	)	PETITION FOR REHEARING
	)	
State of South Carolina	)	Appellate Case:
Respondent.	)	No. 2014-001470
	)	

Petitioner moves this Honorable Court pursuant to South Carolina Appellate court Rules, Rule 221(a) Rehear the decision that was denied by the South Carolina Court of Appeal entered on November 14, 2016. The matter was before the Court on Writ of Certiorari following the denial of Petitioner's Application for forensic DNA testing under the Access to Justice Post Conviction DNA Testing Act.

This Petition for Rehearing will show that the Court of Appeals overlooked some facts material to the Case as presented. And no issue raised herein is raised for the first time.

The Court of Appeals has overlooked Legal and Factual matters when denying Petitioner's Application for DNA Testing.

It is clear from the Order issued by this Court that it has adopted the position of the Respondent's. This is evidenced by the lack of considered "decision". See Black's Law Dictionary page 407 (6th Ed. 1990) "decision defined as a determination arrived at after consideration of the facts and in legal context Law." Nowhere in the Court's decision does the Court address the Legal and factual Matter raised by the Petitioner. The adoption of one party's proposed findings and conclusions is a practice that is expressly disapproved See: Shaw v. Martin 733 F2d 304.

The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a Request under the Evidence Preservation Act has not been followed by any of the Custodians

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of the Evidence involved in this Case and this is evident.

South Carolina Code Ann. 17-28-70(c) States: in part "provide the Appellant and the Solicitor with a copy of any document, note, log, report relating to the physical evidence" The custodian(s) of the evidence have failed to follow the requirement of the Statute. The Respondent nor the Custodian's of the evidence through their own readings prove that the S.C. Code Ann. 17-28-10 through 320 has not been followed.

By any standard the Petitioner was not given a fair opportunity under the criteria of the Evidence Preservation Act or the Application for DNA Testing. The South Carolina Court of Appeals erred when they denied his Appeal, in light of the facts presented by the Petitioner that Support the need for further investigation. The Court should have in the interest of Justice and Fairness allowed Petitioner's Appeal to prevail.

Conclusion

There is one thing that is clear: The Statute concerning the Preservation of Evidence Act was not followed. And as a result the Petitioner is being denied his fair opportunity in his request. A Review of the Record before this Court supports the Petitioner's Claim.

DATE: 11-28-16

Submitted by:

Alfonso Ware, Jr.
Alfonso Ware, Jr.
Petitioner

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Alfonso Ware, Jr.
Petitioner,

v.

State of South Carolina,
Respondent.

CERTIFICATE OF SERVICE

Appellate Case:
No. 2014-001470

Petitioner declared, under the Penalty of Perjury that he mailed a copy of his Petition for Rehearing to the parties listed below by placing in the U.S. Mail, clearly addressed as indicated:

1. Office of the Attorney General
Mr. Alan Wilson
P.O. Box 11549
Columbia, SC 29211

2. S.C. Court of Appeals
Ms. J. Kitchings, Clerk
P.O. Box 11629
Columbia, SC 29211

DATE:

11-28-16

Thank you,

Alfonso Ware, Jr.
Alfonso Ware, Jr.
Petitioner

SCDC# 168464
BRCI
4460 Broad River Rd.
Columbia, SC 29210

The South Carolina Court of Appeals

Alfonso Ware, Jr. Petitioner,

v.

The State, Respondent.

Appellate Case No. 2014-001470

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H B Ware J.

Paul W. Thomas J.

John W. McIntosh J.

Columbia, South Carolina

FILED

January 23, 2017

cc:

Alfonso Ware, Jr., 168464

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

John W. McIntosh, Esquire

Beth Carrigg

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COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Alfonso Ware, Jr. #168464
Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina

) IN THE COURT OF (Select one)
) ☒ GENERAL SESSIONS
) ☐ FAMILY COURT
) JUDICIAL CIRCUIT

) APPLICATION FOR
) FORENSIC DNA TESTING

) ORIGINAL INDICTMENT NO.

) 90 -GS- 32- 0056

) OR

) ORIGINAL PETITION NO.

) -JU-

BEETHA A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2013 JUL 29 PM 1:39

FILED

INSTRUCTIONS - READ CAREFULLY

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

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

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

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

Jury Trial, June 1990 term of Lexington County General
Sessions Court.

2. Give the date of the entry of the judgment and sentence: June 27, 1990.

and current place of incarceration: Broad River Corr. Inst., Columbia, SC.

3. Identify all previous or ongoing proceedings; together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

(a) Direct Appeal; State v. Ware, Op No. 924MO-17 (Ct.App. Filed Feb. 24, 1992).

(b) PCR; denied June 16, 1995; See back of this page for grounds.

(c) Writ of Certiorari to S.C. Supreme Court; denied on Nov. 8, 1996.

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: The alleged murder weapon. Clothing that I wore the day

the murder occurred, which were seized by the police.

Identify the specific type of DNA testing being sought:

Any type that could be used to test any blood found on the weapon and cloth-
-ing, and that could establish conclusively that I did not commit murder.

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

There was only circumstantial evidence connecting me to the crime, the only
evidence the prosecution really had was an alleged confession, which I
maintained that I did not make. The murder happened at extreme close range.

If no blood is found on my clothing or the weapon, it would disprove the pro-
-secutions theory about how the murder occurred.

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:

To my knowledge the material was never tested. My attorney did not request

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that it be tested, and I do not know if the police tested it or not.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

Because if none of the victim's blood is found on the weapon
or my clothing, it would prove that I could not have shot the
victim.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.
9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:
- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
 - (b) The Court may assess the cost of any DNA testing against me;
 - (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
 - (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Alfonso Ware, Jr.

Print Applicant Name

Alfonso Ware Jr.

Signature of Applicant

STATE OF SOUTH CAROLINA

County of **LEXINGTON**

)
)
)

VERIFICATION

I Alfonso Ware, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Alfonso Ware Jr.
Signature of Applicant

SWORN to and subscribed before me this 11th
day of February, 2013.

Susan H. Dye (L.S.)
Notary Public

My Commission Expires: March 5, 2018

5

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

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

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

Alfonso Ware Jr.
Signature of Applicant

SWORN to and subscribed before me this 30
day of Jan, 2013

Eugene Kest (L.S.)
Notary Public

My Commission Expires: My Commission Expires April 4, 2018

January 30, 2013

The Honorable Beth Carrigg, Clerk of Court
205 East Main Street
Lexington, South Carolina 29072

FILED
2013 JUL 29 PM 1:39
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

RE: Application for Forensic DNA Testing

Dear Ms. Carrigg:

Please find enclosed for filing an original and two copies of an Application for Forensic DNA Testing. Please return a clock-stamped copy to me for my record.

Your help with this matter is appreciated.

Sincerely,

s/ Alfonso Ware Jr.
Alfonso Ware, Jr.

Mr. Alfonso Ware, Jr., #168464
Broad River Correctional Inst.
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

ORIGINAL

FILED

2013 JUL 29 PM 1:40

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)

-vs-)

ALFONSO WARE, JR., (#168464),)

Defendant.)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORDER REGARDING MOTION
FOR DNA TESTING

Indictment Number: 1990GS3200056

The defendant has submitted a motion for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. He was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. Pursuant to the Act, the court directs the following actions.

- WAL #1
- 1) The Clerk of Court is to file the application. The court finds that the applicant qualifies for indigent status under §17-28-60.
 - 2) The application does not indicate a request for appointment of counsel. Under §17-28-60, the applicant is to request counsel in his application. The court is unaware of any ongoing PCR action that falls under the language of 17-28-60. The court will consider appointment of counsel if these proceedings reach a stage where the application is determined to be sufficient to proceed further.
 - 3) Under §17-28-50(A):
 - a. a copy of the documents filed shall be forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.
 - b. The Solicitor's office is responsible for notifying the Attorney General's office.

A TRUE COPY

Lex. Co. C.C.P., G.S. & F.C.

- c. The Solicitor's office is responsible for notifying the custodian of evidence.
- d. The victim's family is to be notified under §16-3-1505, et seq., S.C. Code Ann.

4) Under §17-28-50(B):

- a. The Solicitor and/or the Attorney General shall file a response within 90 days of the date that a copy of the application is forwarded by the Clerk of Court. If additional time is needed, the prosecuting agency or agencies may file a request for an extension of time.
- b. The victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) may file a response within 90 days of the filing of the application or within any time frame permitted by the court.

5) Under §17-28-70:

- a. The Solicitor's office is to forward a copy of this order to any custodian of evidence, and the custodian of evidence is hereby ordered to preserve all physical evidence and biological material related to the underlying murder charge.
- b. The custodian of evidence is further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court.
- c. If the custodian of evidence indicates that the evidence has been lost or destroyed, the custodian must comply with §17-28-70(C).

6) Under §17-28-80, if any physical evidence or biological material has previously been submitted for DNA testing, the Solicitor/Attorney General shall produce all written

WPA
#2

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reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

- 7) The court shall be notified of any issues related to preservation of evidence, with a copy sent to the parties. [See, for example, the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.]

AND IT IS SO ORDERED.

July 26, 2013


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#3

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT
Case No: 1990-GS-32-0056

STATE,)
v.)
ALFONSO WARE, JR., #168464,)
DEFENDANT.)

RESPONSE TO DEFENDANT'S
APPLICATION FOR
FORENSIC DNA TESTING AND
MOTION FOR SUMMARY DISMISSAL

This matter comes before the Court by way of an application for Post-Conviction DNA Testing pursuant to S.C. Code Ann. §17-28-10, *et seq.* The Lexington County Solicitor's Office has notified the Attorney General's Office, the Lexington County Clerk of Court, the victim's family, and the custodians of evidence in the Lexington County Sheriff's Department, West Columbia Police Department, South Carolina Law Enforcement Division (SLED), and the Lexington Medical Center of this application in compliance with statute and Order dated July 26, 2013, of the Honorable William P. Keesley. For the following reasons, this Application should be summarily dismissed.

Procedural History

The Defendant is incarcerated in the South Carolina Department of Corrections (SCDC) pursuant to the Lexington County Clerk of Court's Order of Commitment. The Lexington County Grand Jury indicted the Defendant at the January 1990 term for Murder (1990-GS-32-0056). Thomas Bellinger, Esquire, and H. Patterson McWhirter, Esquire, represented the Defendant on the charge. Assistant Solicitors R. Knox McMahon and L. Lisa McPherson appeared on behalf of the State. The Defendant proceeded to a jury trial on June 25, 1990, and he

was found guilty as indicted. The Honorable Hubert E. Long sentenced the Defendant to confinement for a period of life.

On July 3, 1990, H. Patterson McWhirter, Defendant's trial counsel, filed a timely Notice of Appeal on the Defendant's behalf. Robert M. Dudek of the South Carolina Office of Appellate Defense perfected the appeal on the Defendant's behalf. The South Carolina Supreme Court affirmed Defendant's conviction and sentence. *See State v. Ware*, Op. No. 92-MO-17 (S.C. Ct. App. Filed February 24, 1992).

The Defendant subsequently filed a Post-Conviction Relief (PCR) Application on August 21, 1992. The State filed its return on October 9, 1992. On May 2, 1995, the Honorable Daniel E. Martin held an evidentiary hearing. The Defendant was present at the PCR hearing, and Wayne Floyd, Esquire, represented him. By Order dated June 16, 1995, and filed June 21, 1995, Judge Martin denied and dismissed the Defendant's application.

Wayne Floyd, the Defendant's PCR counsel, filed a timely Notice of Appeal on the Defendant's behalf on July 19, 1995, and submitted a Petition for Writ of Certiorari on June 5, 1996. On November 8, 1996, the South Carolina Supreme Court denied the Petition. On December 19, 1996, the Court denied a Petition for Rehearing.

On March 11, 1997, the Defendant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. The Honorable Charles E. Simons, Jr., denied the Petition by Order dated January 14, 1998, and filed January 16, 1998. The Defendant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The Court affirmed the dismissal of the Petition by Order dated June 2, 1998, and filed June 4, 1998.

The Defendant filed a second PCR Application on February 10, 2000, alleging that he had newly discovered evidence that warranted another evidentiary hearing. The State filed its

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Return and Motion to Dismiss on April 13, 2000. The Honorable J.C. Nicholson, Jr., heard the Motion to Dismiss on June 14, 2001. Judge Nicholson denied the Motion to Dismiss by Order dated July 12, 2001, which was filed on July 17, 2001, and by Order dated July 31, 2001, which was filed on August 7, 2001. On August 27, 2001, the Honorable G. Thomas Cooper held an evidentiary hearing. William Rast, Esquire, represented the Defendant. Elizabeth McMahon, Esquire, of the South Carolina Attorney General's Office, represented the State. Judge Cooper denied the application by Order dated October 9, 2001, which was filed on October 26, 2001.

The Defendant filed a third PCR Application on December 6, 2001, alleging that his trial counsel was ineffective for failing to challenge his confession and for failing to object to the trial court's ruling pertaining to the validity of his confession. The Defendant further alleged that he did not knowingly and intelligently waive his right to appeal from the denial of his second PCR Application. The Honorable Marc H. Westbrook held an evidentiary hearing on January 6, 2003. The Defendant was present at the hearing, and Richard Breibart, Esquire, represented him. Allen Bullard, Esquire, of the South Carolina Attorney General's Office, represented the State. The Honorable Marc H. Westbrook denied the application by Order dated January 27, 2003, and filed February 4, 2003.

On August 14, 2003, the Defendant filed a fourth PCR Application against his PCR counsel for failing to appeal his third PCR Application. The State made its Return and Motion to Dismiss on March 31, 2004. The Honorable Clyde N. Davis, Jr., held an evidentiary hearing into the matter on October 21, 2005. The Defendant was present at the hearing, and Tommy A. Thomas, Esquire, represented him. Sabrina C. Todd, Esquire, of the South Carolina Attorney General's Office represented the State. The Honorable Clyde N. Davis, Jr., by Order dated

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November 14, 2005, and filed on November 21, 2005, granted the Defendant's Application, which allowed the Defendant a belated review of the denial of his third PCR Application.

On December 15, 2005, Tommy A. Thomas, Defendant's counsel for his fourth PCR Application, filed a timely Notice of Appeal on the Defendant's behalf and a Petition for Writ of Certiorari for Defendant's third PCR Application. On September 5, 2007, the South Carolina Supreme Court denied the Petition.

Facts

On November 25, 1989, an individual who heard a loud collision outside of his home found Robert Chanon injured in a vehicle on Holmes Street in West Columbia. Law enforcement found a pistol in the vehicle on the passenger's side floorboard, which police later confirmed to be the murder weapon, and money in Chanon's hands. Chanon was incoherent when law enforcement arrived.

Emergency Medical Services (EMS) arrived on the scene and removed Chanon from the car. When EMS removed him, they identified a gunshot wound, and law enforcement found two pieces of crack cocaine in his seat. Chanon stated that someone shot him on crack alley. EMS transported Chanon to the hospital. In the emergency room, he told his girlfriend that an unfamiliar black man shot him.

Three days after the shooting, the police received a tip that the Defendant was involved. An officer located the Defendant and asked him if he knew about the shooting. The Defendant responded that he did, and he voluntarily went to the police station where the police gave him *Miranda* warnings. At this point, the Defendant began talking and gave the officer a confession. An officer typed up the Defendant's statement. Then the Defendant initialed and signed the statement. The Defendant stated that he had shot Chanon after Chanon had stolen his crack and

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money right out of his hand. He also stated that he had thrown the pistol into the car as Chanon drove away.

The day after the Defendant confessed to the shooting, Chanon died from the gunshot wound.

At trial the Defendant testified that the deceased, while in his car, approached him about purchasing crack. He testified that the deceased snatched the crack out of his hand and drove away, and, on cross-examination, the Defendant denied stating that the deceased stole his money as well. He further testified that he threw the gun in the car, but denied intentionally pointing the gun at him or pulling the trigger. He also testified that the gun might have gone off when he threw it in the car.

Material Requested to be Tested

In this current Application for Forensic DNA Testing, the Defendant requests the following material be tested:

1. "The alleged murder weapon."
2. "Clothing that [he] wore the day the murder occurred, which were seized by the police."

Requirements of the Forensic DNA Statute

The Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10 *et seq.*, authorizes a person who is currently incarcerated, who pled not guilty to certain offenses, who was subsequently convicted of the offense, and who asserts he is innocent to apply for forensic testing of his DNA and any physical evidence or biological material related to his conviction.

The Act requires that the Defendant identify the evidence that should be tested. The Act requires that the Defendant specifically articulate the basis for his request for additional testing and the specific testing sought. Further, the Act requires that the Defendant explain why his identity was or should have been a significant issue during the original trial of his case. The Act also requires that the Defendant explain why material to be tested was not previously subjected to testing or why additional testing would provide a substantially more probative result. Finally, the Act requires that the Defendant explain why, if the testing were to produce exculpatory results, the results will constitute new evidence that would change the results of the Defendant's conviction.

The Court shall not order DNA testing of the Defendant's DNA and the physical evidence or biological material until it makes a finding that the Defendant has established each of the following factors by a preponderance of the evidence (S.C. Code Ann. § 17-28-90(B)):

1. the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
2. the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
3. the physical evidence or biological material sought to be tested is material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;

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4. the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;
 5. if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the defendant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;
 6. the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
 7. the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

Failure to Meet the Requirements Set Forth in the Statute

The Defendant has failed to meet the requirements set forth in the statute by a preponderance of the evidence. Specifically, the Defendant has not explained why his identity was a significant issue during the original trial of the case. The Defendant placed himself at the scene of the crime prior to and during the trial. Prior to trial, the Defendant admitted to shooting the deceased after the deceased stole crack and money from him, and he admitted to throwing a gun into the car. The State had the benefit of the Defendant's confession and used it against him during the trial. Moreover, the deceased was found with money in his hand and crack in his seat. A gun also was found in the car. The Defendant provided information to law enforcement that

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only a person at the scene of the crime would have known. Additionally, all of the physical evidence corroborated the Defendant's version of what happened.

Further, the Defendant testified under oath that the deceased approached him, stole from him, and that he threw a gun into the deceased's car. He testified that he did not know if the gun went off. At trial, the Defendant placed himself at the scene; he placed the murder weapon in his own hands. Identity of the Defendant was not a significant issue at the original trial.

This case was properly submitted to the jury to decide guilt or innocence. The trial judge allowed two lesser included verdicts to be submitted to the jury. The jury had the option to convict the Defendant of Murder, Manslaughter, or Involuntary Manslaughter or to find the Defendant not guilty. The jury was the sole finder of fact in this case, and it determined that the Defendant was guilty of Murder after having received all of the testimony and evidence presented during the trial. The Defendant had the opportunity to present his defense at trial. He took the stand and testified on his own behalf. The jury weighed all credible evidence and decided this case.

The Defendant asserts in this Application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred." Whether or not there is blood on the murder weapon or on the Defendant's clothing is inconsequential. Even if DNA results were to demonstrate that the victim's blood was not on the murder weapon or on the Defendant's clothing, that information would not provide evidence inconsistent with the State's theory of the case. The Defendant, through his verbal and written confession, created the State's theory of the case, which was corroborated by the evidence and other witnesses. More importantly, it would not demonstrate evidence that would suggest anyone other than the Defendant was responsible for the murder. The Defendant has failed to describe

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adequately how DNA testing would exclude him to the extent that it would change the outcome of the trial.

Additionally, the murder weapon and the Defendant's clothing cannot be tested because they are no longer available. This murder occurred twenty-four years ago and these items cannot be located.

The Lexington County Clerk of Court does not have any evidence from the trial. On August 24, 1998, the Honorable William P. Keesley signed an Order for Release of Evidence, which ordered that the items in evidence be released from the Clerk's Office to the State for distribution to their rightful owners.

The Lexington County Solicitor's Office does not have any evidence from the trial. On August 22, 2013, Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office contacted Howard Jernigan, an investigator in the Solicitor's Office, who performed a review of the records in the Solicitor's Office. Mr. Jernigan was not able to locate either the evidence or any paperwork relating to the transfer of evidence in this case. Additionally, Mr. Martin contacted Debbie McDaniels, the Solicitor's Office Records Custodian, who informed him that the only files still in existence date back to 1992, because a flood, which was caused by burst pipes, in 1995 destroyed the files stored in the basement of the Solicitor's Office.

The West Columbia Police Department does not have any evidence from the trial. On August 26, 2013, Investigator James P. Sullivan, the Evidence Custodian for the West Columbia Police Department, informed the Solicitor's Officer that a review of West Columbia evidence records revealed that the West Columbia Police Department did not take any property into evidence in reference to this case.

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SLED does not have any evidence from the trial. On September 10, 2013, Sharon Hunt, SLED/Forensic Services, provided the Solicitor's Office with copies of its case files. A review of its files revealed that R.M. Freeman picked up the murder weapon and all other evidence tested. He returned the items to the Lexington County Sheriff's Department on January 23, 1990, prior to the trial. SLED records do not indicate that it took possession of the evidence after the trial.

The Lexington Medical Center does not have any evidence from the trial. On September 12, 2013, Wendi C. Knight, MLS (ASCP), the Lab Manager at the Lexington Medical Center, informed the Solicitor's Office in a sworn affidavit that the Lexington Medical Center no longer has any specimens for testing as it relates to this case. She also informed the Solicitor's Office that the lab records do not indicate that any DNA testing was performed at the Lexington Medical Center.

The Lexington County Sheriff's Department does not have any evidence from the trial. On September 17, 2013, Sergeant Douglas A. Novak, the Sergeant of Evidence for the Lexington County Sheriff's Department, informed the Solicitor's Office that after he performed a search of the evidence room and old records, the only item found was an incident report with case number 89-38992 and that no other evidence could be located as it relates to this matter.

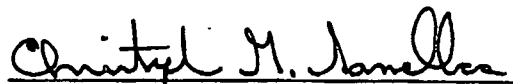
Thus, all custodians of evidence have indicated that they do not have in their possession any evidence as it relates to this case.

Conclusion

WHEREFORE, based on the foregoing, the State respectfully requests that the Court deny Defendant's Application for Post-Conviction Forensic DNA Testing because the Defendant has not articulated why DNA testing would prove probative or change the outcome of his trial. Furthermore, it is factually impossible to perform DNA testing, as the evidence no longer exists.

Thus, this Application should be summarily dismissed for its failure to meet each factor required by a preponderance of the evidence.

Respectfully submitted,



Christopher G. Samellas
Senior Assistant Solicitor
Eleventh Judicial Circuit Solicitor's Office
205 E. Main Street
Lexington, South Carolina 29072

October 22, 2013

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ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

STATE,

v.

ALFONSO WARE, JR., #168464,

DEFENDANT.

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No: 1990-GS-32-0056

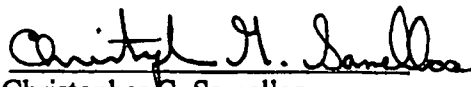
2013 OCT 22 PM 2:41

AFFIDAVIT OF SERVICE BY MAIL

BETH A. GREGG
CLERK OF COURT
LEXINGTON, SC

1. I am an employee of the State 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 State's Response and Motion to Dismiss in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210


Christopher G. Samellas
Senior Assistant Solicitor

October 22, 2013

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State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit

ORIGINAL



COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255

LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. ROOM 309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352

DONALD V. MYERS
Solicitor

October 22, 2013

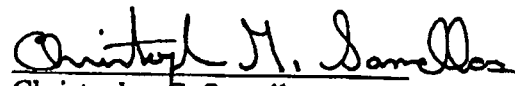
Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

Re: *State v. Ware*, #168464 (1990-GS-32-0056)

Dear Mr. Ware:

Please find enclosed the State's Response to the Defendant's Application for Forensic DNA Testing and Motion for Summary Dismissal.

Sincerely,


Christopher G. Samellas
Senior Assistant Solicitor

cc: The Honorable William P. Keesley
Lexington County Clerk of Court

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA)
LEXINGTON)

-vs-

ALFONSO WARE, JR., (#168464),
Defendant.

ORDER OF THE INTENTION
TO SUMMARILY DISMISS THE
APPLICATION FOR DNA TESTING
Indictment Number: 1990GS3200056
Warrant Number: C560956

The court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. Based on the record at this point, the court sees no purpose for further proceedings and indicates to the applicant/defendant and the Solicitor that the action will be summarily dismissed for the reasons stated below, unless the applicant/defendant raises questions of fact or law related to the issues addressed in this order and the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach

a stage where the application is determined to be sufficient to proceed further. A copy of the documents filed was forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence has been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

FACTUAL RESPONSE

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS, and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under Miranda, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

WPK
#3

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- WPK
#4
- 1) the weapon and the clothing are not available for testing;
 - 2) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - 3) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - 4) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - 5) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;

- 6) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
- 7) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- 8) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

LEGAL ISSUES IN THE RESPONSE

WAL #5
The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

The court agrees, based on the information currently available, that the application should be summarily dismissed because there are not materials to test. S.C. Code Ann. §17-28-90(B) reads:

- (B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:
- (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
 - (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
 - (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo

contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

WPK
#6

The court finds that there is currently no indication that evidence exists that would allow the applicant to meet the requirements of subsections (B)(1) and (B)(2). As for the other subsections, viewing every conceivable inference in the light most favorable to Mr. Ware, the court cannot determine, without reviewing the transcript or having additional knowledge about the evidence, whether DNA testing might tend to be exculpatory or go to show that the applicant did not commit murder. However, since there is no evidence to test, and no indication of a chain of custody, the court fails to see how the other elements could be proven.

The court acknowledges the State's contention that there is nothing to be gained from a DNA analysis, if it could be performed. It recognizes the State's argument that absence of the victim's blood from the defendant's clothing or the gun would not cast doubt on the State's case. However, without knowing more information about the evidence developed and the specific facts presented to the jury, the court is unwilling to summarily dismiss the application on this

ground.¹ The notification of intention to summarily dismiss the application is based on the absence of proof that any DNA material exists to test.

THEREFORE, IT IS ORDERED that the court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The application will be summarily dismissed unless the court is made aware of some purpose for further proceedings. The applicant/defendant and the Solicitor are hereby notified that the action will be summarily dismissed for the reasons stated above, unless the applicant/defendant raises questions of fact or law related to the issues addressed above and those raised in the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

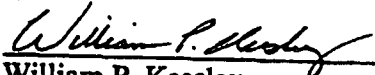
IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Assistant Solicitor Christopher G. Samellas, which he shall be responsible for distributing to any victims or other agencies required to have notice by law.

¹ There is no dispute that Mr. Chanon was shot and, presumably, no dispute that he bled. Mr. Ware admits he was there. In the abstract, it is conceivable that the absence of blood on Mr. Ware's clothing could, depending on the circumstances, provide an indication as to the proximity of Mr. Ware to Mr. Chanon when the shot hit the victim. Likewise, blood on the weapon could go to show the proximity of the weapon to Mr. Chanon when he was hit. If Mr. Ware claims that the weapon discharged by accident or by negligent handling of it, then the proximity of the weapon to the victim could, in abstract theory, support doubt as to whether or not the shooting was a murder. A similar argument could be made related to the lack of blood on Mr. Ware's clothing. His version of events is that he was outside the vehicle and Mr. Chanon was inside the vehicle. The court is unaware of any blood spatter evidence. The court does not know, at this point, what evidence was developed or presented that could go to the issue of the proximity of Mr. Ware and the weapon to Mr. Chanon. The court does not know, based solely on the application and Response, whether there was evidence of a close-contact wound. So, without an additional review, the court would not be able to evaluate whether the presence or absence of Mr. Chanon's blood on the gun could exonerate Mr. Ware, cast doubt, or diminish his conduct to something less than murder.

IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Mr. Alfonso Ware, Jr., #168464, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.

AND IT IS SO ORDERED.

May 21, 2014


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 9, 2014

Beth A. Carrigg, Clerk
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

Dear Ms. Carrigg:

Please find enclosed Reply To Proposed Dismissal Of
Application For DNA Testing, and a copy to be stamp-clocked returned
to me within the prepaid S.A.S.E. provided; this is for my records.
My copy has the paper clip on it with the yellow post-it sticker.

I do appreciate your assistance in this matter. Thank you
very much.

Respectfully,

Alfonso Ware Jr.

Alfonso Ware Jr.

31
ORIGINAL
FILED

2014 JUN 13 AM 9:59

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORIGINAL

FILED

STATE OF SOUTH CAROLINA)
2014 JUN 13 AM 9:59 IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)
BETH A. CARRIGG
STATE OF SOUTH CAROLINA)
CLERK OF COURT
LEXINGTON SC)
REPLY TO PROPOSED DISMISSAL
OF APPLICATION FOR DNA TESTING
V.)
Indictment Number: 1990GS3200056
Warrant Number: C560956
ALFONSO WARE JR. (168464))
DEFENDANT)

Defendant, Alfonso Ware submits the following Reply to Proposed Order of Dismissal of Application for DNA Testing.

PROCEDURAL HISTORY

The defendant is presently confined in the South Carolina Department of Corrections pursuant to Order of Commitment of the Clerk of Court Lexington County. The defendant was indicted at the January 1990 term of the Grand Jury for Lexington County for Murder (90-GS-32-0056). He was represented by Thomas Bellinger. On June 25-27, 1990, the defendant underwent trial by Jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable Hubert E. Long to confinement for a period of Life.

A timely Notice of Appeal was filed on defendant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed defendant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct. App.) filed February 24, 1992.

The defendant subsequently filed an Application for PCR on August 21, 1992, the State filed its Return on October 9, 1992. On May 2, 1995, an evidentiary was held before the Honorable Daniel E. Martin, at which the defendant was present and was represented by Wayne Floyd. By Order dated June 16, 1995, Judge Martin denied and dismissed the defendant's application.

A timely Notice of Appeal was Appeal was filed on the defendants behalf and a petition for Writ of Certiorari was submitted by Wayne Floyd, the defendant PCR Counsel. On November 8, 1996, the South Carolina Supreme Court denied the Petition. A petition for Rehearing was denied on December 19, 1996.

The Applicant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons, Jr., on January 14, 1998. The applicant appealed this decision to the U.S. Court Appeals for the Fourth Circuit. The dismissal of the Applicant's petition was affirmed on June 2, 1998.

The defendant filed yet another PCR Application on February 10, 2000. An Evidentiary hearing was convened on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed defendant to submit another application for Post Conviction Relief. An Evidentiary hearing was held on August 27, 2001, before the Honorable G. Thomas Cooper. Judge Cooper denied the Application. The defendant filed another application for PCR. On December 6, 2001, an Evidentiary hearing into the matter was convened on January 6, 2003, the Honorable Marc Westbrook denied the Application. Defendant filed PCR Application on August 14, 2003, on April 7, 2004, Respondents filed their Return to this Application.

QUESTIONS OF FACT AND LAW

DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN SOUTH CAROLINA CODE ANN. 17-28-320(A) and 17-28-320(C)?

South Carolina Code Annotated §17-28-320(A) States:
A Custodian of the Evidence MUST preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) Murder (§16-3-10)

Fact: Defendant was convicted of Murder.

§17-28-320(C) States: The physical evidence and biological material MUST be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A).

Fact: Defendant since 1990 has been incarcerated.

§17-28-70(C) States: For physical evidence or biological material that the custodian of evidence asserts has been lost or destroyed, the court shall Order a Custodian of Evidence to locate and provide the Applicant and the Solicitor or Attorney General as applicable, with a copy of any document, note, log, report relating to the physical evidence or biological material.

The Solicitor's Office determined that:

- (1) The weapon and clothing are not available for testing.**
- (2) The Evidence from trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998.**

Who was this Evidence released to?

Why was it released, when defendant was still in litigation and incarcerated?

- ¶6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial.**

Who at the Lexington County Sheriff's Dept. took custody of this evidence and the results of SLED Testing? Where is the documentation from that exchange?

While the S.C. Code Ann. §17-28-300 took effect in 2009, a look at the history of this Act shows that in 1990 South Carolina had a Preservation of Evidence Act in place.

This Court is presented with the question of what was the results of the test done by S.L.E.D. in 1990?

From the things determined by the Solicitor's Office, there are questions that are not answered. There are reports and test results not made available, evidence turned over by S.L.E.D. to Lexington County Sheriff Department who in that department? Who was the evidence from the trial released to?

The State has a duty to take affirmative steps to preserve evidence. The defendant has a protected ~~xxxxxx~~ privilege to request and obtain from the State evidence that is material to the guilt of the defendant.

This Honorable Court in its foot note 1. Agree's that in the abstract it is conceivable that the absence of blood on Mr. Ware is very important to the doubt as to support Mr. Ware's verison of the events.

The defendant has raised questions of fact and law related to the issues and the response of the Solicitor filed.

This Court must Order that the defendant is allowed to continue. The Applicant request this Court for an Order for Appoint-ment of Counsel. As is evidence from what has been presented here, this is a complex issue that will require the skills of a trained attorney.

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

Dated: June 9, 2014

FILED

ORIGINAL

STATE OF SOUTH CAROLINA)
2014 JUN 18 AM 9:59 THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)

BETH A. CARRIGG
CLERK OF COURT
STATE OF SOUTH CAROLINA LEXINGTON SC

V.

CERTIFICATE OF SERVICE

ALFONSO WARE JR. (168464))

I, Alfonso Ware Jr., the defendant, declares under the penalty of perjury that I mailed a copy of his Reply to Proposed Dismissal of Application for DNA Testing to the parties listed below by placing in the U.S. Mail clearly addressed as follows:

Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Beth A. Carrigg
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

William P. Keesley, Judge
The Circuit Court of the
Eleventh Judicial Circuit
Post Office Box 10
127 Courthouse Square
Edgefield, SC 29824-0010

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SWORN TO AND SUBSCRIBED BEFORE ME

This 10th day of June, 2014

Susan H. Frye

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: _____
June 15, 2019

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)

-vs-

ALFONSO WARE, JR., (#168464),)
Defendant.)

ORDER OF SUMMARY DISMISSAL
OF APPLICATION FOR DNA TESTING

Indictment Number: 1990GS3200056
Warrant Number: C560956

2014 JUN 20 PM 1:23
BETH A. CARRIGOS
CLERK OF COURT
LEXINGTON, SC

FILED

By order dated May 21, 2014, the court gave notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The court gave both sides an opportunity to file submissions related to this issue. Mr. Ware sent his response on June 10, 2014. Having reviewed the matter, the court finds no basis for this application to continue and no purpose to be gained by doing so. The motion is summarily dismissed.

Wm
#1

Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach a stage where the application is determined to be sufficient to proceed further. Copies of the documents filed were forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

A TRUE COPY
[Signature]
Lex. Co. C.C.P., G.S. & F.C.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence had been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

FACTUAL RESPONSES

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under *Miranda*, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money

was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

WPC
#4

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

In response to the May 21, 2014 order, Mr. Ware recites the following questions:

- a) Did the custodian of the evidence follow the mandates set out in South Carolina Code Ann. 17-28-320(A) and 17-28-320(C)?
 - i. He argues that the custodian of evidence was required to maintain physical evidence and biological material.
 - ii. He argues that, even though the code section cited did not take effect until 2009, there was a preservation of evidence act in place prior to that time, though the provides no specifics.
 - iii. He states, "This Court is presented with the question of what was [sic] the results of the test done by S.L.E.D. in 1990?"

As to these issues, they do not change the basis for the notice of summary dismissal. S.C. Code Ann. §17-28-90(B) provides the basis for having the court order DNA testing. As stated previously, there does not appear to be any biological material to test.

- b) Mr. Ware goes on to argue that "there are questions that are not answered." He objects to the failure of the State to maintain the evidence. He claims that the evidence is material to the question of his guilt. He notes that the court, in its prior order, acknowledged that a question could exist, in the abstract, about whether the

Ware
#5

absence of blood on the gun and on Mr. Ware's clothing could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

As to these arguments, Mr. Ware has no indication that there is any evidence to test. His questions and his assertions really seem to be an attempt to go on a fishing expedition to see what might develop. While that is understandable on the part of someone who has been convicted of murder and is serving a lengthy prison term, this application seeks an order directing DNA testing. The court sees no valid purpose in proceeding with consideration of this application, in the absence of any information that biological material is available for testing.

Further, as explained below, the court was trying to give the applicant every benefit of the doubt in allowing the application to proceed this far and to see if any evidence existed for DNA testing. The point is that Mr. Ware is arguing that he should be able to develop evidence to show the absence of biological material.

WSPH
#6
While the court focused in its prior order on the key issue of the non-existence of anything remaining to test, it seems obvious that Mr. Ware's application and response are questions about the presence or absence of blood, not the source of any blood. He does not seem to even argue that there is a need for DNA testing under the definitions of §17-28-20.

An application under this Act is to include certain things under S.C. Code Ann. §17-28-40. Those requirements include the following:

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity.

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's

conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching.

As noted in the prior order and in this one, Mr. Ware gave a written statement to police and he testified at his trial. He placed himself at the scene. According to the statement, he shot the decedent in a drug deal. According to another version, the decedent grabbed the gun. In another version, the defendant threw the gun into the decedent's car, but never pointed or presented the gun. There is no question about the identity of Mr. Ware as the person with the gun initially. The only conceivable question would relate to which of the stories to believe and/or whether there is any evidence that would create doubt of guilt.

In addition, as noted in the prior order:

The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

WPK
#7

Presumably, Mr. Ware is asserting that the absence of blood on him, his clothing, and the gun would go to issues of his guilt or, if guilty of anything, whether he should have been convicted of the lesser offense of involuntary manslaughter, which was submitted to the jury. There is no indication from anything provided to the court that there was evidence that Mr. Ware was bleeding. The only known evidence related to the source of blood is that the decedent was the sole person bleeding. So, regardless of whether or not DNA testing would have provided information about the source of blood, the question of whether or not blood was present on Mr. Ware, his clothing, or the weapon is not a new issue. Even if it were established that there was no blood on Mr. Ware, his clothing, or the gun, it is merely impeachment evidence. [See §17-

44

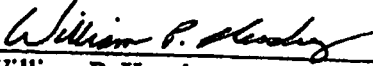
28-40(7)).] It was an issue that one would have known to pursue in the original trial or in any of the multiple PCR applications.

The court has considered the application, the State's response, and the applicant's response. The court finds no purpose in pursuing DNA testing, based on the representations made to the court.

THEREFORE, IT IS ORDERED that the court summarily dismisses the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq.

AND IT IS SO ORDERED.

June 18, 2014



William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

The Honorable Beth Carrigg
Clerk of Court for Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Ms. Carrigg:

Enclosed for filing is a Notice of Appeal in the above
case.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

46

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

The Honorable Jeanette Barber
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State of South Carolina v. Alfonso Ware Jr.,
Indictment No. 1990GS3200056, Warrant No. C560956. Appellant
appeals denial of his Access to Justice Post-Conviction DNA
Testing Act, S.C. Code Ann. 17-28-10 et seq.

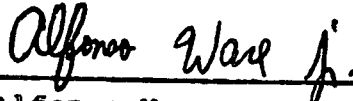
Dear Ms. Barber:

Enclosed for filing is a Notice of Appeal in the above
case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. Copy of the Order.

Also enclosed is a S.A.S.E. to return a clock-stamped copy
for my records. I appreciate your assistance in this matter. Thank
you.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attachments

47

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

NOTICE OF APPEAL

Alfonso Ware Jr. appeals the Order of the Honorable William P. Keesley, dated June 18, 2014. Appellant received written Notice of Entry of this Order on June 26, 2014.

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

cc: File

48

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail clearly addressed.

Ms. Jeanette Barber, Clerk
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Mr. Alan Wilson, Attorney General
Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

Ms. Beth Carrigg, Clerk
Clerk of Court, Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

ORIGINAL

19A06532 0056⁴⁹
C560956

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

FILED
2014 JUL 23 AM 7:51
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

Dear Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

ORIGINAL

50

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUL 23 AM 7:51

FILED

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Mr. Myers:

Enclosed for filing is a Notice of Appeal in the above
~~XXXXX~~ case. I apologize for the delay.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2014 JUL 23 AM 7:51

FILED

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail, postage pre-paid, and clearly addressed.

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, south Carolina 29072

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

52

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

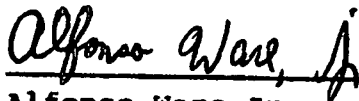
Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Mr. Myers:

Enclosed for filing is a Notice of Appeal in the above case. I apologize for the delay.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail, postage pre-paid, and clearly addressed.

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Alfonso Ware, Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

54

Alfonso Ware Jr.
BRCI/Waterloo 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Waterloo 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

55

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LEXINGTON COUNTY
Court of General Session**

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

INITIAL BRIEF OF APPELLANT

**ALFONSO WARE JR.
Appellant
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210**

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STATEMENT OF ISSUES ON APPEAL

**DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN
SOUTH CAROLINA CODE ANN. ~~17~~ 17-28-320(A) and 17-28-320(C)?**

STATEMENT OF THE CASE

The Appellant is presently confined in South Carolina Department of Corrections pursuant to Order of Commitment of the Clerk of Court Lexington County. The Appellant was indicted at the January 1990 Term of the Grand Jury for Lexington County for Murder (90-GS-32-0056). Appellant was represented by Thomas Bellinger, on June 25-27, 1990, Appellant ~~when~~ went to trial by Jury, found guilty as indicted. He was sentenced by the Honorable Hubert E. Long to Life.

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed Appellant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct App. filed February 24, 1992).

The Appellate subsequently filed an Application for PCR on August 21, 1992, the State filed its Return on October 9, 1992. On May 2, 1995, an Evidentiary hearing was held before the Honorable Daniel E. Martin at which the Appellate was present and was represented by Wayne Floyd. By Order dated June 16, 1995, Judge Martin denied and dismissed the Appellant's Application.

A timely Notice of Appeal was filed and a petition for Writ of Certiorari was submitted by Wayne Floyd. On November 8, 1996, the S.C. Supreme Court denied the petition. A petition for rehearing

was denied on December 16, 1996.

The Appellant filed a Petition for Writ of Habeas Corpus in the U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons Jr. on January 14, 1998. The Appellant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The dismissal of the Appellant's petition was Affirmed on June 2, 1998.

The Appellant file another PCR Application of February 10, 2000. An Evidentiary hearing was held on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed Appellant to submit another Application for PCR. An Evidentiary hearing was held on August 27, 2001, before the Honorable Thomas G. Cooper. Judge Cooper denied the Application. The Appellant filed another PCR Application on December 6, 2001, an Evidentiary hearing was held on January 6, 2003, the Honorable Marc Westbrook denied the Application. Appellant filed PCR Applications on August 14, 2003, and April 7, 2004.

By Order of the Court the Clerk of Court filed this Application for DNA Testing on July 26, 2013. On October 22, 2013, the Solicitor's Office filed a Response and Motion for Summary Dismissal. On June 16, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the Application for DNA Testing. Appellant filed a timely Response to the Order of the Court.

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ARGUMENTS

DID THE COURT ERR, WHEN IT DENIED APPELLANT'S APPLICATION FOR D.N.A. TESTING WITHOUT REQUIRING THE SOLICITOR'S OFFICE AND THE CUSTODIAN OF THE EVIDENCE TO FOLLOW THE STATUTE?

17-28-70(C)(D)

"For physical evidence or ~~bm~~ biological material that the custodian of evidence asserts has been lost or destroyed, the Court shall Order a Custodian of Evidence to locate and provide the Appellant and the Solicitor or Attorney General, as applicable with a copy of any document, note, log or report relating to the physical evidence or biological material.

The Solicitor's Office determined the following:

- (1) The weapon and the clothing are not available for testing
- (2) The evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998
- (6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Dept. on January 23, 1990 which was prior to the trial.

The Court in its Order of intention to Summarily Dismiss the Application for DNA Testing. Factual response state "The response recites the procedural history of the Appellant's murder conviction, including four (4) PCR Application and various appeals."

Clearly from this statement from the Court the evidence should have been preserved, beyond the January 1998 date that the Court claims to have released the evidence from the trial. There is a record of the evidence being released, however, the Solicitor's Office does not indicate who the evidence was released to. 17-28-70(C) in part states "A copy of any document, note, log, or report relating to the physical evidence or biological material" by not providing the Appellant with the name of the person who the evidence was released to or what was released. Just as important who determined and by what method that the evidence should be released.

Office of the Custodian of the Evidence or the Solicitor have not followed the requirements of the statute in their investigation. This Application should not have been denied.

The Solicitor's Office states that "S.L.E.D. does not have any evidence from the trial as the weapon and evidence tested" were returned to the Lexington County Sheriff Dept. January 23, 1990, prior to the trial. Again it is clear that S.L.E.D. tested the weapon and evidence, prior to the trial. What are the results of those test? What was tested? Who at S.L.E.D. tested it? Who was this evidence turned over to? These questions are available at S.L.E.D. Results of their work was retained in their records.

Appellant has claimed from the beginning that he did not fire the gun that killed the victim and as stated by the Court it is conceivable that this is true; See footnote 1 of Order of Intention to Summarily Dismiss.

When the State fails to preserve evidence which might have exonerate the Appellant, the Court must determine both. Whether the evidence was constitutionally material of apparent exculpatory value, and incomparable. Lost or destruction of relevant evidence by the government not only ~~raz~~ raises general questions of the fundamental fairness of a criminal trial, but may also deny the Appellant the right to compulsory process. It is the manifest duty of the to vindicate guarantees of confrontation compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced 94 S.Ct 3090.

It must be established that the law concerning this issue has been followed, and before we can say with certainty that there is no evidence to be tested we must be satisfied that all of the statute is complied with. To protect the rights and interest of the Appellant.

That is not the case here. We are not certain of the existence of any evidence or the results of any test done (S.L.E.D.). If the Custodian of the Evidence or the Solicitor had followed the commands of the statute we may be sure of the existence of the evidence. As long as the dictates of the law is not been applied equally then the Appellant right to due process in his application. As long as the Chain of Custody, the log, notes, and records that have not been produced we will never know with certainty the existence of any evidence, in fact the record reflect more in favor of there being evidence than not, (S.L.E.D. tested and turned over prior to trial), if the Custodian of the Evidence conducts a

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search then we will know for certain.

The law is a two-edge sword that cuts both ways. It not be applied to the Appellant and not the Respondents, they must be made to make a thorough search following the guide-lines already set-out, in the statute §17-28-80, find those records, notes, logs, and Chain of Custody.

This Application is to important to settle on conclusory statements and not fact.

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CONCLUSION

The question present by the Appellant remains unanswered.
Appellant pray that this Court will Order the Respondents to
comply with the law as it applies to this issue (Preservation of
Evidence Act).

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

66

RECEIVED

JUL 29 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

SC Court of Appeals

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

CERTIFICATE OF SERVICE BY MAIL

I, Alfonso Ware Jr., declare under the penalty of perjury that I have served the Initial Brief of Appellant by depositing a copy of it in the U.S. Mail, postage prepaid, to all parties listed below and clearly addressed.

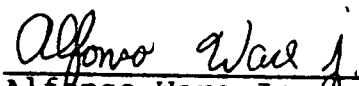
South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Solicitor, Eleventh Judicial Cir.
Donald V. Myers, Solicitor
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Clerk of Court, Lexington County
Ms. Beth Carrigg, Clerk
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Attorney General's Office
Alan Wilson, Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

July 28, 2014


Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

RETURN TO MOTION TO DISMISS APPEAL WITHOUT PREJUDICE

 This matter comes before the Court by a “in the “Motion to dismiss without prejudice and with leave to appeal again” dated July 28, 2015. In the motion in this DNA application denial appeal, the petitioner, Alfonso Ware, Jr., requests the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called “S.L.E.D evidence that was not considered by Judge Keesley.” Respondent opposes the motion to dismiss without prejudice.

A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court and Judge Keesley to consider is a response he received to an Freedom of Information Act request he received on February 4, 2015 which he presented o this Court in an earlier motion to “motion for relief from Judgment ...’ received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matter on appeal from the denial of a DNA application by Judge Keesley nor authorize the

matter for DNA testing to be open below. Neither of the items of S.L.E.D. records from 1990 attached to the June 3 motion do not reflect that there is any trace evidence that was available for DNA testing which is the purpose of the DNA application.

In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- 
- a) the weapon and the clothing are not available for testing;
 - b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-5. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5.

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X3
The material Petitioner attached does not assert any newly discovered evidence that trace evidence, the gun or clothing or other items exist for DNA testing that he is seeking. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations and conclusions in 2013 and 2014 that evidence for DNA testing exists that he seeks to be tested.

In an abundance of caution, Respondent attaches the following documents:

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.

4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Exhibits 1-5 Attached.

The similar request was before the Court when on July 10, 2015, it interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to "stay proceedings in this Court."). The same request is now converted to a motion to dismiss the appeal without prejudice and allow refiling. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed this motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, it shows that SLED released a "box" in January 1990, a matter that is not in dispute on whether the items remain in the custody to the Lexington County Sheriff Department.

Apparently, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. . However, it is neither, but a limited procedure.

The Petitioner has made an inadequate showing to allow a dismissal without prejudice

II.

Wherefore having made Response to the "Motion to Dismiss Without Prejudice and with

Leave to Appeal Again", the Respondent requests that the motion be dismissed."

Respectfully submitted,

Respectfully submitted,

ALAN WILSON
Attorney General

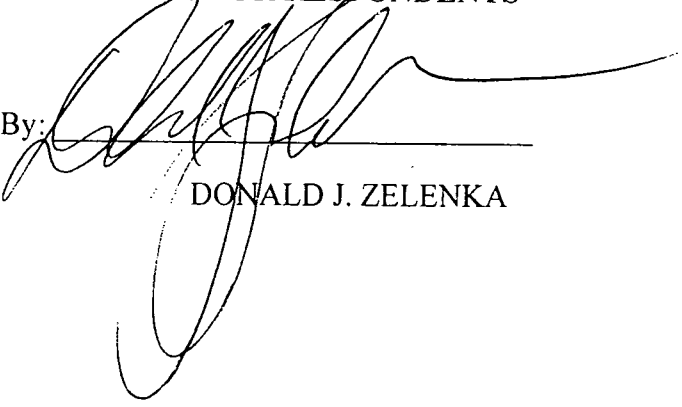
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

45

ATTORNEYS FOR RESPONDENTS

By: 
DONALD J. ZELENKA

August 14, 2015

ATTACHMENTS

1. Copy of an Order for Release of Evidence dated August 24,1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26,2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26,2013.
4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17,2013.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
	)	
THE STATE	)	ORDER FOR RELEASE OF EVIDENCE
VS.	)	
	)	
Alfonso Ware Jr.	)	90-GS-32-56
DEFENDANT.	)	

It appears that the above-captioned action was tried before the Court of General Sessions of Lexington County on June 27, 1990, and that more than ten (10) days have now elapsed since the conclusion of said action. It also appears that no appeal has been perfected with regard to said action.

The following items were introduced into evidence:

No Sheet Available

1998 AUG 24 P 4:40
CLERK OF COURT
LEXINGTON, SC

Since the retention of said items by the Clerk of Court no longer serves any judicial purpose,

IT IS THEREFORE ORDERED that said items be released to the state for distribution to their rightful owners.

AND IT IS SO ORDERED.

William P. Cleaveland
ELEVENTH JUDICIAL CIRCUIT COURT JUDGE

Lexington, South Carolina
August 24, 19 98

ELEVETH CIRCUIT SOLICITOR'S OFFICE

Donald V. Myers, Solicitor



205 EAST MAIN STREET #309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352 FAX: (803) 785-8431



Matthew W. Martin-Chief Investigator
(803) 785-2201

Matthew W. Martin

To: Assistant Solicitor Christopher Samellas
Date: August 26, 2013
Re: State v. Alphonso Ware (90-GS-32-56)

After speaking with you on Thursday, August 22, concerning the appeal on the above mentioned case, I took the following actions. First, I contact Howard Jernigan from our office. Mr. Jernigan has been the liaison between the Lexington Clerk of Court's Office and our office since the early 1990's. Mr. Jernigan completed an intense search of the files in his possession relating to the transfer of evidence from the Clerk's Office back to law enforcement. Mr. Jernigan could find no paperwork related to the above listed case.

I next contacted Debbie McDaniels from our office. Ms. McDaniels is our in-house records custodian. Ms. McDaniels informed me that the only files from our office that still exist start at 1992. She stated that before Lexington County had a central records management storage area, the files for the Lexington County Solicitor's Office were stored in the basement of the office. These files were destroyed by a flood in 1995.

To that end, I am unaware of any other avenue for our office to take to locate any records that would have remained in our care, custody or control. Please do not hesitate to contact me should any further follow up be desired or assistance needed.

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City of West Columbia
Bridging Past, Present and Future

POLICE DEPARTMENT
CHIEF DENNIS K. TYNDALL

To: Lt. Bruce Wade, Chief of Detectives
Cc: Maj. Matt Edwards, Deputy Chief of Police

From: Inv. James P. Sullivan

Ref: State v. Alfonso Ware Jr.

Date: 08/26/2013

On 08/09/2013, Mr. Christopher G. Samellas, Senior Assistant Solicitor, 11th Judicial Circuit Solicitor's Office, pursuant to a Motion for DNA testing requested a review of any and all evidence concerning the State v. Alfonso Ware Jr. The incident took place in the jurisdiction of Lexington County; however, a City of West Columbia Officer did provide assistance. A check of West Columbia evidence records revealed that the City of West Columbia did not take any property into evidence in reference to the aforementioned case.

Sincerely

A handwritten signature in dark ink, appearing to read "James P. Sullivan".

Inv. James P. Sullivan
Evidence Custodian



2720 Sunset Boulevard
West Columbia, SC 29169
803-791-2000

Affidavit of Wendi C. Knight, MLS (ASCP)

On August 7, 2013, I, Wendy C. Knight, MLS (ASCP), received from Christopher G. Samellas, Senior Assistant Solicitor for the Eleventh Judicial Circuit in South Carolina a copy of a Court Order regarding a Motion for DNA Testing in the case of *State v. Alfonso Ware, Jr.* Pursuant to the Court Order, our lab was required to locate the biological material and review the lab records in this case.

I am a licensed Medical Laboratory Scientist who currently works as a Lab Manager at Lexington Medical Center. I possess a board certification from the American Society for Clinical Pathology (ASCP). Additionally, I have an Associate's Degree and a Bachelor's degree. I have extensive professional knowledge regarding laboratory data, policy, and procedure, including but not limited to, the way our lab records are maintained and how to access our lab records. I have been in my current role of Lab Manager at Lexington Medical Center since May of 2011. However, I have been working in this field since 2004.

I have reviewed our lab records from 1990 as it relates to the case of *State v. Alfonso Ware, Jr.*, and I found that we no longer have any specimens for testing. I also determined that our lab did not perform any DNA testing and I do not know if another agency was involved that could have requested DNA testing. Since we did not have a lab computer system in 1990, all of the lab records from that time period are on paper and are attached to one another. Based on our records, I do not believe that the lab can be of any assistance in this matter.

Sincerely,

Wendi C. Knight, MLS (ASCP)
Medical Laboratory, Lab Manager
Lexington Medical Center

SWORN AND SUBSCRIBED before me

This 12th day of September, 2013.

Brenda Rochelle L. Pro
Notary Public for the State of South Carolina

My commission expires on ~~My Commission Expires~~ December 28, 2015.

James R. Metts, Ed. D.

LEXINGTON COUNTY SHERIFF'S DEPARTMENT

September 17, 2013

Senior Assistant Solicitor Chris Samellas
Eleventh Judicial Circuit
205 E. Main St.
Lexington, South Carolina, 29072

Re: State of South Carolina v Alfonso Ware, Jr.

Pursuant to the court order in reference to State of South Carolina vs Alfonso Ware, Jr., a search of the evidence room and old records was performed. The only item found was an incident report with case number 89-38992 which was forwarded to the Solicitors Office. No other evidence could be located in reference to this case.



Sergeant Douglas A Novak
Sergeant of Evidence
Lexington County Sheriff's Department

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LEXINGTON COUNTY SHERIFF'S OFFICE

INCIDENT REPORT

89-389A (2)

[illegible]

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

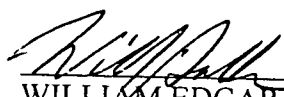
Appellate Case No. 2014-001470

PROOF OF SERVICE

I, William Edgar Salter, III, on behalf of Donald J. Zelenka, Senior Assistant Deputy Attorney General, certifies that on the 14th day of August, 2015, he served two (2) copies of Respondent's Return to Motion to Dismiss Appeal Without Prejudice, with attachments on Petitioner by depositing same in the United States Mail, first class, postage prepaid, addressed as follows:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello 242
4460 Broad River Road
Columbia, South Carolina 29210

August 14, 2015.



WILLIAM EDGAR SALTER, III
Attorneys for Respondent

8/

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

NOV 25 2015

SC Court of Appeals

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record
Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esq.
Post Office Box 11549
Columbia, SC 29211

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

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CERTIFICATE OF COUNSEL**Certificate of Counsel**

Appellant certifies that the South Carolina Court of Appeals issued an Order denying appellant Motion to dismiss without prejudice on October 16, 2015 and received by the Appellant on October 29, 2015.

QUESTION PRESENTED

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

STATEMENT OF THE CASE

An Application for DNA testing was filed in the Lexington County Clerk of Court on July 26, 2013. On October 22, 2013, the Solicitor's Office of Lexington County filed a response and Motion for Summary Dismissal. On May 21, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the application for DNA testing. On May 13, 2014 filed Reply to Judge Keesley Order of Intention to Dismiss.

On June 18, 2014, the Court filed an Order of Summary Dismissal of Application for DNA Testing. A timely notice of appeal was filed. On July 29, 2014, Appellant filed his Initial Brief with the South Carolina Court of Appeals and the State responded.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. On February 4, 2015, the Appellant received from SLED a response to the F.O.I.A. request. On June 2, 2015, Appellant filed with the S.C. Court of Appeals Motion For Relief from Judgment.

On July 28, 2015, Appellant filed with S.C. Court of Appeals Motion to Dismiss Appeal Without Prejudice. On August 14, 2015, the State filed it's Return to Appellant Motion to Dismiss Without Prejudice. On October 16, 2015, the S.C. Court of Appeals issued an Order denying Appellant Motion to Dismiss without Prejudice. This Petition for Writ of Certiorari follows.

ARGUMENT

DID THE SOUTH CAROLINA COURT OF APPEALS ERR WHEN THE COURT DENIED APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE?

This matter comes before this Court by a denial by the S.C. Court of Appeals (on October 19, 2015, and received by the Appellant on October 29, 2015) of Appellant's motion to dismiss without prejudice and with leave to appeal again dated July 28, 2015.

The Appellant request the Court of Appeals to dismiss the matter without prejudice, based upon the receipt of evidence from the State Law Enforcement Division that was not consider by Judge Keesley in his decision prior to denying Appellant's Application for DNA Testing.

In his May 13, 2014, Order conditionally denying the application, Judge Keesley concluded upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that: After the Application was sent to the Solicitor's Office the following things were determined:

- a) The weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998;
- c) On August 22, 2013, the Solicitor's Office of the 11th Judicial Circuit assigned investigators to review records

- and search for evidence and found no paperwork or evidence from the trial;
- d) The Solicitor's Office of the 11th Judicial Circuit instructed its Record Custodian to search for files related to this case and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the solicitor's staff;
 - e) The West Columbia Police Department does not have any evidence from the trial, as confirmed by the Evidence Custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were ~~xxxx~~ returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
 - g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and
 - h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

The Court in its Order of the Intention to Summarily Dismiss

footnote 1: the Court acknowledges that question could exist in the abstract about whether the absence of blood on the gun and on Mr. Ware, could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

X The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a request under the Evidence Preservation Act have not been followed by any of the Custodians of the Evidence involved in this case and this is evident.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. As a result of the request the attached documents were provided by SLED:

1. Official Report of SLED Laboratory File No. L89-11725, December 4, 1989.
2. SLED Disposition of Evidence Form dated January 23, 1990 3:10pm

The fact that this evidence was available to the Appellant through his request to SLED proves that the Custodian of the Evidence and the Office of the Solicitor in their response to the Application for DNA Testing were not as thorough as they should have been in their search for evidence related to this case.

According to the documents provided by SLED, there was testing done by SLED, the results of which was not made available to the Appellant. The question is what are the results of the testing?

South Carolina Code Ann. §17-28-70(c) state: in part "provide the Appellant and the Solicitor with a copy of any document, note,

log, report relating to the physical evidence" the Custodian of the Evidence has failed to follow the requirement of the statute.

The Respondent nor the Custodian's of the Evidence through their own pleading prove that the S.C. Code Ann. §17-28-10 through 320 has not been followed.

The Appellant through motion to dismiss without prejudice and leave to appeal again moved the Honorable South Carolina Court of Appeals to dismiss Appellant's appeal without prejudice to allow Appellant an opportunity to file a motion with Judge Keesley, informing him of the discovery of the SLED documents. And giving Judge Keesley a chance to consider this evidence in conjunction with the fact the record before the Court proves that the criteria of the statute (17-28-10 thru 320) was not followed, and the investigation was not thorough. By any standard the Appellant was not given a fair opportunity under the Criteria of the Preservation of Evidence Act.

The South Carolina Court of Appeals erred when they denied Appellant's motion to dismiss without prejudice, in light of the facts presented by the Appellant that support the need for further investigation. As well as documented fact that the Custodian of the Evidence and the Respondent did not do a thorough investigation or follow mandatory criteria set-out in the statute (§17-28-10 thru 320). The Court should have in the interest of justice and fairness have allowed the Appellant the opportunity to motion Judge Keesley with the evidence from SLED.

CONCLUSION

There is one thing that is clear and not denied by the Respondent. The statute concerning the Preservation of the Evidence Act was not followed. The Appellant as a result is being denied his fair opportunity in this matter; despite the facts and the evidence presented by the Appellant the South Carolina Court of Appeals has reached a decision to deny Appellant's motion. This is a clear err and this Court must exercise its power and correct what the record before this Court demonstrates is an err by the Court of Appeals. For the reasons stated, Appellant asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

~~123~~
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,,

Respondent.

APPENDIX

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210
Pro se, Appellant

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

Attorney for Respondent

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93

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2015

Alfonso Ware, Jr., 168464
Broad River Correctional Institution
4460 Broad River Road
Columbia SC 29210

Re: Alfonso Ware, Jr. v. The State
Appellate Case No. 2014-001470

Dear Mr. Ware:

This Court issued an order on October 16, 2015 denying your motion to dismiss without prejudice. Therefore, this appeal is to proceed on with the filing of the petition for writ of certiorari and appendix. You must file and serve the petition for writ of certiorari and appendix within thirty days of the date of this letter or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
Donald V. Myers, Esquire
Donald J. Zelenka, Esquire

94

Alfonso Ware Jr.
BRCI/Monticello 242; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SLED FOIA Office

Date Received 12-09-14

Due Date 01-05-15

2014-942

December 3, 2014

South Carolina Law Enforcement Division
4400 Broad River Road
Post Office Box 21398
Columbia, South Carolina 29221

RE: State v. Alfonso Ware Jr.
Indictment No.: 1990GS3200056
Warrant No.: C560956

Dear Sir/Ma'am:

Please send to me a copy of any reports done from testing, on any evidence related to the above indictment. Copy of any Chain of Custody concerning this evidence, when this evidence was received from Lexington County and when this evidence was returned to Lexington County and who it was returned to. Any information in your custody relating to this case please send it to me as soon as possible.

Respectfully,

Alfonso Ware Jr.
Alfonso Ware Jr.

cc: File

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

95

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

February 4, 2015

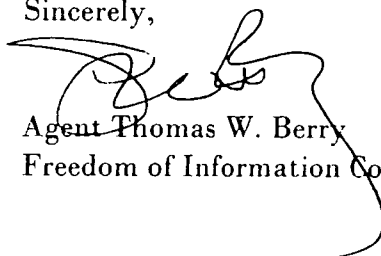
Alfonso Ware, Jr., #168464
Broad River C. I. / Monticello 242
4460 Broad River Road
Columbia, SC 29210

RE: Freedom of Information Act Request #2014-942
SLED Lab No.: L89-11725

Dear Mr. Ware:

This letter is to confirm that we are in receipt of your money order in the amount of \$22.00. I am enclosing the information provided to me by our Forensics Lab regarding your request dated December 3, 2014.

Sincerely,



Agent Thomas W. Berry
Freedom of Information Coordinator

TWB/mcp



SLED FORENSIC SCIENCES EVIDENCE INVENTORY SHEET

Lab Number L89-11725 Sheet # 1 of 1

FORM: CHEM-004
OCTOBER, 1988

[illegible]

IF THE EVIDENCE SUBMITTED IS NOT ITEMIZED BY THE REQUESTING AGENCY, I ACCEPT THE INVENTORY OF THE ASSIGNED SLED EXAMINER.

R.M. Freeman

Delivered By (Print)

(6)

Delivered By (Sign)

29 Nov 89

Date

Received By

Date _____

Received By

Date _____

Received By

Date

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

98

CARROLL A. CAMPBELL, JR.
Governor



ROBERT M. STEWART
Chief

DISPOSITION OF EVIDENCE

DEPARTMENT: Lexington Co 50
COUNTY: Lexington

CASE #	RAPE KIT	ENVELOPE	BAG	OTHER
F89-1368				box
				box

TO: R. M. Freeman R. M. FREEMAN 1-27-90 3:10 PM
SIGNATURE NAME PRINTED (8) DATE TIME

FROM: Carolyn W. Reese CAROLYN W. REESE 1/23/90 3:10 PM
SIGNATURE NAME PRINTED DATE TIME

99
SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor



ROBERT M. STEWART
Chief

4400 Broad River Road (J.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone: 803-737-9000
December 4, 1989

TO: E. Hite
Lexington County Sheriff's Department
PO Box 639
Lexington, SC 29072

LABORATORY FILE NO: L89-11725

SUBJECT(S): Alphonso Ware

VICTIM(S): Robert Channon

This is an official report of the South Carolina Law Enforcement Division Criminalistics Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

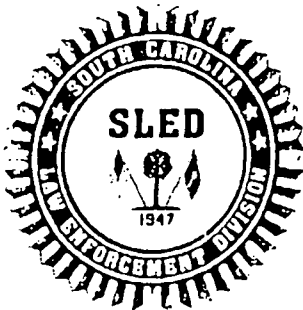
1. Packet containing cotton tipped swabs from the victim.
2. Packet containing cotton tipped swabs from the suspect.

RESULTS OF EXAMINATION(S)

1. The quantity of metals detected in samples submitted for Robert Channon is insufficient to determine the presence of gun primer residue.
2. The quantity of metals detected in samples submitted for Alphonso Ware is insufficient to determine the presence of gun primer residue.

100

SOUTH CAROLINA LAW ENFORCEMENT DIVISION



CARROLL A. CAMPBELL, JR.
Governor

Page 2
L89-11725

ROBERT M. STEWART
Chief

4400 Broad River Road (J.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone: 803/737-9000

Chemical Analyst(s)

Joseph D. Powell

12-4-89

Date _____

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY

ROBERT M STEWART
CHIEF



Trace Department

June 25, 1990

SLED Lab No: L89-11725

Amended Report

Your Case No: 8938992

Incident Date: 11-25-89

(S) Alphonso Ware

(V) Robert Channon

E. Hite
Lexington County Sheriff's Office
P.O. Box 639
Lexington, SC 29072

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Sample of red paint from victim's automobile.
2. Sample of red paint from automobile owned by Betty Willson.

RESULTS OF EXAMINATION(S)

Item #1 is not consistent with item #2 in physical nor chemical characteristics; however, the red layer of paint in item #1 is consistent with item #2 in physical and chemical characteristics.

Chemical Analyst(s)

Jeffrey M. Hollifield
Jeffrey M. Hollifield

6/25/90

Date

SLED

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

FORM: CHEM-003
OCTOBER, 1988

102

Name of Investigating Officer <u>E. Hite</u>		Rank <u>Deputy Sheriff</u>	Sled Lab No. <u>L89-11725</u>
Department <u>Lexington County Sheriff's Department</u>		Telephone Number <u>359-8251</u>	Contributing Agency ORI <u>SCO 320000</u>
Street Address or Post Office Box <u>P.O. Box 639</u>			Contributing Agency Case No. <u>8938992</u>
City <u>Lexington</u>	State <u>S.C.</u>	Zip Code <u>29072</u>	County <u>Lexington</u>
CC: _____			Incident Date <u>25 Nov., 1989</u>
			New Case <u>XX</u> Additional Evidence _____
			Related Lab No. _____

Subject # _____	Victim # <u>XX</u>	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Channon</u>		First Name <u>Robert</u>	Middle Name _____
DOB: _____		Race: Cau <u>XX</u> Blk _____ Other _____	
Subject # <u>XX</u>	Victim # _____	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Ware</u>		First Name <u>Alphonso</u>	Middle Name _____
DOB: _____		Race: Cau _____ Blk <u>XX</u> Other _____	
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	Middle Name _____
DOB: _____		Race: Cau _____ Blk _____ Other _____	
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	Middle Name _____
DOB: _____		Race: Cau _____ Blk _____ Other _____	
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	Middle Name _____
DOB: _____		Race: Cau _____ Blk _____ Other _____	

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

- (1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____
- (2) Possession or Distribution of Illegal Drugs or Controlled Substances _____
- (3) Criminal Sexual Conduct
 - (A) Adult victim _____ (B) Child victim _____
- (4) Homicide
 - (A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison: _____
- (5) Suicide
 - (A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____
- (6) Accidental Death
 - (A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocution _____
- (7) Natural Death
 - (A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____
- (8) Traffic Accident Fatality Victim--Meets criteria of Section 17-7-80 Yes _____ No _____
 - (A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____
- (9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____
- (11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____
- (15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harassment _____
- (20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____
- (24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed: Blood _____	Urine _____	Ocular Fluid _____	Other _____
Examination Requested: Blood Alcohol _____	Drug Screen _____	CO _____	Blood Type _____ Other _____
Autopsy Performed: Yes _____ No _____	Findings _____		
*Drugs Suspected: Yes _____ No _____	Type of Drugs _____		
*Drugs Found at Scene: _____			

(12)

Comments: _____

Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____

THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RMF

R.M. Freeman

R.M. Freeman

29 Nov. 89

Additional

JMH-330

accept: 5

103
FORM: CHEM-003
OCTOBER, 1988

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

Name of Investigating Officer <u>E. Hite</u>		Deputy Sheriff	Sled Lab No. <u>189-11725</u>
Department <u>Lexington County Sheriff's Department</u>		Rank	Contributing Agency ORI <u>SCO 320000</u>
Street Address or Post Office Box <u>P.O. Box 639</u>		Telephone Number <u>359-8251</u>	Contributing Agency Case No. <u>8938992</u>
City <u>Lexington</u>	State <u>S.C.</u>	Zip Code <u>29072</u>	County <u>Lexington</u>
CC: _____			Incident Date <u>25 Nov. 1989</u>
			New Case <u>Additional Evidence XX</u>
			Related Lab No. _____

Subject # _____	Victim # <u>XX</u>	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Charmon</u>		First Name <u>Robert</u>	DL/SS NO: _____
Middle Name _____		Race: Cau <u>XX</u> Blk _____ Other _____	DOB: _____
Subject # <u>XX</u>	Victim # _____	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Ware</u>		First Name <u>Alphonso</u>	DL/SS NO: _____
Middle Name _____		Race: Cau <u>X</u> Blk <u>XXX</u> Other _____	DOB: _____
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	DL/SS NO: _____
Middle Name _____		Race: Cau _____ Blk _____ Other _____	DOB: _____
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	DL/SS NO: _____
Middle Name _____		Race: Cau _____ Blk _____ Other _____	DOB: _____

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

- (1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____
(2) Possession or Distribution of Illegal Drugs or Controlled Substances _____
(3) Criminal Sexual Conduct
(A) Adult victim _____ (B) Child victim _____
(4) Homicide
(A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison: _____
(5) Suicide
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____
(6) Accidental Death
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocution _____
(7) Natural Death
(A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____
(8) Traffic Accident Fatality Victim--Meets criteria of Section 17-7-80 Yes _____ No _____
(A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____
(9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____
(11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____
(15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harassment _____
(20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____
(24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed: Blood _____	Urine _____	Ocular Fluid _____	Other _____
Examination Requested: Blood Alcohol _____	Drug Screen _____	CO _____	Blood Type _____ Other _____
Autopsy Performed: Yes _____ No _____	Findings _____		
*Drugs Suspected: Yes _____ No _____	Type of Drugs _____		
*Drugs Found at Scene: _____			

Comments: (13)
Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____
THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RMF

R.M. Freeman

R.M. Freeman

Lab Number 689-11725 Sheet # 2 of 2

FORM: CHEM-004
OCTOBER, 1988

[illegible]

THE EVIDENCE SUBMITTED IS NOT ITEMIZED BY THE REQUESTING AGENCY, I ACCEPT THE INVENTORY OF THE ASSIGNED SLED EXAMINER.

R.M. Freeman
Served By (Print)

(14)
[Signature]
 Delivered By (Sign)

6 Dec
~~25 Nov.~~ 1989
Date

Received By _____ Date _____

Received By _____ Date _____

Received By _____ Date _____

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
Forensic Science Laboratory
Intradepartmental Change of Custody

LAB CASE NO. L 87-11725

DATE & TIME 1/19/90 4:00 PM

RE: CASE NO.(S) _____

ITEM NO.(S)

NOTES(e.g. sub-item #'s used)

1 sealed bag

Evid. Returned

1/23/90

3:10 PM

RP

Richard Freeman

The above evidence was

RECEIVED FROM:

Jimmie McHalefield

RECEIVED BY:

Carolyn W Reese

106

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

NOV 25 2015

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
SC Court of Appeals

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

CERTIFICATE OF SERVICE

Appellant, Alfonso Ware Jr., declares under the penalty of perjury that he mail a copy of his Appendix and Petition for Writ of Certiorari, by placing in the U.S. Mail addressed clearly as below.

S.C. Court of Appeals
Jenny A. Kitchings, Clerk
Post Office Box 11629
Columbia, SC 29211

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211

Eleventh Circuit Solicitor's Office
Donald V. Myers, Solicitor
205 East Main Street, Suite 309
Lexington, SC 29072

November 24, 2015
COLUMBIA, SOUTH CAROLINA

Alfonso Ware, Jr.

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

107
Alfonso Ware Jr.
BRCI/Montecello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

S.C. Court of Appeals
Jenny A. Ketchings, Clerk
Post Office Box 11629
Columbia, SC 29211

RECEIVED

NOV 25 2015

SC Court of Appeals

RE: Alfonso Ware Jr., v. The State
Appellate Case No. 2014-001470

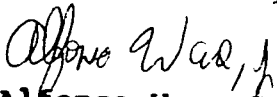
Dear Ms. Ketchings:

Enclosed you will find the original Petition for Writ of Certiorari and Appendix with the six copies of the petition with two copies of the appendix. And also enclosed is a copy for my records to be clock-stamped and returned in the S.A.S.E.

All parties have been served with their copies of the appendix and petition with the certificate of service attached.

I appreciate your assistance in this matter greatly. Thank you very much, and have a blessed thanksgiving.

Sincerely,


Alfonso Ware Jr.

cc: Alan Wilson, Esquire
Donald J. Zelenka, Esquire
Donald V. Myers, Esquire
File

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
1990-GS-32-0056

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

**RETURN TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL
APPENDIX TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-6305

ATTORNEYS FOR RESPONDENT

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PRIOR STATE COURT PROCEDURAL HISTORY 9

ARGUMENTS 14

The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
 - b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
 - c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.
- A. WHY RESPONDENT CONTENDS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURSDICTION. 14
- B. FAILURE TO INCLUDE ANY PORTION OF THE RECORD OF THE LOWER COURT AS ORDERED BY THE COURT OF APPEALS AND ONLY INCLUDING MATTERS ORDERED EXCLUDED FROM THE APPENDIX

REQUIRES DISMISSAL UNDER SCACR RULE 247.....17

STATUTE AND STANDARD BEFORE THE LOWER COURT.....18

HOW THE PETITIONER'S CURRENT CERTIORARI ISSUE HAS BEEN
PRESENTED BEFORE TO THIS COURT AND PROPERLY DENIED.....19

JUDGE KEESLEY PROPERLY DENIED THE APPLICATION WHERE THE
REQUESTED ITEMS WERE NOT AVAILABLE, BUT PETITIONER ABANONED
ANY CHALLENGED TO THE DECISION OF THE LOWER COURT IN HIS
PETITION 22

CONCLUSION 24

SUPPLEMENTAL APPENDIX TO THE RETURN TO THE PETITION FOR WRIT OF
CERTIORARI

CERIFICATE OF SERVICE

~~92/~~ 111

PETITIONER'S QUESTION PRESENTED FOR REVIEW

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. When the notice of appeal in a DNA application case is served upon the Solicitor's Office more than ten (10) days after receipt of the entry of the final order, the Court of Appeals lacks subject matter jurisdiction and the appeal must be dismissed with prejudice for that reason, even though the Petitioner mistakenly sent a copy of the notice of appeal to the Attorney General who was not involved in the action before Judge Keesley.
2. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 257.
3. The Court of Appeals did not err in denying the motion to dismiss the appeal *without prejudice* based upon a desire to relitigate whether trace evidence exists to be tested where the supplemental evidence received does not undermine the findings that the requested items in the original application are not available for testing.

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RESPONDENT'S STATEMENT OF THE CASE

The matter before this Court arises from Alfonso Ware Jr.'s application for DNA testing on July 26, 2013. **Respondent's Supplemental Appendix**, pp. 1-5.¹ On July 26, 2013, the Honorable William P. Keesley, Presiding Judge entered an Order directing the Clerk of Court to file the application and directed procedures pursuant to the DNA Act. *Order Regarding Motion for DNA Testing*, July 26, 2013. Supp. App. 7-9. On October 22, 2013, the Solicitor's Office of the Eleventh Circuit filed a response and motion for dismissal. Supp. App. 10-22.

On May 21, 2014, the Honorable William Keesley conditionally dismissed the application. Supp. App.p. 23-30. In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records

¹ As noted within the argument and Respondent Counter-Statement of Issues on appeal, Respondent asserts that the appeal from the denial of the application for forensic DNA testing must be dismissed for a number of separate reasons. One reason is that the Petitioner's Appendix to his petition for writ of certiorari does not comply with SCACR Rule 247 because it does not contain the lower court record or the orders of Judge Keesley that are on appeal. Respondent has prepared a Respondent's Supplemental Appendix to the Return to the Petition for Writ of Certiorari which contains the lower court record. This will be referred to throughout the Return as "Supp. App." This Supplemental Appendix to the Return will include the following from the lower court: Alfonso Ware Jr.'s application for DNA testing on July 26, 2013 (Supp.App. 1-5); Order Regarding Motion for DNA Testing, July 26, 2013, by Judge Keesley (Supp.App. 7-9); "Response to Defendant's Application for DNA Testing and Motion for Summary Dismissal," by Eleventh Circuit Solicitor's Office, filed October 22, 2013 (Supp.App. 10-22); "Order of Intention to Summarily Dismiss the Application for DNA Testing," dated May 21, 2014, filed May 22, 2013, by Judge Keesley (Supp.App. 23-30); "Reply to Proposed Dismissal of DNA Application." By Alfonso Ware Dated June 10, 2014, filed June 13, 2014 (Supp.App. 31-36); "Order of Summary Dismissal of Application for DNA Testing," by Judge Keesley, dated June 18, 2014, filed June 20, 2014 (Supp.App. 37-44); Initial "Notice of Appeal" dated June 30, 2014 (Supp.App. 45-48); "Notice of Appeal" certificate of service upon Solicitor dated July 21, 2014 (Supp.App. 49-54).

- custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;
 - g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
 - h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 21, 2014, p. 4-5.² Supp. App. 26-27. Ware was given until June 13, 2014 in which to reply to the proposed dismissal. Order, p. 7. Supp. App. 29.

On June 10, 2014, filed June 13, 2014, Ware made written "Reply to Proposed Dismissal of DNA Application." Supp. App. 31-36.

On June 18, 2014, Judge Keesley entered his Order of Summary Dismissal of Application for DNA Testing. Supp. App. 37-44.

The Late Notice of Appeal on the Solicitor's Office

On June 30, 2014, Ware mailed a notice of appeal to Attorney General Alan Wilson concerning the matter which he contends he received written notice of on June 26, 2014. Supp.App. 45-48. *It was not properly served upon the Eleventh Circuit Solicitor's Office or Deputy Solicitor Christopher Samellas who was the only party representative in the action.*

After an inquiry by letter from the Clerk's Office of the Court of Appeals by letter of July

² This was restated again in the *Order of Summary Dismissal of Application for DNA Testing*, filed June 20, 2014, p. 4-5. Supp. App. 40-41.

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15, 2014 about providing a proof of service on the solicitor's office concerning the notice, on July 21, 2014, filed July 23, 2014, Ware served for the first time his notice of appeal by mail upon the Solicitor's Office. Supp.App. 49-54.

Further Proceedings in the Court of Appeals

On July 28, 2014, Petitioner improperly made a *pro se* Initial Brief of Appellant which the Clerk of Court of the Court of Appeals received as correspondence in its docket. The Court made inquiry of the status of a request for a transcript of the proceedings on October 21, 2014. On November 6, 2014, Respondent State of South Carolina responded that the matter should proceed as a petition for writ of certiorari with a copy of the record from the lower court and that Respondent had not been served with such documentation. On November 24, 2014, the Clerk of this Court returned the Initial Brief of Appellant and advised the Petitioner to proceed under Rule 247 of the South Carolina Rules of Appellate Procedure and directing the matters be served within 30 days since there was no hearing in the lower court. Another letter was sent from the Clerk's office on December 12, 2014 concerning the transcript issue again and requested proof of service of the request or proof of an agreement to proceed without the transcript and a supplemental request whether there was an agreement to proceed without a transcript on January 28, 2015.

On February 6, 2015, Respondent, through below-signed counsel, by letter response, advised the Court upon information and belief there was no evidentiary hearing in the matter before Judge Keesley which proceeded on pleadings. Respondent further noted that the matter was subject to dismissal because the Petitioner had failed to timely serve a notice of appeal on the Solicitor's office after he received written notice of entry on June 26, 2014 and served the Solicitor's Office by mail on July 23, 2014 – more than ten days later.

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On March 4, 2015, the Clerk's Office of the Court of Appeals advised that it was allowing the case to proceed since no transcript was necessary or in existence. However, the Clerk also concluded that was allowing the appeal to proceed under SCACR Rule 247 because there was proof of service on the Attorney General (who was not involved in the lower court case) on June 30, 2014 according to a proof of service that had accompanied the notice of appeal. The Clerk further stated again that it was returning the Initial Brief of Appellant received July 29, 2014 and directed the petition and appendix be served within 10 days by March 14, 2015.

The Petitioner next filed a document styled "Leave to Make Motion" pursuant to Rule 60(B) on March 19, 2014. Petitioner contended in his motion that on February 4, 2015, he had received 10 pages of materials from the South Carolina Law Enforcement Division which he claimed was evidence that was not previously before the hearing judge and asserted that "the custodian of the evidence in pleading stated there was no evidence, however, this evidence supports petitioner's claims of innocence." On May 15, 2015, the Court of Appeals, through Associate Justice Stephanie McDonald entered an order denying the request and directing that a copy of the appendix and petition of writ of certiorari within twenty (20) days of the order (by June 4, 2015). In particular, the Court stated:

After carefully considering Petitioner's March 19, 2015 "Leave to Make Motion," it appears Petitioner requests permission to include ten pages in the appendix that were not presented to the circuit court during its review. Petitioner's request is denied. . .

Ware v. The State, Appellate Case No. 2014-001470, Order (S.C. CT. App. May 15, 2015). **However, in violation of the May 15, 2015 Order, the Petitioner has included the 10 pages in his Appendix at Appendix pages 4-15.**

Pertinent to the issue raised in the certiorari petition before this Court, the Petitioner next made a motion to dismiss the appeal without prejudice and with leave to appeal again dated July

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28, 2015. On August 14, 2015, Respondent, through undersigned counsel responded to the motion in opposition. Petitioner made a Reply on August 27, 2015. On October 16, 2015, the Court of Appeals, through Chief Judge John Few entered an order that the motion to dismiss without prejudice was denied. See App.p. 3.

Subsequently, on October 19, 2015, the Clerk of Court wrote Petitioner and advised him that pursuant to the October 16, 2015 order the matter was to proceed and directed that Petitioner file and serve the petition for writ of certiorari within thirty days (November 15, 2015) or it would be dismissed.³ App.p. 3.

On November 24, 2015, Petitioner finally made his Petition for Writ of Certiorari. However, in his petition, he asserts as his sole question:

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

Ware v. State, Petition for Writ of Certiorari, p. 4,6. This Return follows.

PRIOR STATE COURT PROCEDURAL HISTORY

The Petitioner, Alfonso Ware, Jr., #168464, was indicted at the January 1990 term of the Court of General Sessions for Lexington County for murder. He was represented by Thomas Bellinger and H. Patterson McWhirter of the Lexington County Bar. A jury trial was held on June 25-27, 1990, at the conclusion of which the Petitioner was found guilty of the indicted offense. He was sentenced by the Honorable Hubert E. Long to confinement for a period of life.

³ According to the records of the Clerk of Court for Lexington County, on November 4, 2015 in a motion dated October 23, 2015, the Petitioner, pro se, made a "Motion for Relief from Judgment Or Order Pursuant to Rule 29, 17-23-110 and Rule 60(b)(2), (b) (3), (b)(4) and (b)(5)" asserting the documents he received from SLED prove the criteria of Section 17-28-10 have not been followed, there is a need to appoint counsel and fund an investigator. See Lexington County Eleventh Judicial Circuit Public Index (Online), *The State of South Carolina v. Alfonso Ware Jr.* ; Case No. C560956, 1990GS32000056. This is a similar document to the proffered motion that the Court of Appeals denied leave to file in its order May 15, 2015 and the denial to "stay the proceedings in this matter" on July 10, 2015.

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The Petitioner filed a timely Notice of Intent to Appeal, and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense asserting four (4) issues. Following the submission of briefs by both sides, the Supreme Court of South Carolina affirmed the conviction pursuant to Rule 23 of the Rules of Practice of that Court. State v. Ware, Memo. Op. No. 92-MO-17 (filed February 24, 1992).

First PCR Proceedings – 1992.

The Petitioner filed an application for post-conviction relief dated August 21, 1992. The Respondents made Return on October 9, 1992. An evidentiary hearing into the matter was convened on Tuesday, May 2, 1995, at the Lexington County Courthouse. The Petitioner was present at the hearing and was represented by Wayne Floyd of the Lexington County Bar. The State was represented by Teresa Cosby of the South Carolina Attorney General's Office.

Following the hearing, the Honorable Daniel E. Martin issued his Order dated June 16, 1995, denying relief and dismissing the application in its entirety.

First PCR Appeal

The Petitioner appealed to the Supreme Court of South Carolina from the denial of state post-conviction relief. On appeal, he was represented by his post-conviction relief counsel, Wayne Floyd. On June 5, 1995, the Petitioner made a Petition for Writ of Certiorari raising the following six (6) questions:

1. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to object to statements of the solicitor in closing argument?

2. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate the Petitioner's reading ability and school record?
3. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate the circumstances under which the Petitioner gave his statement?
4. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to interview Petitioner's witnesses?
5. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate any intervening causes of death?
6. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate inconsistencies in ballistics testimony?

Respondents made Return to the Petition on July 12, 1996. On November 8, 1996, the Supreme Court of South Carolina entered its letter Order denying the Petition for Writ of Certiorari. Rehearing was denied on December 19, 1996.⁴ [Respondent requests the Court to take appellate judicial notice of the records of the South Carolina appellate courts.⁵]

⁴ Petitioner Ware also made a federal habeas corpus petition in proceeding in March 1997. *Ware v. Bessinger*, C/A No. 5:97-574-6JL. In that proceeding, he raised the following allegations:

1. Trial counsel's failure to contemporaneously move for a mistrial, following improper and prejudicial comments by solicitor, together with trial court failure to give curative instructions following solicitor improper comments, combined to deny petitioner a fair trial in violation of the due process clause of the Fourteenth Amendment.
2. Trial counsel were ineffective in failing to conduct an adequate investigation into the petitioner's reading ability and school record.
3. Trial counsel were ineffective in not moving for mistrial where trial court fail to provide petitioner with a full and fair suppression hearing on the voluntariness of his confession. Thus, trial counsel were ineffective in failing to adequately investigate the circumstances under which petitioner gave his statement.
4. Trial counsel were ineffective in failing to interview witness Jody Taylor. If counsel had interviewed Jody Taylor, counsel would have develop evidence that Jody Taylor was not the confidential

Second PCR Proceedings

Petitioner filed a second PCR application on February 10, 2000 (2000-CP-32-0345.) Following a hearing on Respondent's motion to dismiss, the Honorable J.C. Nicholson, Jr. denied Respondent's motion and granted Petitioner an evidentiary hearing. Following an evidentiary hearing on Petitioner's claim of after-discovered evidence, the Honorable G. Thomas Cooper denied and dismissed his second PCR application with prejudice. (Supp. App. pp.22-28.) There was no appeal from this application.

Third PCR Application.

Petitioner filed his third PCR application on December 6, 2003 (2001-CP-32-3661). Following a January 6, 2003 hearing, the Honorable Marc. H. Westbrook dismissed Applicant's application generally on the grounds it was filed outside the statute of limitations and was

informant and that Jody Taylor had only relayed information to investigators, information which the informant had told Jody Taylor. By not interviewing Jody Taylor, trial counsel did not preserve for trial the opportunity to object to trial judge admission of hearsay testimony by detective Charlie Jones, testimony that Jody Taylor had received information from confidential informant that petitioner had committed the crime.

5. Trial counsel were ineffective in failing to conduct an adequate investigation into any intervening causes of death?

6. Trial counsel were ineffective for failing to investigate inconsistencies in ballistics testimony?

The petition was denied by United States District Judge Simons on January 16, 1998. *Ware v. Bessinger*, No. CA-97-574-5-06JI (D.S.C. Jan. 16, 1998). An appeal to the United States Court of Appeals for the Fourth Circuit was denied on June 2, 1998. *Ware v. Bessinger*, 145 F.3d 1328 (4th Cir. 1998).

A second federal habeas action was dismissed on January 4, 2008 by the Honorable P. Michael Duffy. *Ware v. Warden, Broad River Corr. Inst.*, No. CIV.A. 9:07-3799-PMD, 2008 WL 68635, (D.S.C. Jan. 4, 2008). An appeal to the 4th Circuit was dismissed. *Ware v. Warden*, 272 F. App'x 247 (4th Cir. 2008).

⁵ See, e.g., *Colonial Penn Ins. Co. v. Coll*, 887 F.2d 1236, 1239 (4th Cir.1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"); *Mann v. Peoples First Nat'l Bank & Trust Co.*, 209 F.2d 570, 572 (4th Cir.1954) (approving district court's taking judicial notice of prior suit with same parties: "We think that the judge below was correct in holding that he could take judicial notice of the proceedings had before him in the prior suit to which Mann and the Distilling Company as well as the bank were parties."); and *Long v. Ozmint*, 558 F.Supp.2d 624, 629 (D.S.C.2008) (" 'The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time. Once was sufficient.'").

successive. Regarding Petitioner's claim that he did not knowingly and intelligently waive his right to appeal the denial of his second PCR application, Judge Westbrook found, based on the fact that Petitioner had previously had appealed his conviction, the denial of his first PCR, and the denial of his federal writ of habeas corpus, that his testimony that he was unaware of his right to appeal was not credible. Judge Westbrook acknowledged the Austin claim was not barred by the doctrine against successive applications, but found it nevertheless meritless.

Fourth PCR Application

Petitioner filed his fourth PCR application on August 14, 2003 (2003-CP-32-3045). Following a hearing held on October 21, 2005, the Honorable Clyde N. Davis, Jr. issued an order granting Petitioner relief, finding he is entitled to receive an Austin v. State review of the denial of his third PCR application.

The Petitioner made an appeal to the South Carolina Supreme Court. After review of the Austin petition and petition for writ of certiorari, the Court denied certiorari on September 5, 2007.

ARGUMENTS

The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
- b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
- c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.

A. WHY RESPONDENT CONTENTS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The notice of appeal was untimely served upon the Solicitor's Office on July 21, 2014 which is more than 10 days after Petitioner received of the order on June 26, 2014. Supp. App. P. 49-54. It is untimely and this Court lacks jurisdiction based upon the late service. SCACR Rule 247 (b) ("The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order.") (emphasis added).

Respondent's appellate counsel notified the Clerk of Court of the Court of Appeals concerning the lack of timely service upon the Solicitor's Office and that it was subject to

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dismissal by letter dated February 6, 2015. On March 4, 2015 by letter, Ware and counsel for Respondent were advised by the Clerk of Court because the Attorney General (not the Solicitor's Office who was handling the case) was served on June 30, 2013, the appeal was allowed the appeal to proceed. See Supp.App.p. 45-48.

The Clerk did not address how or why the Attorney General either the proper person to serve or the sole proper party for service of a notice of appeal in the lower court pursuant to S.C. Code Ann. § 17-28-50 (B). It was the Solicitor's Office who represented the State in the matter before Judge Keesley to the exclusion of the Attorney General by statute:

(B) Within ninety days after the forwarding of the application, or upon any further time the court may fix, **the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case**, shall respond to the application. Within ninety days after the docketing of the application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The court may proceed with a hearing if the **solicitor or Attorney General, as applicable**, or the victim does not respond to the application.

S.C. Code Ann. § 17-28-50 (B). Under this theory, the Solicitor would never have to be served with a notice of appeal under SCACR Rule for jurisdiction as long as the Attorney General received a copy of the notice for some unknown reason. Here, the Attorney General was an improper representative to be served since he was not involved in the representation of the State. pro-se
mistake
served

Since the Attorney General did not prosecute the case against Mr. Ware in 1990, by statute, he was never the proper statutory party respondent representative in Court of General Sessions for the DNA application. Simply put, the Attorney General had made no appearance in the action (and did not even become involved in the appeal until requested by the Solicitor's Office). As such, as with any criminal conviction that the Attorney General is not involved, service upon the Attorney General of a notice of appeal is not adequate service upon the Solicitor's Office under SCACR Rule 203(b)(2) and Rule 247(B). By statute, the Attorney

General involvement was limited to those cases that he or his office actually prosecuted. Since Mr. Ware was not prosecuted by the Attorney General, service of the notice rested exclusively upon the Solicitor's Office of the Eleventh Circuit or Deputy Solicitor Samellas in particular as under Rule 247(b) as "the notice of appeal shall be served on all respondents within ten(10) days after receipt of the written notice of entry of the final order." It was belatedly served on July 21, 2014.

Because the Court lacks subject matter jurisdiction, the matter should be dismissed with prejudice. See Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Canal Insurance Co. v. Caldwell, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct.App.1999) (providing that the failure of a party to serve the notice of appeal within thirty days after receiving written notice of the entry of the order divests this court of jurisdiction and requires the dismissal of the appeal); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Allison v. W.L. Gore & Assocs., 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) (stating "an appellate body may not extend the time to appeal"); Wells Fargo Bank, N.A. v. Fallon Properties

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S. Carolina, LLC, 413 S.C. 642, 646-47, 776 S.E.2d 575, 577-78 (Ct. App. 2015) (same).

B. FAILURE TO INCLUDE ANY PORTION OF THE RECORD OF THE LOWER COURT AS ORDERED BY THE COURT OF APPEALS AND ONLY INCLUDING MATTERS ORDERED EXCLUDED FROM THE APPENDIX REQUIRES DISMISSAL UNDER SCACR RULE 247.

A review of the Appendix attached to the Petition made on November 24, 2014 is non-compliant because it includes no material from the "lower court record" as required under SCACR Rule 247 (E). It does not include the application for forensic DNA Testing filed July 29, 2013; the initial "Order Regarding DNA testing" filed July 29, 2013; the Response to the Application for Forensic DNA Testing by the Eleventh Circuit Solicitor's Office filed October 22, 2013; the Order of Intention to Summarily Dismiss the Application for Forensic DNA Testing dated May 21, 2014; Petitioner Ware's written Reply to Proposed Order of Dismissal filed June 13, 2014; Order of Summary Dismissal filed June 20, 2014. Simply put, he includes none of the lower court records in his Appendix.

The Petitioner has only included in his Appendix: 1) a copy of the letter from the Clerk of Court dated October 19, 2015 concerning the October 16, 2015 order denying his motion to dismiss and directing the filing of the petition and appendix within 30 days and 2) the materials from a Freedom of Information Act request of December 3, 2014 after the lower court decision that this Court directed not be included in the Appendix by Order dated May 15, 2015.

Respondent respectfully submits that since the Court's Order of May 15, 2015 was not complied with the inclusion of these improper items this Court ordered excluded in the Appendix, the certiorari appeal should be dismissed with prejudice as a sanction. Additionally, certiorari should alternately dismissed because Ware failed to include any "lower court records" or the "copy of the final order entered in the proceedings" in the Appendix as required by SCACR Rule 247(e)(1)(2). Since the orders of this Court dated May 13, 2015 and October 19,

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2015 were not complied with it, the appeal should be dismissed.

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STATUTE AND STANDARD BEFORE THE LOWER COURT

S.C. Code Ann. § 17-28-90 sets forth the factors to be proved at an application hearing:

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:

- (1) **the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;**
- (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
- (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
- (4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
- (5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is

granted and is not merely cumulative or impeaching;

- (6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
- (7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

HOW THE PETITIONER'S CURRENT CERTIORARI ISSUE HAS BEEN PRESENTED BEFORE TO THIS COURT AND DENIED.

The Petitioner again re-litigates in his Petition whether this Court properly denied his motion to dismiss his appeal without prejudice to allow him to file and pursue another application for a forensic DNA examination based upon his receipt of certain materials from SLED after a Freedom of Information Act request. The Court of Appeals denied the request by Order dated October 16, 2015. In his present petition, Ware is not directly challenging anything about the rulings by Judge Keesley on his DNA application. *Importantly, he did not even include those rulings in his Appendix before this Court.* It appears that he has abandoned any claim that is properly before this Court arising from the rulings of Judge Keesley.

Instead, he is reasserting a collateral issue raised and denied by the Court in the earlier "Motion to dismiss without prejudice and with leave to appeal again" dated July 28, 2015. In the earlier motion, Ware requested the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called "S.L.E.D evidence that was not considered by Judge Keesley." Respondent opposed the motion to dismiss without prejudice in its response August 14, 2015. The Court of Appeals denied the request to dismiss without prejudice on October 16, 2015.

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A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court to re-consider and Judge Keesley to consider is a response he received to a Freedom of Information Act request that he received on February 4, 2015 which he presented to this Court in his earlier motion to "motion for relief from Judgment ..." received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matters which would be properly on appeal from the denial of a DNA application by Judge Keesley (but abandoned in his certiorari petition) nor authorize the matter for DNA testing to be re-opened below. None of S.L.E.D. records from 1990 attached to the June 3, 2015 motion reflect that there is any trace evidence that was or is available for DNA testing which is the purpose of the DNA application nor dispute the findings set forth in Judge Keesley's orders. App. 5-15. Supp.App. 42-44.

In his initial May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- ~~a)~~ b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,

h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

*Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-5.*⁶ Supp.App. 26-27. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5. Supp.App. 40-41.

The recent material Petitioner attached to his motion and his improper Appendix does not reflect that any newly discovered evidence exists for testing or that desired trace evidence, the gun or clothing or other items exist for DNA testing that he is now seeking in his certiorari petition. App.p. 5-15. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations made in the lower court and conclusions in 2013 and 2014 that any evidence for DNA testing exists that he seeks to be tested.

The similar request was initially before the Court of Appeals on July 10, 2015 when the Court interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to "stay proceedings in this Court."). The same request was then converted by Ware to a motion to

⁶ In its Return to Motion to Dismiss Appeal Without Prejudice on August 14, 2015, the State included the following attachments to this Court which this Court can take judicial notice of its own records.

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.
4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Return to Motion to Dismiss Appeal Without Prejudice, August 14, 2015. attachments 1-5.

dismiss the appeal without prejudice and allow refiling. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed a motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, the additional SLED documents only show that SLED released a "box" on January 23, 1990, at 3:31 PM to the Lexington County Sheriff's Department - a matter that is not in dispute. App.p. 8, 15. The actual issue before Judge Keesley was whether the items currently remain in the custody to the Lexington County Sheriff Department in 2013-2016.

Additionally, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. However, it is neither, but it is a limited procedure to determine the existence of proper materials for DNA testing (at this time), what tests to run, and whether favorable results from the identified and available materials would lead to change the result of the conviction and not merely impeach the evidence. S.C. Code Section 17-28-50 (C). The request must be denied.

JUDGE KEESLEY PROPERLY DENIED THE APPLICATION WHERE THE REQUESTED ITEMS WERE NOT AVAILABLE, BUT PETITIONER ABANDONED ANY CHALLENGE TO THE DECISION OF THE LOWER COURT IN HIS PETITION

In his original application for forensic DNA testing, Ware asserted he wanted "the alleged murder weapon"⁷ and clothing that Ware wore the day the murder occurred tested.⁸

⁷ A pistol found on the floorboard of a vehicle of the victim was introduced without objection at trial in June 1990 as State Exhibit 5. See *Ware v. State*, PCR Appeal South Carolina Supreme Court, PCR App. p. 108. Also, PCR App. 107-108, 117, 125, 211-212, 319 (Ware claims he threw the pistol into the car in a statement after firing three or four times); 261-264 (weapon testing and comparison by SLED Agent Parnell); 304-305 (admission of statement by

Application, Section 4, p. 2. Supp.App. 2. He claimed the material was never tested prior to trial and that his attorney did not request that it be tested and that he did not know if it could be tested. He asserted that the DNA testing might include exculpatory results "because if none of the victim's blood is found on the weapon or my clothing, it would prove that I could not have shot the victim." Supp.App.p. 3.

The Petitioner is correct that Judge Keesley did not consider the particular documents that Petitioner subsequently received from SLED pursuant to his post-order freedom of information act request. Petition, p. 6, ¶2. He contends that these documents prove that "testing"⁹ was done by SLED and claims that the results were not made available to the Appellant after his application for DNA testing was made. Petition, p. 8, ¶ 4. He asserts that this proves the DNA Act had not been followed because it is a report relating to physical evidence that he claims was not disclosed earlier pursuant to § 17-28-10 through 320. However, although none of the newly proffered SLED documents suggest that DNA testing was ever done, these "new" documents instead refer to gunshot residue testing of GSR swabs from the victim and suspect (taken after his arrest days later) and red paint chip comparison. None of these materials are the requested materials concerning trace evidence for blood from either the revolver nor Petitioner's clothing which he contends were the subject of the forensic DNA testing request.

Ware had a .22 weapon in hand and when victim attempted to take the crack cocaine Ware stuck gun in car and pulled the trigger 3 or 4 times). Defense counsel at the PCR confirmed the state asserted at trial that the weapon belonged to Ware and that it fired the fatal bullet. PCR App.p. 610-611.

⁸ The shooting occurred Saturday night the 25th. On Monday morning the 27th, Investigator Hite was canvassing the crime scene area and ran into Ware who 11 am. Later, on the 28th, Investigator Hite saw Ware at the Sheriff's Department before Ware was arrested. PCR App.p. 172-175. Also, PCR App.p. 292-298 (West Columbia Patrolman Jones sees Ware on Tuesday November 28 in the Holmes Street area who he knew for over 20 years) At the Jackson v. Denno hearing, Ware testified about being picked up on November 28. PCR App.p. 193-194. There is no indication in the record that the clothes he was wearing at the time of his arrest are the same clothes he had on at the time of the incident on Saturday night. It is unclear whether the clothing that was worn by the Petitioner on the night of the shooting was actually seized from a review of the trial records before this appellate courts.

⁹ There is nothing in the new reports that suggest that DNA testing was done previously or the material from State Exhibit 5 included any trace material that would be subject to DNA testing.

~~124~~ 131

Judge Keesley appropriately granted summary dismissal of the request pursuant to § 17-28-50(B). Judge Keesley, consisted with the DNA Act ordered the preservation of evidence pursuant to § 17-28-70 contemporaneous with the filing of the application. Supp. App. 7-9. The Solicitor's Office surveyed the critical evidence custodians and reported those matters to Judge Keesley in making their motion to dismiss. The Petitioner has abandoned any assertions raised in his reply to the motion to dismiss before Judge Keesley where he sought to use the Act to determine what tests may have been done. Simply put, the evidence before this Court supports the findings of Judge Keesley that there are presently none of the requested items available for testing for DNA which could satisfy the DNA Act.

CONCLUSION

WHEREFORE, having made Return, the Respondents request that the appeal be dismissed for lack of jurisdiction due to untimely service upon the Solicitor's Office of the Eleventh Circuit. Respondent further assert that the matter be dismissed for failing to present a proper appendix pursuant to SCACR Rule 247. Further, Respondent submits that the petition be dismissed for the additional reasons set forth above because the Petitioner abandoned any issue related to the Orders of Judge Keesley in dismissing the application.

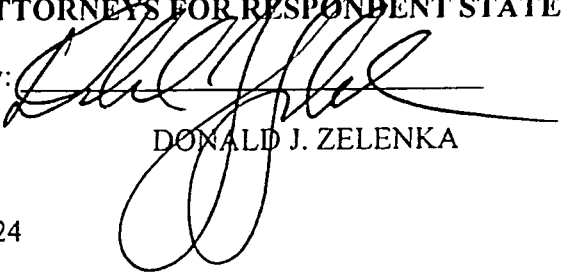
Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT STATE

By:


DONALD J. ZELENKA

February 29, 2016

The South Carolina Court of Appeals

Alfonso Ware, Jr., Petitioner,

v.

The State, Respondent.

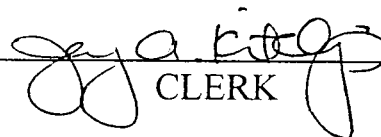
Appellate Case No. 2014-001470

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for forensic DNA testing under the Access to Justice Post-Conviction DNA Testing Act.¹ Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Alfonso Ware, Jr., 168464
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
John W. McIntosh, Esquire

FILED

November 14, 2016 J.O.

¹ S.C. Code Ann. § 17-28-10 to -120 (2014).

THE SOUTH CAROLINA COURT OF APPEALS

Alfonso Ware, Jr.	)	
Petitioner,	)	
	)	
	)	PETITION FOR REHEARING
	)	
State of South Carolina	)	Appellate Case:
Respondent.	)	No. 2014-001470
	)	

Petitioner moves this Honorable Court pursuant to South Carolina Appellate court Rules, Rule 221(a) Rehear the decision that was denied by the South Carolina Court of Appeal entered on November 14, 2016. The matter was before the Court on Writ of Certiorari following the denial of Petitioner's Application for forensic DNA testing under the Access to Justice Post Conviction DNA Testing Act.

This Petition for Rehearing will show that the Court of Appeals overlooked some facts material to the Case as presented. And no issue raised herein is raised for the first tim .

The Court of Appeals has overlooked Legal and Factual matters when denying Petitioner's Application for DNA Testing.

It is clear from the Order issued by this Court that it has adopted the position of the Respondent's. This is evidenced by the lack of considered "decision". See Black's Law Dictionary page 407 (6th Ed. 1990) "decision defined as a determination arrived at after consideration of the facts and in legal context law." Nowhere in the Court's decision does the Court address the Legal and factual Matter raised by the Petitioner. The adoption of one party's proposed findings and conclusions is a practice that is expressly disapproved See: Shaw v. Martin 733 F2d 304.

The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a Request under the Evidence Preservation Act has not been followed by any of the Custodians

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of the Evidence involved in this Case and this is evident.

South Carolina Code Ann. 17-28-70(c) States: in part "provide the Appellant and the Solicitor with a copy of any document, note, log, report relating to the physical evidence" the custodian(s) of the evidence have failed to follow the requirement of the Statute. The Respondent nor the Custodian's of the evidence through their own readings prove that the S.C. Code Ann. 17-28-10 through 320 has not been followed.

By any standard the Petitioner was not given a fair opportunity under the criteria of the Evidence Preservation Act or the Application for DNA Testing. The South Carolina Court of Appeals erred when they denied his Appeal, in light of the facts presented by the Petitioner that Support the need for further investigation. The Court should have in the interest of Justice and Fairness allowed Petitioner's Appeal to prevail.

Conclusion

There is one thing that is clear: The Statute concerning the Preservation of Evidence Act was not followed. And as a result the Petitioner is being denied his fair opportunity in his request. A Review of the Record before this Court supports the Petitioner's Claim.

DATE: 11-28-16

Submitted by:

Alfonso Ware, Jr.
Alfonso Ware, Jr.
Petitioner

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Alfonso Ware, Jr.
Petitioner,

v.

State of South Carolina,
Respondent.

CERTIFICATE OF SERVICE

Appellate Case:
No. 2014-001470

Petitioner declared, under the Penalty of Perjury that he mailed a copy of his Petition for Rehearing to the parties listed below by placing in the U.S. Mail, clearly addressed as indicated:

1. Office of the Attorney General
Mr. Alan Wilson
P.O. Box 11549
Columbia, SC 29211

2. S.C. Court of Appeals
Ms. J. Kitchings, Clerk
P.O. Box 11629
Columbia, SC 29211

DATE:

11-28-16

Thank you,

Alfonso Ware, Jr.
Alfonso Ware, Jr.
Petitioner

SCDC# 168464
BRCI
4460 Broad River Rd.
Columbia, SC 29210

The South Carolina Court of Appeals

Alfonso Ware, Jr. Petitioner,

v.

The State, Respondent.

Appellate Case No. 2014-001470

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H B Ware J.

Paul D. Thomas J.

John W. McIntosh J.

Columbia, South Carolina

FILED

January 23, 2017

cc:

Alfonso Ware, Jr., 168464

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

John W. McIntosh, Esquire

Beth Carrigg

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Alfonso Ware, Jr. #168464
Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina

) IN THE COURT OF (Select one)
) ☒ GENERAL SESSIONS
) ☐ FAMILY COURT
) JUDICIAL CIRCUIT

) APPLICATION FOR
) FORENSIC DNA TESTING

) ORIGINAL INDICTMENT NO.

) 90 -GS- 32- 0056

OR

) ORIGINAL PETITION NO.

) -JU-

FILED
2013 JUL 29 PM 1:39
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

INSTRUCTIONS - READ CAREFULLY

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

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

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

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

1. Identify the proceedings in which the applicant was convicted or adjudicated:

Jury Trial, June 1990 term of Lexington County General
Sessions Court.

2. Give the date of the entry of the judgment and sentence: June 27, 1990.

and current place of incarceration: Broad River Corr. Inst., Columbia, SC.

3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:

(a) Direct Appeal; State v. Ware, Op. No. 924MO-17 (Ct. App. Filed Feb. 24, 1992).

(b) PCR; denied June 16, 1995; See back of this page for grounds.

(c) Writ of Certiorari to S.C. Supreme Court; denied on Nov. 8, 1996.

4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested: The alleged murder weapon. Clothing that I wore the day

the murder occurred, which were seized by the police.

Identify the specific type of DNA testing being sought:

Any type that could be used to test any blood found on the weapon and clothing, and that could establish conclusively that I did not commit murder.

5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:

There was only circumstantial evidence connecting me to the crime. The only evidence the prosecution really had was an alleged confession, which I

maintained that I did not make. The murder happened at extreme close range.

If no blood is found on my clothing or the weapon, it would disprove the prosecution's theory about how the murder occurred.

6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:

To my knowledge the material was never tested. My attorney did not request

that it be tested, and I do not know if the police tested it or not.

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

Because if none of the victim's blood is found on the weapon or my clothing, it would prove that I could not have shot the victim.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:

- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
- (b) The Court may assess the cost of any DNA testing against me;
- (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
- (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Alfonso Ware, Jr.
Print Applicant Name

Alfonso Ware Jr.
Signature of Applicant

STATE OF SOUTH CAROLINA

County of LEXINGTON

VERIFICATION

I Alfonso Ware, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Alfonso Ware Jr.
Signature of Applicant

SWORN to and subscribed before me this 11th
day of February, 2013

Susan W. Dye (L.S.)
Notary Public

My Commission Expires: March 5, 2018

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

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

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

Alfonso Ware Jr.
Signature of Applicant

SWORN to and subscribed before me this 30
day of Jan, 2013

Eugene Kest (L.S.)
Notary Public

My Commission Expires: My Commission Expires April 4, 2016

January 30, 2013

6
FILED
2013 JUL 29 PM 1:39
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

The Honorable Beth Carrigg, Clerk of Court
205 East Main Street
Lexington, South Carolina 29072

RE: Application for Forensic DNA Testing

Dear Ms. Carrigg:

Please find enclosed for filing an original and two copies of an Application for Forensic DNA Testing. Please return a clock-stamped copy to me for my record.

Your help with this matter is appreciated.

Sincerely,

SI Alfonso Ware, Jr.
Alfonso Ware, Jr.

Mr. Alfonso Ware, Jr., #168464
Broad River Correctional Inst.
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

7
ORIGINAL

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2013 JUL 29 PM 1:40

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)

-vs-

ALFONSO WARE, JR., (#168464),)

Defendant.)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORDER REGARDING MOTION
FOR DNA TESTING

Indictment Number: 1990GS3200056

The defendant has submitted a motion for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. He was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. Pursuant to the Act, the court directs the following actions.

- WPA
#1
- 1) The Clerk of Court is to file the application. The court finds that the applicant qualifies for indigent status under §17-28-60.
 - 2) The application does not indicate a request for appointment of counsel. Under §17-28-60, the applicant is to request counsel in his application. The court is unaware of any ongoing PCR action that falls under the language of 17-28-60. The court will consider appointment of counsel if these proceedings reach a stage where the application is determined to be sufficient to proceed further.
 - 3) Under §17-28-50(A):
 - a. a copy of the documents filed shall be forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.
 - b. The Solicitor's office is responsible for notifying the Attorney General's office.

A TRUE COPY

[Signature]
Lex. Co. C.C.P., G.S. & F.C.

- c. The Solicitor's office is responsible for notifying the custodian of evidence.
- d. The victim's family is to be notified under §16-3-1505, et seq., S.C. Code Ann.

4) Under §17-28-50(B):

- a. The Solicitor and/or the Attorney General shall file a response within 90 days of the date that a copy of the application is forwarded by the Clerk of Court. If additional time is needed, the prosecuting agency or agencies may file a request for an extension of time.
- b. The victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) may file a response within 90 days of the filing of the application or within any time frame permitted by the court.

Wpd
#2

5) Under §17-28-70:

- a. The Solicitor's office is to forward a copy of this order to any custodian of evidence, and the custodian of evidence is hereby ordered to preserve all physical evidence and biological material related to the underlying murder charge.
- b. The custodian of evidence is further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court.
- c. If the custodian of evidence indicates that the evidence has been lost or destroyed, the custodian must comply with §17-28-70(C).

6) Under §17-28-80, if any physical evidence or biological material has previously been submitted for DNA testing, the Solicitor/Attorney General shall produce all written

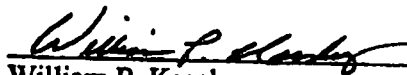
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reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

- 7) The court shall be notified of any issues related to preservation of evidence, with a copy sent to the parties. [See, for example, the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.]

AND IT IS SO ORDERED.

July 26, 2013


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#3

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT
Case No: 1990-GS-32-0056

STATE,)
v.)
ALFONSO WARE, JR., #168464,)
CLERK OF COURT)
LEXINGTON, SC)
DEFENDANT.)

**RESPONSE TO DEFENDANT'S
APPLICATION FOR
FORENSIC DNA TESTING AND
MOTION FOR SUMMARY DISMISSAL**

This matter comes before the Court by way of an application for Post-Conviction DNA Testing pursuant to S.C. Code Ann. §17-28-10, *et seq.* The Lexington County Solicitor's Office has notified the Attorney General's Office, the Lexington County Clerk of Court, the victim's family, and the custodians of evidence in the Lexington County Sheriff's Department, West Columbia Police Department, South Carolina Law Enforcement Division (SLED), and the Lexington Medical Center of this application in compliance with statute and Order dated July 26, 2013, of the Honorable William P. Keesley. For the following reasons, this Application should be summarily dismissed.

Procedural History

The Defendant is incarcerated in the South Carolina Department of Corrections (SCDC) pursuant to the Lexington County Clerk of Court's Order of Commitment. The Lexington County Grand Jury indicted the Defendant at the January 1990 term for Murder (1990-GS-32-0056). Thomas Bellinger, Esquire, and H. Patterson McWhirter, Esquire, represented the Defendant on the charge. Assistant Solicitors R. Knox McMahon and L. Lisa McPherson appeared on behalf of the State. The Defendant proceeded to a jury trial on June 25, 1990, and he

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was found guilty as indicted. The Honorable Hubert E. Long sentenced the Defendant to confinement for a period of life.

On July 3, 1990, H. Patterson McWhirter, Defendant's trial counsel, filed a timely Notice of Appeal on the Defendant's behalf. Robert M. Dudek of the South Carolina Office of Appellate Defense perfected the appeal on the Defendant's behalf. The South Carolina Supreme Court affirmed Defendant's conviction and sentence. *See State v. Ware*, Op. No. 92-MO-17 (S.C. Ct. App. Filed February 24, 1992).

The Defendant subsequently filed a Post-Conviction Relief (PCR) Application on August 21, 1992. The State filed its return on October 9, 1992. On May 2, 1995, the Honorable Daniel E. Martin held an evidentiary hearing. The Defendant was present at the PCR hearing, and Wayne Floyd, Esquire, represented him. By Order dated June 16, 1995, and filed June 21, 1995, Judge Martin denied and dismissed the Defendant's application.

Wayne Floyd, the Defendant's PCR counsel, filed a timely Notice of Appeal on the Defendant's behalf on July 19, 1995, and submitted a Petition for Writ of Certiorari on June 5, 1996. On November 8, 1996, the South Carolina Supreme Court denied the Petition. On December 19, 1996, the Court denied a Petition for Rehearing.

On March 11, 1997, the Defendant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. The Honorable Charles E. Simons, Jr., denied the Petition by Order dated January 14, 1998, and filed January 16, 1998. The Defendant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The Court affirmed the dismissal of the Petition by Order dated June 2, 1998, and filed June 4, 1998.

The Defendant filed a second PCR Application on February 10, 2000, alleging that he had newly discovered evidence that warranted another evidentiary hearing. The State filed its

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Return and Motion to Dismiss on April 13, 2000. The Honorable J.C. Nicholson, Jr., heard the Motion to Dismiss on June 14, 2001. Judge Nicholson denied the Motion to Dismiss by Order dated July 12, 2001, which was filed on July 17, 2001, and by Order dated July 31, 2001, which was filed on August 7, 2001. On August 27, 2001, the Honorable G. Thomas Cooper held an evidentiary hearing. William Rast, Esquire, represented the Defendant. Elizabeth McMahon, Esquire, of the South Carolina Attorney General's Office, represented the State. Judge Cooper denied the application by Order dated October 9, 2001, which was filed on October 26, 2001.

The Defendant filed a third PCR Application on December 6, 2001, alleging that his trial counsel was ineffective for failing to challenge his confession and for failing to object to the trial court's ruling pertaining to the validity of his confession. The Defendant further alleged that he did not knowingly and intelligently waive his right to appeal from the denial of his second PCR Application. The Honorable Marc H. Westbrook held an evidentiary hearing on January 6, 2003. The Defendant was present at the hearing, and Richard Breibart, Esquire, represented him. Allen Bullard, Esquire, of the South Carolina Attorney General's Office, represented the State. The Honorable Marc H. Westbrook denied the application by Order dated January 27, 2003, and filed February 4, 2003.

On August 14, 2003, the Defendant filed a fourth PCR Application against his PCR counsel for failing to appeal his third PCR Application. The State made its Return and Motion to Dismiss on March 31, 2004. The Honorable Clyde N. Davis, Jr., held an evidentiary hearing into the matter on October 21, 2005. The Defendant was present at the hearing, and Tommy A. Thomas, Esquire, represented him. Sabrina C. Todd, Esquire, of the South Carolina Attorney General's Office represented the State. The Honorable Clyde N. Davis, Jr., by Order dated

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November 14, 2005, and filed on November 21, 2005, granted the Defendant's Application, which allowed the Defendant a belated review of the denial of his third PCR Application.

On December 15, 2005, Tommy A. Thomas, Defendant's counsel for his fourth PCR Application, filed a timely Notice of Appeal on the Defendant's behalf and a Petition for Writ of Certiorari for Defendant's third PCR Application. On September 5, 2007, the South Carolina Supreme Court denied the Petition.

Facts

On November 25, 1989, an individual who heard a loud collision outside of his home found Robert Chanon injured in a vehicle on Holmes Street in West Columbia. Law enforcement found a pistol in the vehicle on the passenger's side floorboard, which police later confirmed to be the murder weapon, and money in Chanon's hands. Chanon was incoherent when law enforcement arrived.

Emergency Medical Services (EMS) arrived on the scene and removed Chanon from the car. When EMS removed him, they identified a gunshot wound, and law enforcement found two pieces of crack cocaine in his seat. Chanon stated that someone shot him on crack alley. EMS transported Chanon to the hospital. In the emergency room, he told his girlfriend that an unfamiliar black man shot him.

Three days after the shooting, the police received a tip that the Defendant was involved. An officer located the Defendant and asked him if he knew about the shooting. The Defendant responded that he did, and he voluntarily went to the police station where the police gave him *Miranda* warnings. At this point, the Defendant began talking and gave the officer a confession. An officer typed up the Defendant's statement. Then the Defendant initialed and signed the statement. The Defendant stated that he had shot Chanon after Chanon had stolen his crack and

money right out of his hand. He also stated that he had thrown the pistol into the car as Chanon drove away.

The day after the Defendant confessed to the shooting, Chanon died from the gunshot wound.

At trial the Defendant testified that the deceased, while in his car, approached him about purchasing crack. He testified that the deceased snatched the crack out of his hand and drove away, and, on cross-examination, the Defendant denied stating that the deceased stole his money as well. He further testified that he threw the gun in the car, but denied intentionally pointing the gun at him or pulling the trigger. He also testified that the gun might have gone off when he threw it in the car.

Material Requested to be Tested

In this current Application for Forensic DNA Testing, the Defendant requests the following material be tested:

1. "The alleged murder weapon."
2. "Clothing that [he] wore the day the murder occurred, which were seized by the police."

Requirements of the Forensic DNA Statute

The Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10 *et seq.*, authorizes a person who is currently incarcerated, who pled not guilty to certain offenses, who was subsequently convicted of the offense, and who asserts he is innocent to apply for forensic testing of his DNA and any physical evidence or biological material related to his conviction.

The Act requires that the Defendant identify the evidence that should be tested. The Act requires that the Defendant specifically articulate the basis for his request for additional testing and the specific testing sought. Further, the Act requires that the Defendant explain why his identity was or should have been a significant issue during the original trial of his case. The Act also requires that the Defendant explain why material to be tested was not previously subjected to testing or why additional testing would provide a substantially more probative result. Finally, the Act requires that the Defendant explain why, if the testing were to produce exculpatory results, the results will constitute new evidence that would change the results of the Defendant's conviction.

The Court shall not order DNA testing of the Defendant's DNA and the physical evidence or biological material until it makes a finding that the Defendant has established each of the following factors by a preponderance of the evidence (S.C. Code Ann. § 17-28-90(B)):

1. the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
2. the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
3. the physical evidence or biological material sought to be tested is material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;

- 16
4. the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the defendant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the Defendant may have pled guilty or *nolo contendere* or made or is alleged to have made an incriminating statement or admission as to identity;
 5. if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the defendant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;
 6. the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
 7. the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

Failure to Meet the Requirements Set Forth in the Statute

The Defendant has failed to meet the requirements set forth in the statute by a preponderance of the evidence. Specifically, the Defendant has not explained why his identity was a significant issue during the original trial of the case. The Defendant placed himself at the scene of the crime prior to and during the trial. Prior to trial, the Defendant admitted to shooting the deceased after the deceased stole crack and money from him, and he admitted to throwing a gun into the car. The State had the benefit of the Defendant's confession and used it against him during the trial. Moreover, the deceased was found with money in his hand and crack in his seat. A gun also was found in the car. The Defendant provided information to law enforcement that

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only a person at the scene of the crime would have known. Additionally, all of the physical evidence corroborated the Defendant's version of what happened.

Further, the Defendant testified under oath that the deceased approached him, stole from him, and that he threw a gun into the deceased's car. He testified that he did not know if the gun went off. At trial, the Defendant placed himself at the scene; he placed the murder weapon in his own hands. Identity of the Defendant was not a significant issue at the original trial.

This case was properly submitted to the jury to decide guilt or innocence. The trial judge allowed two lesser included verdicts to be submitted to the jury. The jury had the option to convict the Defendant of Murder, Manslaughter, or Involuntary Manslaughter or to find the Defendant not guilty. The jury was the sole finder of fact in this case, and it determined that the Defendant was guilty of Murder after having received all of the testimony and evidence presented during the trial. The Defendant had the opportunity to present his defense at trial. He took the stand and testified on his own behalf. The jury weighed all credible evidence and decided this case.

The Defendant asserts in this Application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred." Whether or not there is blood on the murder weapon or on the Defendant's clothing is inconsequential. Even if DNA results were to demonstrate that the victim's blood was not on the murder weapon or on the Defendant's clothing, that information would not provide evidence inconsistent with the State's theory of the case. The Defendant, through his verbal and written confession, created the State's theory of the case, which was corroborated by the evidence and other witnesses. More importantly, it would not demonstrate evidence that would suggest anyone other than the Defendant was responsible for the murder. The Defendant has failed to describe

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adequately how DNA testing would exclude him to the extent that it would change the outcome of the trial.

Additionally, the murder weapon and the Defendant's clothing cannot be tested because they are no longer available. This murder occurred twenty-four years ago and these items cannot be located.

The Lexington County Clerk of Court does not have any evidence from the trial. On August 24, 1998, the Honorable William P. Keesley signed an Order for Release of Evidence, which ordered that the items in evidence be released from the Clerk's Office to the State for distribution to their rightful owners.

The Lexington County Solicitor's Office does not have any evidence from the trial. On August 22, 2013, Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office contacted Howard Jernigan, an investigator in the Solicitor's Office, who performed a review of the records in the Solicitor's Office. Mr. Jernigan was not able to locate either the evidence or any paperwork relating to the transfer of evidence in this case. Additionally, Mr. Martin contacted Debbie McDaniels, the Solicitor's Office Records Custodian, who informed him that the only files still in existence date back to 1992, because a flood, which was caused by burst pipes, in 1995 destroyed the files stored in the basement of the Solicitor's Office.

The West Columbia Police Department does not have any evidence from the trial. On August 26, 2013, Investigator James P. Sullivan, the Evidence Custodian for the West Columbia Police Department, informed the Solicitor's Officer that a review of West Columbia evidence records revealed that the West Columbia Police Department did not take any property into evidence in reference to this case.

SLED does not have any evidence from the trial. On September 10, 2013, Sharon Hunt, SLED/Forensic Services, provided the Solicitor's Office with copies of its case files. A review of its files revealed that R.M. Freeman picked up the murder weapon and all other evidence tested. He returned the items to the Lexington County Sheriff's Department on January 23, 1990, prior to the trial. SLED records do not indicate that it took possession of the evidence after the trial.

The Lexington Medical Center does not have any evidence from the trial. On September 12, 2013, Wendi C. Knight, MLS (ASCP), the Lab Manager at the Lexington Medical Center, informed the Solicitor's Office in a sworn affidavit that the Lexington Medical Center no longer has any specimens for testing as it relates to this case. She also informed the Solicitor's Office that the lab records do not indicate that any DNA testing was performed at the Lexington Medical Center.

The Lexington County Sheriff's Department does not have any evidence from the trial. On September 17, 2013, Sergeant Douglas A. Novak, the Sergeant of Evidence for the Lexington County Sheriff's Department, informed the Solicitor's Office that after he performed a search of the evidence room and old records, the only item found was an incident report with case number 89-38992 and that no other evidence could be located as it relates to this matter.

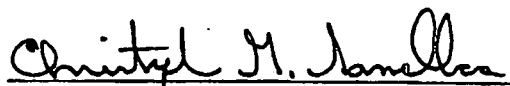
Thus, all custodians of evidence have indicated that they do not have in their possession any evidence as it relates to this case.

Conclusion

WHEREFORE, based on the foregoing, the State respectfully requests that the Court deny Defendant's Application for Post-Conviction Forensic DNA Testing because the Defendant has not articulated why DNA testing would prove probative or change the outcome of his trial. Furthermore, it is factually impossible to perform DNA testing, as the evidence no longer exists.

Thus, this Application should be summarily dismissed for its failure to meet each factor required by a preponderance of the evidence.

Respectfully submitted,


Christopher G. Samellas
Senior Assistant Solicitor
Eleventh Judicial Circuit Solicitor's Office
205 E. Main Street
Lexington, South Carolina 29072

October 22, 2013

21
ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

STATE,

v.

ALFONSO WARE, JR., #168464,

DEFENDANT.

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No: 1990-GS-32-0056

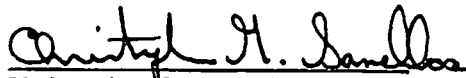
2013 OCT 22 F 2:41

AFFIDAVIT OF SERVICE BY MAIL

BETH A. WINGG
CLERK OF COURT
LEXINGTON, SC

1. I am an employee of the State 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 State's Response and Motion to Dismiss in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210


Christopher G. Samellas
Senior Assistant Solicitor

October 22, 2013

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State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit

ORIGINAL

COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255



LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. ROOM 309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352

DONALD V. MYERS
Solicitor

October 22, 2013

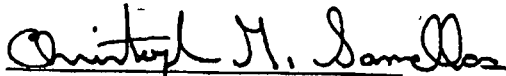
Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello - 286
4460 Broad River Road
Columbia, South Carolina 29210

Re: *State v. Ware*, #168464 (1990-GS-32-0056)

Dear Mr. Ware:

Please find enclosed the State's Response to the Defendant's Application for Forensic DNA Testing and Motion for Summary Dismissal.

Sincerely,


Christopher G. Samellas
Senior Assistant Solicitor

cc: The Honorable William P. Keesley
Lexington County Clerk of Court

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA)

-vs-

ALFONSO WARE, JR., (#168464),
Defendant.

ORDER OF THE INTENTION
TO SUMMARILY DISMISS THE
APPLICATION FOR DNA TESTING
Indictment Number: 1990GS3200056
Warrant Number: C560956

The court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. Based on the record at this point, the court sees no purpose for further proceedings and indicates to the applicant/defendant and the Solicitor that the action will be summarily dismissed for the reasons stated below; unless the applicant/defendant raises questions of fact or law related to the issues addressed in this order and the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach

a stage where the application is determined to be sufficient to proceed further. A copy of the documents filed was forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence has been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

WPC
#2

FACTUAL RESPONSE

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS, and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under Miranda, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

WPK
#3

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- WPK
#4
- 1) the weapon and the clothing are not available for testing;
 - 2) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - 3) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - 4) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - 5) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;

- 6) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
- 7) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- 8) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

LEGAL ISSUES IN THE RESPONSE

The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

WAL
#5

The court agrees, based on the information currently available, that the application should be summarily dismissed because there are not materials to test. S.C. Code Ann. §17-28-90(B) reads:

- (B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:
- (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
 - (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
 - (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo

contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

WPK
#6

The court finds that there is currently no indication that evidence exists that would allow the applicant to meet the requirements of subsections (B)(1) and (B)(2). As for the other subsections, viewing every conceivable inference in the light most favorable to Mr. Ware, the court cannot determine, without reviewing the transcript or having additional knowledge about the evidence, whether DNA testing might tend to be exculpatory or go to show that the applicant did not commit murder. However, since there is no evidence to test, and no indication of a chain of custody, the court fails to see how the other elements could be proven.

The court acknowledges the State's contention that there is nothing to be gained from a DNA analysis, if it could be performed. It recognizes the State's argument that absence of the victim's blood from the defendant's clothing or the gun would not cast doubt on the State's case. However, without knowing more information about the evidence developed and the specific facts presented to the jury, the court is unwilling to summarily dismiss the application on this

ground.¹ The notification of intention to summarily dismiss the application is based on the absence of proof that any DNA material exists to test.

THEREFORE, IT IS ORDERED that the court gives notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The application will be summarily dismissed unless the court is made aware of some purpose for further proceedings. The applicant/defendant and the Solicitor are hereby notified that the action will be summarily dismissed for the reasons stated above, unless the applicant/defendant raises questions of fact or law related to the issues addressed above and those raised in the Response of the Solicitor filed on October 22, 2013. The applicant is given until 5:00 p.m. on Friday, June 13, 2014, in which to file his reply to the proposed dismissal. Upon receipt of the reply (or if none is filed), the court may order the application dismissed, may allow the applicant/defendant to file an amended application, or may direct that the application continue.

WAL
#7

IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Assistant Solicitor Christopher G. Samellas, which he shall be responsible for distributing to any victims or other agencies required to have notice by law.

¹ There is no dispute that Mr. Chanon was shot and, presumably, no dispute that he bled. Mr. Ware admits he was there. In the abstract, it is conceivable that the absence of blood on Mr. Ware's clothing could, depending on the circumstances, provide an indication as to the proximity of Mr. Ware to Mr. Chanon when the shot hit the victim. Likewise, blood on the weapon could go to show the proximity of the weapon to Mr. Chanon when he was hit. If Mr. Ware claims that the weapon discharged by accident or by negligent handling of it, then the proximity of the weapon to the victim could, in abstract theory, support doubt as to whether or not the shooting was a murder. A similar argument could be made related to the lack of blood on Mr. Ware's clothing. His version of events is that he was outside the vehicle and Mr. Chanon was inside the vehicle. The court is unaware of any blood spatter evidence. The court does not know, at this point, what evidence was developed or presented that could go to the issue of the proximity of Mr. Ware and the weapon to Mr. Chanon. The court does not know, based solely on the application and Response, whether there was evidence of a close-contact wound. So, without an additional review, the court would not be able to evaluate whether the presence or absence of Mr. Chanon's blood on the gun could exonerate Mr. Ware, cast doubt, or diminish his conduct to something less than murder.

IT IS FURTHER ORDERED that a copy of this order be forwarded by the Clerk of Court to Mr. Alfonso Ware, Jr., #168464, Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210.

AND IT IS SO ORDERED.

May 21, 2014


William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 9, 2014

Beth A. Carrigg, Clerk
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

Dear Ms. Carrigg:

Please find enclosed Reply To Proposed Dismissal Of
Application For DNA Testing, and a copy to be stamp-clocked returned
to me within the prepaid S.A.S.E. provided; this is for my records.
My copy has the paper clip on it with the yellow post-it sticker.

I do appreciate your assistance in this matter. Thank you
very much.

Respectfully,

Alfonso Ware Jr.

Alfonso Ware Jr.

31
ORIGINAL
FILED

2014 JUN 13 AM 9:59

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

A timely Notice of Appeal was Appeal was filed on the defendants behalf and a petition for Writ of Certiorari was submitted by Wayne Floyd, the defendant PCR Counsel. On November 8, 1996, the South Carolina Supreme Court denied the Petition. A petition for Rehearing was denied on December 19, 1996.

The Applicant subsequently filed a Petition for Writ of Habeas Corpus in U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons, Jr., on January 14, 1998. The applicant appealed this decision to the U.S. Court Appeals for the Fourth Circuit. The dismissal of the Applicant's petition was affirmed on June 2, 1998.

The defendant filed yet another PCR Application on February 10, 2000. An Evidentiary hearing was convened on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed defendant to submit another application for Post Conviction Relief. An Evidentiary hearing was held on August 27, 2001, before the Honorable G. Thomas Cooper. Judge Cooper denied the Application. The defendant filed another application for PCR. On December 6, 2001, an Evidentiary hearing into the matter was convened on January 6, 2003, the Honorable Marc Westbrook denied the Application. Defendant filed PCR Application on August 14, 2003, on April 7, 2004, Respondents filed their Return to this Application.

QUESTIONS OF FACT AND LAW

DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN SOUTH CAROLINA CODE ANN. 17-28-320(A) and 17-28-320(C)?

South Carolina Code Annotated §17-28-320(A) States:
A Custodian of the Evidence MUST preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) Murder (§16-3-10)

Fact: Defendant was convicted of Murder.

§17-28-320(C) States: The physical evidence and biological material MUST be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A).

Fact: Defendant since 1990 has been incarcerated.

§17-28-70(C) States: For physical evidence or biological material that the custodian of evidence asserts has been lost or destroyed, the court shall Order a Custodian of Evidence to locate and provide the Applicant and the Solicitor or Attorney General as applicable, with a copy of any document, note, log, report relating to the physical evidence or biological material.

The Solicitor's Office determined that:

- (1) The weapon and clothing are not available for testing.
- (2) The Evidence from trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998.

Who was this Evidence released to?

Why was it released, when defendant was still in litigation and incarcerated?

- ¶6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial.

Who at the Lexington County Sheriff's Dept. took custody of this evidence and the results of SLED Testing? Where is the documentation from that exchange?

While the S.C. Code Ann. §17-28-300 took effect in 2009, a look at the history of this Act shows that in 1990 South Carolina had a Preservation of Evidence Act in place.

This Court is presented with the question of what was the results of the test done by S.L.E.D. in 1990?

From the things determined by the Solicitor's Office, there are questions that are not answered. There are reports and test results not made available, evidence turned over by S.L.E.D. to Lexington County Sheriff Department who in that department? Who was the evidence from the trial released to?

The State has a duty to take affirmative steps to preserve evidence. The defendant has a protected ~~xxxxxx~~ privilege to request and obtain from the State evidence that is material to the guilt of the defendant.

This Honorable Court in its foot note 1. Agree's that in the abstract it is conceivable that the absence of blood on Mr. Ware is very important to the doubt as to support Mr. Ware's verison of the events.

The defendant has raised questions of fact and law related to the issues and the response of the Solicitor filed.

This Court must Order that the defendant is allowed to continue. The Applicant request this Court for an Order for Appoint-ment of Counsel. As is eviöence from what has been presented here, this is a complex issue that will require the skills of a trained attorney.

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

Dated: June 9, 2014

FILED

ORIGINAL

STATE OF SOUTH CAROLINA)
2014 JUN 18 AM 9:59 THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)

BETH A. CARRIGG
CLERK OF COURT
STATE OF SOUTH CAROLINA LEXINGTON SC

V.)

CERTIFICATE OF SERVICE

ALFONSO WARE JR. (168464))

I, Alfonso Ware Jr., the defendant, declares under the penalty of perjury that I mailed a copy of his Reply to Proposed Dismissal of Application for DNA Testing to the parties listed below by placing in the U.S. Mail clearly addressed as follows:

Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Beth A. Carrigg
Clerk of Court, Lexington County
Lexington County Judicial Center
205 East Main Street, Suite
Lexington, South Carolina 29072

William P. Keesley, Judge
The Circuit Court of the
Eleventh Judicial Circuit
Post Office Box 10
127 Courthouse Square
Edgefield, SC 29824-0010

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SWORN TO AND SUBSCRIBED BEFORE ME

This 10th day of June, 2014

Susan H. Frye

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: _____ Commission Expires
JUN 15 2019

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA,)

-vs-)

ALFONSO WARE, JR., (#168464),)

Defendant.)

ORDER OF SUMMARY DISMISSAL
OF APPLICATION FOR DNA TESTING

Indictment Number: 1990GS3200056
Warrant Number: C560956

BETH A. CARRIGGS
CLERK OF COURT
LEXINGTON, SC

2014 JUN 20 PM 1:23

FILED

By order dated May 21, 2014, the court gave notice of its intention to summarily dismiss the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq. The court gave both sides an opportunity to file submissions related to this issue. Mr. Ware sent his response on June 10, 2014. Having reviewed the matter, the court finds no basis for this application to continue and no purpose to be gained by doing so. The motion is summarily dismissed.

WPM
#1
Mr. Ware was convicted of Murder by a jury and sentenced to life imprisonment on June 27, 1990. By order of July 26, 2013, the court directed that the Clerk of Court file this application. The order also tracked the statutes to set out the procedure to be followed.

PROCEDURE

It was noted in the order that the defendant had not indicated a request for counsel, and the order stated that the court would consider appointment of counsel, if these proceedings reach a stage where the application is determined to be sufficient to proceed further. Copies of the documents filed were forwarded by the Clerk of Court to the Solicitor's office of the 11th Judicial Circuit.

A TRUE COPY

Lex. Co. C.C.P., G.S. & F.C.

The Solicitor's office was alerted that it was responsible for notifying the Attorney General's office, that the Solicitor's office was responsible for notifying the custodian of evidence, and that the victim's family was to be notified under §16-3-1505, et seq., S.C. Code Ann. The State was given 90 days in which to file a response and the victim (as defined under §16-3-1505, et seq., S.C. Code Ann.) was allowed to file a response within 90 days of the filing of the application or within any time frame permitted by the court.

The order further stated that, under §17-28-70, the Solicitor's office was to forward a copy of this order to any custodian of evidence, and the custodian of evidence was ordered to preserve all physical evidence and biological material related to the underlying murder charge. The custodian of evidence was further ordered to prepare an inventory of the physical evidence and biological material, and to forward a copy of that inventory to the applicant, the Solicitor/Attorney General, and the court. If the custodian of evidence indicated that the evidence had been lost or destroyed, the custodian was directed to comply with §17-28-70(C).

Under §17-28-80, if any physical evidence or biological material had previously been submitted for DNA testing, the Solicitor/Attorney General was to produce all written reports and laboratory reports related to the DNA testing, including underlying data and lab notes.

Finally, the court directed that it was to be notified of any issues related to preservation of evidence, with a copy sent to the parties. The parties were told to review the Preservation of Evidence Act, §17-18-300, et seq. which went into effect in 2009.

FACTUAL RESPONSES

On October 22, 2013, the Solicitor's office filed a Response and Motion for Summary Dismissal. The response recites the procedural history of the defendant's murder conviction, including 4 PCR applications and various appeals.

It asserted that the underlying incident occurred on or about November 25, 1989, in West Columbia. Police were called when a vehicle crashed outside an individual's home. The police found Robert Chanon in the vehicle and determined that he had been shot. He was still alive, but incoherent at the scene. EMS was called. A pistol was located in the vehicle. The weapon was determined to be the one that fired the shot that killed Mr. Chanon. Police also found two pieces of crack cocaine in the seat.

Statements were given by the victim to EMS and to his girlfriend while in the Emergency Room. He stated that an unknown person had shot him on "crack alley," and he described the person as being black.

A tip was received 3 days later. In response to the tip, police contacted the defendant and asked him if he knew anything about the shooting. The State contends that the defendant admitted to officers that he knew about the shooting and that the defendant voluntarily met with the police. He was advised of his rights under *Miranda*, and he gave what the State contends to be a confession. The statement was typed, initialed, and signed by the defendant.

In the statement, the defendant admitted that he shot Mr. Chanon after Chanon stole the defendant's crack cocaine and money. The statement also indicated that the defendant threw the pistol into the vehicle.

Mr. Chanon died the day after this statement was given by the defendant.

A jury trial was held, and the defendant was represented by counsel. Mr. Ware testified at the trial. He stated that Mr. Chanon rode up and asked the defendant about purchasing crack cocaine. Mr. Ware testified that Mr. Chanon snatched the crack out of the defendant's hand and drove away. During cross-examination, the defendant denied that he told police that his money

was stolen. He did admit to throwing the gun into the vehicle, but denied pointing the gun or pulling the trigger. He stated that the gun may have gone off when he threw it in the car.

The case was submitted to the jury with the options of finding the defendant not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. The jury found the defendant guilty as charged.

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

WPC
#4

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

In response to the May 21, 2014 order, Mr. Ware recites the following questions:

- a) Did the custodian of the evidence follow the mandates set out in South Carolina Code Ann. 17-28-320(A) and 17-28-320(C)?
 - i. He argues that the custodian of evidence was required to maintain physical evidence and biological material.
 - ii. He argues that, even though the code section cited did not take effect until 2009, there was a preservation of evidence act in place prior to that time, though the provides no specifics.
 - iii. He states, "This Court is presented with the question of what was [sic] the results of the test done by S.L.E.D. in 1990?"

Ware
#5

As to these issues, they do not change the basis for the notice of summary dismissal. S.C. Code Ann. §17-28-90(B) provides the basis for having the court order DNA testing. As stated previously, there does not appear to be any biological material to test.

- b) Mr. Ware goes on to argue that "there are questions that are not answered." He objects to the failure of the State to maintain the evidence. He claims that the evidence is material to the question of his guilt. He notes that the court, in its prior order, acknowledged that a question could exist, in the abstract, about whether the

absence of blood on the gun and on Mr. Ware's clothing could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

As to these arguments, Mr. Ware has no indication that there is any evidence to test. His questions and his assertions really seem to be an attempt to go on a fishing expedition to see what might develop. While that is understandable on the part of someone who has been convicted of murder and is serving a lengthy prison term, this application seeks an order directing DNA testing. The court sees no valid purpose in proceeding with consideration of this application, in the absence of any information that biological material is available for testing.

Further, as explained below, the court was trying to give the applicant every benefit of the doubt in allowing the application to proceed this far and to see if any evidence existed for DNA testing. The point is that Mr. Ware is arguing that he should be able to develop evidence to show the absence of biological material.

WSPH
#6 While the court focused in its prior order on the key issue of the non-existence of anything remaining to test, it seems obvious that Mr. Ware's application and response are questions about the presence or absence of blood, not the source of any blood. He does not seem to even argue that there is a need for DNA testing under the definitions of §17-28-20.

An application under this Act is to include certain things under S.C. Code Ann. §17-28-40. Those requirements include the following:

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity.

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's

conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching.

As noted in the prior order and in this one, Mr. Ware gave a written statement to police and he testified at his trial. He placed himself at the scene. According to the statement, he shot the decedent in a drug deal. According to another version, the decedent grabbed the gun. In another version, the defendant threw the gun into the decedent's car, but never pointed or presented the gun. There is no question about the identity of Mr. Ware as the person with the gun initially. The only conceivable question would relate to which of the stories to believe and/or whether there is any evidence that would create doubt of guilt.

In addition, as noted in the prior order:

The papers submitted by the defendant indicate that he wants DNA testing performed on the weapon and the clothing worn by the defendant on the day of the incident. He asserts in the application that "if no blood is found on [his] clothing or the weapon, it would disprove the prosecution[']s theory about how the murder occurred."

WPK
#7

Presumably, Mr. Ware is asserting that the absence of blood on him, his clothing, and the gun would go to issues of his guilt or, if guilty of anything, whether he should have been convicted of the lesser offense of involuntary manslaughter, which was submitted to the jury. There is no indication from anything provided to the court that there was evidence that Mr. Ware was bleeding. The only known evidence related to the source of blood is that the decedent was the sole person bleeding. So, regardless of whether or not DNA testing would have provided information about the source of blood, the question of whether or not blood was present on Mr. Ware, his clothing, or the weapon is not a new issue. Even if it were established that there was no blood on Mr. Ware, his clothing, or the gun, it is merely impeachment evidence. [See §17-

44

28-40(7)).] It was an issue that one would have known to pursue in the original trial or in any of the multiple PCR applications.

The court has considered the application, the State's response, and the applicant's response. The court finds no purpose in pursuing DNA testing, based on the representations made to the court.

THEREFORE, IT IS ORDERED that the court summarily dismisses the application of the defendant for DNA testing under the Access to Justice Post-Conviction DNA Testing Act, S.C. Code Ann. §17-28-10, et seq.

AND IT IS SO ORDERED.

June 18, 2014



William P. Keesley
Chief Judge for Administrative Purposes
General Sessions, 11th Judicial Circuit

#8

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

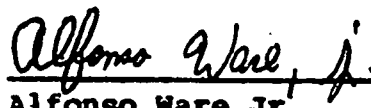
The Honorable Beth Carrigg
Clerk of Court for Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Ms. Carrigg:

Enclosed for filing is a Notice of Appeal in the above
case.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

46

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

June 30, 2014

The Honorable Jeanette Barber
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State of South Carolina v. Alfonso Ware Jr.,
Indictment No. 1990GS3200056, Warrant No. C560956. Appellant
appeals denial of his Access to Justice Post-Conviction DNA
Testing Act, S.C. Code Ann. 17-28-10 et seq.

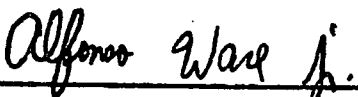
Dear Ms. Barber:

Enclosed for filing is a Notice of Appeal in the above
case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. Copy of the Order.

Also enclosed is a S.A.S.E. to return a clock-stamped copy
for my records. I appreciate your assistance in this matter. Thank
you.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attachments

47

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

NOTICE OF APPEAL

Alfonso Ware Jr. appeals the Order of the Honorable William P. Keesley, dated June 18, 2014. Appellant received written Notice of Entry of this Order on June 26, 2014.

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

cc: File

48

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of General Session
William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina
Respondents

v.

Alfonso Ware Jr.
Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail clearly addressed.

Ms. Jeanette Barber, Clerk
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Mr. Alan Wilson, Attorney General
Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211

Ms. Beth Carrigg, Clerk
Clerk of Court, Lexington County
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

June 30, 2014

ORIGINAL

19906532 0056⁴⁹

C560956

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

FILED
2014 JUL 23 AM 7:51
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

Dear Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

ORIGINAL

50

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2014 JUL 23 AM 7:51

FILED

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Mr. Myers:

Enclosed for filing is a Notice of Appeal in the above
~~XXXX~~ case. I apologize for the delay.

Sincerely,

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

51
ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

FILED
2014 JUL 23 AM 7:51

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail, postage pre-paid, and clearly addressed.

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, south Carolina 29072

Alfonso Ware Jr.

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

52

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

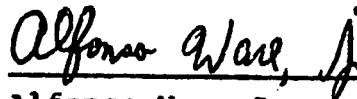
Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

RE: State of South Carolina v. Alfonso Ware Jr.

Dear Mr. Myers:

Enclosed for filing is a Notice of Appeal in the above case. I apologize for the delay.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File
Attorney General Office
SC Court of Appeals
Clerk of Court, Lexington County

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Indictment No. 1990GS3200056
Warrant No. C560956

State of South Carolina Respondents

v.

Alfonso Ware Jr. Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on all parties listed below by depositing a copy in the U.S. Mail, postage pre-paid, and clearly addressed.

Mr. Donald V. Myers
Solicitor, Eleventh Judicial Circuit
Lexington County Judicial Center
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

July 21, 2014

54

Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, South Carolina 29210

July 21, 2014

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

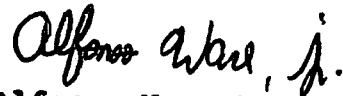
RE: The State v. Alfonso Ware Jr.
Appellate Case No. 2014-001470

Dear Ms. Kitchings:

Enclosed is a copy of the Proof of Service of the Notice of Appeal was served to the solicitor. I do apologize for that mistake. The deficiency has been corrected.

I appreciate your assistance in this matter. Thank you.

Sincerely,



Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

55

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

INITIAL BRIEF OF APPELLANT

ALFONSO WARE JR.
Appellant
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

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17-28-320(C)
17-28-70(C)(D)
17-28-70(C)
17-28-80
Due Process

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Preservation of Evidence Act

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STATEMENT OF ISSUES ON APPEAL

DID THE CUSTODIAN OF THE EVIDENCE FOLLOW THE MANDATES SET OUT IN
SOUTH CAROLINA CODE ANN. ~~XX~~ 17-28-320(A) and 17-28-320(C)?

STATEMENT OF THE CASE

The Appellant is presently confined in South Carolina Department of Corrections pursuant to Order of Commitment of the Clerk of Court Lexington County. The Appellant was indicted at the January 1990 Term of the Grand Jury for Lexington County for Murder (90-GS-32-0056). Appellant was represented by Thomas Bellinger, on June 25-27, 1990, Appellant ~~was~~ went to trial by Jury, found guilty as indicted. He was sentenced by the Honorable Hubert E. Long to Life.

A timely Notice of Appeal was filed on Appellant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court Affirmed Appellant's conviction and sentence. State v. Ware Op.No. 92-MO-17 (S.Ct App. filed February 24, 1992).

The Appellate subsequently filed an Application for PCR on August 21, 1992, the State filed its Return on October 9, 1992. On May 2, 1995, an Evidentiary hearing was held before the Honorable Daniel E. Martin at which the Appellate was present and was represented by Wayne Floyd. By Order dated June 16, 1995, Judge Martin denied and dismissed the Appellant's Application.

A timely Notice of Appeal was filed and a petition for Writ of Certiorari was submitted by Wayne Floyd. On November 8, 1996, the S.C. Supreme Court denied the petition. A petition for rehearing

was denied on December 16, 1996.

The Appellant filed a Petition for Writ of Habeas Corpus in the U.S. District Court. This Petition was denied by written Order of the Honorable Charles E. Simons Jr. on January 14, 1998. The Appellant appealed this decision to the U.S. Court of Appeals for the Fourth Circuit. The dismissal of the Appellant's petition was Affirmed on June 2, 1998.

The Appellant file another PCR Application of February 10, 2000. An Evidentiary hearing was held on June 14, 2001, the Honorable J.C. Nicholson denied Respondent's Motion to Dismiss and allowed Appellant to submit another Application for PCR. An Evidentiary hearing was held on August 27, 2001, before the Honorable Thomas G. Cooper. Judge Cooper denied the Application. The Appellant filed another PCR Application on December 6, 2001, an Evidentiary hearing was held on January 6, 2003, the Honorable Marc Westbrook denied the Application. Appellant filed PCR Applications on August 14, 2003, and April 7, 2004.

By Order of the Court the Clerk of Court filed this Application for DNA Testing on July 26, 2013. On October 22, 2013, the Solicitor's Office filed a Response and Motion for Summary Dismissal. On June 16, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the Application for DNA Testing. Appellant filed a timely Response to the Order of the Court.

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ARGUMENTS

DID THE COURT ERR, WHEN IT DENIED APPELLANT'S APPLICATION FOR D.N.A. TESTING WITHOUT REQUIRING THE SOLICITOR'S OFFICE AND THE CUSTODIAN OF THE EVIDENCE TO FOLLOW THE STATUTE?

17-28-70(C)(D)

"For physical evidence or ~~bx~~ biological material that the custodian of evidence asserts has been lost or destroyed, the Court shall Order a Custodian of Evidence to locate and provide the Appellant and the Solicitor or Attorney General, as applicable with a copy of any document, note, log or report relating to the physical evidence or biological material.

The Solicitor's Office determined the following:

- (1) The weapon and the clothing are not available for testing
- (2) The evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998
- (6) S.L.E.D. does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Dept. on January 23, 1990 which was prior to the trial.

The Court in its Order of intention to Summarily Dismiss the Application for DNA Testing. Factual response state "The response recites the procedural history of the Appellant's murder conviction, including four (4) PCR Application and various appeals."

62

Clearly from this statement from the Court the evidence should have been preserved, beyond the January 1998 date that the Court claims to have released the evidence from the trial. There is a record of the evidence being released, however, the Solicitor's Office does not indicate who the evidence was released to. 17-28 -70(C) in part states "A copy of any document, note, log, or report relating to the physical evidence or biological material" by not providing the Appellant with the name of the person who the evidence was released to or what was released. Just as important who determined and by what method that the evidence should be released.

Office of the Custodian of the Evidence or the Solicitor have not followed the requirements of the statute in their investigation. This Application should not have been denied.

The Solicitor's Office states that "S.L.E.D. does not have any evidence from the trial as the weapon and evidence tested" were returned to the Lexington County Sheriff Dept. January 23, 1990, prior to the trial. Again it is clear that S.L.E.D. tested the weapon and evidence, prior to the trial. What are the results of those test? What was tested? Who at S.L.E.D. tested it? Who was this evidence turned over to? These questions are available at S.L.E.D.! Results of their work was retained in their records.

Appellant has claimed from the beginning that he did not fire the gun that killed the victim and as stated by the Court it is conceivable that this is true; See footnote 1 of Order of Intention to Summarily Dismiss.

When the State fails to preserve evidence which might have exonerate the Appellant, the Court must determine both. Whether the evidence was constitutionally material of apparent exculpatory value, and incomparable. Lost or destruction of relevant evidence by the government not only ~~xxx~~ raises general questions of the fundamental fairness of a criminal trial, but may also deny the Appellant the right to compulsory process. It is the manifest duty of the to vindicate guarantees of confrontation compulsory process, and due process clauses, and to accomplish that it is essential that all relevant and admissible evidence be produced 94 S.Ct 3090.

It must be established that the law concerning this issue has been followed, and before we can say with certainty that there is no evidence to be tested we must be satisfied that all of the statute is complied with. To protect the rights and interest of the Appellant.

That is not the case here. We are not certain of the existence of any evidence or the results of any test done (S.L.E.D.). If the Custodian of the Evidence or the Solicitor had followed the commands of the statute we may be sure of the existence of the evidence. As long as the dictates of the law is not been applied equally then the Appellant right to due process in his application. As long as the Chain of Custody, the log, notes, and records that have not been produced we will never know with certainty the existence of any evidence, in fact the record reflect more in favor of there being evidence than not, (S.L.E.D. tested and turned over prior to trial), if the Custodian of the Evidence conducts a

search then we will know for certain.

The law is a two-edge sword that cuts both ways. It not be applied to the Appellant and not the Respondents, they must be made to make a thorough search following the guide-lines already set-out, in the statute §17-28-80, find those records, notes, logs, and Chain of Custody.

This Application is to important to settle on conclusory statements and not fact.

~~65~~
65

CONCLUSION

The question present by the Appellant remains unanswered.
Appellant pray that this Court will Order the Respondents to
comply with the law as it applies to this issue (Preservation of
Evidence Act).

Alfonso Ware Jr.
Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

66

RECEIVED

JUL 29 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of General Session

SC Court of Appeals

William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

State of South Carolina

Respondents

v.

Alfonso Ware Jr.

Appellant

CERTIFICATE OF SERVICE BY MAIL

I, Alfonso Ware Jr., declare under the penalty of perjury that I have served the Initial Brief of Appellant by depositing a copy of it in the U.S. Mail, postage prepaid, to all parties listed below and clearly addressed.

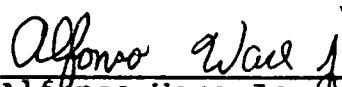
South Carolina Court of Appeals
Ms. Jenny Abbott Kitchings, Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Solicitor, Eleventh Judicial Cir.
Donald V. Myers, Solicitor
205 E. Main Street, Suite 309
Lexington, South Carolina 29072

Clerk of Court, Lexington County
Ms. Beth Carrigg, Clerk
205 E. Main Street, Suite 227
Lexington, South Carolina 29072

Attorney General's Office
Alan Wilson, Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

July 28, 2014


Alfonso Ware Jr.
BRCI/Wateree 286; #168464
4460 Broad River Road
Columbia, SC 29210

cc: File

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

RETURN TO MOTION TO DISMISS APPEAL WITHOUT PREJUDICE

 This matter comes before the Court by a “in the “Motion to dismiss without prejudice and with leave to appeal again” dated July 28, 2015. In the motion in this DNA application denial appeal, the petitioner, Alfonso Ware, Jr., requests the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called “S.L.E.D evidence that was not considered by Judge Keesley.” Respondent opposes the motion to dismiss without prejudice.

A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court and Judge Keesley to consider is a response he received to an Freedom of Information Act request he received on February 4, 2015 which he presented o this Court in an earlier motion to “motion for relief from Judgment ...’ received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matter on appeal from the denial of a DNA application by Judge Keesley nor authorize the

matter for DNA testing to be open below. Neither of the items of S.L.E.D. records from 1990 attached to the June 3 motion do not reflect that there is any trace evidence that was available for DNA testing which is the purpose of the DNA application.

In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- 
- a) the weapon and the clothing are not available for testing;
 - b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
 - c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
 - d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
 - e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;

- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-5. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5.

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X3
The material Petitioner attached does not assert any newly discovered evidence that trace evidence, the gun or clothing or other items exist for DNA testing that he is seeking. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations and conclusions in 2013 and 2014 that evidence for DNA testing exists that he seeks to be tested.

In an abundance of caution, Respondent attaches the following documents:

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.

4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Exhibits 1-5 Attached.

6
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The similar request was before the Court when on July 10, 2015, it interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to “stay proceedings in this Court.”). The same request is now converted to a motion to dismiss the appeal without prejudice and allow refiling. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed this motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, it shows that SLED released a “box” in January 1990, a matter that is not in dispute on whether the items remain in the custody to the Lexington County Sheriff Department.

Apparently, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. . However, it is neither, but a limited procedure.

The Petitioner has made an inadequate showing to allow a dismissal without prejudice

II.

Wherefore having made Response to the “Motion to Dismiss Without Prejudice and with

Leave to Appeal Again", the Respondent requests that the motion be dismissed."

Respectfully submitted,

Respectfully submitted,

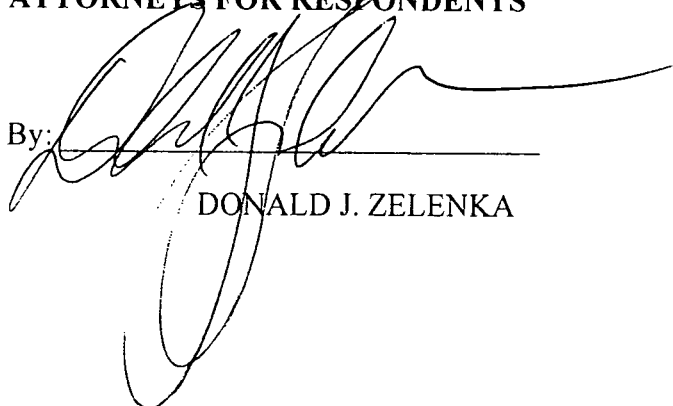
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
SC Bar #5758

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

By: 

DONALD J. ZELENKA


August 14, 2015

ATTACHMENTS

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.
4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
THE STATE	)	ORDER FOR RELEASE OF EVIDENCE
VS.	)	
Alfonso Ware Jr.	)	90-GS-32-56
DEFENDANT.	)	

It appears that the above-captioned action was tried before the Court of General Sessions of Lexington County on June 27, 1990, and that more than ten (10) days have now elapsed since the conclusion of said action. It also appears that no appeal has been perfected with regard to said action.

The following items were Introduced into evidence:

No Sheet Available

1990 AUG 21 P 4:40
CLERK OF COURT
LEXINGTON SC

Since the retention of said items by the Clerk of Court no longer serves any judicial purpose,

IT IS THEREFORE ORDERED that said items be released to the state for distribution to their rightful owners.

AND IT IS SO ORDERED.

William P. Cleary
ELEVENTH JUDICIAL CIRCUIT COURT JUDGE

Lexington, South Carolina
August 24, 1998

ELEVETH CIRCUIT SOLICITOR'S OFFICE

Donald V. Myers, Solicitor



205 EAST MAIN STREET #309
LEXINGTON, SOUTH CAROLINA 29072
TELEPHONE: (803) 785-8352 FAX: (803) 785-8431



Matthew W. Martin-Chief Investigator
(803) 785-2201

Matthew W. Martin

To: Assistant Solicitor Christopher Samellas
Date: August 26, 2013
Re: State v. Alphonso Ware (90-GS-32-56)

After speaking with you on Thursday, August 22, concerning the appeal on the above mentioned case, I took the following actions. First, I contact Howard Jernigan from our office. Mr. Jernigan has been the liaison between the Lexington Clerk of Court's Office and our office since the early 1990's. Mr. Jernigan completed an intense search of the files in his possession relating to the transfer of evidence from the Clerk's Office back to law enforcement. Mr. Jernigan could find no paperwork related to the above listed case.

I next contacted Debbie McDaniels from our office. Ms. McDaniels is our in-house records custodian. Ms. McDaniels informed me that the only files from our office that still exist start at 1992. She stated that before Lexington County had a central records management storage area, the files for the Lexington County Solicitor's Office were stored in the basement of the office. These files were destroyed by a flood in 1995.

To that end, I am unaware of any other avenue for our office to take to locate any records that would have remained in our care, custody or control. Please do not hesitate to contact me should any further follow up be desired or assistance needed.

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City of West Columbia

Bridging Past, Present and Future

POLICE DEPARTMENT

CHIEF DENNIS K. TYNDALL

To: Lt. Bruce Wade, Chief of Detectives
Cc: Maj. Matt Edwards, Deputy Chief of Police

From: Inv. James P. Sullivan

Ref: State v. Alfonso Ware Jr.

Date: 08/26/2013

On 08/09/2013, Mr. Christopher G. Samellas, Senior Assistant Solicitor, 11th Judicial Circuit Solicitor's Office, pursuant to a Motion for DNA testing requested a review of any and all evidence concerning the State v. Alfonso Ware Jr. The incident took place in the jurisdiction of Lexington County; however, a City of West Columbia Officer did provide assistance. A check of West Columbia evidence records revealed that the City of West Columbia did not take any property into evidence in reference to the aforementioned case.

Sincerely

A handwritten signature in black ink, appearing to read "James P. Sullivan".

Inv. James P. Sullivan
Evidence Custodian



2720 Sunset Boulevard
West Columbia, SC 29169
803-791-2000

Affidavit of Wendi C. Knight, MLS (ASCP)

On August 7, 2013, I, Wendy C. Knight, MLS (ASCP), received from Christopher G. Samellas, Senior Assistant Solicitor for the Eleventh Judicial Circuit in South Carolina a copy of a Court Order regarding a Motion for DNA Testing in the case of *State v. Alfonso Ware, Jr.* Pursuant to the Court Order, our lab was required to locate the biological material and review the lab records in this case.

I am a licensed Medical Laboratory Scientist who currently works as a Lab Manager at Lexington Medical Center. I possess a board certification from the American Society for Clinical Pathology (ASCP). Additionally, I have an Associate's Degree and a Bachelor's degree. I have extensive professional knowledge regarding laboratory data, policy, and procedure, including but not limited to, the way our lab records are maintained and how to access our lab records. I have been in my current role of Lab Manager at Lexington Medical Center since May of 2011. However, I have been working in this field since 2004.

I have reviewed our lab records from 1990 as it relates to the case of *State v. Alfonso Ware, Jr.*, and I found that we no longer have any specimens for testing. I also determined that our lab did not perform any DNA testing and I do not know if another agency was involved that could have requested DNA testing. Since we did not have a lab computer system in 1990, all of the lab records from that time period are on paper and are attached to one another. Based on our records, I do not believe that the lab can be of any assistance in this matter.

Sincerely,

Wendi C. Knight, MLS (ASCP)
Medical Laboratory, Lab Manager
Lexington Medical Center

SWORN AND SUBSCRIBED before me

This 12th day of September, 2013.

Brenda Rochelle L. Loo
Notary Public for the State of South Carolina

My commission expires on My Commission Expires December 28, 2015

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James R. Metts, Ed. D.

LEXINGTON COUNTY SHERIFF'S DEPARTMENT

September 17, 2013

Senior Assistant Solicitor Chris Samellas
Eleventh Judicial Circuit
205 E. Main St.
Lexington, South Carolina, 29072

Re: State of South Carolina v Alfonso Ware, Jr.

Pursuant to the court order in reference to State of South Carolina vs Alfonso Ware, Jr., a search of the evidence room and old records was performed. The only item found was an incident report with case number 89-38992 which was forwarded to the Solicitors Office. No other evidence could be located in reference to this case.



Sergeant Douglas A Novak
Sergeant of Evidence
Lexington County Sheriff's Department

LEXINGTON COUNTY SHERIFF'S OFFICE

INCIDENT REPORT

[illegible]

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

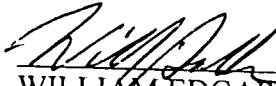
Appellate Case No. 2014-001470

PROOF OF SERVICE

I, William Edgar Salter, III, on behalf of Donald J. Zelenka, Senior Assistant Deputy Attorney General, certifies that on the 14th day of August, 2015, he served two (2) copies of Respondent's Return to Motion to Dismiss Appeal Without Prejudice, with attachments on Petitioner by depositing same in the United States Mail, first class, postage prepaid, addressed as follows:

Alfonso Ware, Jr., #168464
Broad River Correctional Institution
Monticello 242
4460 Broad River Road
Columbia, South Carolina 29210

August 14, 2015.


WILLIAM EDGAR SALTER, III
Attorneys for Respondent

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

NOV 25 2015

SC Court of Appeals

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record
Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esq.
Post Office Box 11549
Columbia, SC 29211

Alfonso Ware, Jr.
Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

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CERTIFICATE OF COUNSEL**Certificate of Counsel**

Appellant certifies that the South Carolina Court of Appeals issued an Order denying appellant Motion to dismiss without prejudice on October 16, 2015 and received by the Appellant on October 29, 2015.

QUESTION PRESENTED

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

STATEMENT OF THE CASE

An Application for DNA testing was filed in the Lexington County Clerk of Court on July 26, 2013. On October 22, 2013, the Solicitor's Office of Lexington County filed a response and Motion for Summary Dismissal. On May 21, 2014, Appellant received from the Honorable William P. Keesley, Order of Intention to Summarily Dismiss the application for DNA testing. On May 13, 2014 filed Reply to Judge Keesley Order of Intention to Dismiss.

On June 18, 2014, the Court filed an Order of Summary Dismissal of Application for DNA Testing. A timely notice of appeal was filed. On July 29, 2014, Appellant filed his Initial Brief with the South Carolina Court of Appeals and the State responded.

On December 9, 2014, Appellant filed with the State Law Enforcement Division, Freedom of Information Request No. 2014-942. On February 4, 2015, the Appellant received from SLED a response to the F.O.I.A. request. On June 2, 2015, Appellant filed with the S.C. Court of Appeals Motion For Relief from Judgment.

On July 28, 2015, Appellant filed with S.C. Court of Appeals Motion to Dismiss Appeal Without Prejudice. On August 14, 2015, the State filed it's Return to Appellant Motion to Dismiss Without Prejudice. On October 16, 2015, the S.C. Court of Appeals issued an Order denying Appellant Motion to Dismiss without Prejudice. This Petition for Writ of Certiorari follows.

ARGUMENT

DID THE SOUTH CAROLINA COURT OF APPEALS ERR WHEN THE COURT DENIED APPELLANT'S MOTION TO DISMISS WITHOUT PREJUDICE?

This matter comes before this Court by a denial by the S.C. Court of Appeals (on October 19, 2015, and received by the Appellant on October 29, 2015) of Appellant's motion to dismiss without prejudice and with leave to appeal again dated July 28, 2015.

The Appellant request the Court of Appeals to dismiss the matter without prejudice, based upon the receipt of evidence from the State Law Enforcement Division that was not consider by Judge Keesley in his decision prior to denying Appellant's Application for DNA Testing.

In his May 13, 2014, Order conditionally denying the application, Judge Keesley concluded upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that: After the Application was sent to the Solicitor's Office the following things were determined:

- a) The weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an Order of this Court dated August 24, 1998;
- c) On August 22, 2013, the Solicitor's Office of the 11th Judicial Circuit assigned investigators to review records

and search for evidence and found no paperwork or evidence from the trial;

- d) The Solicitor's Office of the 11th Judicial Circuit instructed its Record Custodian to search for files related to this case and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the solicitor's staff;
- e) The West Columbia Police Department does not have any evidence from the trial, as confirmed by the Evidence Custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were ~~return~~ returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;
- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

The Court in its Order of the Intention to Summarily Dismiss

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footnote 1: the Court acknowledges that question could exist in the abstract about whether the absence of blood on the gun and on Mr. Ware, could go to an issue related to whether there is doubt as to murder versus accident or involuntary manslaughter.

X The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a request under the Evidence Preservation Act have not been followed by any of the Custodians of the Evidence involved in this case and this is evident.

On December 9, 2014, Appellant filed with the State Law **Enforcement** Division, Freedom of Information Request No. 2014-942. As a result of the request the attached documents were provided by SLED:

1. Official Report of SLED Laboratory File No. L89-11725, December 4, 1989.
2. SLED Disposition of Evidence Form dated January 23, 1990 3:10pm

The fact that this evidence was available to the Appellant through his request to SLED proves that the Custodian of the Evidence and the Office of the Solicitor in their response to the Application for DNA Testing were not as thorough as they should have been in their search for evidence related to this **case**.

According to the documents provided by SLED, there was testing done by SLED, the results of which was not made available to the Appellant. The question is what are the results of the testing?

South Carolina Code Ann. §17-28-70(c) state: in part "provide the Appellant and the Solicitor with a copy of any document, note,

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log, report relating to the physical evidence" the Custodian of the Evidence has failed to follow the requirement of the statute.

The Respondent nor the Custodian's of the Evidence through their own pleading prove that the S.C. Code Ann. §17-28-10 through 320 has not been followed.

The Appellant through motion to dismiss without prejudice and leave to appeal again moved the Honorable South Carolina Court of Appeals to dismiss Appellant's appeal without prejudice to allow Appellant an opportunity to file a motion with Judge Keesley, informing him of the discovery of the SLED documents. And giving Judge Keesley a chance to consider this evidence in conjunction with the fact the record before the Court proves that the criteria of the statute (17-28-10 thru 320) was not followed, and the investigation was not thorough.⁷ By any standard the Appellant was not given a fair opportunity under the Criteria of the Preservation of Evidence Act.⁷

The South Carolina Court of Appeals erred when they denied Appellant's motion to dismiss without prejudice, in light of the facts presented by the Appellant that support the need for further investigation. As well as documented fact that the Custodian of the Evidence and the Respondent did not do a thorough investigation or follow mandatory criteria set-out in the statute (§17-28-10 thru 320). The Court should have in the interest of justice and fairness have allowed the Appellant the opportunity to motion Judge Keesley with the evidence from SLED.

CONCLUSION

There is one thing that is clear and not denied by the Respondent. The statute concerning the Preservation of the Evidence Act was not followed. The Appellant as a result is being denied his fair opportunity in this matter; despite the facts and the evidence presented by the Appellant the South Carolina Court of Appeals has reached a decision to deny Appellant's motion. This is a clear err and this Court must exercise its power and correct what the record before this Court demonstrates is an err by the Court of Appeals. For the reasons stated, Appellant asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Alfonso Ware Jr.

Alfonso Ware Jr.

BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

APPENDIX

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210
Pro se, Appellant

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

Attorney for Respondent

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The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2015

Alfonso Ware, Jr., 168464
Broad River Correctional Institution
4460 Broad River Road
Columbia SC 29210

Re: Alfonso Ware, Jr. v. The State
Appellate Case No. 2014-001470

Dear Mr. Ware:

This Court issued an order on October 16, 2015 denying your motion to dismiss without prejudice. Therefore, this appeal is to proceed on with the filing of the petition for writ of certiorari and appendix. You must file and serve the petition for writ of ceritorari and appendix within thirty days of the date of this letter or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Alan McCrory Wilson, Esquire
Donald V. Myers, Esquire
Donald J. Zelenka, Esquire

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Alfonso Ware Jr.
BRCI/Monticello 242; #168464
4460 Broad River Road
Columbia, South Carolina 29210

SLED FOIA Office

Date Received 12-09-14

Due Date 01-05-15

2014-942

December 3, 2014

South Carolina Law Enforcement Division
4400 Broad River Road
Post Office Box 21398
Columbia, South Carolina 29221

RE: State v. Alfonso Ware Jr.
Indictment No.: 1990GS3200056
Warrant No.: C560956

Dear Sir/Ma'am:

Please send to me a copy of any reports done from testing, on any evidence related to the above indictment. Copy of any Chain of Custody concerning this evidence, when this evidence was received from Lexington County and when this evidence was returned to Lexington County and who it was returned to. Any information in your custody relating to this case please send it to me as soon as possible.

Respectfully,

Alfonso Ware, Jr.
Alfonso Ware Jr.

cc: File

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

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NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

February 4, 2015

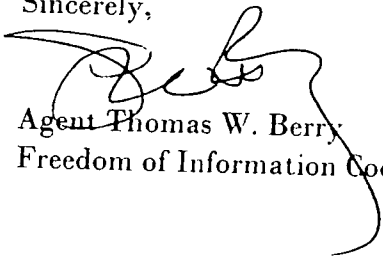
Alfonso Ware, Jr., #168464
Broad River C. I. / Monticello 242
4460 Broad River Road
Columbia, SC 29210

RE: Freedom of Information Act Request #2014-942
SLED Lab No.: L89-11725

Dear Mr. Ware:

This letter is to confirm that we are in receipt of your money order in the amount of \$22.00. I am enclosing the information provided to me by our Forensics Lab regarding your request dated December 3, 2014.

Sincerely,



Agent Thomas W. Berry
Freedom of Information Coordinator

TWB/mcp



Lab Number L89-11725 Sheet # 1 of 1

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IF THE EVIDENCE SUBMITTED IS NOT ITEMIZED BY THE REQUESTING AGENCY, I ACCEPT THE INVENTORY OF THE ASSIGNED SLED EXAMINER.

29 Nov 89
Date

Received By _____ Date _____

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

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CARROLL A. CAMPBELL, JR.
Governor



ROBERT M. STEWART
Chief

DISPOSITION OF EVIDENCE

DEPARTMENT: Lexington Co 50

COUNTY: Lexington

CASE #	RAPE KIT	ENVELOPE	BAG	OTHER
F89-1368				box
				box

TO: R. M. Freeman R. M. FREEMAN 1-27-90 3:10pm
 SIGNATURE NAME PRINTED DATE TIME

FROM: Carolyn W. Reese CAROLYN W. Reese 1/23/90 3:10pm
 SIGNATURE NAME PRINTED DATE TIME

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor



ROBERT M. STEWART
Chief

4400 Broad River Road (J.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone 803-737-9000
December 4, 1989

TO: E. Hite
Lexington County Sheriff's Department
PO Box 639
Lexington, SC 29072

LABORATORY FILE NO: L89-11725

SUBJECT(S): Alphonso Ware

VICTIM(S): Robert Channon

This is an official report of the South Carolina Law Enforcement Division Criminalistics Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Packet containing cotton tipped swabs from the victim.
2. Packet containing cotton tipped swabs from the suspect.

RESULTS OF EXAMINATION(S)

1. The quantity of metals detected in samples submitted for Robert Channon is insufficient to determine the presence of gun primer residue.
2. The quantity of metals detected in samples submitted for Alphonso Ware is insufficient to determine the presence of gun primer residue.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

CARROLL A. CAMPBELL, JR.
Governor



Page 2
L89-11725

ROBERT M. STEWART
Chief

4400 Broad River Road (I.P. Strom Boulevard) • Mail P.O. Box 21398
Columbia, South Carolina 29221-1398 • Phone: 803/737-9000

Chemical Analyst(s)

Joseph D. Powell
Joseph D. Powell

12-4-89

Date

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY

ROBERT M STEWART
CHIEF



Trace Department

June 25, 1990

SLED Lab No: L89-11725

Amended Report

Your Case No: 8938992

Incident Date: 11-25-89

(S) Alphonso Ware

(V) Robert Channon

E. Hite
Lexington County Sheriff's Office
P.O. Box 639
Lexington, SC 29072

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

1. Sample of red paint from victim's automobile.
2. Sample of red paint from automobile owned by Betty Willson.

RESULTS OF EXAMINATION(S)

Item #1 is not consistent with item #2 in physical nor chemical characteristics; however, the red layer of paint in item #1 is consistent with item #2 in physical and chemical characteristics.

Chemical Analyst(s)

Jeffrey M. Hollifield
Jeffrey M. Hollifield

6/25/90

Date

SLED

Location

SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

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Name of Investigating Officer <u>E. Hite</u>		Rank <u>Deputy Sheriff</u>	Slad Lab No. <u>L89-11725</u>
Department <u>Lexington County Sheriff's Department</u>		Telephone Number <u>359-8251</u>	Contributing Agency ORI <u>SCO 320000</u>
Street Address or Post Office Box <u>P.O. Box 639</u>			Contributing Agency Case No. <u>8938992</u>
City <u>Lexington</u>	State <u>S.C.</u>	Zip Code <u>29072</u>	County <u>Lexington</u>
CC: _____			Incident Date <u>25 Nov., 1989</u>
			New Case <u>XX</u> Additional Evidence _____
			Related Lab No. _____

Subject # _____	Victim # <u>XX</u>	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Channon</u>		First Name <u>Robert</u>	DOB: _____
		Middle Name _____	Race: Cau <u>XX</u> Blk _____ Other _____
Subject # <u>XX</u>	Victim # _____	Sex: M <u>XX</u> F _____	SID/FBI _____
Last Name <u>Ware</u>		First Name <u>Alphonso</u>	DOB: _____
		Middle Name _____	Race: Cau _____ Blk <u>XX</u> Other _____
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	DOB: _____
		Middle Name _____	Race: Cau _____ Blk _____ Other _____
Subject # _____	Victim # _____	Sex: M _____ F _____	SID/FBI _____
Last Name _____		First Name _____	DOB: _____
		Middle Name _____	Race: Cau _____ Blk _____ Other _____

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

- (1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____
- (2) Possession or Distribution of Illegal Drugs or Controlled Substances _____
- (3) Criminal Sexual Conduct
(A) Adult victim _____ (B) Child victim _____
- (4) Homicide
(A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison: _____
- (5) Suicide
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____
- (6) Accidental Death
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocution _____
- (7) Natural Death
(A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____
- (8) Traffic Accident Fatality Victim—Meets criteria of Section 17-7-80 Yes _____ No _____
(A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____
- (9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____
- (11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____
- (15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harrassment _____
- (20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____
- (24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed: Blood _____	Urine _____	Ocular Fluid _____	Other _____
Examination Requested: Blood Alcohol _____	Drug Screen _____	CO _____	Blood Type _____ Other _____
Autopsy Performed: Yes _____ No _____	Findings _____		
*Drugs Suspected: Yes _____ No _____	Type of Drugs _____		
*Drugs Found at Scene: _____			

(12)

Comments:

Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____

THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RME

Additional

JMH-330

accept: 5

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION - FORENSIC SCIENCES REQUEST

FORM: CHEM-003
OCTOBER, 1988

Name of Investigating Officer <u>E. Hite</u>		Rank <u>Deputy Sheriff</u>	Sled Lab No. <u>L89-11725</u>
Department <u>Lexington County Sheriff's Department</u>		Telephone Number <u>359-8251</u>	Contributing Agency ORI <u>SCO 320000</u>
Street Address or Post Office Box <u>P.O. Box 639</u>			Contributing Agency Case No. <u>8938992</u>
City <u>Lexington</u>	State <u>S.C.</u>	Zip Code <u>29072</u>	County <u>Lexington</u>
CC: _____			Incident Date <u>25 Nov. 1989</u>
			New Case <u>Additional Evidence XX</u>
			Related Lab No. _____

Subject # _____ Victim # XX Sex: M XX F _____ SID/FBI _____
Last Name Channon First Name Robert Middle Name _____ DOB: _____
Race: Cau XX Blk _____ Other _____

Subject # XX Victim # _____ Sex: M XX F _____ SID/FBI _____
Last Name Ware First Name Alphonso Middle Name _____ DOB: _____
Race: Cau X Blk XX Other _____

Subject # _____ Victim # _____ Sex: M _____ F _____ SID/FBI _____
Last Name _____ First Name _____ Middle Name _____ DOB: _____
Race: Cau _____ Blk _____ Other _____

Subject # _____ Victim # _____ Sex: M _____ F _____ SID/FBI _____
Last Name _____ First Name _____ Middle Name _____ DOB: _____
Race: Cau _____ Blk _____ Other _____

TYPE OF SUSPECTED CASE (CHECK MORE THAN ONE IF APPLICABLE)

- (1) *DUI _____ *Felony DUI _____ Was a Breathalyzer Test given? Yes _____ No _____
(2) Possession or Distribution of Illegal Drugs or Controlled Substances _____
(3) Criminal Sexual Conduct
(A) Adult victim _____ (B) Child victim _____
(4) Homicide
(A) Gunshot XX (B) Stabbing _____ (C) Beating _____ (D) Strangulation _____ (E) *Drug/Poison: _____
(5) Suicide
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Carbon Monoxide _____ (E) Hanging _____
(6) Accidental Death
(A) Gunshot _____ (B) Alcohol _____ (C) *Drug/Poison _____ (D) Fire _____ (E) Electrocution _____
(7) Natural Death
(A) Heart Related _____ (B) Disease (specify) _____ (C) Infant Related _____
(8) Traffic Accident Fatality Victim---Meets criteria of Section 17-7-80 Yes _____ No _____
(A) Driver _____ (B) Pedestrian _____ (C) Motorcyclist _____ (D) Bicyclist _____ (E) Passenger _____
(9) Swimming Accident Fatality Victim _____ (10) Boating Accident Fatality Victim _____
(11) Kidnapping _____ (12) Armed or Strong Armed Robbery _____ (13) Arson _____ (14) Assault (Simple Assault, ABHAN, or ABIK) _____
(15) Burglary/B and E _____ (16) Forgery _____ (17) Fraud _____ (18) Embezzlement _____ (19) Harassment _____
(20) Weapons Offense _____ (21) Larceny (Petit or Grand) _____ (22) Hit and Run _____ (23) Polygraph Subject _____
(24) Other (specify) _____

COMPLETE THIS SECTION ON ALL CASES INVOLVING TOXICOLOGICAL ANALYSIS:

Number of Specimens Enclosed: Blood _____ Urine _____ Ocular Fluid _____ Other _____
Examination Requested: Blood Alcohol _____ Drug Screen _____ CO _____ Blood Type _____ Other _____
Autopsy Performed: Yes _____ No _____ Findings _____
*Drugs Suspected: Yes _____ No _____ Type of Drugs _____
*Drugs Found at Scene: _____

(13)

Comments: _____
Are these specimens from a known AIDS victim? Yes _____ No _____ Possible _____ Comment _____
THE ITEMS SUBMITTED BELOW WILL BE EXAMINED WITH YOUR ASSURANCE THAT THE SUBMITTED SPECIMENS HAVE NOT NOR WILL BE SUBMITTED TO ANY OTHER LABORATORY FOR TECHNICAL OR SCIENTIFIC EXAMINATION. THIS STATEMENT WAS READ BY OFFICER. RMP

Lab Number 689-11725 Sheet # 2 of 2

104

THE EVIDENCE SUBMITTED IS NOT ITEMIZED BY THE REQUESTING AGENCY, I ACCEPT THE INVENTORY OF THE ASSIGNED SLED EXAMINER.

6 Dec
~~2 Nov.~~ 1989
Date

Received By

105

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
Forensic Science Laboratory
Intradepartmental Change of Custody

LAB CASE NO. L 87-11725

DATE & TIME 11/19/90 4:22 PM

RE: CASE NO.(S) _____

ITEM NO.(S)

NOTES(e.g. sub-item #'s used)

1 sealed box

Evid. Returned

1/23/90

3:10 PM

RP2

Richard Freeman

The above evidence was

RECEIVED FROM:

Jerry M. Hallfield

RECEIVED BY:

Carolyn W Reese

106

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

NOV 25 2015

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2014-001470

Alfonso Ware, Jr.

Appellant,

v.

The State,

Respondent.

CERTIFICATE OF SERVICE

Appellant, Alfonso Ware Jr., declares under the penalty of perjury that he mail a copy of his Appendix and Petition for Writ of Certiorari, by placing in the U.S. Mail addressed clearly as below.

S.C. Court of Appeals
Jenny A. Kitchings, Clerk
Post Office Box 11629
Columbia, SC 29211

Office of the Attorney General
Alan Wilson, Attorney General
c/o Donald J. Zelenka, Esquire
Post Office Box 11549
Columbia, SC 29211

Eleventh Circuit Solicitor's Office
Donald V. Myers, Solicitor
205 East Main Street, Suite 309
Lexington, SC 29072

Alfonso Ware, Jr.

Alfonso Ware Jr.
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015
COLUMBIA, SOUTH CAROLINA

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Alfonso Ware Jr.
BRCI/Montecello 242; 168464
4460 Broad River Road
Columbia, SC 29210

November 24, 2015

S.C. Court of Appeals
Jenny A. Kitchings, Clerk
Post Office Box 11629
Columbia, SC 29211

RECEIVED

NOV 25 2015

SC Court of Appeals

RE: Alfonso Ware Jr., v. The State
Appellate Case No. 2014-001470

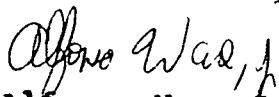
Dear Ms. Kitchings:

Enclosed you will find the original Petition for Writ of Certiorari and Appendix with the six copies of the petition with two copies of the appendix. And also enclosed is a copy for my records to be clock-stamped and returned in the S.A.S.E.

All parties have been served with their copies of the appendix and petition with the certificate of service attached.

I appreciate your assistance in this matter greatly. Thank you very much, and have a blessed thanksgiving.

Sincerely,


Alfonso Ware Jr.

cc: Alan Wilson, Esquire
Donald J. Zelenka, Esquire
Donald V. Myers, Esquire
File

~~108~~ 108

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Lexington County
Court of Common Pleas
Honorable William P. Keesley, Circuit Court Judge
1990-GS-32-0056

Alfonso Ware, Jr.

Petitioner,

v.

The State ,

Respondent.

Appellate Case No. 2014-001470

**RETURN TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL
APPENDIX TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
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ATTORNEYS FOR RESPONDENT

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The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
 - b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
 - c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.
- A. WHY RESPONDENT CONTENDS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION. 14
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PETITIONER'S QUESTION PRESENTED FOR REVIEW

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

RESPONDENT'S COUNTER-STATEMENT OF ISSUES ON APPEAL

1. When the notice of appeal in a DNA application case is served upon the Solicitor's Office more than ten (10) days after receipt of the entry of the final order, the Court of Appeals lacks subject matter jurisdiction and the appeal must be dismissed with prejudice for that reason, even though the Petitioner mistakenly sent a copy of the notice of appeal to the Attorney General who was not involved in the action before Judge Keesley.
2. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 257.
3. The Court of Appeals did not err in denying the motion to dismiss the appeal *without prejudice* based upon a desire to relitigate whether trace evidence exists to be tested where the supplemental evidence received does not undermine the findings that the requested items in the original application are not available for testing.

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RESPONDENT'S STATEMENT OF THE CASE

The matter before this Court arises from Alfonso Ware Jr.'s application for DNA testing on July 26, 2013. **Respondent's Supplemental Appendix, pp. 1-5.**¹ On July 26, 2013, the Honorable William P. Keesley, Presiding Judge entered an Order directing the Clerk of Court to file the application and directed procedures pursuant to the DNA Act. *Order Regarding Motion for DNA Testing*, July 26, 2013. Supp. App. 7-9. On October 22, 2013, the Solicitor's Office of the Eleventh Circuit filed a response and motion for dismissal. Supp. App. 10-22.

On May 21, 2014, the Honorable William Keesley conditionally dismissed the application. Supp. App.p. 23-30. In his May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records

¹ As noted within the argument and Respondent Counter-Statement of Issues on appeal, Respondent asserts that the appeal from the denial of the application for forensic DNA testing must be dismissed for a number of separate reasons. One reason is that the Petitioner's Appendix to his petition for writ of certiorari does not comply with SCACR Rule 247 because it does not contain the lower court record or the orders of Judge Keesley that are on appeal. Respondent has prepared a Respondent's Supplemental Appendix to the Return to the Petition for Writ of Certiorari which contains the lower court record. This will be referred to throughout the Return as "Supp. App." This Supplemental Appendix to the Return will include the following from the lower court: Alfonso Ware Jr.'s application for DNA testing on July 26, 2013 (Supp.App. 1-5); Order Regarding Motion for DNA Testing, July 26, 2013, by Judge Keesley (Supp.App. 7-9); "Response to Defendant's Application for DNA Testing and Motion for Summary Dismissal," by Eleventh Circuit Solicitor's Office, filed October 22, 2013 (Supp.App. 10-22); "Order of Intention to Summarily Dismiss the Application for DNA Testing," dated May 21, 2014, filed May 22, 2013, by Judge Keesley (Supp.App. 23-30); "Reply to Proposed Dismissal of DNA Application." By Alfonso Ware Dated June 10, 2014, filed June 13, 2014 (Supp.App. 31-36); "Order of Summary Dismissal of Application for DNA Testing," by Judge Keesley, dated June 18, 2014, filed June 20, 2014 (Supp.App. 37-44); Initial "Notice of Appeal" dated June 30, 2014 (Supp.App. 45-48); "Notice of Appeal" certificate of service upon Solicitor dated July 21, 2014 (Supp.App. 49-54).

- custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
 - f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriffs Department on January 23, 1990, which was prior to the trial;
 - g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
 - h) the Lexington County Sheriffs Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

Order of Intention to Summarily Dismiss the Application for DNA Testing, May 21, 2014, p. 4-5.² Supp. App. 26-27. Ware was given until June 13, 2014 in which to reply to the proposed dismissal. Order, p. 7. Supp. App. 29.

On June 10, 2014, filed June 13, 2014, Ware made written "Reply to Proposed Dismissal of DNA Application." Supp. App. 31-36.

On June 18, 2014, Judge Keesley entered his Order of Summary Dismissal of Application for DNA Testing. Supp. App. 37-44.

The Late Notice of Appeal on the Solicitor's Office

On June 30, 2014, Ware mailed a notice of appeal to Attorney General Alan Wilson concerning the matter which he contends he received written notice of on June 26, 2014. Supp.App. 45-48. *It was not properly served upon the Eleventh Circuit Solicitor's Office or Deputy Solicitor Christopher Samellas who was the only party representative in the action.*

After an inquiry by letter from the Clerk's Office of the Court of Appeals by letter of July

² This was restated again in the *Order of Summary Dismissal of Application for DNA Testing*, filed June 20, 2014, p. 4-5. Supp. App. 40-41.

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15, 2014 about providing a proof of service on the solicitor's office concerning the notice, on July 21, 2014, filed July 23, 2014, Ware served for the first time his notice of appeal by mail upon the Solicitor's Office. Supp.App. 49-54.

Further Proceedings in the Court of Appeals

On July 28, 2014, Petitioner improperly made a *pro se* Initial Brief of Appellant which the Clerk of Court of the Court of Appeals received as correspondence in its docket. The Court made inquiry of the status of a request for a transcript of the proceedings on October 21, 2014. On November 6, 2014, Respondent State of South Carolina responded that the matter should proceed as a petition for writ of certiorari with a copy of the record from the lower court and that Respondent had not been served with such documentation. On November 24, 2014, the Clerk of this Court returned the Initial Brief of Appellant and advised the Petitioner to proceed under Rule 247 of the South Carolina Rules of Appellate Procedure and directing the matters be served within 30 days since there was no hearing in the lower court. Another letter was sent from the Clerk's office on December 12, 2014 concerning the transcript issue again and requested proof of service of the request or proof of an agreement to proceed without the transcript and a supplemental request whether there was an agreement to proceed without a transcript on January 28, 2015.

On February 6, 2015, Respondent, through below-signed counsel, by letter response, advised the Court upon information and belief there was no evidentiary hearing in the matter before Judge Keesley which proceeded on pleadings. Respondent further noted that the matter was subject to dismissal because the Petitioner had failed to timely serve a notice of appeal on the Solicitor's office after he received written notice of entry on June 26, 2014 and served the Solicitor's Office by mail on July 23, 2014 – more than ten days later.

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On March 4, 2015, the Clerk's Office of the Court of Appeals advised that it was allowing the case to proceed since no transcript was necessary or in existence. However, the Clerk also concluded that was allowing the appeal to proceed under SCACR Rule 247 because there was proof of service on the Attorney General (who was not involved in the lower court case) on June 30, 2014 according to a proof of service that had accompanied the notice of appeal. The Clerk further stated again that it was returning the Initial Brief of Appellant received July 29, 2014 and directed the petition and appendix be served within 10 days by March 14, 2015.

The Petitioner next filed a document styled "Leave to Make Motion" pursuant to Rule 60(B) on March 19, 2014. Petitioner contended in his motion that on February 4, 2015, he had received 10 pages of materials from the South Carolina Law Enforcement Division which he claimed was evidence that was not previously before the hearing judge and asserted that "the custodian of the evidence in pleading stated there was no evidence, however, this evidence supports petitioner's claims of innocence." On May 15, 2015, the Court of Appeals, through Associate Justice Stephanie McDonald entered an order denying the request and directing that a copy of the appendix and petition of writ of certiorari within twenty (20) days of the order (by June 4, 2015). In particular, the Court stated:

After carefully considering Petitioner's March 19, 2015 "Leave to Make Motion," it appears Petitioner requests permission to include ten pages in the appendix that were not presented to the circuit court during its review. Petitioner's request is denied. . .

Ware v. The State, Appellate Case No. 2014-001470, Order (S.C. CT. App. May 15, 2015). **However, in violation of the May 15, 2015 Order, the Petitioner has included the 10 pages in his Appendix at Appendix pages 4-15.**

Pertinent to the issue raised in the certiorari petition before this Court, the Petitioner next made a motion to dismiss the appeal without prejudice and with leave to appeal again dated July

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28, 2015. On August 14, 2015, Respondent, through undersigned counsel responded to the motion in opposition. Petitioner made a Reply on August 27, 2015. On October 16, 2015, the Court of Appeals, through Chief Judge John Few entered an order that the motion to dismiss without prejudice was denied. See App.p. 3.

Subsequently, on October 19, 2015, the Clerk of Court wrote Petitioner and advised him that pursuant to the October 16, 2015 order the matter was to proceed and directed that Petitioner file and serve the petition for writ of certiorari within thirty days (November 15, 2015) or it would be dismissed.³ App.p. 3.

On November 24, 2015, Petitioner finally made his Petition for Writ of Certiorari. However, in his petition, he asserts as his sole question:

Did the South Carolina Court of Appeals err when the Court denied Appellant's motion to dismiss without prejudice?

Ware v. State, Petition for Writ of Certiorari, p. 4,6. This Return follows.

PRIOR STATE COURT PROCEDURAL HISTORY

The Petitioner, Alfonso Ware, Jr., #168464, was indicted at the January 1990 term of the Court of General Sessions for Lexington County for murder. He was represented by Thomas Bellinger and H. Patterson McWhirter of the Lexington County Bar. A jury trial was held on June 25-27, 1990, at the conclusion of which the Petitioner was found guilty of the indicted offense. He was sentenced by the Honorable Hubert E. Long to confinement for a period of life.

³ According to the records of the Clerk of Court for Lexington County, on November 4, 2015 in a motion dated October 23, 2015, the Petitioner, pro se, made a "Motion for Relief from Judgment Or Order Pursuant to Rule 29, 17-23-110 and Rule 60(b)(2), (b) (3), (b)(4) and (b)(5)" asserting the documents he received from SLED prove the criteria of Section 17-28-10 have not been followed, there is a need to appoint counsel and fund an investigator. See Lexington County Eleventh Judicial Circuit Public Index (Online), *The State of South Carolina v. Alfonso Ware Jr.* ; Case No. C560956, 1990GS32000056. This is a similar document to the proffered motion that the Court of Appeals denied leave to file in its order May 15, 2015 and the denial to "stay the proceedings in this matter" on July 10, 2015.

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The Petitioner filed a timely Notice of Intent to Appeal, and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense asserting four (4) issues. Following the submission of briefs by both sides, the Supreme Court of South Carolina affirmed the conviction pursuant to Rule 23 of the Rules of Practice of that Court. State v. Ware, Memo. Op. No. 92-MO-17 (filed February 24, 1992).

First PCR Proceedings – 1992.

The Petitioner filed an application for post-conviction relief dated August 21, 1992. The Respondents made Return on October 9, 1992. An evidentiary hearing into the matter was convened on Tuesday, May 2, 1995, at the Lexington County Courthouse. The Petitioner was present at the hearing and was represented by Wayne Floyd of the Lexington County Bar. The State was represented by Teresa Cosby of the South Carolina Attorney General's Office.

Following the hearing, the Honorable Daniel E. Martin issued his Order dated June 16, 1995, denying relief and dismissing the application in its entirety.

First PCR Appeal

The Petitioner appealed to the Supreme Court of South Carolina from the denial of state post-conviction relief. On appeal, he was represented by his post-conviction relief counsel, Wayne Floyd. On June 5, 1995, the Petitioner made a Petition for Writ of Certiorari raising the following six (6) questions:

1. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to object to statements of the solicitor in closing argument?

2. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate the Petitioner's reading ability and school record?
3. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate the circumstances under which the Petitioner gave his statement?
4. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to interview Petitioner's witnesses?
5. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to adequately investigate any intervening causes of death?
6. Did the Circuit Court err in holding that Petitioner's trial counsel were not ineffective in failing to investigate inconsistencies in ballistics testimony?

Respondents made Return to the Petition on July 12, 1996. On November 8, 1996, the Supreme Court of South Carolina entered its letter Order denying the Petition for Writ of Certiorari. Rehearing was denied on December 19, 1996.⁴ [Respondent requests the Court to take appellate judicial notice of the records of the South Carolina appellate courts.⁵]

⁴ Petitioner Ware also made a federal habeas corpus petition in proceeding in March 1997. *Ware v. Bessinger*, C/A No. 5:97-574-6JI. In that proceeding, he raised the following allegations:

1. Trial counsel's failure to contemporaneously move for a mistrial, following improper and prejudicial comments by solicitor, together with trial court failure to give curative instructions following solicitor improper comments, combined to deny petitioner a fair trial in violation of the due process clause of the Fourteenth Amendment.
2. Trial counsel were ineffective in failing to conduct an adequate investigation into the petitioner's reading ability and school record.
3. Trial counsel were ineffective in not moving for mistrial where trial court fail to provide petitioner with a full and fair suppression hearing on the voluntariness of his confession. Thus, trial counsel were ineffective in failing to adequately investigate the circumstances under which petitioner gave his statement.
4. Trial counsel were ineffective in failing to interview witness Jody Taylor. If counsel had interviewed Jody Taylor, counsel would have develop evidence that Jody Taylor was not the confidential

Second PCR Proceedings

Petitioner filed a second PCR application on February 10, 2000 (2000-CP-32-0345.) Following a hearing on Respondent's motion to dismiss, the Honorable J.C. Nicholson, Jr. denied Respondent's motion and granted Petitioner an evidentiary hearing. Following an evidentiary hearing on Petitioner's claim of after-discovered evidence, the Honorable G. Thomas Cooper denied and dismissed his second PCR application with prejudice. (Supp. App. pp.22-28.) There was no appeal from this application.

Third PCR Application.

Petitioner filed his third PCR application on December 6, 2003 (2001-CP-32-3661). Following a January 6, 2003 hearing, the Honorable Marc. H. Westbrook dismissed Applicant's application generally on the grounds it was filed outside the statute of limitations and was

informant and that Jody Taylor had only relayed information to investigators, information which the informant had told Jody Taylor. By not interviewing Jody Taylor, trial counsel did not preserve for trial the opportunity to object to trial judge admission of hearsay testimony by detective Charlie Jones, testimony that Jody Taylor had received information from confidential informant that petitioner had committed the crime.

5. Trial counsel were ineffective in failing to conduct an adequate investigation into any intervening causes of death?

6. Trial counsel were ineffective for failing to investigate inconsistencies in ballistics testimony?

The petition was denied by United States District Judge Simons on January 16, 1998. *Ware v. Bessinger*, No. CA-97-574-5-06JI (D.S.C. Jan. 16, 1998). An appeal to the United States Court of Appeals for the Fourth Circuit was denied on June 2, 1998. *Ware v. Bessinger*, 145 F.3d 1328 (4th Cir. 1998).

A second federal habeas action was dismissed on January 4, 2008 by the Honorable P. Michael Duffy. *Ware v. Warden, Broad River Corr. Inst.*, No. CIV.A. 9:07-3799-PMD, 2008 WL 68635, (D.S.C. Jan. 4, 2008). An appeal to the 4th Circuit was dismissed. *Ware v. Warden*, 272 F. App'x 247 (4th Cir. 2008).

⁵ See, e.g., *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir.1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"); *Mann v. Peoples First Nat'l Bank & Trust Co.*, 209 F.2d 570, 572 (4th Cir.1954) (approving district court's taking judicial notice of prior suit with same parties: "We think that the judge below was correct in holding that he could take judicial notice of the proceedings had before him in the prior suit to which Mann and the Distilling Company as well as the bank were parties."); and *Long v. Ozmint*, 558 F.Supp.2d 624, 629 (D.S.C.2008) (" 'The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time. Once was sufficient.'").

successive. Regarding Petitioner's claim that he did not knowingly and intelligently waive his right to appeal the denial of his second PCR application, Judge Westbrook found, based on the fact that Petitioner had previously had appealed his conviction, the denial of his first PCR, and the denial of his federal writ of habeas corpus, that his testimony that he was unaware of his right to appeal was not credible. Judge Westbrook acknowledged the Austin claim was not barred by the doctrine against successive applications, but found it nevertheless meritless.

Fourth PCR Application

Petitioner filed his fourth PCR application on August 14, 2003 (2003-CP-32-3045). Following a hearing held on October 21, 2005, the Honorable Clyde N. Davis, Jr. issued an order granting Petitioner relief, finding he is entitled to receive an Austin v. State review of the denial of his third PCR application.

The Petitioner made an appeal to the South Carolina Supreme Court. After review of the Austin petition and petition for writ of certiorari, the Court denied certiorari on September 5, 2007.

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ARGUMENTS

The Court of Appeals did not err when it denied the motion to dismiss *without prejudice* the appeal from the denial of the application for DNA testing based upon the post-order of dismissal receipt of materials from the South Carolina Law Enforcement Division State Law Enforcement Division Freedom of Information Act request consisting of ten pages.

- a. The Court of Appeals should dismiss the appeal for lack of jurisdiction because the notice of appeal was belatedly served upon the Solicitors Office beyond the 10 days period after knowledge of the entry of the order and inadequate service upon the Attorney General who was not a party representative before Judge Keesley and not proper service.
- b. When the Petitioner fails to comply with SCACR Rule 247 and fails to include any materials from the lower court record, including the orders appealed, in the Appendix to the Petition for Writ of Certiorari and instead includes material which the Court of Appeals ruled on May 15, 2015 cannot be included in the Appendix because they were not part of the lower court record, the certiorari petition must be dismissed as failing to comply with SCACR Rule 247.
- c. Any claims related to the Orders of Judge Keesley were abandoned by the Petitioner when nothing was raised as an issue presented related to his orders.

A. WHY RESPONDENT CONTENTS THE NOTICE OF APPEAL WAS NOT TIMELY SERVED BY THE BELATED JULY 21, 2014 SERVICE UPON THE SOLICITOR'S OFFICE AS THE RESPONDENT'S COUNSEL AND WHY THE ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The notice of appeal was untimely served upon the Solicitor's Office on July 21, 2014 which is more than 10 days after Petitioner received of the order on June 26, 2014. Supp. App. P. 49-54. It is untimely and this Court lacks jurisdiction based upon the late service. SCACR Rule 247 (b) ("The notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the final order.") (emphasis added).

Respondent's appellate counsel notified the Clerk of Court of the Court of Appeals concerning the lack of timely service upon the Solicitor's Office and that it was subject to

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dismissal by letter dated February 6, 2015. On March 4, 2015 by letter, Ware and counsel for Respondent were advised by the Clerk of Court because the Attorney General (not the Solicitor's Office who was handling the case) was served on June 30, 2013, the appeal was allowed the appeal to proceed. See Supp.App.p. 45-48.

The Clerk did not address how or why the Attorney General either the proper person to serve or the sole proper party for service of a notice of appeal in the lower court pursuant to S.C. Code Ann. § 17-28-50 (B). It was the Solicitor's Office who represented the State in the matter before Judge Keesley to the exclusion of the Attorney General by statute:

(B) Within ninety days after the forwarding of the application, or upon any further time the court may fix, **the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case**, shall respond to the application. Within ninety days after the docketing of the application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The court may proceed with a hearing if the **solicitor or Attorney General, as applicable**, or the victim does not respond to the application.

S.C. Code Ann. § 17-28-50 (B). Under this theory, the Solicitor would never have to be served with a notice of appeal under SCACR Rule for jurisdiction as long as the Attorney General received a copy of the notice for some unknown reason. Here, the Attorney General was an improper representative to be served since he was not involved in the representation of the State.

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Mistake
served

Since the Attorney General did not prosecute the case against Mr. Ware in 1990, by statute, he was never the proper statutory party respondent representative in Court of General Sessions for the DNA application. Simply put, the Attorney General had made no appearance in the action (and did not even become involved in the appeal until requested by the Solicitor's Office). As such, as with any criminal conviction that the Attorney General is not involved, service upon the Attorney General of a notice of appeal is not adequate service upon the Solicitor's Office under SCACR Rule 203(b)(2) and Rule 247(B). By statute, the Attorney

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General involvement was limited to those cases that he or his office actually prosecuted. Since Mr. Ware was not prosecuted by the Attorney General, service of the notice rested exclusively upon the Solicitor's Office of the Eleventh Circuit or Deputy Solicitor Samellas in particular as under Rule 247(b) as "the notice of appeal shall be served on all respondents within ten(10) days after receipt of the written notice of entry of the final order." It was belatedly served on July 21, 2014.

Because the Court lacks subject matter jurisdiction, the matter should be dismissed with prejudice. See Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Canal Insurance Co. v. Caldwell, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct.App.1999) (providing that the failure of a party to serve the notice of appeal within thirty days after receiving written notice of the entry of the order divests this court of jurisdiction and requires the dismissal of the appeal); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."); Allison v. W.L. Gore & Assocs., 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) (stating "an appellate body may not extend the time to appeal"); Wells Fargo Bank, N.A. v. Fallon Properties

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S. Carolina, LLC, 413 S.C. 642, 646-47, 776 S.E.2d 575, 577-78 (Ct. App. 2015) (same).

B. FAILURE TO INCLUDE ANY PORTION OF THE RECORD OF THE LOWER COURT AS ORDERED BY THE COURT OF APPEALS AND ONLY INCLUDING MATTERS ORDERED EXCLUDED FROM THE APPENDIX REQUIRES DISMISSAL UNDER SCACR RULE 247.

A review of the Appendix attached to the Petition made on November 24, 2014 is non-compliant because it includes no material from the "lower court record" as required under SCACR Rule 247 (E). It does not include the application for forensic DNA Testing filed July 29, 2013; the initial "Order Regarding DNA testing" filed July 29, 2013; the Response to the Application for Forensic DNA Testing by the Eleventh Circuit Solicitor's Office filed October 22, 2013; the Order of Intention to Summarily Dismiss the Application for Forensic DNA Testing dated May 21, 2014; Petitioner Ware's written Reply to Proposed Order of Dismissal filed June 13, 2014; Order of Summary Dismissal filed June 20, 2014. Simply put, he includes **none** of the lower court records in his Appendix.

The Petitioner has only included in his Appendix: 1) a copy of the letter from the Clerk of Court dated October 19, 2015 concerning the October 16, 2015 order denying his motion to dismiss and directing the filing of the petition and appendix within 30 days and 2) the materials from a Freedom of Information Act request of December 3, 2014 after the lower court decision that this Court directed not be included in the Appendix by Order dated May 15, 2015.

Respondent respectfully submits that since the Court's Order of May 15, 2015 was not complied with the inclusion of these improper items this Court ordered excluded in the Appendix, the certiorari appeal should be dismissed with prejudice as a sanction. Additionally, certiorari should alternately dismissed because Ware failed to include any "lower court records" or the "copy of the final order entered in the proceedings" in the Appendix as required by SCACR Rule 247(e)(1)(2). Since the orders of this Court dated May 13, 2015 and October 19,

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2015 were not complied with it, the appeal should be dismissed.

STATUTE AND STANDARD BEFORE THE LOWER COURT

*

S.C. Code Ann. § 17-28-90 sets forth the factors to be proved at an application hearing:

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:

(1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;

(2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;

(3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is

granted and is not merely cumulative or impeaching;

- (6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
- (7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

HOW THE PETITIONER'S CURRENT CERTIORARI ISSUE HAS BEEN PRESENTED BEFORE TO THIS COURT AND DENIED.

The Petitioner again re-litigates in his Petition whether this Court properly denied his motion to dismiss his appeal without prejudice to allow him to file and pursue another application for a forensic DNA examination based upon his receipt of certain materials from SLED after a Freedom of Information Act request. The Court of Appeals denied the request by Order dated October 16, 2015. In his present petition, Ware is not directly challenging anything about the rulings by Judge Keesley on his DNA application. *Importantly, he did not even include those rulings in his Appendix before this Court.* It appears that he has abandoned any claim that is properly before this Court arising from the rulings of Judge Keesley.

Instead, he is reasserting a collateral issue raised and denied by the Court in the earlier "Motion to dismiss without prejudice and with leave to appeal again" dated July 28, 2015. In the earlier motion, Ware requested the Court of Appeals to dismiss the matter without prejudice, based upon receipt of so-called "S.L.E.D evidence that was not considered by Judge Keesley." Respondent opposed the motion to dismiss without prejudice in its response August 14, 2015. The Court of Appeals denied the request to dismiss without prejudice on October 16, 2015.

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A review of the prior pleadings before this Court suggests that the so-called SLED evidence that he wants this Court to re-consider and Judge Keesley to consider is a response he received to a Freedom of Information Act request that he received on February 4, 2015 which he presented to this Court in his earlier motion to "motion for relief from Judgment ..." received by the Court on June 2, 2015. These materials received by the Petitioner from S.L.E.D. do not effect either the matters which would be properly on appeal from the denial of a DNA application by Judge Keesley (but abandoned in his certiorari petition) nor authorize the matter for DNA testing to be re-opened below. None of S.L.E.D. records from 1990 attached to the June 3, 2015 motion reflect that there is any trace evidence that was or is available for DNA testing which is the purpose of the DNA application nor dispute the findings set forth in Judge Keesley's orders. App. 5-15. Supp.App. 42-44.

In his initial May 21, 2014 Order conditionally denying the application, Judge Keesley concluded, upon the October 22, 2013 response from the 11th Circuit Solicitor's Office that :

After the application was sent to the Solicitor's office, the following things were determined:

- a) the weapon and the clothing are not available for testing;
- ~~b)~~ b) the evidence from the trial was released by the Clerk of Court, pursuant to an order of this court dated August 24, 1998;
- c) on August 22, 2013, the Solicitor's office of the 11th Judicial Circuit assigned investigators to review records and to search for evidence, and found no paperwork or evidence from the trial;
- d) the Solicitor's office of the 11th Judicial Circuit instructed its records custodian to search for files related to this case, and it was determined that files prior to 1992 were destroyed when pipes burst in the basement of the old office of the Solicitor's staff;
- e) the West Columbia Police Department does not have any evidence from the trial, as confirmed by the evidence custodian of that agency on August 26, 2013;
- f) SLED does not have any evidence from the trial, as the weapon and evidence tested were returned to the Lexington County Sheriff's Department on January 23, 1990, which was prior to the trial;

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- g) Lexington Medical Center confirmed by affidavit that it does not have any evidence from the trial, no longer has any specimens for testing related to this case, and that its records show that no DNA testing was done by Lexington Medical Center; and,
- h) the Lexington County Sheriff's Department does not have any evidence from the trial, except an incident report with case number 89-38992, as confirmed by a search performed by the Sergeant of Evidence for the department.

*Order of Intention to Summarily Dismiss the Application for DNA Testing, May 13, 2014, p. 4-5.*⁶ Supp.App. 26-27. This was restated again in the Order of Summary Dismissal of Application for DNA Testing, filed June 20, 2014, p. 4-5. Supp.App. 40-41.

The recent material Petitioner attached to his motion and his improper Appendix does not reflect that any newly discovered evidence exists for testing or that desired trace evidence, the gun or clothing or other items exist for DNA testing that he is now seeking in his certiorari petition. App.p. 5-15. In fact, it remains unclear why Petitioner asserts these particular SLED documents have any effect upon the representations made in the lower court and conclusions in 2013 and 2014 that any evidence for DNA testing exists that he seeks to be tested.

The similar request was initially before the Court of Appeals on July 10, 2015 when the Court interpreted the request as a motion to stay the proceedings and denied the motion. Ware v. State, Appellate Case 2014-001470, Order (July 10, 2015) (order denying request to "stay proceedings in this Court."). The same request was then converted by Ware to a motion to

⁶ In its Return to Motion to Dismiss Appeal Without Prejudice on August 14, 2015, the State included the following attachments to this Court which this Court can take judicial notice of its own records.

1. Copy of an Order for Release of Evidence dated August 24, 1998 by the Honorable William P. Keesley.
2. Copy of a letter from Chief Investigator Matthew W. Martin of the Eleventh Judicial Circuit Solicitor's Office dated August 26, 2013.
3. Copy of a letter from the Evidence Custodian for the West Columbia Police Department dated August 26, 2013.
4. Copy of a sworn affidavit from the Lexington Medical Center dated September 12, 2013
5. Copy of a letter from the Sergeant of Evidence for the Lexington County Sheriffs Department dated September 17, 2013.

Return to Motion to Dismiss Appeal Without Prejudice, August 14, 2015. attachments 1-5.

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dismiss the appeal without prejudice and allow refile. On July 23, 2015, by letter from the Clerk, the Petitioner was advised to file his Petition for Writ of Certiorari within 10 days. Rather than comply, he filed a motion to dismiss without prejudice and allow him to seek a reconsideration before Judge Keesley of his same presentation, again without recognizing that the information still does not reflect the existence of requested items to be tested. To the contrary, the additional SLED documents only show that SLED released a "box" on January 23, 1990, at 3:31 PM to the Lexington County Sheriff's Department - a matter that is not in dispute. App.p. 8, 15. The actual issue before Judge Keesley was whether the items currently remain in the custody to the Lexington County Sheriff Department in 2013-2016.

Additionally, the Petitioner may be confused about the limited purpose of an application for DNA testing and thinks it is the equivalent of either a Rule 29 motion for new trial or application for post-conviction relief under S.C. Code Ann. Section 17-27-10, et. seq. However, it is neither, but it is a limited procedure to determine the existence of proper materials for DNA testing (at this time), what tests to run, and whether favorable results from the identified and available materials would lead to change the result of the conviction and not merely impeach the evidence. S.C. Code Section 17-28-50 (C). The request must be denied.

JUDGE KEESLEY PROPERLY DENIED THE APPLICATION WHERE THE REQUESTED ITEMS WERE NOT AVAILABLE, BUT PETITIONER ABANDONED ANY CHALLENGE TO THE DECISION OF THE LOWER COURT IN HIS PETITION

In his original application for forensic DNA testing, Ware asserted he wanted "the alleged murder weapon"⁷ and clothing that Ware wore the day the murder occurred tested.⁸

⁷ A pistol found on the floorboard of a vehicle of the victim was introduced without objection at trial in June 1990 as State Exhibit 5. See *Ware v. State*, PCR Appeal South Carolina Supreme Court, PCR App. p. 108. Also, PCR App. 107-108, 117, 125, 211-212, 319 (Ware claims he threw the pistol into the car in a statement after firing three or four times); 261-264 (weapon testing and comparison by SLED Agent Parnell); 304-305 (admission of statement by

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Application, Section 4, p. 2. Supp.App. 2. He claimed the material was never tested prior to trial and that his attorney did not request that it be tested and that he did not know if it could be tested. He asserted that the DNA testing might include exculpatory results "because if none of the victim's blood is found on the weapon or my clothing, it would prove that I could not have shot the victim." Supp.App.p. 3.

The Petitioner is correct that Judge Keesley did not consider the particular documents that Petitioner subsequently received from SLED pursuant to his post-order freedom of information act request. Petition, p. 6, ¶2. He contends that these documents prove that "testing"⁹ was done by SLED and claims that the results were not made available to the Appellant after his application for DNA testing was made. Petition, p. 8, ¶ 4. He asserts that this proves the DNA Act had not been followed because it is a report relating to physical evidence that he claims was not disclosed earlier pursuant to § 17-28-10 through 320. However, although none of the newly proffered SLED documents suggest that DNA testing was ever done, these "new" documents instead refer to gunshot residue testing of GSR swabs from the victim and suspect (taken after his arrest days later) and red paint chip comparison. None of these materials are the requested materials concerning trace evidence for blood from either the revolver nor Petitioner's clothing which he contends were the subject of the forensic DNA testing request.

Ware had a .22 weapon in hand and when victim attempted to take the crack cocaine Ware stuck gun in car and pulled the trigger 3 or 4 times). Defense counsel at the PCR confirmed the state asserted at trial that the weapon belonged to Ware and that it fired the fatal bullet. PCR App.p. 610-611.

⁸ The shooting occurred Saturday night the 25th. On Monday morning the 27th, Investigator Hite was canvassing the crime scene area and ran into Ware who 11 am. Later, on the 28th, Investigator Hite saw Ware at the Sheriff's Department before Ware was arrested. PCR App.p. 172-175. Also, PCR App.p. 292-298 (West Columbia Patrolman Jones sees Ware on Tuesday November 28 in the Holmes Street area who he knew for over 20 years) At the Jackson v. Denno hearing, Ware testified about being picked up on November 28. PCR App.p. 193-194. There is no indication in the record that the clothes he was wearing at the time of his arrest are the same clothes he had on at the time of the incident on Saturday night. It is unclear whether the clothing that was worn by the Petitioner on the night of the shooting was actually seized from a review of the trial records before this appellate courts.

⁹ There is nothing in the new reports that suggest that DNA testing was done previously or the material from State Exhibit 5 included any trace material that would be subject to DNA testing.

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Judge Keesley appropriately granted summary dismissal of the request pursuant to § 17-28-50(B). Judge Keesley, consistent with the DNA Act ordered the preservation of evidence pursuant to § 17-28-70 contemporaneous with the filing of the application. Supp. App. 7-9. The Solicitor's Office surveyed the critical evidence custodians and reported those matters to Judge Keesley in making their motion to dismiss. The Petitioner has abandoned any assertions raised in his reply to the motion to dismiss before Judge Keesley where he sought to use the Act to determine what tests may have been done. Simply put, the evidence before this Court supports the findings of Judge Keesley that there are presently none of the requested items available for testing for DNA which could satisfy the DNA Act.

CONCLUSION

WHEREFORE, having made Return, the Respondents request that the appeal be dismissed for lack of jurisdiction due to untimely service upon the Solicitor's Office of the Eleventh Circuit. Respondent further assert that the matter be dismissed for failing to present a proper appendix pursuant to SCACR Rule 247. Further, Respondent submits that the petition be dismissed for the additional reasons set forth above because the Petitioner abandoned any issue related to the Orders of Judge Keesley in dismissing the application.

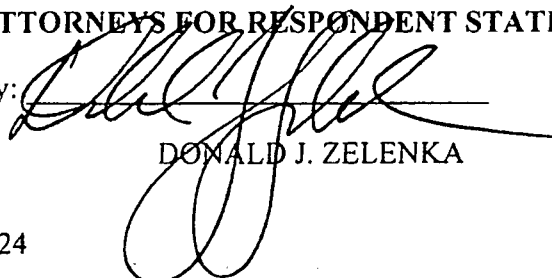
Respectfully submitted,

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
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ATTORNEYS FOR RESPONDENT STATE

By:



DONALD J. ZELENKA

February 29, 2016

The South Carolina Court of Appeals

Alfonso Ware, Jr., Petitioner,

v.

The State, Respondent.

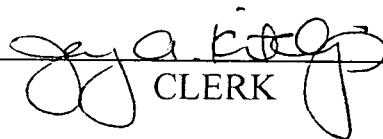
Appellate Case No. 2014-001470

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for forensic DNA testing under the Access to Justice Post-Conviction DNA Testing Act.¹ Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Alfonso Ware, Jr., 168464

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

John W. McIntosh, Esquire

FILED

November 14, 2016 J.O.

¹ S.C. Code Ann. § 17-28-10 to -120 (2014).

THE SOUTH CAROLINA COURT OF APPEALS

Alfonso Ware, Jr.	)	
Petitioner,	)	
	)	
	)	PETITION FOR REHEARING
	)	
State of South Carolina	)	Appellate Case:
Respondent.	)	No. 2014-001470
	)	

Petitioner moves this Honorable Court pursuant to South Carolina Appellate court Rules, Rule 221(a) Rehear the decision that was denied by the South Carolina Court of Appeal entered on November 14, 2016. The matter was before the Court on Writ of Certiorari following the denial of Petitioner's Application for forensic DNA testing under the Access to Justice Post Conviction DNA Testing Act.

This Petition for Rehearing will show that the Court of Appeals overlooked some facts material to the Case as presented. And no issue raised herein is raised for the first time.

The Court of Appeals has overlooked Legal and Factual matters when denying Petitioner's Application for DNA Testing.

It is clear from the Order issued by this Court that it has adopted the position of the Respondent's. This is evidenced by the lack of considered "decision". See Black's Law Dictionary page 407 (6th Ed. 1990) "decision defined as a determination arrived at after consideration of the facts and in legal context Law." Nowhere in the Court's decision does the Court address the Legal and factual Matter raised by the Petitioner. The adoption of one party's proposed findings and conclusions is a practice that is expressly disapproved See: Shaw v. Martin 733 F2d 304.

The Criterial of the Evidence Preservation Act S.C. Code Ann. 17-28-10 through 320 has not been followed. The procedure to be followed in addressing a Request under the Evidence Preservation Act has not been followed by any of the Custodians

of the Evidence involved in this Case and this is evident.

South Carolina Code Ann. 17-28-70(c) States: in part "provide the Appellant and the Solicitor with a copy of any document, note, log, report relating to the physical evidence" The custodian(s) of the evidence have failed to follow the requirement of the Statute. The Respondent nor the Custodian's of the evidence through their own readings prove that the S.C. Code Ann. 17-28-10 through 320 has not been followed.

By any standard the Petitioner was not given a fair opportunity under the criteria of the Evidence Preservation Act or the Application for DNA Testing. The South Carolina Court of Appeals erred when they denied his Appeal, in light of the facts presented by the Petitioner that Support the need for further investigation. The Court should have in the interest of Justice and Fairness allowed Petitioner's Appeal to prevail.

Conclusion

There is one thing that is clear: The Statute concerning the Preservation of Evidence Act was not followed. And as a result the Petitioner is being denied his fair opportunity in his request. A Review of the Record before this Court supports the Petitioner's Claim.

DATE: 11-28-16

Submitted by:

Alfonso Ware, Jr.
Alfonso Ware, Jr.
Petitioner

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V.

Appellate Case:
No. 2014-001470

2. S.C. Court of Appeals
Ms. J. Kitchings, Clerk
P.O. Box 11629
Columbia, SC 29211

4460 Broad River Rd.
Columbia, SC 29210

The South Carolina Court of Appeals

Alfonso Ware, Jr. Petitioner,

v.

The State, Respondent.

Appellate Case No. 2014-001470

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H B Ware J.

Paul W. Thomas J.

John W. McIntosh J.

Columbia, South Carolina

FILED

cc:

Alfonso Ware, Jr., 168464

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

John W. McIntosh, Esquire

Beth Carrigg

January 23, 2017