

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEAL

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, Circuit Court Judge

ELSON MCKANIC,

Petitioner,

v.

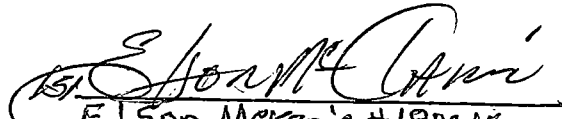
THE STATE OF SOUTH CAROLINA, RESPONDENT,

RECORD ON APPEAL

ELSON MCKANIC No. 182215
Perry Correctional Inst.
430 oaklawn Road
Pelzer, S.C. 29669
Pro Se

OTHER COUNSEL OF RECORD

Justin James Hunter
S.C. Bar No: 101254
P.O. Box 16549
Columbia, S.C. 29211
Attorney for Respondent


ELSON MCKANIC #182215
Perry Correctional Inst.
430 oaklawn Road
Pelzer, S.C. 29669
Pro Se

This 24 day
of August, 2017

RECEIVED

AUG 30 2017

SC Court of Appeals

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-44-81

FILED FOR RECORD

Elson McKanic Jr #182215

State of South Carolina

2017 JAN 4 PM 12 38

PLAINTIFF(S)

CLERK OF COURT

DEFENDANT(S)

Submitted by:

UNION, SC

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

JUDGEMENT ROLL NO. 08-44-1585

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Attached Petition is dismissed with prejudice:

1. Petition is meritless on its face.
2. Petition is subject to the Order Restricting filings (Order dated November 7, 2008)

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

John C. H. [Signature]
Circuit Court Judge
SCRPC Form 4C (03/2013)

2644
Judge Code

1/4/17
Date

STATE OF SOUTH CAROLINA
COUNTY OF UNION

) IN COURT OF COMMON PLEAS
)
) SIXTEENTH JUDICIAL CIRCUIT

Elson McKanic, Jr., #182215
Petitioner,
v.
State of South Carolina,
Respondent.

C/A NO: _____

PETITION FOR WRIT
OF MANDAMUS

COME NOW, the above-named petitioner does hereby petition the Honorable Court for an issuance of a Writ of Mandamus to release ~~him from his unconstitutional conviction and sentence as set forth~~ in his attached Memorandum of Law in support of his petition.

Respectfully submitted,

Date: 12-21-2016
Greenville County

Elson McKanic
Elson McKanic, Jr., #182215
Perry Correctional Institute
430 Oaklawn Rd. / Q1
Pelzer, SC 29669

STATE OF SOUTH CAROLINA
COUNTY OF UNION

) IN COURT OF COMMON PLEAS
)
) SIXTEENTH JUDICIAL CIRCUIT

Elson McKanic, Jr., #182215)

C/A NO: _____

)
) Petitioner,)

)
) v.)

)
) **SUMMONS**)

)
) State of South Carolina,)

)
) Respondent.)
)

To the above Respondent, you are hereby summoned and required to serve upon the petitioner, whose address is listed below, an answer to the petition for Writ of Mandamus, which is herewith served upon you, within thirty (30) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the petition for Writ of Mandamus.

Respectfully submitted,

Date: 12-21-2016
Greenville County

Elson McKanic
Elson McKanic, Jr., #182215
Perry Correctional Institute
430 Oaklawn Rd. / Q1
Pelzer, SC 29669

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

IN COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Elson McKanic, Jr., #182215)
)
Petitioner,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

C/A NO: _____

MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR
WRIT OF MANDAMUS

COME NOW, the above-named petitioner to hereby present his Memorandum of Law in support of his petition for Writ of Mandamus and would show the following unto the Honorable Court.

STATEMENT OF THE CASE

The petitioner pled guilty on March 15, 1971, to Armed Robbery in Spartanburg County without waving his rights to counsel, or having a counsel appointed to represent him in said proceedings. He was, thereafter, sentenced to five (5) years, on the service of one (1) year; the remainder to be served on probation.

The petitioner was indicted at the September 1975 term of the Union County Grand Jury for Armed robbery (1975-GS-44-0177). Jack S. Flynn, Esq. represented him on the charges. On September 18, 1975 applicant went to trial and was found guilty as indicted. The Honorable Clarence E. Singletary sentenced him to twenty-five (25) years. A timely appeal was filed on petitioner's behalf. The S.C. Supreme Court affirmed his conviction and sentence; State v. McKanic, OP. NO. 76-21 (S.Ct. filed March 16, 1976).

The petitioner was indicted at the August 1991 term of the Union County Grand Jury for Armed Robbery (1991-GS-44-0557), Assault and Battery with Intent to Kill, and Possession of a Firearm or Knife During the Commission of a Violent Crime

(1991-GS-44-0558). Joseph Workman, Esq. represented him on the charges. On September 26, 1991, the jury found him guilty of Armed Robbery, Assault and Battery of a High and Aggravated Nature, and Possession of a Firearm or Knife During the Commission of a Violent Crime. The Honorable H. Dean Hall sentenced him to confinement for a period of life without parole for Armed Robbery and ten (10) years for Assault and Battery of a High and Aggravated Nature. Applicant did not appeal his convictions and sentences.

STANDARD OF REVIEW

(A) To obtain a Writ of Mandamus requiring the performance of an act, the petitioner must show (1) a duty of the opposing party to perform the act; (2) the ministerial nature of the act; (3) the specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. See Porter v. Jedziniak, 512 S.E.2d 497 (1994); Anderson v. State, 527 S.E.2d 497 (1994).

(B) In addressing a Miscarriage of Justice claim, the S.C. Supreme Court has held that finality must be realized at some juncture to achieve a semblance of effectiveness in dispensing justice; at some juncture review must stop with only the very rarest of exception, "when to continue a petitioner's imprisonment without a review (of the merits) would amount to a miscarriage of justice." See Aice v. State, 409 S.E.2d 392 (1991). The imposition of a sentence in excess of S.C. statutory and constitutional laws should qualify as a miscarriage of justice to excuse a procedural bar.

ARGUMENT

The court should entertain the merits of this Writ of Mandamus to correct the miscarriage of justice regarding petitioner's unlawful Life Sentence for three (3) armed robbery convictions.

In the applicant's case, the record shows that he was convicted of his first armed robbery in 1971. He was again convicted for armed robbery in 1975, and he was finally convicted of his current armed robbery in 1991. After his conviction for the last armed robbery offence, the judge sentenced him to a life sentence under the "Habitual Offender Law" set forth under the "1986 Omnibus Crime Bill and Safe Street Act."

Accordingly, in 1986 the S.C. Legislators enacted the Omnibus Crime Bill which denied parole eligibility for all prisoners who committed a violent crime subsequent to the passage of this Bill. However, there was no provision in this Bill that authorized a judge to impose a sentence beyond the statutory maximum, as he did in petitioner's case, by unlawfully sentencing him to an illegal life sentence for armed robbery.

Moreover, with regard to any procedural bar, the petitioner submits that his unconcealed 1971 armed robbery was employed to enhance his sentence to life without parole which still persists to entitle him to a review on the merits of his claim. See McDuffie v. State, 277 S.E.2d 595 (S.C. 1981); Jackson v. State, 489 S.E.2d 415 (1997).

In addressing an excessive sentence such as that alleged by petitioner, the S.C. Supreme Court has held that if the Court unyieldingly enforces post-conviction relief as the only avenue of relief in his case, there exists a real threat that the petitioner will unlawfully continue to remain in prison beyond his life expectancy [fn. 1]. Thus, under such exceptional circumstances, the Court held that a case such as petitioner's should be remanded to the circuit court for resentencing. See e.g., State v. Johnson, 510 S.E.2d 423 (S.C. 1999).

[fn. 1] In 1990, the maximum sentence for armed robbery was twenty-five (25) years, which was not parolable under the Omnibus Crime Bill.

In conjunction, the petitioner submits that it cannot seriously be denied that his unlawful life sentence for armed robbery does not amount to a gross miscarriage of justice to foreclose an evidentiary review on the merits of his claimed violations set forth above. Aice, Butler, and Johnson, at supra.

CONCLUSION

Wherefore, for the foregoing reasons, this Honorable Court should grant an evidentiary hearing to correct a fundamental miscarriage of justice suffered by the petitioner.

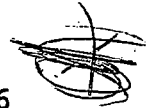
Respectfully submitted,

Date:

12-21-2016
Greenville County

Elson McKanic, Jr.

Elson McKanic, Jr., #182215
Perry Correctional Institute
430 Oaklawn Rd. / Q1
Pelzer, SC 29669



1 court to poll the jury.

2 THE COURT: All right poll the jury.

3 (Whereupon the jury was polled by the clerk and
4 all jurors answered affirmatively.)

5 THE COURT: All right Mr. Workman, you want to
6 bring Mr. McKanic up.

7 MR. GRANT: Your Honor, if we might there's
8 something on his record that I would like to be
9 confirmed. If it's all right I'd like his sentencing
10 to be deferred until the morning. I need to check in
11 Spartanburg.

12 THE COURT: Any objection.

13 MR. WORKMAN: No, Your Honor. I don't see any
14 reasonable grounds to object.

15 THE COURT: I think it would be the Court would
16 like to know the accurate record before sentencing and
17 such we'll uphold that until you complete your and let
18 us know when you have that completed so that we have an
19 accurate record. And also please furnish a copy to Mr.
20 Workman and to the defendant.

21 MR. GRANT: Yes, sir.

22 THE COURT: All right, the defendant.

23 MR. WORKMAN: At this time, Your Honor, I would
24 like to put a motion for a new trial on behalf of the
25 defendant. I feel like the verdict of the jury was

1 against the greater weight of the evidence presented.

2 THE COURT: Anything else.

3 MR. WORKMAN: No, sir.

4 THE COURT: All right the Court notes your motion
5 and the motion is denied. Any other motions.

6 MR. GRANT: None from behalf of the State, Your
7 Honor.

8 (Thursday, September 26, 1991.)

9 THE COURT: Elson McKanic. 91-44 0558.

10 MR. GRANT: Your Honor, of course Elson who was
11 convicted on Tuesday of aggravated assault and battery
12 and of armed robbery. And he has to be sentenced.

13 Your Honor, at this time I would pass up to the
14 Court a document and ask to make it part of the Court
15 record. Solicitor's request In section 17-25-45 State
16 South Carolina code of laws, for imposition of a life
17 sentenced based upon Mr. Elson McKanic's convictions in
18 1971, March the 15th of 1971 in Spartanburg County for
19 armed robbery. And on September 19 of 1975, was
20 convicted in Union County on the charge of armed
21 robbery, making it two prior armed robbery or violate
22 crime convictions. And the State would evoke the
23 portion of that statute which requires a life sentence
24 for the person convicted of such crimes, and request
25 the prior record be made part of the record.

1 THE COURT: Mr. Workman, have you seen the copy
2 that prior record.

3 THE COURT: Yes, sir, I have been aware of Elson
4 has been convicted twice of armed robbery.

5 THE COURT: All right. Do you have any comments
6 to make.

7 MR. WORKMAN: Well, Your Honor, I feel due to the,
8 I think one of the prior armed robberies was in '71 and
9 I think one was in 75, due the age of those convictions
10 I feel like I don't think the life sentence provision
11 should be revoked against.

12 THE COURT: Well, my interpretation, I maybe
13 wrong, of the statute is that the Court doesn't have
14 discretion. The way they allegedly worded the statute
15 it's says using the word mandatory to me, something as
16 mandatory it may not be given the option, but it says
17 that shall upon conviction, shall upon the third
18 conviction in this State of violent crime shall
19 experience life in prison, and the word shall be based
20 on case law that's intended the use of the word shall.
21 I would interpret that as being a mandatory instruction
22 from our legislature that I couldn't use any discretion
23 to change.

24 Mr. McKanic, any comments from you.

25 MR. MCKANIC: Armed robbery in '71 sir, from I

1 what I understand now, I pled guilty to a lesser charge
2 'cause I went to the State hospital for observation.

3 The State I know---

4 THE COURT: When was that?

5 MR. MCKANIC: In '71, '70, '71 something. I had
6 pled guilty to a lesser charge that was my, from my
7 understanding, sir.

8 THE COURT: Well, we've got a record here on?

9 MR. MCKANIC: I went to a mental hospital for
10 observation and stayed awhile and then they brought me
11 back. I went down there and in '70, I came back '71. I
12 pleaded guilty to a lesser crime, and he gave me a
13 year.

14 THE COURT: Your sentenced says that you were
15 sentenced to five years, provide upon the service of
16 one year the balance of the sentence was suspended.
17 You were placed on probation for four years that was in
18 1971 it says the offense was armed robbery.

19 MR. MCKANIC: I don't know.

20 THE COURT: Any other comments from you, Mr.
21 McKanic?

22 MR. MCKANIC: No, sir.

23 THE COURT: On 91-0557, armed robbery, the
24 sentence that the defendant Elson McKanic be committed
25 to the State Department of Corrections for the term of

Separate

Designation of matter

1 life without parole. On indictment 91-0558, the jury
2 found Mr. McKanic guilty of assault and battery of a
3 high and aggravated nature, the sentence on 91-0558
4 will be the defendant Elson McKanic be committed to the
5 State Department of Corrections for period of ten
6 years. Okay.

7 MR. GRANT: Your Honor, just so the later.

8 THE COURT: Mr. Solicitor, I am making your
9 paperwork that you have passed up, mark the report,
10 pass the record to the court reporter and ask her to
11 mark it as part of the record.

12 MR. GRANT: And Your Honor, so the record will be
13 clear, I have a pending indictment on Mr. McKanic
14 91-44-595 for assault and battery of a high and
15 aggravated nature which occurred on July the 15 or 16th
16 some day after the armed robbery in which Mr. Floyd
17 Snider was hit in the head and his billfold was taken,
18 but due to these sections, I am nolle processing this
19 case and will not proceed on that case, but I want the
20 record to be clear as to this proceeding having taken
21 care of all pending charges against Elson.

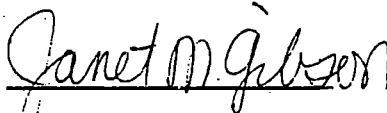
22 THE COURT: All right this make this part of the
23 record.

24
25

1 I, the undersigned Janet M. Gibson, Official Court
2 Reporter for the 16th Judicial Circuit of the State of
3 South Carolina, do hereby certify that the foregoing is
4 a true, accurate, and complete Transcript of Record of
5 all the proceedings had and evidence introduced in the
6 trial of the captioned case, relative to appeal, in the
7 Criminal Court for Union County, South Carolina, on the
8 24th day of September, 1991.

9 I do further certify that I am neither of kin,
10 counsel nor interest to any party hereto.

11
12
13 January 31, 1992

14 

15 Janet M. Gibson

16 Notary Public

17 My Commission Expires February 25, 2001

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