

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF APPEALS

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM YORK COUNTY

Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Daniel Dewitt Hall, Circuit Court Judge

Unpublished Opinion No. 2017-UP-385

(S.C. Ct.App. Filed October 18, 2017)

Antonio Gordon,

Petitioner,

v.

State of South Carolina,

Respondent.

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PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 242, SCACR

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**S.C. SUPREME COURT**

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Question Presented

Whether the Court of Appeals erred when the Court found that any material fact or principle of law has been either overlooked or disregarded where the Court Unpublished opinion failed to address Petitioner's "subject matter jurisdiction question and argument" properly raised to the Court for the first time on appeal in his initial, reply and final briefs and Petition for rehearing?

Whether the Circuit Court was without jurisdiction over the subject matter and Gordon because Family Court acquired the "[f]irst" jurisdiction over him and the subject matter upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)(supp.1998) ?

Statement of the case

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

Approx 6 to 8 hours after the Petitioner were taken into custody he appeared before a magistrate judge and signed an arrest warrant for murder and had a bond hearing. See Appendix Volume one pages 89 line 13-page 90 line 12-Volume one page 101 line 1-24 (John Thicken testimony).

On July 27,1998, Gordon were issued arrest warrants for possession of a weapon during the commission of a violent crime,two counts of attempted armed robbery,criminal and criminal conspiracy. Appendix Volume one pages 222-224.

October 15,1998,the York County Grand Jury indicted Petitioner for murder,two counts of attempted armed robbery,three counts of possession a weapon during the commission of a violent crime and criminal conspiracy. Appendix Volume one pages 225-247 .See Fn2

On July 16,1999,after a Jackson v. Denno hearing the Petitioner plead guilty in general sessions court to murder,two counts of attempted armed

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Fnl Petitioner was sixteen years of age with an IQ 68 when he was taken into custody.

Fn2 The indictments was not filed with the Clerk of Court office once the grand jury returned the true bill but were filed after the case ended. Appendix Volume one(a) page 128(a).

robbery, three counts of possession of a weapon during the commission of a violent crime, possession of a pistol and criminal conspiracy. On July 19, 1998, the Honorable John C. Hayes, III, sentenced the Petitioner to a forty year defacto life sentence. Appendix Volume one page 204 line 8-25.

Petitioner filed his first Post-Conviction Relief application June 29, 2000. Gordon v. State, 2000-CP-46-1414. Appendix Volume one page 248-252. Petitioner filed a second Post-Conviction relief application during the pendency of PCR (1414). Gordon v. State, 01-cp-46-1866. See Fn3 In the application Petitioner properly raised to the PCR Court a subject matter jurisdiction claim (family court never relinquished jurisdiction). See Appendix Volume one pages 256-257. Petitioner properly amended his application and raised a second subject matter jurisdiction claim and a constitutional challenge to S.C. Code Ann §20-7-6605(1) (supp.1998) Title Definition statute. See Appendix Volume one page 268-274.

Tara D. Shurling, Esquire was court appointed to represent Petitioner. At an evidentiary hearing convened on July 29, 2003, counsel inadequately raised Petitioner's jurisdictional questions and constitutional challenge to §20-7-6605(1) as a ineffective assistance of trial counsel claim (failure to make a concerted effort to convince the solicitor's office to remand the case to family court). See Appendix Volume one pages 285 line 15-pg 289 line 11. The PCR court addressed the ineffective assistance of counsel claim in its order of dismissal and not the subject matter jurisdiction claim. Appendix Volume one page 354.

Petitioner's counsel was not properly served with order of dismissal. See Appendix Volume one page 345. Petitioner asked counsel to file a Rule 59(e)

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Fn3 These two applications were merged together.

motion. Appendix Volume one page 366 second paragraph lines 8-11. At some point Petitioner filed a timely Rule 59(e) motion pro se. The PCR court denied and dismissed finding all grounds raised had been ruled on. Appendix Volume one page 362. This Court eventually nullified Petitioner's motion and vacated the PCR Court Order as been improperly filed under Foster. See Appendix Volume one page 365.

Subsequently why Petitioner's Appeal where pending in PCR (1414) he filed a second Post-Conviction Relief application and asserted as a ground for relief the trial court was without subject matter jurisdiction (no waiver hearing). The PCR Court denied as being successive and time barred. Appendix Volume one page 372-405.

Petitioner then filed a State habeas corpus in York County. Gordon v. State, 2006-CP-46-0010. In the petition he asserted General sessions was without jurisdiction because family court never relinquished its jurisdiction in that his due process right were violated because there no waiver hearing. Appendix Volume one page 430. The Respondent filed a return and motion to dismiss the petition for writ of habeas corpus. Appendix Volume one page 435-439. The Honorable John C. Hayes, III, issued an order of dismissal with prejudice finding Petitioner to a large extent raised his claims in his post-conviction. Appendix Volume one pages 443-444. Approx 90 days later Petitioner filed a Rule 60(b) motion alleging Judge Hayes were a conflict of interest and that he failed to inform Gordon he could have appealed his decision. Appendix Volume one page 444(b)-449. A hearing was convened in January of 2008 and the Honorable Couch granted the motion providing relief that Petitioner did not request for in his motion. Appendix Volume one page 450.

February 2, 2015, Petitioner filed a Rule 60(b), (5)-Austin v. State, 409 S.E.2d 395 (S.C.1991) review alleging counsel failed to file a notice of appeal at his request and that judge Couch granted him relief he did not ask for and considered his first Rule 60(b) motion as a Rule 59(e) motion

and attached two jurisdiction issues. Appendix Volume one pages 451-458. The Honorable John C. Hayes, III, in a order dismissed the motion without prejudice finding he was not a conflict of interest, Petitioner had already raised the juvenile jurisdiction issues and Petitioner was not entitled to an Austin review because he was granted relief asked for in his motion. Appendix volume one pages 461-463. Petitioner filed a Rule 59(e) motion asking the court to reconsider, alter and amend the judgment to find he was a conflict of interest, Petitioner's jurisdiction claim (b) was not previously raised and ruled on and that he was entitled to an Austin review. Appendix Volume one pages 464-468. The Honorable D. Hall issued an order making specific finding of fact and conclusion of law finding Petitioner had already raised the jurisdiction issues and that the jurisdiction issues were untimely. Appendix Volume one page 469.

Petitioner appealed to this Court and this Court transferred to the Court of Appeals. In Petitioner's initial brief he properly raised a "[n]ew" subject matter jurisdiction claim and argument to the court. Appendix Volume One(a) page 5A first claim, argument at page 11A second paragraph-page 16A. However, the Court of Appeals issued an Unpublished Opinion on October 18, 2017, which did not address Petitioner's jurisdiction question and argument. Appendix Volume one(a) page 111(a)-112(a). Petitioner filed for a Petition for Rehearing and raised the following questions:

(1) Whether this Court Unpublished Opinion overlooked or misapprehended Gordon's entire subject matter jurisdiction question and argument on whether the General Sessions Court was without the jurisdiction over the subject matter and him because family court acquired the first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)(supp.1998) Title "Taking a Child into custody" ?

(2) Whether the circuit court was without jurisdiction over the subject matter and Gordon because family court acquired the first jurisdiction over

the subject matter and Gordon upon him being found violating a criminal law taken into custody pursuant to §20-7-7205(a)?

Appendix Volume one(a) page 116(a). The Court of Appeals denied Petitioner's petition for rehearing finding the court was 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. Appendix  
Volume one(a) page 127(a).

## Argument

The Court of Appeals erred when the Court found that any material fact or principle of law has been either overlooked or disregarded where the Court Unpublished Opinion failed to address Petitioner's "subject matter jurisdiction question and argument" properly raised to the Court for the first time on appeal in his initial, reply and final briefs and petition for rehearing

Petitioner asserts the Court of Appeals committed error when the Court found that any material fact or principle of law has been either overlooked or disregarded where the Court Unpublished Opinion failed to address Gordon's subject matter jurisdiction question and argument properly raised to the Court in his initial, reply and final brief and petition for rehearing. See Appendix Volume one(a) pages 5A and pages 11A second paragraph through pages 16A line 6 and Appendix Volume one(a) page 49A first claim and pages 56A-57A and pages 75A second paragraph through pages 80A line 6 and Appendix Volume one(A) page 116A and pages 120A fourth paragraph through pages 122A.

In the initial brief of Appellant at appendix volume one(a) page 5A statement of the grounds on appeal, Ground (1) Petitioner asked whether the circuit court was without jurisdiction over the subject matter and him because family court acquired the first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody pursuant to section 20-7-7205(a). To support his claim Gordon argued that when he was found violating a criminal law and taken into custody based upon probable cause approx 9:30-10:30a.m, July 23, 1998, he was not [charged] with a Class A, B, C, or D felony as defined in section 20-7-6605(1), and that because he was not "charged" with one of the class felonies listed in section 20-7-6605(1) prior to or when he was taken into custody, family court as

a matter of statutory law acquired the "[f]irst" jurisdiction. See Appendix Volume one(a) page 11A second paragraph through page 16A line 6.

However, the Respondent replied to Petitioner's subject matter jurisdiction question and argument alleging pursuant to S.C. Code Ann §20-7-6605(1), a person sixteen years of age or older who is [charged] with a Class A, B, C, or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more may be remanded to the family court for disposition of the charge at the discretion of the solicitor. Gordon was sixteen years old when he committed the crimes for which he was [indicted] and the crimes committed were Class A, B, C, or D felonies. Therefore, the General Sessions court had jurisdiction. Gordon mistakenly believes that anytime a child is taken into custody, the Family Court and only the Family Court may exercise exclusive jurisdiction. See Appendix Volume one(a) page 103A second paragraph line 2-10. See Fn1

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Fn1 The respondent couched its procedural argument in its Initial brief as (1) Petitioner clearly raised his jurisdiction argument or (2) "could have raised his jurisdiction argument in his previous proceedings. Appendix Volume one(a) page 39A first paragraph. The Petitioner in his reply brief objected to this procedural argument alleging (1) The PCR court did not issue an order addressing whether the circuit court was without jurisdiction because family court acquired the first jurisdiction over Petitioner and the subject matter upon him being found violating a criminal law and taken into custody pursuant to section 20-7-7205(a), (2) PCR counsel Tara Shurling, esquire, inadequately raised the issue in Petitioner's first PCR (1414), thereby depriving Petitioner of his procedural right to "one full fair bite at the apple" pursuant to Odom v. State, 523 S.E.2d 753 (1999) which should entitle Petitioner to a evidentiary hearing on his jurisdiction argument in the interest of justice, and (3) Because no court has ever issued an order adjudicating the jurisdiction argument on the merits, res judicata does not apply and Petitioner's jurisdiction argument could be raised for the first time on appeal pursuant to Brown v. State, supra. Appendix Volume one(a) pages 54a-55a.

This Court in Brown v. State, 343 S.C. 342, 540 S.E.2d 848, 849 (S.C.2001) held "The jurisdiction of a court over the subject matter of a proceeding is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by the court. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal". See Fn2 Therefore, the Court of Appeals erred when it did not address Petitioner's subject matter jurisdiction question and argument in its Unpublished Opinion which is fundamental and may be raised at any time. Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989); Brown v. State, *supra* and should therefore be reversed.

The Circuit Court was without jurisdiction over the subject matter and Petitioner because Family Court acquired the first jurisdiction over the subject matter and him upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann §20-7-7205(a)(supp.1998) Title "Taking a Child into custody"

It is argued by Petitioner that when he was found violating a criminal law and taken into custody based upon probable cause approx 9:30-10:30a.m, July

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Fn2 In Brown v. State, *supra* the State couched its procedural argument in terms of res judicata. However, this Court in Fn1 of Brown held "In a PCR action, the doctrine of res judicata does not apply to issues of subject matter jurisdiction". Petitioner asserts on the procedural aspect his case is almost identical to Brown which made him properly before the Court of Appeals on his jurisdiction question and argument.

23,1998,he was not "[c]harged" with a Class A,B,C, or D felony as defined in section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more under S.C. Code Ann § 20-7-6605(1)(supp.1998) Title "Definition" statute and that because he was not [charged] with one of the class felonies listed in section 20-7-6605(1),family court acquired the first exclusive original jurisdiction over the subject matter and Petitioner upon him being found violating a criminal law and taken into custody pursuant to S.C. Code Ann § 20-7-7205(a) which provides in relevant part:

When a child is found violating a criminal law or ordinance is taken into custody,the taking into custody is not an arrest. The jurisdiction of the court attaches from the time of the taking into custody.See Fn3

S.C. Code Ann § 20-7-6605(1)(supp.1998) Title "Definition" statute provides in relevant part:

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

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**FN3**

Pursuant to §20-7-6605(2) the "[C]ourt" means the "[F]amily Court".

Petitioner asserts penal statutes must be construed strictly against the State and in favor of him. William v. State, 410 S.E.2d 564 (1991). The Court's primary function in interpreting a statute is to ascertain the intent of the legislature. State v. Blackmon, 403 S.E.2d 660, 662 (1991). When terms of a statute are clear and unambiguous, the Court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. In construing statutory language, the statute must be read as a whole and sections which are apart of the same general law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase. S.C. State Ports Auth v. Jasper, 629 S.E.2d 624, 629 (2006).

Construing §20-7-7205(a) and 20-7-6605(1), (2) of the Children Code of Laws as a whole and together, it is clear the legislature intent is ascertain that family court jurisdiction attached over Petitioner and the subject matter soon as he was found violating a criminal law and taken into custody based upon probable cause pursuant to §20-7-7205(a) and once family court jurisdiction attached it became exclusive original jurisdiction and shall be the sole court for initiating an action pursuant to S.C. Code Ann § 20-7-400(a), (3).

Petitioner argue that because family court acquired the first jurisdiction over him and the subject matter and that he met the requirement of mandatory waiver/transfer to general sessions court, an order should have first been issued by family court relinquishing its first attach jurisdiction before the grand jury could have exercise it authority in returning a true bill indictment because at the time the grand jury issued its true bill indictments, family court jurisdiction were still attached, therefore, because jurisdiction still belonged to family court, Petitioner's indictments is absolutely a nullity and void sb initio because the circuit court lack jurisdiction. McClure v. State, 289 S.E.2d 138 (1982) (No indictments may be

true billed by grand jury when the circuit court lacks jurisdiction).  
Petitioner also asserts his guilty plea judgment entered July 19, 1999, in  
general sessions court is absolutely a nullity and void ab initio and should  
be vacated because the court did not have the authority to exercise its  
jurisdiction over the subject matter and him pursuant to  
§20-7-400(a), (3); State v. England, 245 S.E.2d 608 (S.C. 1978). Here Petitioner  
is also entitled to his speedier and immediate release since family court  
jurisdiction has terminated over him and cannot issue an order transferring  
jurisdiction. Sanders v. State, 314 S.E.2d 319 (1984); §20-7-400(b).

Conclusion

Petitioner respectfully ask that this Court Grant his Petition for writ  
of certarati in the interest of justice.

Respectfully Submitted

Antonio Gordon  
01-02-2018

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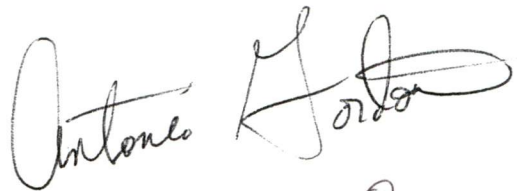
v.

State of South Carolina,

Respondent.

Certificate of counsel

Antonio Gordon, the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2017.



01-02-2018

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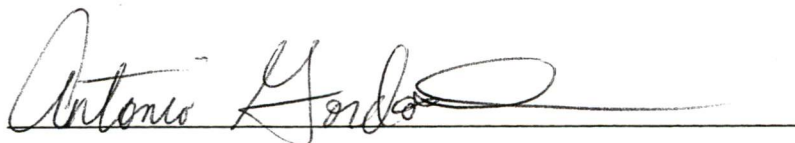
Respondent.

Certificate of Service

Antonio Gordon, the Petitioner hereby certifies that I did serve  
Petitioner's Petition for writ of certiorari, Petitioner's \_\_\_\_\_ and  
Petitioner's certificate of counsel on:

South Carolina Attorney General Office  
Justin J. Hunter, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

by depositing a copy in the mail with sufficient funds on 02 Day of  
January, 2018.

  
\_\_\_\_\_