STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2017-000841

BRANTLEY W. CLARKE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

REPLY TO RETURN
TO PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

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ATTORNEY FOR PETITIONER.

INDEX

ARGUMENT

Petitioner, acting through undersigned Counsel, would offer the following in Reply to certain points made by Respondent in the State's Return. With regard to all other issues, Petitioner relies on the arguments and authorities presented in his Petition for Writ of Certiorari previously filed with this Honorable Court.

I.

Timeliness of Application

Respondent asserts that Petitioner could have researched the law and discovered that mandatory GPS electronic monitoring was applicable in his case pursuant to S.C. Code Ann. § 23-3-540, which was in effect for a year and a half before Petitioner's plea. Respondent's reliance on that analysis is misplaced. The documents before this Honorable Court clearly show that there is no record of Petitioner having been advised by the Court of the mandatory GPS electronic monitoring requirements found in § 23-3-540. Respondent's Return states that the transcript of Petitioner's plea proceeding ends before the Court's oral sentence was delivered. Respondent cites to App. p. 28 for that assertion. App. p. 28 is in fact page one of Petitioner's current Application for Post-Conviction Relief. The record contained in the Appendix does, however, contain a transcript of the plea proceeding which includes the portion of that proceeding where the sentence was handed down by the Court. App. pp. 25-26. The sentencing order signed by the presiding judge does not order GPS monitoring despite the fact that the form utilized by the Court contains a blank box specifically designed to document such a sentencing provision. App. p. 86. Although the Court specifically inquired as to whether the Petitioner had been informed of the requirement that Petitioner register as a sex offender, the record does not include any instructions from the bench concerning GPS

electronic monitoring. While there is a vague reference to Petitioner having had registration "and the other requirements of this statute" explained to him, nowhere in this record was Petitioner expressly advised of the GPS electronic monitoring requirement. As this Court is aware, there are other requirements under this statute other than GPS electronic monitoring and therefore, further discussions with Petitioner concerning some of those terms does not necessarily guarantee he was thoroughly advised concerning the mandatory GPS electronic monitoring provision. App. p. 9, ll. 19-23. Petitioner, therefore, asserts that he relied upon the accuracy of his sentencing sheet and had no reason to question its content at any time prior to his notice that the provision was being applied to him.

At the evidentiary hearing held on Petitioner's current Applicant, Judge Perry H. Gravely, presiding circuit court judge, noted that the State's Motion to Dismiss had been denied by Order of the Honorable J. Mark Hayes, II, dated January 26, 2016. Judge Gravely announced his interpretation of that order on the record, including his view that the Petitioner's current Application was before him for a hearing on the issues raised. The State in fact acknowledged that the State's Motion to Dismiss had been resolved by the Order issued by Judge Hayes. App. p. 94, l. 24- p. 99, l. 18. Respondent raises a question concerning the date of the SCDC documents which put Petitioner on notice that he would be subject to GPS electronic monitoring. Return, p. 6, fn. 2. The SCDC records before this Honorable Court reveal the following. On October 24, 2008, Petitioner received notice that a detainer had been placed on him due to GPS monitoring offense. App. p. 118. On September 2, 2008, Petitioner inquired as to why he had not gone up for parole and why he had a detainer on him for GPS monitoring when his sentencing sheet did not order it. Although Respondent is correct that the inquiry was made on September 2, 2008, the document clearly reflects that the response to his question was not written until October 10, 2008. The document

does not reflect when Petitioner received this answer to his question. App. p. 54. We also know that Petitioner received an additional notice of this detainer on October 24, 2008. App. p. 118. The inquiry made by Petitioner in September clearly evidences Petitioner's belief, based upon his sentencing order, that the GPS monitoring detainer had been put on him in error. It is highly unlikely that Petitioner got the response written on October 10, 2008 that same date. Nevertheless, even if he did, this PCR Application would be timely filed on October 9, 2009, the date on which this Application was filed. App. p. 28 and App. p. 119.

Petitioner's application was timely. *See also, Robertson v. State*, 418 S.C 505, 795 S.E.2d 29 (S.Ct. filed December 14, 2016) wherein the PCR Application was filed within one year of the Applicant discovering that his previous PCR Counsel was not qualified to represent him pursuant to S.C. Code § 17-27-160(B). In so ruling, this Honorable Court found it, "unreasonable to think that an indigent PCR Applicant, who relies on the State to appoint qualified counsel would have the knowledge to question counsel's qualifications at the outset of the proceeding. Although Petitioner is intelligent, he was a Youth Minister prior to the charge before the Court and had no background in the law. It is, therefore, not reasonable to think he would question a Sentencing Order signed by a circuit court judge. As in *Robertson*, Petitioner acted to address the problem with his case once he had reason to do so. Furthermore, the dates alleged for Petitioner's crime in an indictment which gave an extremely broad time frame for the offense, literally straddled the effective date of the legislation in question. It is unreasonable to expect a young minister to have understood the intricacies of the statute in question. Contrary to the assertions of Respondent the language of § 23-3-540(A) is far from plain. The statutory language cited by Respondent is not as clear as the State asserts. For example, virtually all South Carolina sentencing provisions state that, "upon conviction", the offender must be punished as provided by the particular sentencing statute. *See, by*

way of example, § 44-53-370(b)(1), § 16-23-220, §16-11-360. Notwithstanding such language, the operative date for determining punishment is the date of the offense unless the newer provision is more lenient. *State v. Varner*, 310 S.C. at 264, 423 S.E.2d at 133 (S. Ct. 1992). Likewise, it is totally unreasonable to expect a defendant to know that a provision would apply to him, even taking the offense date to be controlling, where the overly broad time frame alleged includes dates when the statute would apply and many where it would not.

II.

Ineffective Assistance of Counsel

Respondent's position, as adopted by the circuit court in the Order of Dismissal, is that the requirement of GPS electronic monitoring is tied to the date of conviction or plea. As demonstrated above, the statute in question is not as unambiguous as Respondent asserts. Trial Counsel certainly should have been astute enough to observe that the State was alleging an unusually broad time from the alleged offense which conveniently placed Petitioner's crime as having taken place either before, or after, the effective date of the legislation. Petitioner has demonstrated that the Investigator in Petitioner's case admitted that, based on everything their investigation yielded, ***"the date that probably most accurately reflects the incident would be August 5, of 2005."*** He confirmed that based on what he had, he did not believe anything occurred after that date. Despite this fact, he put August, 2006 as the end date in the arrest warrant. Petitioner most respectfully asks this Honorable Court to question whether a sentence of incarceration would be affirmed if it reflected a mandatory minimum that did not go into effect until nearly a year after the probable date of the offense. In this case, § 23-3-540 became effective on July 1, 2006, nearly eleven months after the most accurate date for the Petitioner's offense. App. p. 159, l. 1- p. 160, l. 11.

Finally, Respondent argues that Petitioner's argument concerning his exposure to mandatory GPS electronic monitoring is an *Ex Post Facto* claim which does not give rise to a cognizable PCR claim. This approach to Petitioner's true claim, overlooks the actual claim involved in this case; that Plea Counsel was ineffective for failing to challenge the two year and seven month time frame alleged as overly broad, in conflict with all known evidence in the case, and calculated to expose Petitioner to a burdensome and expensive monitoring requirement for which there was no factual basis for applying to Petitioner.

CONCLUSION

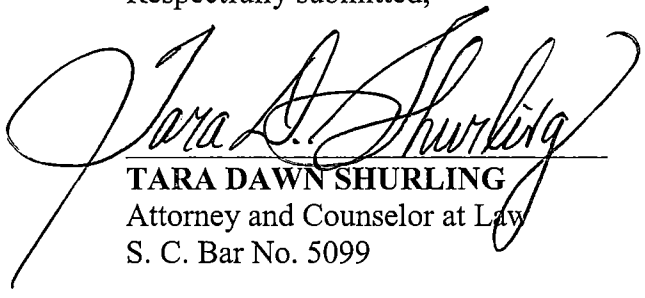
For the reasons set forth herein, as well as the arguments and authorities presented in his Petition for Writ of Certiorari, asserts that the lower court erred in denying him the relief requested. He argues that his current application was timely and should have been granted.

As noted by Respondent, Petitioner has not alleged that he would not have pleaded had he been aware of the monitoring requirement. In his pleadings, he did not seek vacation of his judgment and senesce as his primary request for relief, but rather seeks a correction of his sentence in a manner consistent with the fact that he was not ordered by his plea judge to be subject to this monitoring requirement, and his Plea Counsel exposed him to this requirement by his deficient representation. He would note that his sentencing judge may have declined to impose the monitoring requirement based upon the fact that the time frame chosen by the prosecution and law enforcement was unreasonable. Sadly, Judge Johnson is now deceased and can not be asked to clarify his intent.

Alternatively, Petitioner has asked for resentencing or a new trial. If this Honorable Court finds a new trial is not an appropriate remedy in light of Petitioner's failure to assert that

he would not have pleaded, guilty but for Plea Counsel's deficient representation, Petitioner would assert, on the facts of this case, that this factor would not preclude the primary relief sought; amendment of his sentence or a new trial. App. p. 50-51.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 12th day of March, 2018.

STATE OF SOUTH CAROLINA
In The Supreme Court

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STATE OF SOUTH CAROLINA,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Reply to State's Return to Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, W. Joseph Maye, Assistant Attorney General, this 12th day of March, 2018, by mailing one (1) copy in a stamped envelope properly addressed to:

W. Joseph Maye, Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

Tara D. Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 12th day of March, 2018.

Suzanne Graham

Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF

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S.C. SUPREME COURT

March 12, 2018

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Brantley W. Clarke v. State of South Carolina
Appellate Case No. 2017-000841.

Dear Mr. Shearouse:

My Reply to the Respondent's Return in the above captioned matter was due March 8, 2018. That evening I mailed a request for an additional four (4) day extension of time in which to submit that Rely. At that time, due to the hour, I had been unable to discuss that request with opposing counsel. Since that time, I have discussed this request with W. Joseph Maye, Assistant Attorney General, and he has graciously consented to this request. In hopes that the Court will grant my previous request, I have attached my completed Reply for filing. I thank you for your time and remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: W. Joseph Maye, Assistant Attorney General (w/enclosure)