

FILED COMMON PLEAS  
 STATE OF SOUTH CAROLINA EIGHTH JUDICIAL CIRCUIT THE COURT OF COMMON PLEAS  
 COUNTY OF GREENWOOD GREENWOOD, S.C. EIGHTH JUDICIAL CIRCUIT

2012 FEB 27 ) AM 10 29

Bobby Joe Lewis, #286070, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

2009-CP-24-0111

**RECEIVED**  
 APR 16 2012  
 S.C. SUPREME COURT

FINAL ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 26, 2009. The Respondent (the State) made its Return and Motion to Dismiss on January 10, 2012, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated January 12, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein is an Affidavit of Service dated February 1, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document titled "Applicants Objections to Conditional Order of Dismissal, Motion to Appoint Counsel, and Motion for evidentiary Hearing," the Applicant argues his newly discovered evidence, in the form of the South Carolina Supreme Court case State v. Sowell, Op. No. 26199 (filed on August 14, 2006), entitles him a new evidentiary hearing. This Court has reviewed the

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ATTEST A TRUE COPY  
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 CLERK OF COURT  
 GREENWOOD COUNTY  
 S. C.



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Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. The Applicant claims he filed his second application for PCR within a year of his discovery of the aforementioned case. The Applicant analysis of newly discovered evidence is in error. Section 17-27-45 (C) states

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or **after the date when the facts could have been ascertained by the exercise of reasonable diligence.** (Emphasis added)

The Applicant claims he filed within a year of becoming apprised of this case, but the statute clearly states he must have filed his Application within a year of when the new facts could have been ascertained by the exercise of reasonable diligence. State v. Sowell was filed on August 14, 2006. Therefore, the Applicant would have to file his PCR application on or before August 14, 2007. This Application was filed on January 26, 2009, which is almost a year and a half after the Sowell case was available as a public record. Additionally, the South Carolina Supreme Court found in the Applicant's Counsel not to be in contempt of the circuit court's order.

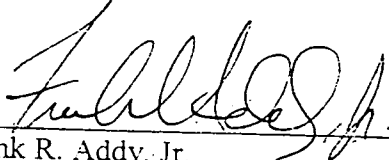
Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203,

SCACR. The Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 24<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Frank R. Addy, Jr.  
Chief Administrative Judge  
Eighth Judicial Circuit

Greenville, South Carolina.



SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Code Section 15-9-500, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated L.T. McCormick (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA ) AFFIDAVIT OF PERSONAL SERVICE  
COUNTY OF GREENWOOD )

On this 1<sup>st</sup> day of February, 2012, I served the signed Conditional Order of Dismissal on Inmate Bobby Joe Lewis, SCDC Inmate No. 286070, by delivering personally and leaving a copy of the same at McCormick Correctional Institution, McCormick South Carolina. Deponent is not a party to this action.

s/ L.T. McCormick  
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 01 day of February, 2012  
J. Franklin (L.S.)

Notary Public for South Carolina

My Commission Expires: 12.16.2019

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, McCormick Correctional Institution, McCormick, McCormick County, South Carolina, this 1<sup>st</sup> day of February, 2012.

s/ Bobby Joe Lewis  
Inmate Signature  
SCDC No. 286070

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Lewis, Op. No. 2004-UP-290 (S.C. Ct. App. filed May 4, 2004). The Remittitur was sent on June 7, 2004.

**2005-CP-24-476**

The Applicant filed his first PCR application on April 12, 2005. An evidentiary hearing was convened at the Greenwood County Courthouse on August 15, 2006. The Applicant was present at the hearing and was represented by Jason Sturkie, Esquire. On February 7, 2007, the Honorable J. Cordell Maddox, Jr. denied and dismissed the application by written Order.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court denied certiorari on June 12, 2008. The Remittitur was sent on July 1, 2008.

In his current application for PCR, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Newly Discovered Evidence"
3. "Due Process of Law"
4. "Deprived of Fair Representation"

Incorporated herein are the Clerk of Court records, the South Carolina Department of Corrections' records, the Applicant's appellate and PCR records by reference, and the Applicant's PCR applications which were merged by Order dated August 10, 2009. . The Respondent reserves the right to amend this information upon receipt of any relevant materials.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding Applicant has taken to secure relief, may not be the basis for a subsequent Application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended Application.

Successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on the Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. The Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

This Court additionally finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on July 26, 2002. The Remittitur from the Applicant's unsuccessful appeal was issued on June 7, 2004. The Applicant was therefore required to file his application by June 8, 2005. This Application was filed on January 26, 2009, which was well after the statutory filing period had expired.

A motion for summary judgement may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law."

This Court further finds the Applicant cannot satisfy the requirements of the Lanier test for newly discovered evidence. Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d 456 (S.C. App. 2005).

A party making a motion for a new trial or for relief from judgment based on newly-discovered evidence must show that the evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. The Applicant has failed to set forth with any specificity what the alleged newly discovered evidence is that

would entitle him to a successive PCR action. Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, for being successive, and for not properly alleging "newly discovered evidence."

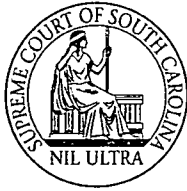
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Greenwood County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: J. Rutledge Johnson, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
FRANK R. ADDY, JR.  
Chief Administrative Judge  
Eighth Judicial Circuit

\_\_\_\_\_, South Carolina



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499

TO: Bobby Joe Lewis SCDC# 286070  
DATE: 4-2-12

We are in receipt of your notice of appeal. It will be necessary for you to provide this office with the following required documents within **ten (10)** days of the date of this notice. Failure to provide the requested documents may result in dismissal of this matter.

\_\_\_\_\_ proof of service showing notice of appeal was served on opposing counsel,  
(Attorney General's Office)

\_\_\_\_\_ a copy of the final order of dismissal

\_\_\_\_\_ a copy of the conditional order of dismissal (if one was issued)

a copy of the conditional order of dismissal dated 1-12-2012

2009-CP-11-0111  
all orders on appeal.

Please return this sheet with the requested documents. Thank you!

RECEIVED

APR 11 2012

MAIL ROOM

Bobbi Jo Lewis  
286070  
MCT  
386 Redempt Way SC  
M5 COMMUNIT SC  
29839

SC SUPREME COURT  
PO BOX 11330  
Columbia SC  
29201

HON. DANIEL SHEAROUSE,  
S,C, SUPREME COURT  
P.O. BOX 11330  
COLUMBIA, S.C. @(@)!

**RECEIVED**

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**S.C. SUPREME COURT**

BOBBY JOE LEWIS V. STATE

GREENWOOD COUNTY

HON. FRANK R. ADDY JR. (JUDGE)

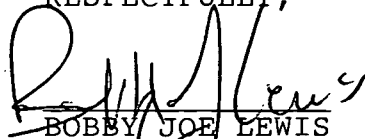
PCR 09 CP 11-0111

DEAR SIR,

PLEASE FIND ENCLOSED A NOTICE OF INTENT TO APPEAL AND A RULE  
243 PETITION TO PROCEED ON THE APPEAL.

A TRUE COPY HAS BEEN SERVED ON OPPOSING COUNSEL.

RESPECTFULLY,



BOBBY JOE LEWIS

MCCORMICK C.I..

386 REDEMPTION WAY

MCCORMICK, S.C. 29899

CC: ATTORNEY GENERAL

IN THE SUPREME COURT  
FOR STATE OF SOUTH CAROLINA

---

HON. FRANK R. ADDY, JR. JUDGE  
GREENWOOD COMMON PLEAS  
PCR 09 CP 11 0111

---

BOBBY JOE LEWIS.....PETITIONER

V.

STATE.....RESPONDENT

---

NOTICE OF INTENT TO APPEAL  
AND  
RULE 243 PETITION TO ALLOW APPELLATE REVIEW  
SCRAP 243 (C)

---

THE PRO SE PETITIONER HEREBY FILES HIS NOTICE OF INTENT TO APPEAL  
THE SUMMARY DISMISSAL OF HIS SECOND POST-CONVICTION APPLICATION--  
THAT WAS DISMISSED BASED UPON STATUTE OF LIMITATIONS 17-27-10 (A)  
SC CODE OF LAWS, 'THAT THE PCR SHOULD HAVE BEEN FILED WITHIN ONE  
YEAR FROM STATE V. SOWELL, (OP#26199 AUGUST 14, 2006) DECISION.

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MAR 30 2012

**S.C. SUPREME COURT**

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THE PETITIONER HAS SET FORTH THE REQUIRED AFFIDAVIT AS TO THE DATE OF HIS DISCOVERY OF THE EXISTENCE OF STATE V. SOWELL, DECISION, THAT SET FORTH FACTS TO CREATE A "INHERENT CONFLICT OF INTEREST" WITH COUNSEL WHO REPRESENTED A TESTIFYING CO-DEFENDANT ~~INTEREST~~ WHO HAD PAID FOR DEFENDANT'S (PETITIONER'S) LAWYER, THEN LEAKED MATERIAL TO CO-CONSPIRATOR.

TO PARAPHRASE THIS MOST BLATANT ACTS OF FAILURE TO DISCLOSE TO THE PETITIONER (WHO HAD BEEN INDICTED BY THE STATEWIDE GRAND JURY ALONG WITH CO-CONSPIRATOR KENNY CURTIS FOR CONSPIRING TO TRAFFIC MORE THAN 400 GRAMS METH.) THAT HIS COUNSEL KEN SOWELL (ESQ.) LEAKED INFORMATION TO GENE GORE WHO THEN LEAKED INFORMATION TO KENNY CURTIS, A CO-CONSPIRATOR. HAD HE KNOWN OF THIS, HE WOULD HAVE NOT WAIVED HIS RIGHT TO CONFLICT FREE COUNSEL.

THESE RELEVANT FACTS WERE WITHHELD FROM PETITIONER AT THE TIME THE PURPORTED WAIVER OF CONFLICT WAS GIVEN AND WERE NOT KNOWN TO HIM AT THE TIME OF FIRST PCR HEARING, AND FIRST CAME TO BE KNOWN TO HIM WITHIN ONE YEAR FROM THE DATE OF EXECUTION OF THE ATTACHED AFFIDAVIT (ATTACHED TO THE OBJECTION TO CONDITIONAL ORDER) DATED JANUARY 30, 2012, AS REQUIRED BY 17-27-45 (C)

THIS IS BASED UPON SCDC REFUSAL TO UPDATE S.E. 2d. VOLUMES SINCE 2003. THE SOWELL DECISION WAS NOT PROVIDED TO SCDC PRISONERS, AND NOT KNOWN TO PETITIONER.

SECONDLY, THESE FACTS/HEARING FOR SOWELL'S CONTEMPT WAS WITHHELD FROM PETITIONER EVEN THOUGH THE CONTEMPT HEARING WAS HELD DURING THE TRIAL PROCEEDINGS.

IT IS PETITIONER'S POSITION HE SHOULD HAVE BEEN NOTIFIED OF

THESE FACTS IN ORDER TO MAKE A "KNOWING AND INTELLIGENT DECISION TO WAIVE THE CONFLICT OF INTEREST." AND CLEARLY SUCH FACTS WERE RELEVANT TO PETITIONER'S DECISION TO WAIVE CONFLICT OF INTEREST, U.S. V. OLANO 113 S.CT. 1770, 1777 (1993).

PETITIONER HAS ATTACHED THE OBJECTIONS TO THE CONDITIONAL ORDER WITH THE EXHIBITS TO INCLUDE SOWELL DECISION, PETITIONER'S AFFIDAVIT AS TO THE DATE OF DISCOVERY AS WELL AS THE JOHNSON BRIEF THAT DETAILS CONFLICT OF INTEREST PRIOR TO DISCOVERY OF SOWELL DECISION, BY PETITIONER.

PETITIONER'S COUNSEL, THE COURT AND THE SOLICITOR FAILED TO EVEN NOTIFY PETITIONER OF THE EXISTENCE OF SOWELL CONTEMPT PROCEEDINGS. THIS CREATES A MATERIAL FACTUAL DISPUTE THAT PRECLUDES SUMMARY JUDGMENT PUR. TO LEAMON V, STATE 415 S.E. 2d. 415 (2004) AND SHOWS UNETHICAL CONDUCT OF COUNSEL AND THE COURT AND PETITIONERS UNDERLYING FACTS AND LEGAL CONTENTIONS IF TRUE WOULD ENTITLE THE PETITIONER TO RELIEF PUR. TO UNITED STATES V. SCOTT 980 F. SUPP. 165 (EDVA 1997) COUNSEL WHO WAS RETAINED FOR DEFENDANT BY OTHER MEMBERS OF THE DRUG CONSPIRACY AND HAD TAKEN UP REPRESENTATION OF A SECOND INDIVIDUAL INVOLVED IN THE CONSPIRACY WHICH CREATED A ACTUAL AND POTENTIAL CONFLICT OF INTEREST THE COURT CONCLUDED COUNSEL COULD NOT REPRESENT ANY OF THE DEFENDANTS, CITING MICKENS V. TAYLOR 122 S. CT. 1237 (2002).

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CLEARLY IN THE PROCEDURAL POSTURE OF THIS CASE, THE ATTORNEY GENERAL WHO HAS BEEN AUTHORIZED TO MAKE THE DECISION WHEN THE APPOINTMENT OF COUNSEL IS REQUIRED ERRED IN FAILING TO APPOINT COUNSEL.<sup>1</sup>

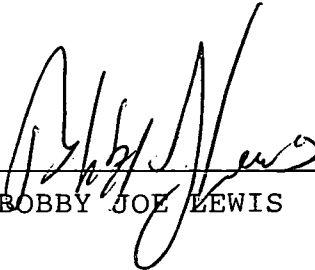
<sup>1</sup> PETITIONER ASSERTS THAT THE COURT SHOULD HAVE APPOINTED COUNSEL PUR. SCACR 71.1.

THE APPOINTMENT OF COUNSEL AND A HEARING ON THE MOTION TO DISMISS WOULD HAVE REQUIRED AN EVIDENTIARY HEARING AS A "MATERIAL FACTUAL DISPUTE EXISTS WHERE IF PETITIONER'S ALLEGATIONS ARE FOUND TRUE THEN HE WOULD BE ENTITLED TO RELIEF." LEAMON V. STATE. SUPRA.

CONCLUSION

THIS CASE SHOULD BE REMANDED TO COURT OF COMMON PLEAS WITH ORDER OF APPOINTMENT OF COUNSEL. THE PETITIONER SHOULD BE ALLOWED TO PROCEED PUR. RULE 243 SCACR.

RESPECTFULLY,

S/   
BOBBY JOE LEWIS



ALAN WILSON  
ATTORNEY GENERAL

**RECEIVED**

MAR 05 2012

GENERAL COUNSEL

*MCCI*

March 1, 2012

Christina Kellett  
Department of Corrections  
4444 Broad River Road  
Columbia SC

Re: Bobby J. Lewis v. State of South Carolina  
2009-CP-24-0111

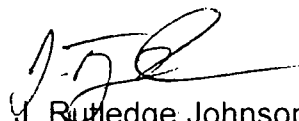
*286070*

Dear Ms. Kellett:

Enclosed please find a Final Order on the above referenced matter. Please serve a copy on the inmate and return the enclosed affidavit of service to me.

Thank you for your cooperation in this matter and if you have any questions, please feel free to contact me.

Sincerely,

  
J. Rutledge Johnson  
Assistant Attorney General

JRJ:cey  
Enclosure

R/S

FILED COMMON PLEAS  
STATE OF SOUTH CAROLINA EIGHTH JUDICIAL CIRCUIT THE COURT OF COMMON PLEAS  
COUNTY OF GREENWOOD GREENWOOD, S.C. EIGHTH JUDICIAL CIRCUIT

2012 FEB 27 ) AM 10 29

Bobby Joe Lewis, #286070, ) 2009-CP-24-0111

Applicant, )

v. )

**FINAL ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

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CCGP AND GS  
GREENWOOD COUNTY  
S. C.

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The Applicant claims he filed within a year of becoming apprised of this case, but the statute clearly states he must have filed his Application within a year of when the new facts could have been ascertained by the exercise of reasonable diligence. State v. Sowell was filed on August 14, 2006. Therefore, the Applicant would have to file his PCR application on or before August 14, 2007. This Application was filed on January 26, 2009, which is almost a year and a half after the Sowell case was available as a public record. Additionally, the South Carolina Supreme Court found in the Applicant's Counsel not to be in contempt of the circuit court's order.

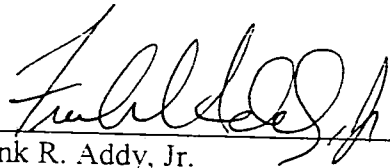
Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203,

SCACR. The Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 24<sup>th</sup> day of February, 2012.



Frank R. Addy, Jr.  
Chief Administrative Judge  
Eighth Judicial Circuit

Greenville, South Carolina.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Code Section 15-9-500, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated L.T. McCurry (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA ) AFFIDAVIT OF PERSONAL SERVICE  
COUNTY OF GREENWOOD )

On this 1<sup>st</sup> day of February, 2012, I served the signed Conditional Order of Dismissal on Inmate Bobby Joe Lewis, SCDC Inmate No. 286070, by delivering personally and leaving a copy of the same at McCormick Correctional Institution, McCormick South Carolina. Deponent is not a party to this action.

s/ L.T. McCurry  
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 01 day of February, 2012  
J. Franklem (L.S.)

Notary Public for South Carolina

My Commission Expires: 12.16.2019

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, McCormick Correctional Institution, McCormick, McCormick County, South Carolina, this 1<sup>st</sup> day of February, 2012.

s/ Bobby Joe Lewis  
Inmate Signature  
SCDC No. 286070

EVIDENT (1)

CLERK OF COURT OF  
GREENWOOD COUNY  
~~MCCORMICK SC 29899~~ COURT HOUSE  
GREENWOOD SC 29644

Bobby Joe Lewis 286070  
McCORMICK C.I.  
386 Redemption Way  
McCORMICK SC 29899

RE: Bobby Joe Lewis v. STATE. 2009-CP-24-0111  
janurary 30, 2012

Dear Clerk of Court,

Please find enclosed Applicants Objections to  
CONDITIONAL Order of Dismssal , MOTION TO APPOINT COUSEL , and  
motion for evidentiary Hearing. Along with below proof of service  
on opposing counsel.

Please file the same and send me a clock stamp copy.

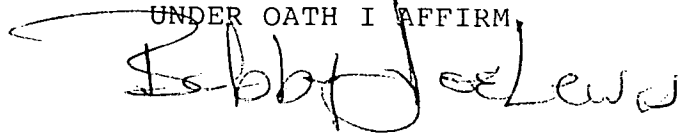
RESPECTFULLY SUBMITTED



PROOF OF SERVICE

I, Bobby Joe Lewis do hereby affirm Imailed a true  
copy to J, Rutledge Johnson P.O.BOX 11549 Columbia S.C. 29211  
this 30 DAY OF JANURARY 2012. By US MAIL POSTAGE PAID.

UNDER OATH I AFFIRM,



STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

BOBBY JOE LEWIS,

APPLICANT,

VS.

STATE OF SOUTH CAROLINA,

RESPONDENTS

CA. NO. 2009-CP-24-0111

IN THE COURT OF COMMON  
PLEAS

OBJECTIONS TO CONDITIONAL  
ORDER OF DISMISSAL;

MOTION TO APPOINT COUNSEL;

MOTION FOR AN EVIDENTIARY  
HEARING

THE PRO SE APPLICANT WOULD RESPECTFULLY MOVE THIS HONORABLE COURT TO NOTE THE OBJECTIONS OF THE APPLICANT, AND CONSTRUE THEM LIBERALLY FOR CONTENT, AND APPOINT COUNSEL TO FULLY BRIEF AND ARGUE MERITORIOUS ISSUES PARTIALLY FORMULATED HEREIN BY THE PRO SE APPLICANT AND GRANT A FULL IN-COURT HEARING ON THE STATE'S MOTION TO DISMISS, AS THE STATE'S BLATANT CONTINUAL REFUSAL TO PROVIDE THE BRADY/RULE 5 MATERIAL, TO INCLUDE BUT NOT LIMITED TO, SHERIFF OF GREENWOOD'S INVESTIGATIVE FILES, AND THE SAME CANNOT BE OBTAINED WITHOUT THE GUIDING HAND OF COUNSEL!! THIS COURT SHOULD, IN ITS DISCRETION, APPOINT COUNSEL.

APPLICANT'S CORE ALLEGATION IS "PROSECUTORIAL MISCONDUCT", BY AND THRU, WITHHOLDING OF FAVORABLE, MATERIAL EVIDENCE, RULE 5/ & BRADY MATERIAL. THAT CANNOT BE PROVEN WITHOUT ACCESS TO THE MATERIAL THAT STATE (AGAIN,) REFUSES TO DISCLOSE.

BANKS V. DRETKE, 125 SCT 1256 (2005) HAS HELD "IT IS UNTENABLE IN A SYSTEM BOUND TO AFFORD THE DEFENDANT DUE PROCESS TO DE-

BJC

CLARE A RULE THAT A PROSECUTOR MAY HIDE AND THE DEFENDANT MUST SEEK". THIS CASE BEARS STRIKING SIMILARITIES W/ BANKS V. PRETKE, AS STATE CONTINUES TO "HIDE" THE MATERIAL AND IMPEACHMENT EVIDENCE." THUS, THE NEED FOR COUNSEL AND A HEARING ON THE MOTION TO DISMISS. As well as further development of the factual record regarding the CONFLICT OF INTREST issue based on the NEWLY DISCOVERED EVIDENCE pur. 17-27-10 .

FACTUAL HISTORY / RELEVANT FACTS

(1) THE APPLICANT WAS INDICTED BY STATE WIDE GRAND JURY JUNE 2002 FOR CONSPIRING TO TRAFFICK IN MORE THAN 400 GRAMS OF CRANK (METH) AND TRAFFICKING MORE THAN 10 GRAMS OF CRANK (METH) ON JULY 26, 2002. A JURY FOUND DEFENDANT GUILTY--THE HON. W. SANDERS JR. SENTENCED HIM TO 25 YEARS AND 10 YEARS CONCURRENT; DIRECT APPEAL AFFIRMED MAY 4, 2004.

APPLICANT FILED A FIRST PCR<sup>(1)</sup> IN APRIL 12, 2005, IN WHICH SEVERAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE RAISED AND RULED UPON BY THE PCR COURT AS WELL AS A CLAIM OF CONFLICT OF INTEREST WITH TRIAL COUNSEL WHO ACCEPTED PAYMENT FROM TESTIFYING CO-DEFENDANT WHOM HE ALSO REPRESENTED, KENNY CURTIS. THAT PCR WAS DENIED AND CERTIORARI WAS DENIED.

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FN (1) HOWEVER, APPLICANT ASSERTS HE COULD NOT GET HIS "FULL BITE AT THE APPLE" AT 1ST PCR AS STATE HAS REFUSED TO TURN OVER THE RULE 5/ BRADY MATERIAL.

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INSTANT PCR

THE APPLICANT HAS FILED A SECOND P.C.R. BASED UPON "MATERIAL

B52

EVIDENCE DISCOVERED WITHIN THE PAST YEAR". 17-27-45 (C) THAT SHOWS A VIOLATION OF APPLICANT'S SIXTH AMENDMENT RIGHT TO COUNSEL-- AND ESTABLISHES A "CONFLICT OF INTEREST" TO REVERSE THE CONVICTION AND ESTABLISHES A MATERIAL FACT THAT WOULD HAVE NEGATED THE SUPPOSED WAIVER OF CONFLICT OF INTEREST.

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AT PAGE 1752 THE TRIAL COURT HELD THAT APPLICANT WAIVED HIS RIGHT TO "CONFLICT FREE" COUNSEL IN THAT COUNSEL ALSO REPRESENTED A TESTIFYING CO-DEFENDANT AND HIS (ALLEGED) INVESTIGATOR KENNY CURTIS AND GENE GORE, RESPECTIVELY. DEFENDANT DISCOVERED THIS AT THE TRIAL.

P. 1751 LINE 17, AT 1753 L. 15-17 THE COURT FINDS THE WAIVER "KNOWING AND INTELLIGENTLY MADE."

HOWEVER, THE RECORD WAS EXPANDED AFTER THAT RULING. CLEARLY RELEVANT TO THE FACTS NEEDED TO BE KNOWN BY DEFENDANT TO EXECUTE A PROPER WAIVER OF CONFLICT.

APPLICANT ASSERTS WITHIN THE PAST YEAR PUR. TO 17-27-45 (C) HE BECAME AWARE OF THE DECISION OF STATE V. SOWELL OP#26199 (FILED AUG. 14, 2006) IN WHICH SOWELL, WHO WAS DEFENDANT'S COUNSEL, WAS FOUND IN CONTEMPT OF COURT--DURING THE TRIAL--WITHOUT THE DEFENDANT BEING PROPERLY NOTIFIED--OF THE CONTEMPT HEARING.

DEFENDANT ASSERTS FIRST THAT A CONTEMPT CITATION ON HIS TRIAL COUNSEL FOR ACTIONS RELATED TO THE DEFENDANT'S CASE WAS A "CRITICAL STAGE OF THE PROCEEDINGS" THAT DEFENDANT HAD A CONSTITUTIONAL RIGHT TO BE PRESENT, AND TO BE NOTIFIED THEREOF.

THE DISCOVERY OF STATE V. SOWELL LED TO HIS KNOWLEDGE OF

FACTS HE WAS NOT AWARE OF AT THE TIME OF THE WAIVER, SPECIFICALLY THAT HIS COUNSEL (SOWELL) LEAKED INFORMATION TO GENE GORE WHO WAS NOT AN INVESTIGATOR BUT RATHER A CLIENT WHO WAS ACTIVELY LEAKING ATTORNEY-CLIENT PRIVILEGED INFORMATION TO THE STATE WITNESS KENNY CURTIS WHO IS AN ALLEGED CO-CONSPIRATOR.

COUNSEL DID NOT ADVISE DEFENDANT OF THESE OPERATIVE FACTS, AND HAD DEFENDANT KNOWN OF THESE FACTS HE WOULD NOT HAVE WAIVED THE CONFLICT, HAD COURT NOTIFIED DEFENDANT OF CONTEMPT CITATION.

STATE V. SOWELL WAS MADE KNOWN TO THIS DEFENDANT WITHIN ONE YEAR OF THE FILING OF THIS PCR PUR. 17-27-45(C).

THUS, THERE IS A "MATERIAL FACTUAL DISPUTE" THAT WARRANTS AN EVIDENTIARY HEARING. LEAMON V. STATE 611 SE 2d. 415 (2004).

THIS NEWLY DISCOVERED INFORMATION MEETS THE REQUIREMENTS OF 17-27-45 (C) ON ISSUES OF

(1) TRIAL COUNSEL ACTED TO DEPRIVE DEFENDANT TO BE PRESENT AT A "CRITICAL STAGE" OF THE PROCEEDINGS, (NOTIFICATION OF CONTEMPT CITATION AND THE FACTS RELEVANT THERETO.)

(2) TRIAL COUNSEL WITHHELD INFORMATION FROM HIS CLIENT THAT MADE THE "WAIVER OF CONFLICT OF INTEREST" W/ SOWELL INVOLUNTARY AS "OPERATIVE FACTS" AS TO SOWELL LEAKING ATTORNEY-CLIENT MATERIAL TO GORE AND TO KENNY CURTIS EVENTUALLY WERE NOT KNOWN TO DEFENDANT. HAD HE KNOWN HE WOULD NOT HAVE WAIVED CONFLICT.<sup>2</sup>

---

FN 2 INTER ALIA, THE TRIAL COURT KNEW OF THESE FACTS NOT PRIVY TO DEFENDANT. COURT SHOULD HAVE REOPENED THE RECORD, (COUNSEL INEFFECTIVE FOR NOT DOING SO).

257

\* LAW \* CONFLICT \* \*

IN UNITED STATES V. SCOTT, 980 F. SUPP. 165 (E.D. VA 1997) COUNSEL WHO WAS RETAINED FOR DEFENDANT IN DRUG CONSPIRACY CASE BY OTHER MEMBERS OF THE CONSPIRACY AND HAD TAKEN UP REPRESENTATION OF A SECOND INDIVIDUAL INVOLVED IN THE CONSPIRACY WHICH CREATED A ACTUAL AND POTENTIAL CONFLICT AND COURT CONCLUDED THAT COUNSEL COULD NOT REPRESENT ANYONE IN THAT CONSPIRACY.

THIS CASE IS DIRECTLY ON POINT WITH DEFENDANTS. THIS CASE CLEARLY REQUIRES THE RECORD TO BE EXPANDED ON THE CONFLICT OF INTEREST ISSUE. IN WOOD V. GEORGIA 101 S.CT. 1097 (1981) "CONFLICT OF INTEREST ISSUE REQUIRED EVIDENTIARY HEARING, WHERE THIRD PARTY RETAINED COUNSEL." MICKENS V. TAYLOR, 122 S.CT. 1237 (2002) (CONFLICT OF INTEREST).

II. CRITICAL STAGE OF THE PROCEEDINGS!

APPLICANT ASSERTS "THE CONTEMPT HEARING WAS A CRITICAL STAGE OF THE PROCEEDINGS THAT HE WAS EXCLUDED FROM. U.S. CONSTITUTION, FIFTH AND FOURTEENTH AMENDMENTS.

\*(AS SET FORTH HEREIN).

III. PROSECUTORIAL MISCONDUCT

APPLICANT ALLEGES THAT THE STATE HAS REFUSED TO DISCLOSE EVIDENCE FAVORABLE TO THE ACCUSED, MATERIAL TO GUILT OR INNOCENCE. KYLES V. WHITLEY 115 S.CT. 1555 (1995).

\*NOTE: THE STATE HAS IGNORED ALL DISCOVERY REQUESTS/ SUCH REQUESTS HAVE BEEN MADE PART OF THE RECORD.

BJJ

EVIDENTIARY HEARING

APPOINTMENT OF COUNSEL

APPLICANT ASSERTS THAT MATERIAL FACTUAL DISPUTE EXISTS AS TO WHETHER APPLICANT DISCOVERED FOR THE FIRST TIME WITHIN PAST YEAR PUR. 17-27-45 (C). (A): SOWELL HAD BEEN FOUND IN CONTEMPT OF COURT, AND;

(B): WHETHER APPLICANT WOULD HAVE WAIVED THE CONFLICT HAD HE KNOWN COUNSEL LEAKED MATERIAL TO GORE ENDED W/ KENNY CURTIS BEING APPRISED OF ATTY/ CLIENT MATERIAL INTER ALIA.

SINCE NEWLY DISCOVERED FACTS RE. TO STATE V. SOWELL, COUNSEL MUST BE APPOINTED TO MEET ENDS OF JUSTICE "AS NEW FACTS OR LEGAL DEVELOPMENTS WARRANTING RELITIGATION OF THE CLAIM". WILLIAMS V. LOCKHART, 862 F2d 155, 158 (8TH CIR 1988) (IN RE: TO CONFLICT OF INTEREST).

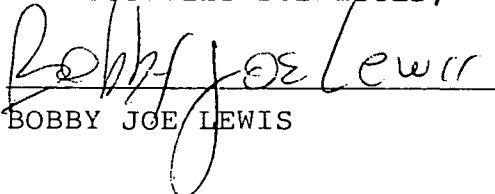
LIKewise, IN RE: THE BRADY CLAIMS COUNSEL MUST BE APPOINTED TO ASSIST IN GATHERING CRUCIAL BRADY MATERIAL.

CONCLUSION:

THE CONDITIONAL ORDER OF DISMISSAL SHOULD NOT BE SIGNED AND COURT SHOULD APPOINT COUNSEL AND CONDUCT A HEARING ON MOTION TO DISMISS.

DATE: 1-30-2012

RESPECTFULLY SUBMITTED,

  
BOBBY JOE LEWIS

BOBBY LEWIS V. STATE #09 CP 24 0111

GREENWOOD COMMON PLEAS (PCR)

AFFIDAVIT OF

BOBBY JOE LEWIS

I BOBBY JOE LEWIS BEING OF SOUND MIND, DO HEREBY MAKE THIS STATEMENT OF FACT SWORN TO BE TRUE AND CORRECT.

(1) AT THE TIME I WAIVED THE CONFLICT OF INTEREST WITH MY LAWYER KEN SOWELL (ESQ) I DID NOT KNOW OF THE FACT THE TRIAL COURT HAD CITED HIM FOR CONTEMPT OF COURT FOR LEAKING MATERIAL TO A PSEUDO-INVESTIGATOR GENE GORE (NOT AN INVESTIGATOR BUT A USED CAR SALESMAN AND CLIENT OF SOWELL) THAT ENDED UP IN KENNY CURTIS' POSSESSION OR KNOWLEDGE. HAD I KNOWN THESE SPECIFIC FACTS I WOULD NOT HAVE WAIVED THE CONFLICT.

(2) I CAME INTO KNOWLEDGE OF ST. V. SOWELL (2006) (WHICH IS NOT IN SCDC LIBRARY AS CASES STOP IN 2003) THROUGH MY FAMILY WITHIN ONE YEAR OF FILING OF PCR AND THESE NEW FACTS ARE THE BASIS OF PCR PUR. TO WILLIAMS V. LOCKHART, 862 F2d. 155, 158 (8TH 1998) 17-27-45 (C).

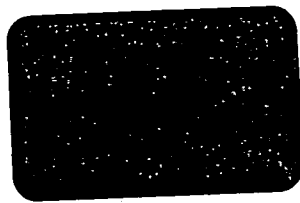
UNDER OATH I AFFIRM THIS

AS TRUE AND CORRECT.

*Bobby Joe Lewis*

1-30-2012

*(B)*



MEMORANDUM

TO: LEAP FROG / SLED CASE NO 2501-0311

FROM: <sup>PLP</sup> PHILIP L. PALMER, NG-OPERATIONAL INVESTIGATIVE SUPPORT

RE: FREQUENCY REPORT FOR (864)833-0550 (BOBBY JOE LEWIS).

---

Telephone tolls were received from BellSouth listed in the name of Bonnie S. Lewis. The following is a summary of all calls with known subscribers dialed from 846-833-0550.

(864) 833-0550  
 Bonnie S. Lewis  
 100 Beauregard ST  
 Clinton, SC 29325

<u># Dialed</u>	<u>Dialed Name</u>	<u>Date of Calls</u>	<u>Frequency</u>
864-354-3258	Kenneth Curtis Cell Phone	Jan 2001 thru Feb2002	+2 13
864-232-6403	Kenneth Curtis Home Phone	Jan 2001 thru Feb 2002	28 30

Skip Navigation

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

The State, Respondent,

v.

Kenneth E. Sowell, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenwood County  
Wyatt T. Saunders, Jr, Circuit Court Judge

Opinion No. 26199  
Heard May 3, 2006 – Filed August 14, 2006

REVERSED

Kenneth E. Sowell, of Anderson, pro se.

Attorney General Henry Dargan McMaster,  
Chief Deputy Attorney General John W.  
McIntosh, and State Grand Jury Chief  
Jennifer D. Evans, all of Columbia, for  
Respondent.

**JUSTICE WALLER:** We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Sowell, Op. No. 2005-UP-122 (Ct. App. filed Feb. 17, 2005). The Court of Appeals affirmed the circuit court's holding that Sowell was in contempt for releasing grand jury information to his private investigator. We reverse.

## FACTS

Sowell is an attorney who was hired to represent Bobby Joe Lewis, a criminal defendant who was indicted by the State Grand Jury for trafficking methamphetamine. On March 4, 2002, the circuit court issued a protective order pursuant to S.C. Code Ann. § 14-7-1720 (Supp. 2004), directing that any State Grand Jury material given to the defendants was being provided only for purposes of their trials, and that their attorneys were bound by the secrecy provisions of § 14-7-1720. [1]

Sowell hired a private investigator, Gene Gore, to look into the charges and to investigate how other witnesses would testify. According to Sowell, he had utilized Gore, who also worked as a used car salesman, numerous times in the past as a private investigator. Gore testified that he understood that he was acting as Sowell's agent, or a paralegal, while conducting his investigations.

Sowell gave Gore the Grand Jury file information forwarded to him from the Attorney General's office. At Sowell's contempt trial, the assistant solicitor questioned Gore as to whether, when Sowell left this information with him, "did he give you any instructions about what to do or anything about grand jury material, anything like that?" Gore responded negatively. However, when questioned by Sowell as to whether he was warned by Sowell not to discuss the contents of the file with anyone, Gore responded:

A. The best I can recall, you handed me that box and you said, "These are statements that have been taken from the people in this case. I want you to look through them and go investigate the ones you feel are pertinent to the upcoming case.

Q. And what did I tell you about disclosing the information from that file?

A. No, you told me to keep the box under lock and key at all times.

Sowell also testified he instructed Gore not to disclose the contents of the file or show it to anyone.

Lewis' first trafficking trial, in April 2002, ended in a hung jury. During that trial, it became evident the state had information that a man named Floyd Eugene Ballew, Jr., a/k/a Dooney, was supplying drugs to Lewis. It also became evident at the first trial that Lewis and Dooney's supplier was a man named "Kenny," or "KC," from Greenville. Subsequent to the first trial, Dooney was added to the indictment as a co-conspirator in the trafficking ring. Dooney was arrested and, prior to Lewis' second trial, Sowell met with him in the Laurens County jail and took an affidavit and statement from him. From his meeting with Dooney, Sowell concluded Kenneth Curtis was the "Kenny" or "KC" implicated in the first trial. Sowell therefore instructed Gore to talk to Curtis and ascertain the substance of his testimony if called as a witness at the second trial.

\* Kenneth Curtis was called as a witness by the state at the contempt hearing. Curtis testified that he had paid Lewis' attorney fee to Sowell, and that Sowell allegedly advised Curtis he would let him know if Lewis was "going to flip on him." Curtis testified he was kept advised of the on-going investigation by Gore. On cross-exam by Sowell, however, Curtis testified that he was never told about the contents of the Grand Jury file by Gore.

Gore simply advised Curtis that his name was "all over the place" and that police were about to get him.

At the conclusion of the contempt hearing, the state asserted that the only basis upon which it was seeking a finding of contempt was that Sowell had released the Grand Jury file to Gore; the state specifically advised the court it was not alleging a contempt violation based upon any disclosure by Gore to Curtis.

The circuit court found Sowell in criminal contempt of the March 4, 2002 protective order, holding that he was not authorized to release the Grand Jury information to Gore, and that he had not explained the secrecy requirements of the protective order to Gore.

The Court of Appeals affirmed the contempt finding. It found Sowell had failed to inform the court that he had disclosed the Grand Jury information to Gore, and had failed to explain to Gore the obligation of secrecy.

### ISSUE

Did the Court of Appeals err in affirming the finding of contempt?

### DISCUSSION

Willful disobedience of an Order of the Court may result in contempt. Spartanburg County Dep't of Social Svcs. v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988). A willful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Id. at 82-83, 370 S.E.2d at 874, citing Black's Law Dictionary 1434 (5th Ed. 1979). However, "[o]ne may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do." Welch v. Boyter, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973). In order to sustain a finding of contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based. Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915, 918 (1982). In a criminal contempt proceeding, the state has the burden of proving the guilt of the defendant beyond a reasonable doubt. State v. Bowers, 270 S.C. 124, 131, 241 S.E.2d 409, 412 (1978). A determination of contempt is within the sound discretion of the trial judge, but is subject to reversal where based on a finding that is without evidentiary support or where there has been an abuse of discretion. Pratt v. S.C. Dep't of Social Svcs., 283 S.C. 550, 324 S.E.2d 97 (Ct.App.1984).

Here, the trial court's protective order states, in pertinent part:

IT IS HEREBY ORDERED that the Attorney General is protected if he chooses to disclose to the attorneys for the defendants in the above-captioned cases testimony taken in the State Grand Jury and interviews of witnesses and other documents which must subsequently be disclosed under normal circumstances at trial. It is understood that the State Grand Jury material is being provided only for purposes of the trial of the above-captioned cases. The attorney for the defendants and the defendants are bound by the secrecy provisions of § 14-7-1720.

IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. §§ 14-7-1700 and -1720(A) (Law. Co-op. 1976), the defendants and their attorneys are prohibited from photocopying any State Grand Jury testimony, interviews of witnesses and any other documents that may be disclosed to the defendants and their attorneys in reference to the above-captioned case. All such materials shall be completely destroyed at the conclusion of the case.

Nothing in this Order prohibits the defendants or their attorneys from using Brady material for purposes of preparing for trial.

\* Pursuant to S.C. Code Ann. §14-7-1700, a defendant has the right to review and reproduce grand jury materials. This section also requires the Attorney General, subject to the limitations of S.C. Code Ann. § 14-7-1720 (A) and (D), to provide the defendant a copy of the transcript of the recorded testimony or proceedings. Subsection 14-7-1720 (A) provides, in pertinent part, as follows:

A state grand juror, the Attorney General or his designee, any interpreter used, the court reporter, and any person to whom disclosure is made pursuant to subsection (B) (2) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court for [certain purposes]. . .

Subsection (B) (2) provides:

(B) In addition, disclosure of testimony of a witness examined before a state grand jury or other evidence received by it may be made without being directed by a court to:

(1) the Attorney General or his designee for use in the performance of their duties; and

(2) those governmental personnel, including personnel of the State or its political subdivisions, as are considered necessary by the Attorney General or his designee to assist in the performance of their duties to enforce the criminal laws of the State; provided that any person to whom matters are disclosed under this item (2) shall not utilize that state grand jury material for purposes other than assisting the Attorney General or his designee in the performance of their duties to enforce the criminal laws of the State. The Attorney General or his designee promptly shall provide the presiding judge before whom was impaneled the state grand jury whose material has been disclosed, the names of the persons to whom the disclosure has been made, and shall certify that he has advised these persons of the obligation of secrecy under this section.

By its terms, subsection A applies only to the Attorney General or his designees, or to those whom disclosure is made pursuant to Subsection B. Subsection B is inapplicable here, as it likewise pertains to the Attorney General, and governmental personnel acting in the performance of their duties. We find no basis to hold Sowell in criminal contempt for willful violation of a statute which, on its face, does not apply to him. Welchel v. Boyter (party may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do).

The Court of Appeals affirmed the finding of contempt based in part upon the emphasized language of § 14-7-1720(B) (2), requiring the Attorney General or his designee to give notice to the circuit court if grand jury information was disclosed. The Court of Appeals cited the mandatory language of section 14-7-1720(B) (2), as follows:

The Attorney General or his designee promptly shall provide the presiding judge before whom was impaneled the state grand jury whose material has been disclosed, the names of the persons to whom the disclosure has been made, and shall certify that he has advised these persons of their obligation of secrecy under this section.

The Court of Appeals went on to note there was evidence to support the trial court's rulings inasmuch as Sowell failed to inform the court that he disclosed the grand jury material to Gore. However, Sowell's failure to advise the trial court of disclosure was not the basis of the trial court's finding of contempt. Accordingly, the Court of Appeals erred in utilizing this as a basis for affirming the contempt finding. Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E.2d 738 (1989) (Court of Appeals may not decide an issue neither raised to nor ruled upon by the trial judge).

Further, the Court of Appeals affirmed the contempt finding based on the fact that Curtis testified he was kept apprised by Gore of materials which pertained to him. However, the State specifically maintained at the contempt hearing that it was not seeking a contempt violation for Gore's disclosure to a third party but, rather, due solely to Sowell's disclosure to Gore. The Court of Appeals erred in utilizing this ground to affirm the contempt finding. Connolly v. People's Life.

Further, subsection 14-7-1720 (B)(2) authorizes the designee of the Attorney General to disclose as he deems necessary to assist personnel in the performance of their duties to enforce the criminal laws. This section, if applied to Sowell, would authorize Sowell's disclosure to necessary personnel (i.e. Gore) to aid him in his duties. Accordingly, Sowell may not be held in willful contempt for disseminating information for which 14-7-1720 (B) (2) authorizes disclosure.

evidentiary support).

**CONCLUSION**

Given that S.C. Code Ann. § 14-7-1720 is, by its terms, inapplicable to Sowell, we find that the protective order fails to sufficiently advise him of what he must do. Accordingly, the finding of contempt is reversed.

**REVERSED.[2]**

**MOORE and PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.**

**Chief Justice Toal:** I respectfully dissent. In my opinion, the majority mistakenly relies on S.C. Code Ann. § 14-7-1720(B)(2) (Supp. 2004) in overturning Sowell's contempt citation. The majority correctly states that subsection (B)(2) outlines specific duties of governmental personnel involved in enforcing the criminal laws of the State. However, the majority ignores the fact that the trial court's protective order directs that the parties to this action are also subject to the restrictions of S.C. Code Ann. § 14-7-1700. The Code provides that a criminal defendant is entitled to a copy of the transcript of the grand jury hearing "subject to the limitations of Section 14-7-1720(A) and (D) and Rule 5, South Carolina Rules of Criminal Procedure." S.C. Code Ann. § 14-7-1700 (Supp. 2004).

Accordingly, the language of § 14-7-1700 places *the same secrecy restrictions* upon the criminal defendant and his counsel that *the state grand jurors* are subject to via § 14-7-1720(A).[3] This limitation dictates that "[s]tate grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations . . . of the state grand jury." S.C. Code Ann. § 14-7-1720(A). Therefore, any disclosure under section (A) must be done under the direction of the Court.[4]

The portion of the statute relied upon by the majority, § 14-7-1720 (B)(2) governs those occasions when disclosure can be made without leave of the court. As correctly pointed out, this section is not even applicable to Sowell. Were it applicable, Sowell's disclosure to Gore would be permissible because he could have done it without the court's permission. However, because § 14-7-1720(A) requires the leave of the court to disclose grand jury information, Sowell was appropriately held in contempt pursuant to § 14-7-1720(D) for his disclosure to Gore.[5]

Therefore, I would uphold the trial court's decision holding Sowell in contempt.

**BURNETT, J., concurs.**

[1] The order does not prohibit the defendants or their attorneys from using Brady material for purposes of preparing for trial. Brady v. Maryland, 373 U.S. 83 (1963).

[2] The dissent concludes Sowell was properly held in contempt pursuant to S.C. Code Ann. §§ 14-7-1700 and 14-7-1720 (A). Section 14-7-1700 requires disclosure of grand jury proceedings to the defendant "subject to the limitations of Section 14-7-1720(A) and

(D)." The portion of § 14-7-1720 (A) cited by the dissent applies to state grand jurors themselves stating, "state grand jury proceedings are secret, and a state grand juror shall not disclose the nature or substance of the deliberations or vote of the state grand jury." The only portion of § 14-7-1720 (A) which could conceivably apply here states, "a state grand juror, the Attorney General or his designee, any interpreter used, the court reporter, and **any person to whom disclosure is made pursuant to subsection (B)(2) of this section may not disclose the testimony of a witness examined before a state grand jury or other evidence received by it except when directed by a court.**" Accordingly, this section requires a court order directing disclosure only if the disclosure was initially made pursuant to subsection (B)(2).

Moreover, the position advanced by the dissent would expose criminal defense attorneys who disclose grand jury materials to their office personnel for trial, investigative or discovery purposes to a finding of criminal contempt absent a court order authorizing such disclosure.

[3] Under the majority's rationale, the language contained in § 14-7-1700 stating that "~~subject to the limitations of [s]ection 14-7-1720(A) and (D) . . .~~ a defendant has the right to review . . . materials" is meaningless. S.C. Code Ann. § 14-7-1700 (emphasis added).

[4] The majority correctly points out that a criminal defense attorney must make clear to whom disclosure can be made by asking the court for permission to disclose under § 14-7-1720(A). This would include a defense attorney's employees or office personnel. The grand jury proceedings are by their very nature secretive and designed to prevent the very thing that happened in the present case – i.e. disclosure to an unauthorized person who then takes that information and divulges it to a person under investigation by the grand jury. This result is not dictated by my position but rather by the very language contained in the statute. The majority's position would insulate an authorized person from penalty under the statute by allowing the authorized person to simply inform their employee of the grand jury's investigation and then leave it to chance whether that employee informs whomever he or she would like. In my opinion, the integrity of the grand jury proceedings can be compromised by engaging a lawyer's office in a game of "whisper down the line." It is not overly burdensome to get the court's permission for a specific disclosure, and obtaining such disclosure permission protects the lawyer from unauthorized down the line disclosure.

[5] To further exemplify the contemptuous nature of Sowell's actions, the record indicates that a person under investigation by the grand jury, Curtis, paid a legal fee to Sowell to keep another suspect from testifying against Curtis. While Curtis paying Sowell a fee might not be the reason for the trial court holding Sowell in contempt, this fact epitomizes Sowell's total disregard for the much needed secrecy in the grand jury proceedings.

Lastly, the trial court held that "Gore stated in his testimony that he was not given any instruction regarding the release of this information to any other individuals [from Sowell]." As Sowell points out, however, this is not what Gore testified. Gore was asked by the prosecution, "When Mr. Sowell left this information with you, did he give you any instructions about what to do or anything about grand jury material, anything like that?" Gore responded, "No, ma'am." However, Gore later testified that "The best I can recall, you handed me that box and you said, 'These are statements that have been taken from the people in this case. I want you to look through them and go investigate the ones you feel are pertinent to the upcoming case.'" The query went on, "And what did I tell you about disclosing the information from that file?" [Answer] "No, you told me to keep the box under lock and key at all times."

Sowell subsequently testified that before he gave the information to Gore, he had instructed him not to disclose the contents to anyone. We find that, to the extent the trial court held Sowell had released the information to Gore without advising him not to further disseminate it, its findings are not supported by the evidence. Pratt v. S.C. Dep't of Social Svcs. (contempt finding is subject to reversal where based on a finding that is without

BOBBY JOE LEWIS 296070  
mc cormick c.i.  
386 Redemption way  
McCormick SC 29899

January 23, 2012

RE: FREEDOM OF INFORMATION ACT  
REQUEST FOR FILES, (etc.)

Sheriff of GREENWOOD

GREENWOOD, SC

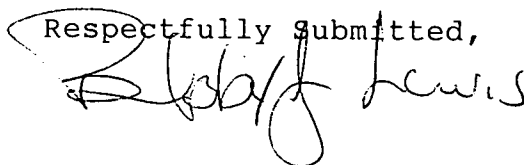
Dear Sheriff,

Please allow this correspondence to serve as a formal request for the;

1) ANY INVESTIGATIVE FILES in re; to Bobby Joe Lewis and allegations of any alleged Drug activity to include but not limited to Indictment STATE v Bobby JOE LEWIS 2002 - GGS- 47-17 and the files of any material fact witness contained therein; IN RE: Bobby Joe Lewis .

This request is made under the provisions of the Freedom of Information Act and Your reply within the fifteen days as provided by F.O.I.A. would be sincerely appreciated.

Respectfully submitted,





STATE GRAND JURY OF SOUTH CAROLINA

THE STATE OF S.C.	)	2002-GS-47-17
PLAINTIFF	)	DEMAND FOR PRELIMINARY HEARING,
-vs-	)	BRADY MOTION, RULE 5 MOTION
	)	MOTION FOR WITNESS STATEMENTS
BOBBY JOE LEWIS et.al.	)	MOTION FOR DISCLOSURE
DEFENDANT	)	

**FILED**

MAR 8 2002

LISA C. DUNBAR,  
CLERK, STATE GRAND JURY

TO: THE STATE and Attorney General for S.C.

PLEASE TAKE NOTICE that the undersigned attorney for defendant, Bobby Joe Lewis, will move before the court, is such be necessary, for an order directing the prosecution to provide a preliminary hearing to the defendant and to disclose and provide and allow inspection and coping of the following:

1. All statements made by defendant, and witnesses for prosecution or defense.
2. All discoverable material pursuant to Rule 5.
3. All material set forth as discoverable based on Brady.
4. All information concerning bargains, deals, negotiations, promises or implications made to and with or discussed with defendant, informant, witnesses, potential witnesses connected to or related to this defendant's defense or to prosecutions case, and all information concerning criminal records or acts or prosecution of any of the above set forth, charges nol processed, warrant recalled, chargers investigated but not filed and any other information in the possession of or known to the state concerning potential witnesses, and any information or documents or otherwise in existence which would be of benefit to defendant
5. Any other information and document to be provided to defendant based upon Court Rules, Court Opinions, Statutes and doctrines of fairness

GREENVILLE, S.C.

*K. Sowell*

---

KENNETH E. SOWELL  
700 Pettigru St.  
Greenville, S.C. 29601  
864-271-7777:  
Fax:332-0199

March 7, 2002

ATTORNEY FOR DEFENDANT: Bobby Joe Lewis

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO GREENWOOD COUNTY  
J. CORDELL MADDOX, JR., CIRCUIT COURT JUDGE

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BOBBY JOE LEWIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

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KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER.

256594

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to obtain a valid waiver of the attorney's conflict of interest in representing Kenneth Curtis, in an unrelated criminal matter, when Curtis testified against the defendant at trial and testified that he furnished the money used to pay the defendant's legal fees?

## STATEMENT

On February 21, 2002, the State Grand Jury of South Carolina indicted Lewis for conspiring to traffic in more than 400 grams of methamphetamine, for trafficking in 10 grams of methamphetamine and for possession with intent to distribute methamphetamine, indictment #02-GS-47-17-01. The case was called to trial on April 29, 2002 but ended in a mistrial. A superseding indictment was filed on June 12, 2002, alleging a conspiracy to traffic in more than 400 grams of methamphetamine and a trafficking in 10 grams of methamphetamine but not the possession with intent to distribute methamphetamine charge. On July 22, 2002, Lewis proceeded to jury trial before the Honorable Wyatt T. Saunders, Jr. Attorney Kenneth Sowell represented Lewis at trial. The jury returned verdicts of guilty as charged. Judge Saunders sentenced Lewis to 25 years for conspiracy and 10 years concurrent for trafficking. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Lewis, Op. No. 04-UP-290 (S.C.Ct.App. filed May 4, 2004).

On April 12, 2005, Lewis filed an application for post conviction relief. The State filed a return on July 28, 2005. An evidentiary hearing was held on August 15, 2006, before the Honorable J. Cordell Maddox, Jr. In a written order signed February 5, 2007, Judge Maddox denied relief and dismissed the application. A timely notice of intent to appeal was filed on March 2, 2007. This petition follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to obtain a valid waiver of the attorney's conflict of interest in representing Kenneth Curtis, in an unrelated criminal matter, when Curtis testified against the defendant at trial and testified that he furnished the money used to pay the defendant's legal fees.

In the PCR application Lewis raised the issue that he was deprived of his Sixth Amendment right to effective counsel due to a conflict of interest arising from counsel's representation in an unrelated criminal matter, of Kenneth Curtis, a witness who testified against Lewis during his retrial. (App. pp 1808-1817). Mr. Curtis did not testify at the first trial. Prior to the second trial, Curtis was arrested by the federal authorities and charged with operating a meth lab. (App. p. 1749, lines 1-20). Curtis provided a statement to the authorities that he provided Lewis with methamphetamine. (App. p. 1749, lines 1-20). During a motions hearing on July 16, 2002, prior to the second trial, the prosecution made the court aware that Mr. Sowell, counsel for Lewis, represented Curtis on an unrelated charge of reckless driving. (App. p. 1749, lines 19 – p. 1750, lines 1-3). The judge questioned Lewis about the conflict of interest. (App. pp. 1750 – 1753). The judge found that Lewis freely, voluntarily and knowingly waived the conflict of interest. (App. p. 1752, lines 22- p. 1753, lines 1-21).

After the judge found that Lewis waived the conflict of interest, the prosecution advised the judge that Curtis alleges that he paid attorney Sowell to represent Lewis in this matter. (App. p. 1754, lines 10-24). Attorney Sowell denied directly receiving money from Curtis to represent Lewis. (App. p. 1757, lines 2-22). The judge failed to revisit the waiver issue with Lewis after learning of Curtis' allegation that he paid Lewis' legal fees. (App. pp. 1757-1759). Curtis testified at trial implicating Lewis in the methamphetamine business. (App. pp. 355-370). In reply, Curtis

testified that he gave Lewis' wife \$10,000 for bond, \$20,000 for legal fees, and \$5,000 for investigative fees. (App. p. 763, lines 23- p. 764, 765, 766, lines 1-2). Mrs. Lewis denied receiving money from Curtis. (App. p. 531, lines 18 – p. 532, 533, 534, 535, lines 1-14).

In a separate matter involving a contempt charge against attorney Sowell, "Curtis testified that he had paid Lewis' attorney fee to Sowell, and that Sowell allegedly advised Curtis he would let him know if Lewis was 'going to flip on him.'" Curtis testified that he was kept advised of the on-going investigation by Gore [the investigator hired by Sowell]." State v. Sowell, 370 S.C. 330, 335, 635 S.E.2d 81, 83 (2006). Curtis was not called as a witness at the PCR hearing.

Attorney Sowell testified at the PCR hearing that he received his legal fees for Lewis' representation from Mrs. Lewis. (App. pp. 1850 – 1856). Counsel admitted that he only learned that Curtis would be a witness against Lewis immediately prior to the motions hearing. (App. p. 1855, lines 21- p. 1856, line 1). The PCR judge summarily dismissed the allegation involving the conflict without making any specific finding as to that allegation. (App. pp 1870-1871). The PCR judge erred.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest affected his attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Staggs v. State, 372 S.C. 549, 643 S.E.2d 690 (2007); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). An actual conflict of interest occurs " . . . when a defense attorney places himself in a situation inherently conducive to divided loyalties . . ." If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently

adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.” Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) citing Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979). A defendant who demonstrates that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

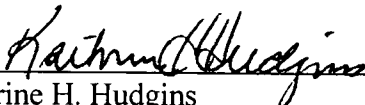
The purported waiver of the conflict of interest was not made knowingly and intelligently. At the time of the purported waiver Lewis was not advised of the allegation that Curtis indirectly paid the attorney to represent Lewis. The record supports the fact that counsel never discussed the conflict of interest or the waiver with Lewis. Once counsel became aware that Curtis not only would testify against Lewis but was alleging that he paid Lewis’ attorney fees, counsel should have extensively discussed the conflict with Lewis. By failing to properly advise Lewis, counsel placed himself in a situation inherently conducive to divided loyalties. While attorney Sowell represented Curtis on an unrelated criminal charge and did not represent Curtis on the federal methamphetamine charges, counsel admitted discussing with Curtis, at some point, how to manufacture methamphetamine. (App. p. 1757, lines 17-22).

The PCR judge erred in refusing to find trial counsel ineffective for failing to obtain a valid waiver of the attorney’s conflict of interest in representing Kenneth Curtis, in an unrelated criminal matter, when Curtis testified against the defendant at trial and testified that he furnished the money used to pay the defendant’s legal fees.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2007.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO GREENWOOD COUNTY  
J. CORDELL MADDOX, JR., CIRCUIT COURT JUDGE

---

BOBBY JOE LEWIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

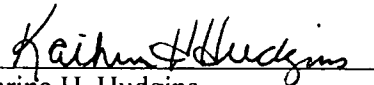
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Counsel for Bobby Joe Lewis states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 15, 2006. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Bobby Joe Lewis.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of October, 2007

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO GREENWOOD COUNTY  
J. CORDELL MADDOX, JR., CIRCUIT COURT JUDGE

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BOBBY JOE LEWIS,

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STATE OF SOUTH CAROLINA,

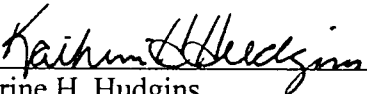
RESPONDENT

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CERTIFICATE OF SERVICE

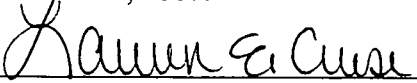
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Julie M. Thames, Esquire, and Bobby Joe Lewis, # 286070, Lee Correctional Institution, this 17th day of October, 2007.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day  
of October, 2007.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: August 23, 2014.

*Agent's Copy*

# STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA

WARRANT FOR ARREST

vs.

**BOBBY JOE LEWIS**

**CASE NUMBER: 2002-GS-47-17-01**

A TRUE COPY

Attest: Lisa C. Dunbar, Clerk

TO: Any Law Enforcement Officer of this State  
or Any County or Municipal Officer Within his Jurisdiction By: *Alice S. Douglas*  
Deputy Clerk

YOU ARE HEREBY COMMANDED to arrest Bobby Joe Lewis and bring him or her forthwith before me to answer an Indictment of the State Grand Jury of South Carolina charging him or her with  
(brief description of offense)

**Trafficking Methamphetamine (Conspiracy)**

(A copy of the Indictment is attached for service on the Defendant.  
For a description of the charges see the Indictment.)

in violation of 1976 Code of Laws of South Carolina, as amended, Section(s) 44-53-375(C)(5). A copy of this Warrant for Arrest shall be delivered to the defendant at the time of its execution, or as soon thereafter as practicable.

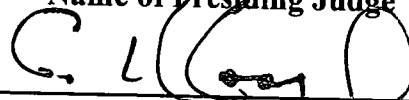
February 21, 2002

G. Thomas Cooper, Jr.

Date

Name of Presiding Judge

Columbia, SC




**FILED**

Location

Signature of Presiding Judge

MAR 7 2002

LISA C. DUNBAR, CLERK, STATE GRAND JURY		
<b>RETURN</b>		
This warrant was received and executed with the arrest of the above-named defendant at <u>Clinton, SC</u> . A Copy of this warrant was delivered to the defendant on <u>2-27-02</u> , 2002.		
Date Received	Name and Title of Arresting Officer	Signature of Arresting Officer
Date of Arrest	D. Max Dorsey II SIA-SLED	
2-27-02		

PROOF OF SERVICE

A TRUE COPY HAS BEEN MAILED TO ATTORNEY GENERAL'S OFFICE AT

P.O. BOX 11549  
COLUMBIA, S.C. 29211

THIS 21 DAY OF MARCH 2012 BY U.S. MAIL,

PUR. 28 U.S.C. 1746

I AFFIRM UNDER OATH

S/ Bobby Joe Lewis  
BOBBY JOE LEWIS

Bobby Joe Lewis 286070

MCI

386 Redemption way  
McCormick SC 29899

CLERK OF COURT  
SC Supreme Court  
PO Box 11330  
Columbia SC 29201

LEGAT/MAC

Mailed  
3/2/12 (BSC)

RECEIVED

MAR 2 2012

MAIL ROOM  
MCCI

RMC

MAR 2

MAIL ROOM

RECEIVED BY THE  
CLERK OF COURT  
SC SUPREME COURT  
PO BOX 11330  
COLUMBIA SC 29201