

**STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2017-000841

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S.C. SUPREME COURT

BRANTLEY CLARKE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

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1 State of South Carolina

2 In the Court of General Sessions

3 County of Lexington

4
5 The State,

6 v.

7 Brantley Walker Clarke,

8 defendant.

9
10 B E F O R E : The Honorable Judge James Johnson

11
12 A P P E A R A N C E S :

13 for the state: Shannon Heath, assistant solicitor

14 for the defendant: David A. Culberson, Esq.

15
16 Court Reporter: smokey perry

17
18 #2007-GS-32-1210

19
20 April 5, 2007

21
22
23
24
25

1 (the defendant was sworn to tell the truth.)

2 The Court: All right. The next indictment is 07-1210 STATE -VS- BRANTLEY WALKER

3 CLARKE. You Mr. Clarke?

4 The defendant: Yes, sir.

5 The Court: What is your age, please, sir?

6 The defendant: 27.

7 The Court: 27? How much formal education you have?

8 The defendant: Currently attending college.

9 The Court: Are you married?

10 The defendant: No, sir.

11 The Court: Any children?

12 The defendant: No.

13 The Court: What kinda work do you do?

14 The defendant: Pharmacy technician.

15 The Court: When you were arrested on this charge, did you stay in jail for any period of time
16 before you bonded out?

17 The defendant: One night.

18 The Court: One night? And, Mr. Culberson, you represent Mr. Clarke. Is that right?

19 Mr. Culberson: That's correct, Your Honor.

20 The Court: He is charged with and apparently pleading to the charge of committing or
21 attempting a lewd act on a child under the age of 16. I believe that's a 15-year offense. Is that what
22 you've explained to him?

23 Mr. Culberson: That's correct.

24 The Court: He has also signed on the indictment indicating his desire to waive presentment to
25 the grand jury. Have you explained that to him?

1 Mr. Culberson: Yes, sir.

2 The Court: All right. Mr. Clarke, you have signed your name indicating that you do want to
3 waive presentment to the Lexington County Grand Jury and go ahead and deal with this charge today. Is
4 that correct?

5 The defendant: Yes, sir.

6 The Court: Is that your decision?

7 The defendant: Yes.

8 The Court: Have you made it of your own free will?

9 The defendant: Yes, sir.

10 The Court: All right, sir. I will permit you to waive presentment to the grand jury. Mr. Clarke, at
11 this time do you have any questions about either the charge or the possible sentence that could be
12 imposed on this charge?

13 The defendant: No.

14 The Court: You have signed your name on the paperwork indicating that you do wish to plead
15 guilty to lewd act on a minor. Is that correct?

16 The defendant: Yes.

17 The Court: And is the decision to enter that plea, is that your decision?

18 The defendant: Yes.

19 The Court: Have you made it of your own free will?

20 The defendant: Yes.

21 The Court: Solicitor, there is a recommendation. Is that correct?

22 The Solicitor: Yes, Your Honor.

23 The Court: What is it, please?

24 The Solicitor: A cap of 10 years incarceration.

25 The Court: First of all let me be sure that everyone understands that with a recommendation as

1 opposed to a negotiated plea, the recommendation can be accepted or rejected by The Court and The
2 Court can then go ahead and do what I feel is appropriate, but the cap of 10 years also my understanding
3 of a cap would be that the state has, in effect, made a recommendation that Mr. Clarke's exposure be
4 reduced from 15 to 10 years. The defense is free to argue and plead for anything under the 10 years. Is
5 that basically the way, Solicitor, you understand it?

6 The Solicitor: Yes, Your Honor.

7 The Court: And, Mr. Culberson, you understand it?

8 Mr. Culberson: You understand it?

9 The Court: And, Mr. Clarke, is that the way that you understand this recommendation?

10 The defendant: Yes, sir.

11 The Court: All right, sir. Other than this recommendation, Mr. Clark, have there been any other
12 promises from anyone or threats made against you by anyone to force you to plead to this charge?

13 The defendant: No, sir.

14 The Court: Have you had enough time to discuss all of this with your attorney?

15 The defendant: Yes.

16 The Court: And have you told him everything that you know about this situation so that he
17 could prepare and defend you in this case?

18 The defendant: Yes.

19 The Court: You're satisfied then with his representation?

20 The defendant: Yes, sir.

21 The Court: I am sure that Mr. Culberson has gone over with you the rights that you have that
22 you're going to give up by pleading. I'm required to do that here in the courtroom. If you don't
23 understand or need more detailed explanation, stop me. If you need to speak with Mr. Culberson, stop
24 me, and I'll give you whatever time you do need. You do have the right to have a jury trial where a jury
25 would be selected. The state would have the burden of proving your guilt beyond a reasonable doubt

1 before you could be convicted. As a defendant you do not have to prove you're not guilty; the state has
2 to prove that you are. You would have the opportunity if you had a trial to present any defenses that
3 might be available to you. I know nothing about the case. I don't know if you have defenses, but you
4 would have the opportunity to present those defenses to the jury. You'd have the authority to subpoena
5 witnesses to come in and testify on your behalf. But, again, the burden of proof would be on the state to
6 prove this charge beyond a reasonable doubt. The purpose of the jury trial would be to determine
7 whether the state could meet that burden. If you do enter this plea, you will be giving up and waiving
8 your right to have a jury trial. Do you understand that?

9 The defendant: I do.

10 The Court: Any questions about that?

11 The defendant: No, sir.

12 The Court: You do have a constitutional right of confrontation, simply meaning to look at and to
13 see who the witnesses against you are. You have the right to have your attorney cross examine and
14 questions those witnesses while they testify. At a guilty plea the solicitor is not required to bring any
15 witnesses to court. So you'll be giving up your right to confront the witnesses who would've testified
16 against you if you'd gone to trial. That occurs if you plead guilty. Do you understand that?

17 The defendant: Yes, sir.

18 The Court: And finally, Mr. Clarke, you have a constitutional right to remain silent which simply
19 means that no one here, not your lawyer, not the solicitor, not even the judge could force you to take the
20 witness stand and to testify against yourself. If you elected not to testify, your silence could not be held
21 against you or used against you in any way. If you are going to plead guilty, you're required to give up
22 that right in order to come into court and admit your guilt if you're going to plead. Do you understand
23 that?

24 The defendant: Yes, sir.

25 The Court: All right. Any questions about any of those rights, Mr. Clarke?

1 The defendant: No, sir.

2 The Court: Knowing that you're going to give up all those rights if you plead guilty, do you still
3 want to plead guilty?

4 The defendant: Yes, sir.

5 The Court: Are you guilty of the charge that you are pleading to here today?

6 The defendant: Yes, sir.

7 The Court: Right now are you under the influence of any kind of drugs or alcohol?

8 The defendant: No.

9 The Court: Taken any kind of prescription medication?

10 The defendant: No.

11 The Court: Are you now or have you ever been treated for any kind of mental health problems?

12 The defendant: No.

13 The Court: All right, sir. And do you have any questions about what's going on right now?

14 The defendant: No.

15 The Court: All right. Solicitor?

16 The Solicitor: Thank you, Your Honor. The defendant actually volunteered as a youth leader at
17 the Roundhill Baptist Church. That's how he knew both of the young victims in this case. There are two
18 victims in this case. One of the charges is being dismissed with one victim. *Minor Victim 1* is
19 the victim of the lewd act. He is 13. Your Honor, he is in the front row of the courtroom. And *Minor*
20 *Victim 2* who is 12 is the victim on the charges that are being dismissed. He is also in the courtroom on the
21 first row. The defendant would have these boys over to his parents' house where he would -- at
22 Blueberry Drive in Lexington County, he would have them over there and sometimes they would spend
23 the night or just come over and watch movies. This actually happened between January the first of 2004
24 and August the first of 2006. The defendant was between the ages of 25 and 27 at the time. The two boys
25 would come over because he said they would give them candy; they would play Nintendo games and

1 they liked coming to visit him. He was originally charged with permitting a minor 18 years or younger to
2 engage in a violation of the obscenity laws. He was also charged with disseminating obscene material to a
3 minor under the age of 12. That indicates where *Victim 2* was the victim, Your Honor. These charges
4 are just being dismissed. That the facts on those charges are that the defendant invited *Victim* over to his
5 house. He showed the victim a pornographic video. He allowed the victim to watch it while he was there.
6 The video showed people engaging in sexual activity. The defendant also permitted the victim to engage
7 in a sex act. He used -- he provided him with a sex toy which is described as a glow in the dark pocket
8 pussy, and he gave him lubrication and he told him how to use it. He also watched the victim masturbate
9 to this. These incidents did occur in Lexington County at Blueberry Drive. The defendant did confess to
10 this once he came to the sheriff's office and stayed with Detective Pritchard, and Detective Pritchard told
11 him he would need to turn in the sex toy as well as the video, and he actually at that time had it in the
12 trunk of the car and turned it over to the sheriff's department. As I said, Your Honor, the victim *Minor*
13 *#2* is here as well as members of his family in the audience and Richard Gregg who is his grandfather
14 would like to speak at the appropriate time.

15 The charge that he's pleading to is lewd act on a minor. Between January the first 2004 and
16 August the first of 2006 the victim *Minor #1* went over to the defendant's house at Lexington County
17 to spend the night. The victim was laying in the bed and the defendant was in the bed with him. They
18 were sleeping in the same bed. He started to play with *Victim #1* penis and *Victim #1* eventually woke up and
19 asked him what he was doing. When interviewed by Detective Pritchard, the defendant said that he
20 accidentally placed his hand on *Victim #1* penis, but when he woke up and realized it was there, he took it
21 away. The victim on that case is here as well, Your Honor. And at the appropriate time, Ronald Williams
22 would address Your Honor, and he is right here as well. The state is allowing him to plead to lewd act for
23 a cap of 10 years, dismissing the charges that I mentioned before. Because of the actions that the
24 defendant took with these boys and because of the fact that he did it as a youth leader through the church,
25 the state feels that the cap of 10 years is an appropriate sentence. The victims all think that a 10-year

1 sentence is appropriate. They would ask for the maximum sentence, Your Honor. The parents that their
2 children were safe. They would -- he was with the church and they thought that when he went off --
3 their children went off to spend the night with a youth leader at the church that they'd be safe. And the
4 defendant certainly took advantage of the parents; he took advantage of the situation and he took
5 advantage of a little boy. And as I said, at the appropriate time the victims would like to address Your
6 Honor, and I also have Detective Pritchard here if you have any questions.

7 The Court: Any prior history?

8 The Solicitor: No, Your Honor.

9 The Court: All right. That is a sufficient factual basis for the plea that Mr. Clarke has entered. I
10 will accept his plea. It has been entered with the advice and the assistance of counsel with whom he has
11 indicated his satisfaction. Mr. Culberson, before I hear from you and anything the defendant might like to
12 say, I'll hear from the victims, and then I'll get back to you folks. All right. Solicitor?

13 The Solicitor: Mr. Elders -- I'm sorry -- Mr. Ronald Williams is gonna speak on behalf of
14 *Victim #1* who's the victim on the lewd act.

15 The Court: All right. Mr. Williams?

16 Mr. Williams: Your Honor, my name is Ronald Williams. I'm the stepfather of *Victim #1*.
17 I've been in his life quite a while now. I have noticed the damage that's been caused by what's happened
18 to him. His trust in most men now has been severely damaged. He is scared to go out at night. He is
19 scared to be in public; he is constantly in fear; he is in fear of the accused. His life has dramatically
20 changed and will never be the same. We feel that his life is ruined. And he will have to carry this
21 sentence that's been imposed upon him for the rest of his life no matter what the sentence to the accused.
22 And at this time we ask that if it would, Your Honor, we would please ask for the maximum sentence of
23 the 10 years because my son has to live with it the rest of his life. Also, I am familiar with other --
24 defendant, he has to live with it for the rest of his life too.

25 The Court: Is the child now has he received any counseling?

1 Mr. Williams: Yes, sir, that is correct. He received counseling at Crossroads Counseling. He
2 went for approximately 10 visits and it got to where it was just too stressful to keep repeating the situation
3 and decided he didn't want to go anymore.

4 The Court: All right. All right, thank you, Mr. Williams.

5 Mr. Williams: Yes, sir.

6 The Court: Solicitor, you have another---

7 The Solicitor: And, Your Honor, this is *Minor # 2* mother Lisa Wallace and I think his
8 grandfather Richard Greggs will be addressing Your Honor.

9 The Court: All right, sir.

10 Mr. Greggs: I'd like to address The Court. I'm Richard Greggs.

11 The Court: All right, sir.

12 Mr. Greggs: Grandfather. We trust that you will make a fair and just decision, but we as a family
13 do decide that he does need to serve time, give him time to think about what he's done and seek
14 counseling also.

15 The Court: All right. Thank you, Mr. Greggs.

16 Mr. Greggs: Thank you, sir.

17 The Court: All right, Solicitor, anything further at this time?

18 The Solicitor: Nothing further, Your Honor.

19 The Court: All right. Mr. Culberson, you have explained to your client the requirement that he
20 will have to register and the other---

21 Mr. Culberson: Yes, sir.

22 The Court: ---requirements of this statute. Is that correct?

23 Mr. Culberson: We've gone over all that. Thank you, Your Honor.

24 The Court: I'll be glad to hear from you and anything Mr. Clarke might like to say.

25 Mr. Culberson: Your Honor, I would like to hand up at this time if I may approach the bench a

1 packet of information I've prepared on behalf of Mr. Clarke. I appreciate the opportunity to be before
2 you and to be heard in the matter of Brantley Clarke. It's my privilege to be retained counsel for Brantley
3 Clarke. Brantley was born here in Lexington County on September 13th 1979. He's 27 years old. He has
4 lived in the same home he lives in now at Blueberry Drive in Lexington. He is single and lives with
5 his parents.

6 Brantley has always been an outstanding student. He's never participated in organized sports,
7 but he did join the band as early as 5th grade at Lexington High School. He constantly -- it was constantly
8 recognized for his proficiency in playing the trumpet as well as his academic performance there. Bradley
9 has been very active at Roundhill Baptist Church here in Lexington since childhood. He worked with the
10 youth even after he graduated from high school and led music and praise worship there. As indicated in
11 the materials that I have handed up to The Court and copies provided to the solicitor, he has always -- he
12 was always reliable. He could be called upon when any special need in church arose. He was and still is
13 respected and well loved by both the youth and adults there alike. Brantley has attended the University of
14 South Carolina and Midlands Technical College. He's working on his last class at Midlands Technical
15 College and is due to complete that course in May. He is a straight A student and works part-time at
16 Riley's Drugs which is an independent pharmacy here in Lexington on Columbia Avenue. And he has
17 worked there for the past 9 years.

18 As said, I've handed up a packet of materials for the consideration of The Court, and I've also
19 provided copies to Ms. Heath. That contains professional reports of clinical psychologists who have
20 evaluated and one of whom is now treating Brantley. Those are under tab one. We've also presented a
21 number of affidavits. We've organized those affidavits by group in order to demonstrate that in each of
22 the wide range of activities in which Brantley is known, his character remains the same. We have
23 affidavits of his employer and co-workers under tab two. Under tab three we present affidavits of the
24 family. Tab 4 are statements from family friends. Tab 5 is the section of fellow church members who
25 know and appreciate the talents and enthusiasm and love that Brantley brought to Roundhill Baptist

Church. These affidavits are relatively few and number, but are really a very small tip of an enormous iceberg of support for Brantley Clarke in this community. Ten 6 is a collection of Brantley's awards and citations over the course of the past 10 years. They include his transcript from Midlands Technical College where he was a straight A student. He stays on the Honor Roll or the President's List there. He has been inducted into two honor societies or fraternities, and of course, this is consistent with his course of academic proficiency all the way back into high school.

Finally under tab 7 I have provided statements from Brantley's father and mother: Walter and Barbara Clarke as well as the various recognitions or letter of recommendation that they had received. Brantley's father is retired from the South Carolina Department of Transportation where he received numerous awards in recognition as an outstanding state employee. Barbara is the administrative assistant to Donald Tudor (phonetic) who is the director of the office of transportation from the Department of Education. This is the office that keeps the school buses rolling and carrying our public school students to and from school throughout the state. Barbara has worked for Mr. Tudor for 16 years and is a 45-year veteran of state employment. I would like to turn the microphone over at this point to Dr. Diane Follingstadt. She is a professor at the Department of Psychology at the University of South Carolina. She also maintains an office in Columbia where she practices clinical psychology. The materials under tab one set forth her CV containing her numerous works, her educational and employment background, professional associations and licensure details. I would like her to present to The Court, as she can far better than I, set forth the entails of her testing and evaluation of Brantley Clarke. And she would be glad to respond to any questions The Court or the solicitor may have. I'd like to have Dr. Follingstadt step forward.

The Court: All right, Doctor.

Dr. Follingstadt: I have a 10-page report which is in your folder.

The Court: That's what I'm going through right now, yes, ma'am.

Dr. Follingstadt: And what I'd like to do is try to stick with some of the most pertinent



1 information and try to be able to summarize at the end by trying to answer some very specific questions
2 that need to be thought and considered when thinking about who Mr. Clarke is and what type of person
3 and what his activities actually mean about him.

4 I did an evaluation that consisted of initially a total of 12 and a half hours with Mr. Clarke, mostly
5 interviewing some psychological testing. I observed him during that period and I also did independent
6 collateral interviews with his mother and father in March 1st of this year. I did extensive psychological
7 testing with him. It was a variety. Some was to see whether or not he might be malingering. Some were
8 screened for intelligence to see if that was a factor. There were a number of measures that we're looking
9 very specifically at what kind of psychopathology abnormal behavior he might have as well as personality
10 aspects. A couple measures we're looking very specifically at sexual functioning, and I even had an
11 additional one that was looking at potential anti-social features of an individual.

12 The Court: All right.

13 Dr. Follingstad: I also reviewed all of the Lexington County Sheriff's Department information
14 with regarding these cases. Because Mr. Culberson had talked to you something about his background,
15 I'm not going to talk about that other than to say that it is a background where you find no traumas, no
16 school problems, a lot of stability and a very kind of quiet, conservative family background. What
17 becomes more important in this kind of case is what starts to happen to him once he is finishing high
18 school and moving on in terms of what his interpersonal and sexual life is actually like. What you find is
19 that Mr. Clarke has been an individual who has been fairly shy but has managed to find niches where he
20 can find people, mostly safer environments like church, schooling and things like this. He has some
21 dating that he has done over the years. He did have one 3-year relationship, but if you really look at his
22 background he has less dating and less sexual experience than most young men his age. Except for one
23 early exploratory experience that he had with a boy who was his age way back when he was -- before
24 puberty, you find that his sexual experience has only been in relation to females. He's never sought out
25 materials about activities with males. His fantasy life is around females and as best he is aware, he does

1 not believe he is interested in sexual activities with males. He had an unfortunate experience in high
2 school where he and his best -- best friend were called gay because they hung around together, and he
3 did have a period where this worried him like it would most children. He talked to a counselor at that time
4 who reassured him that he was not gay.

5 What's important to know about his sexuality is that he has quite a bit of guilt and anxiety due to
6 very strong religious beliefs, and this results in a lot of conflict for him and some big consistent reactions
7 on his part. When he has engaged in some sexual activities with females, they've occurred more
8 impulsively allowing him to, you know, have some sexual activity, but because he didn't really do it, as
9 he sees, real deliberately or planned ahead of time, he can handle the guilt a little bit better when he
10 realizes what he has done. He even has some ideas that he really should be very careful and not
11 masturbate too much. So his whole idea around sexuality is fairly kind of guilt ridden and inhibited.

12 He doesn't possess very positive attitudes about himself in terms of being masculine, in terms of
13 being attractive to females as a sexual being. He doesn't have a very good body image. He knows he has
14 limited experiences, and he's been pretty passive in terms of dating, usually waiting to see who will
15 approach him. So we have a picture of kind of his young adulthood as his sexual life being marked by
16 kind of infrequent activity, limited experience, a lot of conflict and a lot of guilt for him.

17 On the positive side there's no acknowledged interest in any deviant modes of sexuality, and to
18 this date we don't have any reason to believe that he has definite interest in deviant modes of sexuality.

19 To very quickly talk about the testing results, all of the validity indicators and malingering
20 indicators suggested that he was not trying to bias or under report or over report. So that was very good.
21 We had more confidence in the results.

22 When I screened for his intellectual level, I found that he is a very bright young man. His overall
23 IQ score is at the 99 percentile. He's up in the 130's. So he's a very bright young man. This fits with his
24 having an A average at this point.

25 Two major objective measures of psychopathology and personality were given to him, the very

1 standard ones that are given, and they're given because they are norms to compare his scores with people
2 who do have psychological problems. Basically what I was able to do is rule out a lot of very serious
3 kinds of mental health problems. He did not appear to be an aggressive anti-social character. He did not
4 appear to have any major mental disorders. His thinking processes are not disturbed. He doesn't have
5 major mood disorders. Does not have substance problems. He doesn't have severe maladaptive patterns
6 to handle anxiety. So this was a very positive thing seeing that there weren't a lot of mental health
7 problems. Rather he has a milder personality style of someone who is pretty socially shy, inept, awkward
8 who is very afraid of being rejected in relationships; lacks self confidence; is pretty passive and dependent
9 in relationships with other people. However, he worries about what other people think. He works to
10 avoid conflicts, and he also has avoided very autonomous in his life, rather staying within safe
11 frameworks like home and church and things like that.

12 It's expected however that he has the capacity, according to some of the testing, to be able to
13 relate effectively to people. He likes people. He identifies with people. We don't have any of these major
14 problems such that he has the capability to relate effectively as well as recognize conventional modes of
15 response.

16 Regarding the measures of sexuality, he has reasonable levels of information. He's not
17 functioning on inaccurate information, but he seems to have low levels of experience, low drive, more
18 concertive attitudes, low fantasy levels, a more negative body image and not a very strong identification of
19 himself as masculine. But on these measures, it was positive that he wasn't trying to justify or explain
20 away his actions. He does not appear to have any unusual sexual outlets or interest, and even though
21 these actions were done in relation to some prepubescent or pubescent boys, he doesn't have a lot of
22 endorsement of items that have to do with child molestation or an attraction to children.

23 So to pull it all together, I have asked some very specific questions. The first one is does Mr.
24 Clarke meet the criteria for pedophilia. And I worked to get this information in a lot of different ways,
25 through certain kinds of testing; through certain kinds of information gathering, and I could find no

1 specific focus on prepubescent regarding fantasies about them, urges or thinking about them as sexual
2 objects. I cannot find in his background a sexual attraction for children. So it's because that is the very
3 specific criteria that he does not seem to actually fit criteria for pedophilia. There's also no evidence of
4 child pornography, and his main sexual outlet over time has involved either dating partners or
5 masturbation including the use of a sex toy: a female genitalia.

6 The next question does Mr. Clarke's testing indicate -- his testing indicate pedophilia. Well, we
7 never can say what somebody scores on a test means they are or are not a pedophilic. There are several
8 profiles on the MMPI 2 which we commonly find. He did not have any of the three common profiles that
9 we find with pedophiles. Nor did he have elevations on two of the validity scales that pedophiles often
10 elevate because they'll often try to present themselves in an unrealistically favorable light. And he did not
11 do that. And on the multiphasic sex inventory, he only endorsed two out of 35 items on that child
12 molestation scale. Again, suggesting this is not a major orientation for him sexually.

13 The other question that has to be asked is is his sexual orientation heterosexual or homosexual.
14 The data appears to be that his orientation is heterosexual. He's only dated females; has heterosexual
15 fantasies; had a heterosexual video; was using a sex toy of female genitalia, and his parents independently
16 reported that all his life he has been attracted to girls.

17 Then we have to ask well does he appear to be a person who grooms children for sexual
18 purposes. Grooming implies that an adult will put in a lot of effort to gain access to and get children
19 receptive to their advances. We cannot use working with the youth group as evidence in and of itself
20 because a lot of people work with a youth group and work with children. So what becomes more
21 important is was his primary way of relating with these children in groups. His parents reported to me
22 that he was typically not the one soliciting the boys, but rather, the boys liked him a lot and were asking to
23 come over. So as best I understand, his contact with the youth was with groups without deliberate
24 solicitation of very specific children.

25 Then we must ask what diagnostic categories, if any, does he qualify for. While I cannot find a

1 diagnosis that he would fit of the major clinical symptoms, he qualifies for features of something we call
2 avoidant personality disorder, and he doesn't even have enough criteria for the full personality disorder,
3 but he is that picture I gave earlier of somebody who is very restrained in terms of being able to meet
4 people, feels very socially inept, feels inferior to other people, feels inhibited in interpersonal situations.
5 But this also appears to be much more with adult females than it does seem to be with adult males.

6 The only -- the next question I asked was what are some of the risk factors that you would want
7 to be looking at for people who we know who engage in pedophilia, and what would be Mr. Clarke's
8 status with regard to these. The first thing I looked very carefully at is anti-social personality. On five
9 different measures and scales of psychopathology -- excuse me -- psychopathy and anti-social, Mr.
10 Clarke scored very low, and on the one scale that was designed specifically to measure psychopathy, you
11 need a score of 30 to start to think of someone with that personality style, and his score was either zero or
12 one. It was at the most he would have a score of one. So he does not appear to have any symptoms or
13 behaviors of an anti-social style.

14 We also worry about major mental disorders because we worry about people having distorted
15 thinking processes, pressured actions, fewer behavioral controls and things like that. Again, as I
16 mentioned earlier with the testing, I did not find any major mental disorders, and he has had no treatment
17 for anything like that which also supports the idea of a lack of those disorders.

18 We also are typically concerned about substance abuse or dependence worrying about two
19 things: worrying that people will use an altered mental state to disinhibit them to proceed with a sexual
20 act or use it as an excuse for things that they engage in. Mr. Clarke has a remarkably substance-free
21 background. I believe he's tasted alcohol once or twice; never tried drugs, and none of the testing has
22 indicated any maladaptive use of substances.

23 Look for hedonism; somebody who might be thrill seeking; kind of a quest for sensory pleasures
24 at any cost; a lifestyle that focused on obtaining and experiencing physical pleasure. There's no evidence
25 of this for Mr. Clarke; no stylistic way of living like this; rather, most people would have seen him as a

1 pretty conventional, pretty quiet, pretty reserved, conforming type of individual. His free time was
2 focused on church activities, friends or dating.

3 We look at responsiveness to social conventions. This is someone who can recognize that only
4 what is lawful, what -- what would be within society's expectations. And, again, we see a pretty
5 conservative life style, much religious orientation and some typical ambition in terms of occupational things.
6 He also has a flawless prior legal record. He's never even had a speeding ticket.

7 Just three more in this area. We look to see if there's any history of violence or use of force.
8 You can see very quickly it's been quite the opposite. You have somewhat more of a quiet, passive,
9 conforming individual. No history of fights or anything like that.

10 And the last one in this area is the idea of impulsivity, and that is the idea of acting without
11 contemplation. We always would want to know impulse level. Now Mr. Clarke in the general out-in-the-
12 world is someone who doesn't appear to act very impulsively, but specifically in the area of sexuality, I do
13 believe this has played a part in the events that have taken place. While in one way we can think that this
14 would suggest that it was more of a spontaneous, impulsive act as opposed to a lack of planning, I see it
15 as very important that he is going to need to thoroughly understand and identify his own sexual impulses
16 so that he can respond to them in a most appropriate way.

17 So in trying to wrap up, how do we understand what Mr. Clarke did; what would be the best
18 explanation. Well, I want to break it down into two major questions because this is rarely a simple
19 answer, but usually more of a complex explanation. We have to ask two questions: why would Mr.
20 Clarke do something sexual that is not appropriate. We have to look at Mr. Clarke as someone whose
21 personality and sexual life is not as developed as that of most individuals his age. He has areas of his life
22 he's handled successfully, but regarding his experience of himself as male in the terms of relating to
23 women as sexual objects, he feels somewhat inadequate and does show some immaturity. His tendency
24 is more toward emotional dependency and this more passive style results in him not being someone who
25 really actively seeks out female partners, and when he dates, he has a more inhibited style of relating to

1 them sexually. What then comes into play is the idea that because of these conflicts about sexuality due
2 to the strong religious ideas that he has, his style has been to try to keep a lip on his sexual impulses by
3 trying to repress them, push them back, try not to experience them or feel them, but because he still has
4 the impulses like everybody does, his limited sexual activity with females has occurred impulsively, and
5 during these times he feels he's overwhelmed by sexual feelings and acts on them without having made a
6 very deliberate, specific choice about doing so. Afterwards he feels guilty, but not quite as responsible as
7 if he had actually decided to engage in the sexuality. So the impulsivity has actually helped him avoid
8 being down on himself and feeling really, really bad about himself. But the guilt works to make him try
9 again to repress the feeling, and you get a cycle of this kind of behavior which occurs. Therefore, you see
10 a sexuality as characterized by inhibition, immaturity, repression, some impulsivity and guilt, and that's
11 how something inappropriate can occur. It's important that this first question however is that this is
12 unlike the picture of the sexual predator that we have of somebody who might be obsessed with sexuality;
13 someone who might take advantage of any outlet for their sexuality; a psychopathic anti-social person
14 who's gonna use any means to accomplish their goals of erotic satisfaction. It's very much different. It's
15 very much of an inhibited sexuality that needs to be understood and developed.

16 The second question though that answers maybe why he might do something inappropriate, but
17 why would he engage in appropriate sexuality with a boy. Well, because of the immature sexuality which
18 is not sufficiently developed in Mr. Clarke, he still functions psychologically at times in a sexual way as
19 though he were a younger boy. He still is in more of what we call kind of a chum, a pal stage of
20 development that is more prepubescent, pubescent in which boys share sexual information and think
21 about females but really don't perceive of themselves as men who seek out living, breathing females as
22 sexual objects. So feeling that he's something of a big brother counseling younger boys as to what is
23 normal sexually, he doesn't exactly stop to realize is a dangerous zone that he should not be entering. In
24 his own early introduction into sexuality by a boy who was his peer seems to make his exchanges of same
25 sex information to these boys not seem as problematic as they should be and which he needs to learn

1 about. For example, just as he was shown Playboy magazines by another boy, he went and shared sexual
2 information with a boy. Because of his sexual immaturity, his contact with a boy seems similar to his
3 early introductory experiences and seems more educational, playful. Again, his perception, not what he
4 needs to learn about his sexuality. So then when he's confronted by situations where there can be some
5 heightened sexuality, you have a combination of not having the insight into his behavior, the sexual
6 repression, and his more immature development are resulting in these actions. Again, a different picture
7 from an anti-social sexual predator, and rather, a picture for which treatment has a better chance of
8 producing positive changes.

9 The very last question is is he amenable to treatment. He has a variety of characteristics which
10 make him a very good candidate for psychotherapy and a small number of characteristics which he would
11 have to work through for treatment to be successful. On the positive side, he's young. This does not
12 appear to be a fixed ingrained pattern. He's very bright and verbal which makes him more able to handle
13 the talk therapy, the insight building, understanding concepts that would be important. He has excellent
14 social support and a realistic plan for his future employment. The goal of psychotherapy is he must
15 develop inside and introspection. He's going to need to look very carefully at his own sexuality in order
16 to understand how he ended up in the situations for he's facing charges. He's going to have to
17 understand himself rather than just establishing rules for insuring that he's never in this kind of situation
18 again. He needs to be willing to understand that some part of him is not known to him and that he has
19 some blind spots regarding boundaries for his behavior, and rather than trying to psychologically
20 convince himself that this isn't him and trying to repress all this sexuality, he's going to need to very
21 carefully investigate his own sexuality through psychotherapy. Treatment does have a good probability of
22 being successful.

23 Mr. Culberson: Thank you, Dr. Follingstadt. I'm sure The Court---

24 The Court: I've only got one question of course when this incident occurred, he was sleeping as
25 a 20 some -- somethin' year old male with a 12 or 13 year-old child. I'm just wondering what your

1 comments on that situation might be.

2 Dr. Follingstadt: The best I understand and how and this includes information from his parents
3 is that this was not an atypical experience with the church group where people would go to hotels; people
4 would sleep two to a bed, an adult and a child. In those cases it was -- you know, there were more people
5 in the room than just two, but even his parents said that they didn't really stop to think about that being a
6 problem because that was somewhat normative in the church youth group. However, it is certainly
7 something that Mr. Clarke should have very much stopped to think that this is a dangerous thing to do
8 and this -- this absolutely should not have happened.

9 The Court: All right. Thank you, Doctor.

10 Mr. Culberson: The Court will also notice in the materials provided and immediately following
11 Dr. Follingstadt's report a letter from Dr. Peter Kilman (phonetic) indicating that he has been engaged as a
12 therapist for Brantley. He gives his prognosis and indicates to The Court that given a course of therapy, in
13 his opinion, as with Dr. Follingstadt, it is unlikely that any such incident such as has brought us here today
14 will ever happen again.

15 At this time before recapping briefly the affidavits submitted by the family, friends and
16 supporters of Brantley Clarke, I'd ask them to stand up for The Court. Would the friends and supporters
17 of Brantley Clarke please rise and I will attempt to the best of my failing to introduce everyone that is
18 here. This is, of course, not everyone who has submitted an affidavit, but these are the friends and family
19 and co-workers that could appear here today. From the right we have Larry and Diane Post. They are
20 friends of the family. They have submitted an affidavit. We have Fred and Peggy Ogburn. They are the
21 maternal aunt and uncle.

22 The Court: They also have an affidavit.

23 Mr. Culberson: They also have an affidavit on file. And we have Mr. and Mrs. Clarke, the
24 gentleman in the brown coat and his wife. In the blue standing in the very back we Cathy Moore. She's a
25 pharmacist. Works with Brantley and has worked with him for nine years. And the in the very back sort

1 of concealed by Mr. and Mrs. Clarke is Katrina Ingle. That is (unintelligible) half sister. And all those
2 individuals, in addition to others, have submitted affidavits. And you can have a seat. Thank you.

3 In reviewing the affidavits that I have presented here on behalf of Brantley all of which were
4 written by the witnesses themselves rather than me preparing something for them to sign, The Court will
5 note that those are the words of the witness rather than the lawyer and those affidavits contain certain
6 consistencies throughout. Brantley is dependable, trustworthy and caring. He is respectful of others and
7 always willing to help others. Brantley accepts delegation of tasks and carries them through to completion
8 with a high degree of proficiency. He is conscientious. Brantley is a person of high moral character and
9 practices his faith regularly both in and out of church. He lives his faith. He is described uniformly as a
10 fine Christian man. He has shared that faith with the children and the people younger than himself and
11 has always been appropriate and well liked. Brantley is highly intelligent, artistic and talented. At the
12 same time he is very humble and reserved. Everyone agrees that Brantley has led an exemplary life. He's
13 never been in trouble. He doesn't drink alcohol; has never taken drugs, and these charges are both
14 surprising and totally out of character with all past behavior. All of these witnesses believe in Brantley
15 and believe that he deserves a second chance after making this mistake.

16 I'm sure that The Court has not had an opportunity to fully review all these affidavits because
17 they are, as I pointed out earlier, numerous. Everyone believes Brantley deserves a second chance and
18 everyone agrees that this is the only second chance that Brantley will ever need. Both psychologists have
19 ruled out that deviant or harmful behaviors, mental illness, substance abuse or traits that characterize
20 sexual predators or pedophiles. Both psychologists agree that with proper therapy the likelihood of
21 anything like this ever happening again are minimal and that Brantley is not a threat to the community.

22 The events related by the solicitor and conceded by the defendant are not acts of violence or
23 duress, nor was there actually any sex act alleged or committed. What has been presented is a situation
24 with faulty judgment and immaturity led to a bad event taking place. Given the exemplary life led by
25 Brantley Clarke up to this point in time, we believe he deserves a second chance. We do not have the

1 temerity to demand it as his right but to plead for it based on all of the facts that we have presented before
2 this Court which indicate there is merit in according mostly in this case.

3 In this Easter season of mercy and grace and forgiveness, I ask that The Court grant lenience in
4 this sentence and to avail itself of some of the alternative sentencing tools that are within its power.

5 And, finally, rather than rely upon my poor words, I turn to one who's been honored for his able
6 turn of phrase as I quote Porsha's (phonetic) speech to Shilock (phonetic) and to the Dukescourt
7 (phonetic) from THE MERCHANT OF VENICE if I can be indulged and get just a glass of water. The
8 quality of mercy is not strained. It droppeth as the gentle rain from heaven upon the place beneath. It is
9 twice blessed. It blesseth him that takes and him that gives. Tis mightiest in the mightiest. It becomes the
10 throne monarch better than the crown. His scepter shows the force of temporal power the attribute to awe
11 in majesty wherein doth sit the dread and fear of kings. But mercy is above this sceptered sway. It is
12 enthroned in the hearts of kings. It is an attribute to God himself and earthly power doth then show likest
13 gods when mercy seasons justice. Therefore though justice be the plea consider this that in the course of
14 justice none of us should see salvation. We do pray for mercy and that same prayer doth teach us all to
15 render the deeds of mercy.

16 Thank you, Judge. I appreciate your time, your consideration, and hope that you can give this
17 gentleman a second chance.

18 The Court: All right. Thank you, Mr. Culberson. Mr. Clarke, is there anything you'd like to add
19 to what your attorney and the presentation he's made?

20 The defendant: I made a statement. I would like to apologize for the inconvenience that I have
21 caused everyone. I have made errors in judgment and made some mistakes that I am truly sorry for. I
22 cannot do anything to change the past, but I can change the future. I currently am in counseling and have
23 a lot of family and friends behind me to help me get through this. I'm currently finishing my last class in
24 college for my degree in computer networking and keeping a straight A average.

25 To the families I would like to apologize for everything that they have had to go through. I know

1 this hasn't been the easiest time for them and I am sorry and wish them only the best and I do wish that
2 they could forgive me, and I would ask for The Court's mercy in this matter for the understanding that I
3 will complete any task to the best of my ability that I am given by this Court. I'm not a threat to the
4 community and I have many people behind and help me, support me through this. I am truly sorry for
5 everything that's happened.

6 Mr. Culberson: And, Judge, I believe that Mr. and Mrs. Clarke would like to make a statement to
7 The Court as well.

8 The Court: All right.

9 Mr. Culberson: If The Court will indulge them.

10 The Court: Go ahead.

11 Mr. Clarke: Your Honor?

12 The Court: Yes, sir.

13 Mr. Clarke: I mean my voice has gotten bad. I am Brantley's father and he has accomplished a
14 lot in his life. He has grown up in the church. I know he's made a mistake.

15 Mr. Culberson: Mr. Clarke, get closer to the microphone if you don't mind. She's got to take
16 down what you say.

17 Mr. Clarke: I am Brantley's father. And he has spent the majority of his life in and out of the
18 church. He did make a mistake. Of course a lot of us make mistakes. I just ask The Court's mercy upon
19 him. He is a good kid. Thank you very much.

20 The Court: All right. Thank you, Mr. Clarke. Anything you'd like to add, ma'am?

21 Mrs. Clarke: Yes, sir. I am Brantley's mother Barbara Clarke. As a child Brantley was well
22 behaved, well adjusted and a good student. The worst trouble he ever got in was lunchroom detention in
23 middle school. He became a Christian at the age of eight and has always loved church. In middle school
24 he learned to play the trumpet, joined the band. Went on to be in the marching band all through high
25 school, and he began using his musical talents in church also.

1 In high school he was a member of the Honor Society and the Key Club. He learned to play the
2 guitar and soon then added that to his service in church. He never reached the age of rebellion. And he
3 made his own decisions to avoid partying and under age drinking.

4 As an adult he still does not party or drink. He's been a good citizen. He's never even had a
5 speeding ticket or a traffic ticket.

6 Some of his activities in church since he was -- has been an adult a Sunday School teacher,
7 Chair of the Baptism Committee, Contemporary Christian Music Leader, Assistant to the Youth Director
8 and Deacon in Training. He's also served on the Sound Committee and helped out whenever and
9 wherever he was asked to help out. He's been on several mission trips over the past few years. No
10 complaints were ever made against his conduct. He has dated several young ladies, but he's not the type
11 to rush into marriage. For right now he's kept his emphasis on education and after he finishes the course
12 he's taking now, he'll have a degree in computer networking.

13 His goals in life have always included getting married and having a family of his own.

14 We have found a new church we plan to join soon, and I can say emphatically that Brantley will
15 never again work with children or youth; not that anyone would ever be in danger from him, but as his
16 mother, I will make sure there will never even be the possibility of anyone doubting his motives. I know
17 what a good person Brantley is, and I know how he loves God. Whatever lack of judgment he showed
18 that has brought him here today will be addressed and the counseling that he will -- is receiving and will
19 continue to receive.

20 We're asking for a second chance so that he can finish his education and find new ways to use
21 his talents in our new church and also his education. As much as is humanly possible for me to say, he
22 will never need a third chance. Our family has always been close, and his father and I will work very hard
23 to make sure that nothing like this ever happens again. Thank you.

24 The Court: All right. Thank you, Ms. Clarke.

25 Mr. Culberson: Your Honor, that concludes our presentation on behalf of the defense, and

1 obviously we believe that the imposition of the maximum penalty, much less the cap would be
2 inappropriate under these circumstances, and we believe there is merit in this case in this man's past
3 behavior, notwithstanding these circumstances, to grant leniency, if not mercy. We believe that The Court
4 is equipped with tools sufficient to protect the community, to administer punishment and yet allow this
5 young man to pursue a course of healing which he has already set himself forth on. The Court will note
6 that Kilman (phonetic) has recommended weekly counseling for the next four months at the end of which
7 there will be a reevaluation to see what further therapy might need to be pursued, and we would ask The
8 Court to let him seek this -- this out and pursue this self healing and be required to do so. But we don't
9 believe ten years in the penitentiary, we don't believe time in the penitentiary for this young man will
10 produce any positive result but rather reek a vengeance and certainly not of justice or mercy. In fact, we
11 believe that time in the penitentiary for this young man would destroy a life, and we ask The Court to take
12 that into consideration. Thank you.

13 The Court: All right. Thank you, Mr. Culberson.

14 Mr. Culberson: Thank you.

15 The Court: Solicitor, anything further?

16 Ms. Heath: Nothing further, Your Honor.

17 The Court: I've been on the bench now for a little over 15 years, and I used to try to explain
18 some of my thought processes, particularly in difficult situations like this, and quite frankly I've gotten
19 away from that. I think it's easier for me simply to sentence someone. I would this, Mr. Culberson: you
20 have made an impressive presentation on behalf of Mr. Clarke. I don't think there's any question but that
21 he has done a lot of good in his life. There's no question about that, and probably has as much support as
22 any defendant that's ever stood in this courtroom before this court. The dependability, the
23 trustworthiness and those characteristics that have been testified through both through live testimony and
24 through the affidavits that have been presented, some of those characteristics are the same characteristics
25 that put him in the situation that led to this charge. And -- and while the good that's been said about Mr.



1 Clarke, it has to be balanced and tempered with the children who have been taken advantage of and have
2 had what happened to them happen to them, and The Court has to take all of that into consideration. I
3 know the recommendation is for a cap of 10 years. The sentence will be within that cap, but I do think I
4 would be letting the victims down if The Court simply placed Mr. Clarke on probation.

5 The sentence of this Court is that Mr. Clarke be confined for 10 years. That will be suspended on
6 the service of 7 years with 5 years of probation; credit for any time that he has already served. He will be
7 required to complete sex offender counseling that is recommended by the probation office.

8 Mr. Culberson: Thank you, Your Honor.

9 *****endoftranscript*****
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CERTIFICATE

I, THE UNDERSIGNED, CARLA PERRY, OFFICIAL AND CERTIFIED COURT REPORTER FOR THE STATE OF SOUTH CAROLINA (RETIRED), DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT TO THE BEST OF MY ABILITY AND SKILL.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

Carla Jo Perry

2-10-09

11th W
ORIGINAL

STATE OF SOUTH CAROLINA

County of

LEXINGTON

FILED

2009 OCT -9 In the Court of Common Pleas

BRANTLEY CLARKE

Full name and prison number (if any) of Applicant.

#321118

Vs.

SOUTH CAROLINA

Name of Respondent,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SCAPPLICATION FOR
POST-CONVICTION RELIEF

2009CP3204571

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention:

RIDGELAND DETENTION CENTER

2. Name and location of Court which imposed sentence:

GENERAL SESSIONS, LEXINGTON, SC.

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3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

- (a) 7
- (b) _____
- (c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

- (a) 4/5/07
- (b) _____
- (c) _____

5. Check whether a finding of guilty was made:

- (a) after a plea of guilty ☒
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

6. Did you appeal from the judgement of conviction or the imposition of sentence?

NO

7. If you answered "yes" to (6), list

- (a) the name of each Court to which you appealed:

- i. _____
- ii. _____
- iii. _____

- (b) the result in each such Court to which you appealed:

- i. _____
- ii. _____
- iii. _____

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(c) the date of each such result:

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- i. _____
- ii. _____
- iii. _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. _____
- ii. _____
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
- (b) _____
- (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) AFTER DISCOVERED EVIDENCE
- (b) _____
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) ELECTRONIC MONITORING
- (b) _____
- (c) _____

11. Prior to this application have you filed with respect to this conviction:

- (a) any petition in the State Court under South Carolina Law? NO
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO

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(c) any petitions in the United States Supreme Court for certiorari, other than petitions, if any, already specified in (7)? no 2004 OCT - 9 A 10: 58

(d) any other petitions, motions or applications in this or any other Court? no COURT A. CARRIGG
CLERK OF COURT
LEXINGTON SC

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

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- i. _____
- ii. _____
- iii. _____
- iv. _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion, or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State, or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? DAVID CULBERSON
- (b) your trial, if any? _____
- (c) your sentencing? _____

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(d) your appeal, if any, from the judgement of conviction or the imposition of sentence? _____

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(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

BETH A. GARRIGG
CLERK OF COURT
LEXINGTON SC

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you:

i. DAVID CULBERSON

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. GUILTY PLEA

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

OVERTURN CONVICTION

19. Are you now under sentence from any other court that you have not challenged?

NO

2009CP3204571

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

ORIGINAL
FILED

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

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

BETH A. CARRIGG
CLERK OF COURT
EXETER, NH

Sprentiss
Applicant *for*

SWORN or affirmed to and subscribed before me this

9th day of October, 2009

John F. White
Notary Public

My Commission Expires: July 2, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	Case No.: 2009-CP-32-4571
Brantley W. Clarke, # 321118,	)	
Applicant,	)	
v.	)	RETURN AND MOTION TO DISMISS
State of South Carolina,	)	
Respondent.	)	

Respondent, making its Return and Motion to Dismiss to the application for post conviction relief (PCR) filed October 9, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting Lewd Act Upon Child Under Sixteen (2007-GS-32-1210). He was represented by David Culbertson, Esquire. On April 5, 2007, the Applicant pled guilty as charged. He was sentenced by the Honorable James W. Johnson, Jr., to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction; the Applicant's records from the South Carolina Department of Corrections; and the transcript of the proceedings against the Applicant.

II.

In his current application, Applicant does not allege that he is being held in custody unlawfully, but instead makes the following complaints:

1. "After discovered evidence:
 - a. "Electronic Monitoring"

Respondent interprets these complaints to mean that the Applicant was not aware at the time of the entry of his guilty plea that he would be subject to electronic monitoring upon his release.

III.

The Respondent submits 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, et. seq.

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 judgment 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 April 5, 2007. This Application was filed on October 9, 2009, which was well after the statutory filing period had expired.

A motion for summary judgment 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) (1985) 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 judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

Respondent further submits that the Court should immediately dismiss the Current Application because electronic monitoring is a collateral consequence of a conviction and therefore, is not proper claim to raise in a PCR action. See Williams v. State, 662 S.E.2d 615 (S.C. App. Ct. 2008). "The imposition of a sentence may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. Id.

A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. See State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating the defendant must be apprised of the direct consequences, which are the direct and immediate results, of his guilty plea). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973). The purpose of the sexual registry is that of community and police supervision. Registration on the sexual offender registry has no direct bearing on the range of the defendant's punishment as delineated in Cuthrell. Id.

Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief.

V.

Finally, Respondent submits that the Court should immediately dismiss the Current Application because the Applicant has failed to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003), and the relief sought by the Applicant, to be removed from the sex offender registry, is not provided through Post-Conviction Relief (PCR).

Applicant's request to be removed from the sex offender registry is not relief that is attainable through Post-Conviction Relief, as the only relief offered through Post-Conviction Relief is a new trial. Moreover, an Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim

for post-conviction relief under any of the statutory grounds. The Respondent therefore moves for summary dismissal of this allegation pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211

1/5, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Brantley W. Clarke, # 321118,

Applicant.

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2009-CP-32-4571

JUL 31 A 11: 20

CONDITIONAL ORDER OF DISMISSAL

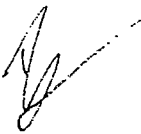
SCANNED

This matter comes before the Court by way of an Application for post-conviction relief (PCR) filed October 9, 2009. Respondent made its Return and Motion to Dismiss on or about January 5, 2010.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting Lewd Act Upon Child Under Sixteen (2007-GS-32-1210). He was represented by David Culbertson, Esquire. On April 5, 2007, the Applicant pled guilty as charged. He was sentenced by the Honorable James W. Johnson, Jr., to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence.

Before this Court are the records of the Lexington County Clerk of Court regarding the subject conviction; the Applicant's records from the South Carolina Department of Corrections; and the transcript of the proceedings against the Applicant.



II.

In his current application, Applicant does not allege that he is being held in custody unlawfully, but instead makes the following complaints:

1. "After discovered evidence:
 - a. "Electronic Monitoring"

This Court interprets these complaints to mean that the Applicant was not aware at the time of the entry of his guilty plea that he would be subject to electronic monitoring upon his release.

III.

This Court finds that the Application for Post-Conviction Relief must 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, et. seq. 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 judgment 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 April 5, 2007. This Application was filed on October 9, 2009, which was well after the statutory filing period had expired.

A motion for summary judgment 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) (1985) 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 judgment as a matter of law." Therefore, this Court finds that the application for post conviction relief is summarily dismissed for failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

This Court finds, further, that this Application for PCR should also be summarily dismissed because electronic monitoring is a collateral consequence of a conviction and therefore, is not proper claim to raise in a PCR action. See Williams v. State, 662 S.E.2d 615 (S.C. App. Ct. 2008). "The imposition of a sentence may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. Id.

A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. See State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating the defendant must be apprised of the direct consequences, which are the direct and immediate results, of his guilty plea). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973). The purpose of the sexual registry is that of community and police supervision. Registration on the sexual offender registry has no direct bearing on the range of the defendant's punishment as delineated in Cuthrell. Id.

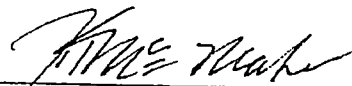


V.

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 Lexington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Kaelon E. May, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

- AND IT IS SO ORDERED this 30 day of JAN, 2012.


William P. Keesley R. KEELEY McMAHON
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina

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

BRANTLEY CLARKE, #321118,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Conditional Order of Dismissal has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

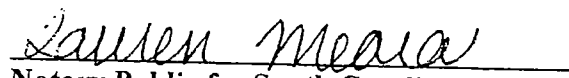
Reynolds H. Blankenship, Jr., Esquire
917 Calhoun St.
Columbia, SC 29201

This 13th Day of February, 2012.



Lena Pelishenko
Legal Assistant for Respondent

SWORN to before me this 12th Day of February, 2012.


Notary Public for South Carolina.
My Commission Expires: 9/25/19

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarke, #321118,)

Case No. 2009-CP-32-4571

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

NOTICE OF MOTION AND MOTION TO
AMEND APPLICATION FOR
POST-CONVICTION RELIEF

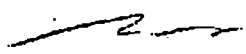
TO: KAELOM MAY, OFFICE OF THE SOUTH CAROLINA ATTORNEY GENERAL

PLEASE TAKE NOTICE that ten days after the filing of this Motion, or as soon thereafter as counsel may be heard, Applicant intends to move this Court to amend his application for post-conviction relief (PCR) pursuant to Rule 15(a), SCRCP, which provides that leave to amend "shall be freely given." The State would not be prejudiced by the proposed amendment, a copy of which is attached hereto.

Undersigned counsel for Applicant has consulted with opposing counsel for the State pursuant to Rule 11, SCRCP, regarding this Motion prior to filing.

Respectfully submitted,

MASELLA LAW FIRM, P.A.


Reynolds H. Blankenship, Jr.
SC Bar No. 72784
917 Calhoun Street
Columbia, South Carolina 29201
803.748.9990
803.748.9948/fax
rblankenship@masellalaw.com
Attorney for Applicant

Columbia, South Carolina
February 14, 2012

FILED FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Brantley W. Clarke, #321118

Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention None (was incarcerated at Ridgeland until October 1, 2009)
2. Name and location of Court which imposed sentence Lexington County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Case No. 2007-GS-32-1210 (Lewd Act on a Minor, SC Code § 16-15-140)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 5, 2007

(b) 10 years suspended on service of 7 years and 5 years probation, plus \$125 costs

(c) Condition: complete sex offender counseling recommended by the probation office

6. Check whether a finding of guilty was made:

(a) after a plea of guilty X

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Petitioner was unaware of the problem with his sentencing until October 10, 2008.

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

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2008 OCT 16 3 18

custody unlawfully:

(a) The sentencing judge did not sentence Applicant to Mandatory GPS, as indicated by the absence of a check mark in that box on the sentencing sheet, which is attached. (See also the attached transcript of the plea and sentencing hearing.) Until October 10, 2009, Applicant was not made aware that the Department of Corrections and/or the Department of Probation, Parole, and Pardon Service had Applicant registered for Mandatory GPS as part of his sentence. See attached "Request to Staff Member." Since the sentencing judge did not impose Mandatory GPS as part of the sentence, Mandatory GPS cannot lawfully be part of the sentence, and Applicant is entitled to relief pursuant to South Carolina Code section 17-27-20(a)(1) and (3)-(6). Since Applicant was not made aware of this issue with his sentence, nor could have become aware of it prior to October 10, 2009 with the exercise of due diligence, his original application was timely pursuant to South Carolina Code section 17-27-45(C). Further, the pleadings in this Amended Application relate back to the date of the original Application pursuant to Rule 15(c), SCRPC.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See answer to 10(a).

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

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ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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- (b) the proceedings in which each ground was raised:
- i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Petitioner believes that the PCR Court is the proper forum in which to first present these issues.
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? N/A
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. David Culberson of Lexington (deceased)
 - ii. _____
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Arraignment
 - ii. Plea
 - iii. Sentencing
19. State clearly the relief you seek in filing this application:
- Petitioner seeks correction of his sentence on record with all state agencies and offices in accordance with the actual sentence imposed by the sentencing judge. In the alternative,

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Petitioner seeks re-sentencing or a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

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STATE OF SOUTH CAROLINA)

County of LEXINGTON)

VERIFICATION

I, Brantley W. Clarke, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this _____
day of _____, 2____.

Notary Public (L.S.)

My Commission Expires: _____

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2017 OCT 16 AM 9:18

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

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

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

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2____.

Notary Public

My Commission Expires: _____

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2017-10-18
Lmc

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER

TO: NAME: <i>Ms Myers</i>	TITLE: <i>Classification - CA</i>	DATE: <i>9-2-08</i>
INMATE'S NAME: <i>Brantley Clarke</i>		SCDC #: <i>321118</i>
INSTITUTION: <i>RCI</i>		LIVING QUARTERS: <i>CA-12</i>

① I was wondering why I haven't gone up for parole yet. I entered SCDC in April 2007 and I am non-violent, shouldn't I go up yearly?

② Also, I have a detainer that is a hold for GPS. I checked my sentencing paper and the GPS monitoring box is not checked (4 my charge isn't automatic GPS), why do I have this detainer?

DISPOSITION BY STAFF MEMBER:

~~Inmate~~ Clark,
I called Columbia and was informed that if your offense (Lew Act) date was on or after 7/1/06, the GPS monitor is automatic.

DATE: <i>10/10/08</i>	SIGNATURE: <i>Ms. Myers</i>
--------------------------	--------------------------------

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarkc, #321118,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

Case No. 2009-CP-32-4571

CERTIFICATE OF SERVICE

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 2012 FEB 16 3 19 PM
 LMC

Undersigned counsel hereby certifies that on this date he has served Applicant's Notice of Motion and Motion to Amend Application for PCR by first-class U.S. mail, postage paid, upon the following:

Kaelon E. May
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211-1549

Respectfully submitted,

MASELLA LAW FIRM, P.A.

 Reynolds H. Blankenship, Jr.
 SC Bar No. 72784
 917 Calhoun Street
 Columbia, South Carolina 29201
 803.748.9990
 803.748.9948/fax
 rblankenship@masellalaw.com
 Attorney for Applicant

Columbia, South Carolina
 February 14, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Brantley W. Clarke

☒ Plaintiff

v.

The State Of South Carolina

☐ Defendant.

FILED

ORIGINAL

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-32-4571

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Reynolds H. Blankenship, Jr., Bar No. 72784
Address:
917 Calhoun Street, Columbia, SC 29201
phone: 748-9990 fax: 748-9948
e-mail: rblankenship@masellalaw.com other:

Defendant's Attorney:
Kaelon E. May, Bar No.
Address:
P.O. Box 11549
phone: 734-3970 fax: 253-6283
e-mail: other:

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Amend PCR Application

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO**SECTION II: Motion/Order Type**

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

February 14, 2012

Date submitted

SECTION III: Motion Fee

- ☐ **PAID - AMOUNT:**
☒ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support
 (check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

- ☐ **MOTION FEE COLLECTED:** _____
☐ **CONTESTED - AMOUNT DUE:** _____

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON) 2012 FEB 21 P 2:43

Brantley W. Clarke, #321118,) Case No. 2009-CP-32-4571

Applicant,

vs.

State of South Carolina,

Respondent.

REPLY TO CONDITIONAL ORDER
 OF DISMISSAL

Applicant Brantley W. Clarke hereby responds to the Court's Conditional Order of Dismissal of the application for post-conviction relief (PCR). The application should not be dismissed for the following reasons: (1) Applicant has filed a motion to amend the application, and dismissal while that motion is pending would be premature; (2) the application was filed within one (1) year from the date on which he reasonably discovered the error in his sentence—electronic monitoring—and the application was therefore timely filed pursuant to South Carolina Code section 17-27-45(C); and (3) the sentencing judge did not sentence Applicant to electronic monitoring, and electronic monitoring cannot be added to a defendant's sentence by anyone other than the sentencing judge.

I. APPLICANT HAS FILED A MOTION TO AMEND THE PCR APPLICATION, AND DISMISSAL WHILE THAT MOTION IS PENDING WOULD BE PREMATURE.

On February 14, 2012, Applicant filed and served a Motion to Amend Application for Post-Conviction Relief, which is attached. Until the Court addresses that motion, dismissal of the application would be premature.

II. THE APPLICATION WAS FILED WITHIN ONE (1) YEAR FROM THE DATE

- ☐ cc: Box
☐ cc: Mail
☒ cc: Person
☐ cc: None

ON WHICH APPLICANT REASONABLY DISCOVERED THE ERROR IN HIS SENTENCE—ELECTRONIC MONITORING—AND THE APPLICATION WAS THEREFORE TIMELY FILED PURSUANT TO SOUTH CAROLINA CODE SECTION 17-27-45(C).

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South Carolina Code section 17-27-45(C) provides:

DETHA A. CARRICO
CLERK OF COURT
LAWRENCE SC

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.

S.C. Code Ann. § 17-27-45(C) (2011).

In this case, as explained in the proposed Amended Application, the sentencing judge did not sentence Applicant to Mandatory GPS, as indicated by the absence of a check mark in that box on the sentencing sheet (which is attached to the proposed Amended Application along with the transcript of the plea and sentencing hearing). Until October 10, 2009, Applicant was not made aware that the Department of Corrections and/or the Department of Probation, Parole, and Pardon Service had Applicant registered for Mandatory GPS as part of his sentence. (See the "Request to Staff Member" attached to the proposed Amended Application.)

Since the sentencing judge did not impose Mandatory GPS as part of the sentence, Mandatory GPS cannot lawfully be part of the sentence, and Applicant is entitled to relief pursuant to South Carolina Code section 17-27-20(a)(1) and (3)–(6). Since Applicant was not made aware of this issue with his sentence, nor could have become aware of it prior to October 10, 2009 with the exercise of due diligence, his original application was timely pursuant to South Carolina Code section 17-27-45(C).

III. THE SENTENCING JUDGE DID NOT SENTENCE APPLICANT TO ELECTRONIC MONITORING, AND ELECTRONIC MONITORING CANNOT

BE ADDED TO A DEFENDANT'S SENTENCE BY ANYONE OTHER THAN THE SENTENCING JUDGE.

South Carolina Code section 23-3-540(A) provides:

2017 FEB 21 P 2:43

Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140, the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

S.C. Code Ann. § 23-3-540(A) (2011).

In Applicant's case, the sentencing judge did not sentence Applicant to electronic monitoring pursuant to Code section 23-3-540(A). (See the sentencing sheet and transcript attached to the proposed Amended Application.) The State did not object to the sentencing judge's failure to do so. Nor has the State ever moved to have the sentencing Court correct the sentence in accordance with the statute.

Apparently, however, the Department of Corrections and/or the Department of Probation, Parole and Pardon Services corrected the sentence on their own, as an administrative matter. That is improper, invalid, and an unconstitutional violation of due process.

In Earley v. Murray, 451 F.3d 71, 74-77 (2d Cir. 2006), the United State Court of Appeals for the Second Circuit held that when anyone other than the sentencing court corrects a sentence to impose a statutorily mandatory post-release supervision (PRS), the addition is a violation of due process. As in Applicant's case, the sentencing judge in Earley had not imposed PRS even though PRS was statutorily required. Id. at 73. The New York Department of

Correctional Services took it upon itself to correct the sentence and add the statutory period of PRS. Id. The Second Circuit, relying on the United States Supreme Court's decisions in Bozz v. United States, 330 U.S. 160 (1947) and Hill v. United States ex rel. Wampler, 298 U.S. 460 (1936), held that this was a violation of due process. The Court observed that the State could have moved the sentencing court to correct the sentence but had never done so. Earley, 451 F.3d at 76. The Court remanded the case to the District Court with an instruction to issue a writ of habeas corpus vacating the period of PRS added to the sentence. Id. at 76-77. The United States Supreme Court denied the State's petition for a writ of certiorari. Burhlre v. Earley, 551 U.S. 1159 (2007). See also United States ex rel. Carroll v. Hathaway, 2012 U.S. Dist. LEXIS 6746, at 24-26 (N.D. Ill. 2012) (following Earley); Maciel v. Cate, 2011 U.S. Dist. LEXIS 104670, at *3 (C.D. Cal. 2011) (same).

The facts of Applicant's case parallel those in Earley, and this Court should grant the application for PCR and vacate the electronic monitoring unconstitutionally added to his sentence. Here, as clearly shown in the transcript of the sentencing hearing and on the sentencing sheet, the sentencing judge did not impose electronic monitoring as part of Applicant's sentence. By failing to object, the State waived the sentencing judge's non-compliance with South Carolina Code section 23-3-540(A). Neither the Department of Corrections nor the Department of Probation, Parole, and Pardon Services had authority to unilaterally add electronic monitoring to Applicant's sentence.

Contrary to the State's argument, electronic monitoring is not "automatic" or "collateral" in the sense that it does not matter whether the sentencing judge follows the statute and imposes it. If the sentencing judge does not impose it, then, constitutionally, it is not part of the sentence.

FILED
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OFFICE
JAN 10 2013
U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
JAN 10 2013

Consequently, the imposition of electronic monitoring upon Applicant in this case was a violation of due process. His application for PCR should therefore be granted, and the condition of electronic monitoring vacated.

CONCLUSION

Applicant's application for PCR should not be dismissed for various reasons. First, Applicant has filed a motion to amend the application, and dismissal while that motion is pending would be premature.

Second, the conclusion in the Conditional Order of Dismissal that the application was not filed within the time provided by the statute of limitations is erroneous. The application was filed within one (1) year from the date on which Applicant reasonably discovered the error in his sentence—electronic monitoring—and the application was therefore timely filed pursuant to South Carolina Code section 17-27-45(C).

Third, the sentencing judge did not sentence Applicant to electronic monitoring; rather, the Department of Corrections or Department of Probation, Parole, and Pardon Services added it on their own, as an administrative matter, without ever asking the State to seek correction of the sentence by the sentencing court. Only the sentence imposed by the sentencing court is the actual sentence of a defendant, however. The facts of this case are parallel to those in the Second Circuit's Earley opinion, in which the Court ruled that the addition of a sentencing condition by anyone other than the sentencing court is a violation of due process.

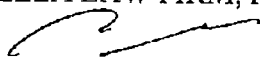
In accordance with Earley, the cited Supreme Court opinions on which Earley is based, and the opinions of other courts that have followed Earley, this Court should grant Applicant's application for PCR and vacate the imposition of electronic monitoring on him.

FILED
JAN 31 2 24 PM '13
CLERK OF COURT
SOUTH CAROLINA

Columbia, South Carolina
February 20, 2012

Respectfully submitted,

MASELLA LAW FIRM, P.A.



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SC Bar No. 72784
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Attorney for Applicant

FILED

2012 FEB 21 P 2:43

CLERK OF DISTRICT COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON) IN THE COURT OF COMMON PLEAS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

2012 FEB 21 2:45
 Brantley W. Clarke, #321118,) Case No. 2009-CP-32-4571

Applicant, PETHA A. GARRIGG
 CLERK OF COURT
 LEXINGTON SC

vs.)

CERTIFICATE OF SERVICE

State of South Carolina,)

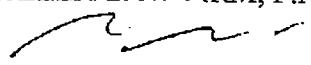
Respondent.)

Undersigned counsel hereby certifies that on this date he has served Applicant's Reply to
 Conditional Order of Dismissal by first-class U.S. mail, postage paid, upon the following:

Kaelon E. May
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211-1549

Respectfully submitted,

MASELLA LAW FIRM, P.A.


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 803.748.9948/fax
 rblankenship@masellalaw.com
 Attorney for Applicant

Columbia, South Carolina
 February 21, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarke, #321118,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

Case No. 2009-CP-32-4571

ORDER

Date: January 14, 2016
Judge: J. Mark Hayes, II
Counsel for Applicant: Robert M.P. Masella
Counsel for Respondent: Patrick Lowell Schmeckpeper
Court Reporter: Stacy Johnson

FILED
2016 FEB - 3 A 11:41
BETH A. OVERBROG
CLERK OF COURT
LEXINGTON, SC

PROCEDURAL POSTURE

This matter initially came before the court by Petitioner's filing of a Post-Conviction Relief Application on October 9, 2009. An amended application was filed by petitioner on February 16, 2012. The State filed a motion to dismiss on or about January 5, 2010. A Conditional Order of Dismissal was executed by the Honorable R. Knox McMahon on January 30, 2012 and filed January 31, 2012. A Reply to the Conditional Order of Dismissal was filed by Petitioner on February 21, 2012. A second (identical) Conditional Order of Dismissal was executed by Judge McMahon on June 29, 2012 and filed on July 3, 2012. A letter dated July 19, 2012 reaffirmed the previously filed Reply to the Conditional Order of Dismissal and was mailed on July 19, 2012 to the Lexington County Clerk of Court.

A status conference was held by the Honorable William P. Keesley on October 8, 2015. As a result of the conference, Judge Keesley set today's hearing for the court to determine if a further review of this Post-Conviction matter should be conducted.

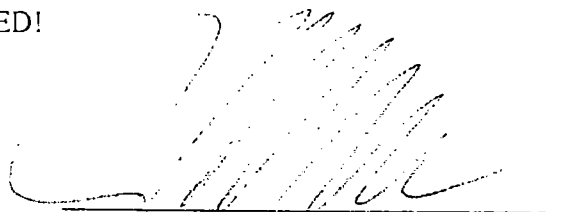
FINDINGS OF FACT AND CONCLUSIONS OF LAW

South Carolina Code §17-27-70 sets out the procedure the Court should apply upon receipt of a Post-Conviction Relief Application. As stated above, the State filed a motion for a dismissal of the application. Judge McMahon issued a Conditional Order of Dismissal and gave

Applicant twenty (20) days to show why his Order should not become final. Applicant provided a Reply to the Conditional Order of Dismissal within the specified time.

After reviewing the Applicant's Reply and after hearing from counsel for the State and the applicant, this court feels a sufficient showing that a material issue of fact has been made to warrant a further review. Therefore I direct that an evidentiary hearing be scheduled to allow for further review of this Post-Conviction Relief Application.

AND IT IS SO ORDERED!



J. Mark Hayes, II
Presiding Judge

January 26, 2016
Lexington, South Carolina

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

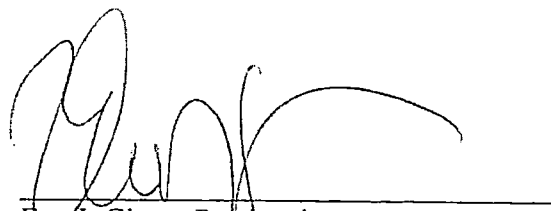
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FILED

CERTIFICATE OF SERVICE BY MAIL

I, Eva J. Glenn, Employee of Masella Law Firm, P.A., do hereby certify that a filed copy of Order was served upon the parties by depositing said papers via US Mail, postage prepaid, on this 5th day of February, 2016, with the first class postage duly affixed thereto and addressed as follows:

Mr. Patrick Schmeckpeper, Esq.
Assistant Attorney General
PO Box 11549
Columbia, SC 29211-1549



Eva J. Glenn, Paralegal
MASELLA LAW FIRM, P.A.
917 Calhoun Street
Columbia, SC 29201

FORM 5

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

2009-CP-32-04571

Brantley W. Clarke, #321118)

Full name and prison number (if any) of Applicant.)

SECOND AMENDED

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention None (was incarcerated at Ridgeland until October 1, 2009)
2. Name and location of Court which imposed sentence Lexington County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Case No. 2007-GS-32-1210 (Lewd Act on a Minor, SC Code §16-15-140)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 5, 2007

Revised 3/2003

- (b) 10 years suspended on service of 7 years and 5 years probation, plus \$125 costs
- (c) Condition: complete sex offender counseling recommended by the probation

office

6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty X
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 - (a) Petitioner was unaware of the problem with his sentencing until October 29, 2008.
 - (b) _____
 - (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The sentencing judge did not sentence Applicant to Mandatory GPS, as indicated by the absence of a check mark in that box on the sentencing sheet, which is attached. (See also the attached transcript of the plea and sentencing hearing.) Counsel did not insure the date range set out on the indictment was correct. Counsel did not place on the record the statute requiring the Mandatory GPS was passed by the legislature after Applicant's date of arrest and after any date where the State alleges applicant committed on offense (see Plea Transcript). The incident occurred prior to the date the legislature passed the Mandatory GPS statute and the range of dates listed on the indictment were after the date of the passing of the Mandatory GPS statute.

Until October 10, 2009, Applicant was not made aware that the Department of Corrections and/or the Department of Probation, Parole, and Pardon Services had Applicant registered for Mandatory GPS as part of his sentence. See attached "Request to Staff Member." Since the sentencing judge did not impose Mandatory GPS as part of the sentence, Mandatory GPS cannot lawfully be part of the sentence, and Applicant is entitled to relief pursuant to South Carolina Code section 17-27-20(a)(1) and (3)-(6). Since Applicant was not made aware of this issue with his sentence, nor could have become aware of it prior to October 10, 2009 with the exercise of due diligence, his original application was timely pursuant to South Carolina Code section 17-27-45(c). Further, the pleadings in this Amended Application relate back to the date of the original Application pursuant to Rule 15(c), SCRC.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See answer to 10(a).

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
 - i. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings in which each ground was raised:
 - i. _____
 - ii. _____
 - iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Petitioner believes that the PCR Court is the proper forum in which to first present these issues.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? N/A
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. David Culberson of Lexington (deceased)
 - ii. _____

- iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Arraignment
 - ii. Plea
 - iii. Sentencing

19. State clearly the relief you seek in filing this application:

Petitioner seeks correction of his sentence on record with all state agencies and offices in accordance with the actual sentence imposed by the sentencing judge. In the alternative, Petitioner seeks re-sentencing or a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of LEXINGTON)

VERIFICATION

I, Brantley W. Clarke, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Brantley Clarke

SWORN to and subscribed before me this 25
day of March, 2016.

[Signature] (L.S.)
Notary Public Eric J. Glenn

My Commission Expires: 11-8-2017

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

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

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

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Brantley W. Clarke,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE ELEVENTH JUDICIAL CIRCUIT

2016 APR 13 / 3 50

2009-CP-32-4571

BETH A. GALLAGHER
CLERK OF COURT
LEXINGTON, SC

**AMENDED RETURN AND
MOTION TO DISMISS**

ORIGINAL

In this amended response to the post-conviction relief (PCR) application filed October 9, 2009, initially amended February 16, 2012, and later amended March 25, 2016, the Respondent would respectfully show this Court:

I.

The Applicant is not presently confined but was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen (2007-GS-32-1210). David Culbertson, Esquire, represented the Applicant. On April 5, 2007, the Applicant pleaded guilty as charged. The Honorable James W. Johnson, Jr., sentenced the Applicant to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence.

II.

In his first and current application¹ for post-conviction relief, the Applicant makes the following allegations:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to ensure the indictment dates were correct
 - b. Counsel failed to place S.C. Code Ann. § 23-3-540 on the record
2. Newly Discovered Evidence
 - a. Electronic Monitoring

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the transcript of the proceedings against the Applicant, and the Applicant's application for post-conviction relief.

III.

The Respondent submits 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 judgment 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). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a

¹ Applicant has filed two amendments to his original application.

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 judgment as a matter of law.”

The Applicant pleaded guilty on April 5, 2007, causing any subsequent application for post-conviction relief to be due by April 6, 2008. However, the application for post-conviction relief was not filed until October 9, 2009, *over a year and a half* beyond the time allotted. Therefore, the Respondent respectfully submits that this Court summarily dismiss the application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

IV.

Respondent further submits that Applicant's allegation of “after-discovered evidence” is without merit because mandatory GPS electronic monitoring is a collateral consequence of a conviction or guilty plea; therefore, Applicant has failed to state a claim cognizable in post-conviction relief. While the Applicant alleges that mandatory GPS electronic monitoring is unlawful because it was not a part of his original sentence, the State maintains that this is irrelevant because electronic monitoring is not a criminal punishment; therefore, the Applicant is not suffering from an *ex post facto* violation of his rights. *See In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013); *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013); *State v. Nation*, 408 S.C. 474, 759 S.E.2d 428 (2014); *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002).

The South Carolina Supreme Court has repeatedly established that the electronic monitoring of persons convicted of criminal sexual conduct with a minor under the age of sixteen does not violate the *ex post facto* clause of the United States and South Carolina Constitutions. *Id.* An *ex post facto* violation “occurs when a change in the law retroactively alters the definition of crime or increases punishment for a crime.” *Walls*, 348 S.C. at 30, 558 S.E.2d at

525-26. Further, the Court has found that the General Assembly's intent in enacting S.C. Code Ann. § 23-3-54 was not punitive in nature but rather a means of providing for "the safety and welfare of the State's citizens and [eliminating] information deficits which hinder law enforcement in their apprehension" of sex offenders. *In re Justin B.*, 405 S.C. at 408, 747 S.E.2d at 783. Therefore, the Respondent respectfully submits that this Court summarily dismiss this application for post-conviction relief.

V.

Respondent further submits that Applicant's allegation of "after-discovered evidence" is without merit because the Applicant with due diligence could have discovered that he was subject to electronic monitoring upon his release. In his application for post-conviction relief, Applicant alleges that he "was not made aware that the Department of Corrections and/or the Department of Probation, Parole and Pardon Services had Applicant registered for Mandatory GPS as a part of his sentence." Pursuant to S.C. Code Ann. § 17-27-45(c), a claim of after-discovered evidence can be timely raised within one year of actual discovery or *within one year of when, by the exercise of due diligence, such evidence could have been ascertained.*

On January 1, 2006, South Carolina enacted its version, S.C. Code Ann. § 23-3-540, of what is commonly known as "Jessie's Law." Pursuant to S.C. Code Ann. § 23-3-540(A),

Upon conviction, adjudication of delinquency, *guilty plea*, or plea of nolo contendere of a person from committing criminal sexual conduct with a minor . . . in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when under the supervision of the Department of Probation, Parole, and Pardon Services shall be monitored by the Department of Probation, Parole, and Pardon Services with the active electronic monitoring device.

Applicant pleaded guilty to his charges on April 5, 2007, *over one (1) year and three months* after the statute was enacted. Therefore, Applicant, with due diligence, should have been able to

discover the enactment of "Jessie's Law." Further, a consequence that the Applicant must be informed of is one which impacts the sentence imposed on the Applicant, and as such, is a direct consequence. Registration on the sexual offender registry and electronic monitoring have no direct bearing on the range of the Applicant's sentenced punishment and therefore are collateral rather than direct consequences. *See Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973). Accordingly, the Respondent respectfully submits that Applicant's application for post-conviction relief be summarily dismissed.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired and because Applicant has failed to state a claim cognizable in post-conviction relief.

[Signature block on the following page]

Respectfully submitted,

ALAN WILSON
Attorney General

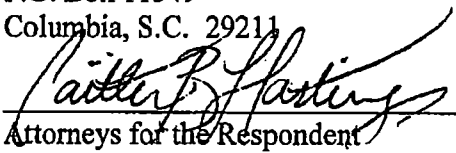
JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

CAITLIN BAZAN HASTINGS
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondent

Columbia, South Carolina
April 8, 2016

FILED
2016 APR 12 10 51
BETH A. CANTRELL
CLERK OF COURT
EXINGTON, SC

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

Brantley W. Clarke,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Amended Return and Motion to Dismiss** has been served upon the applicant by emailing and mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Mr. Robert M.P. Masella, Esq.
Masella Law Firm, P.A.
917 Calhoun St.
Columbia, SC 29201

RMasella@masellalaw.com

This 8th day of April, 2016.


Deonna Rogers
Legal Assistant for Respondent

FILED
 2016 APR 13 A 3:51
 BETH A. CROOKS
 CLERK OF COURT
 LEXINGTON, SC

SWORN to before me this 8th day of April, 2016.


Notary Public for South Carolina.

My Commission Expires: 12/16/2024

ARREST WARRANT

J-081050

STATE OF SOUTH CAROLINA
COUNTY OF LexingtonTHE STATE
against

BRANTLEY WALKER CLARKE

Address: BLUEBERRY DRIVE
LEXINGTON, SC 29073

Phone: 240- SSN:

Sex: M Race: W Height: 5- 5 Weight: 180

DL State: SC DL#: [REDACTED]

DOB: [REDACTED] Agency ORI#: 3200

Prosecuting Agency: L. C. S. D.

Prosecuting Officer: PRITCHARD, D.L.

Offense: COMM. LEWD ACT UPON CHILD

Offense Code

Code/Ordinance Sec.: 16-15-140

This warrant is CERTIFIED FOR SERVICE
in the COUNTY/ MUNICIPALITY OFThe accused is to be arrested and brought
before me to be dealt with according to
law.

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered
to defendant BRANTLEY WALKER CLARKE
on 8-18-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO

GARY REINHART
521 GIBSON ROAD
LEXINGTON, SC 29072
951-2542

ORIGINAL COURT COPY

STATE OF SOUTH CAROLINA
COUNTY OF Lexington

AFFIDAVIT

Personally appeared before me the affiant D.L. PRITCHARD who
being duly sworn deposes and says that defendant BRANTLEY WALKER CLARKE
did within this county and state on _____ violate the criminal laws of the
State of South Carolina (or ordinance of _____)
in the following particulars:
DESCRIPTION OF OFFENSE: COMM. LEWD ACT UPON CHILD

I further state that there is probable cause to believe that the above did commit
the crime set forth and that probable cause is based on the following facts:

THAT BETWEEN THE DATES OF JAN. 1, 2004 AND AUG. 1, 2006 THE DEF. BRANTLEY CLARK, WHO WAS
OVER THE AGE OF EIGHTEEN, DID COMMIT A LEWD ACT UPON THE VICTIM WHO WAS UNDER THE AGE OF
SIXTEEN. THE VICTIM WAS SPENDING THE NIGHT WITH THE DEF. WHO WAS SLEEPING IN THE SAME BED
AS THE VICTIM. DURING THE NIGHT THE DEF. PLACED HIS HAND ON THE GENITALS OF THE VICTIM AND
RUBBED THE VICTIM'S GENITALS. THIS INCIDENT OCCURRED ON BLUEBERRY DRIVE IN LEXINGTON COUNTY
SC, THE VICTIM AND DEFENDANT HAVE PROVIDED STATEMENTS.

Signature of Affiant

STATE OF SOUTH CAROLINA
COUNTY OF Lexington

Affiant's
Information
LCSD
D.L. PRITCHARD
521 GIBSON ROAD
LEXINGTON, SC 29072
785-8230

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on _____ defendant BRANTLEY WALKER CLARKE
did violate the criminal laws of the State of South Carolina (or ordinance of _____)
as set forth below:

DESCRIPTION OF OFFENSE:
16-15-140 COMM. LEWD ACT UPON CHILD
COMMITTING OR ATTEMPTING LEWD ACT U
FOURTEEN

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest
the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this
Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is
practicable.

Sworn to and subscribed before me
on 08/18/2006

Signature of Issuing Judge (L.S.)
Judge code: 886 Issuing Court: Magistrate

Issuing Judge

SCOTT D. WHITTLE
650 KNOX ABBOTT DR.
CAYCE, SC 29033
(803) 796-7100

ORIGINAL COURT COPY

ORIGINAL COURT COPY

#01061904

BAIL set by

Judge _____

on 8/19/06Type and Amount: \$1BName of Surety: 33 000

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

BEITH A. CARRIG
 CLERK OF COURT
 LEXINGTON, SC

2006 AUG 25 P 12: 37

FILED

Culberson

WITNESSES

LCSD
Pritchard, D

DOCKET NO. 2007-GS-32-1210

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

April TERM 2007

THE STATE

vs.

Brantley Walker Clarke

A-2006-32-02254

11/15/2006 8:25 AM

ARREST WARRANT NUMBER

J081050

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury

Date:

CDR# 2468

Indictment for

Committing or Attempting Lewd Act Upon
Child under Sixteen

§16-15-140

DONALD V. MYERS, SOLICITOR

I DO HEREBY WAIVE MY RIGHT
TO GRAND JURY PRESENTMENT

Brantley Walker Clarke
DEFENDANT

4-5-07
DATE

[Signature]
WITNESS

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

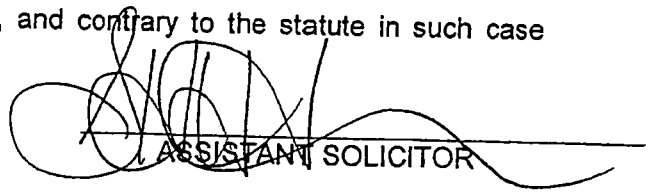
INDICTMENT FOR
Committing or Attempting Lewd Act Upon Child under
Sixteen

§16-15-140

At a Court of General Sessions, convened on April 2, 2007, the Grand Jurors of Lexington County present upon their oath:

That Brantley Walker Clarke did in Lexington County on or about or between January 01, 2004 and August 01, 2006, being a person over the age of fourteen, willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit:, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child, to wit: defendant placed his hands on the genitals of *Minor Victim* and rubbed them, in violation of § 16-15-140 of the Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF BeaufortSTATE VS.AKA: Grantley Walker ClarkRace: WDOB: Sex: MAge: 27Address: Blueberry DriveCity, State, Zip: Lex, SC 29073DL# SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007-GS-32-1210
A/W#: 7081030
Date of Offense: Between 1/1/04 & 8/1/11
S.C. Code §: 16-15-140
CDR Code #: 2468

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS
TO: Armed Act on a MURDER
in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUSThe charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☒ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☒ Recommendation by the State (Defendant initial)
ATTEST: Solicitor Defendant Attorney for Defendant WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of 7 days/months/years and/or payment
of \$; plus costs and assessments as applicable; the balance is suspended with probation for 5
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
☐ set by SCDPPPSRecipient:
Fine:
4-1-206 (Assessments 107.5%) \$
4-1-211(A)(1) (Conv. Surcharge) \$
4-1-211(A)(2) (DUI Surcharge) \$ 100.00
1-5-2995 (DUI Assessment) \$
1-13 (Public Def/Prob) \$
3-1B TP (Law Enforce. Funding) \$ 100
7-1B TP (Drug Court Surcharge) \$ 12
21-114(BUI Breath Test Fee) \$ 500
1-2942(J) (Vehicle Assessment) \$ 25
County (if paid in installments) \$ 100
\$ 50
\$ 40/ea
\$ 125

PTUP

Obtain GED days/hours Public Service Employment
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
Other: Complete sex offender counseling
Recommended by the probation office.
☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.Seth A. Canine
Clerk of Court/Deputy Clerk
S. PercyPRESIDING JUDGE
Judge Code: 2
Sentence Date: 9/5/07

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 11/05/09
 OMCOMITA RELEASE DATE SCREEN C023981
 SCDC# > 321118 LOC: RIDGELAND
 CLARK, BRANTLEY WALTER SCDC CLASSIFICATION..: NON-VIOLENT
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: Y
 SEXUAL PREDATOR...: PENDING
 DNA STATUS.....: COMPLETED
 GPS REQUIREMENT...: Y
 PREA DECISION....:
 CURRENT SENTENCE: 007-00-000 CONSECUTIVE SENTENCE ...: N
 007-00-000 CURRENT SENT START DATE: 04/04/2007
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 10/05/2010 CURRENT EWC ..: 2 F 5
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
 INITIAL PAROLE DATE: 02/20/2009 NEXT PAROLE HEARING DATE: 04/08/2010

 TOTAL GT DAYS EARNED: 000600 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000312 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CURRENT OR PRIOR SEX CONDUCT CONVICT
 TOTAL EXTRA EARNED CREDITS ..: 000
 TOTAL SERVICE TIME EARNED ...: 000938

PFKEYS: 5:HISTORY OF DATE CHANGES

4- 1 Sess-1 167.7.50.33 SCDC1265 3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 11/05/09

C0239

CLARK, BRANTLEY WALTER FBI # 158663NC7 SID# SC01713334 SCDC # 321118

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: RIDGELAND CORR INST

SECURITY/CUST.: 2 MINIMUM IN

CURR INCARC SENT...: 7 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #....:

DORM.....: CA0012A

RACE....:W SEX...:M

PROJ MAXOUT DATE: 10/05/2010

PROJ PAROLE DATE: 04/08/2010

EWC JOB...: CHAPLAIN ASSISTANT

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: CHAPLAIN AIDE

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 30 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE			U/NU	CATEGORY
	YRS	MOS	DYS		START	4/	20		
LEWD ACT/CHILD UNDER 16	7	0	0	LEXINGTON	4/	4/20	7	N	4

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINEES (HOLD,WANTED,NOTIFY):

LEWD ACT/CHILD UNDER 16

HOLD

IRO

CATEG: 4

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

NO NON-ASSAULTIVE DISCIPLINARY HISTORY

HISTORY OF MOVEMENTS:

10/21/ 8 RIDGELAND

INCARCERATED

ADMINISTRATIVE

10/21/ 8 KIRKLAND

INCARCERATED

MEDICAL

5/31/ 7 RIDGELAND

INCARCERATED

ADMINISTRATIVE

4/11/ 7 KIRKLAND

INCARCERATED

NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
CHAPLAIN ASSISTANT	06/17/08	0/ 0/ 0		YF5
FOOD SERVICE AIDE	06/08/07	6/16/ 8	INMATE REQUEST	YF5
FOOD SERVICE AIDE	06/05/07	6/ 7/ 7	MI ELIGIBLE FOR LEVEL 2	YF5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
NO SCHOOL ASSIGNMENTS			

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

COUNTY OF JOHNSON

STATE

VS.

AKA: BRONLEY WILKINSON CLARKRace: WSex: MAge: 27

DOB: _____

SS#: _____

Address: Blueberry DriveCity, State, Zip: LEX, SC 29073

DL# _____

SID# _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS-22-1710AW#: 1081050Date of Offense: Between 1/1/04 & 8/1/06S.C. Code §: 16-15-140CDR Code #: 2468

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Second Act on a MINDin violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2468☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSC☐ §17-25-45w/minor 1st or Lewd Act).The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☒ Defendant Waives Presentment to Grand Jury.

(Defendant initial)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST: _____

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of 7 days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for 5 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services' standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

*Fine: \$ _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 12.50TOTAL \$ 12.50

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning: _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: complete sex offender counselingrecommended by the probation office.☒ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 21101515Sentence Date: 11/4/07Court Reporter: S. Kern

Clerk of Court/Deputy Clerk

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) COURT OF COMMON PLEAS

Brantley W. Clarke,)
Applicant,)
v.) Case No. 09-CP-32-04571
State of South Carolina ,)
Defendant.)

TRANSCRIPT OF HEARING

The within Post-conviction Relief Hearing in the above-captioned matter was held April 20th, 2016, before The Honorable Perry H. Gravely in the Court of Common Pleas for Lexington County, South Carolina; attended by counsel as follows:

APPEARANCES:

Robert M. P. Masella, Esq.
....Appearing for Applicant

Johanna C. Valenzuela, Esq.
Caitlan Hastings, Esq.
OFFICE OF ATTORNEY GENERAL
...Appearing for State of South Carolina

ALSO ATTENDING:

Brantley W. Clarke, Applicant

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

2

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Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

3

1 (APPLICANT PRESENT)

2 THE COURT: Let me get the packet --
3 (review). Okay. Are we ready? This is
4 the matter of Brantley Clarke versus the
5 State of South Carolina.

6 This is -- is this a Motion to Dismiss
7 and a merits hearing? Or is it an all-in-
8 one, or is it ---

9 MS. HASTINGS: Both, Your Honor.

10 THE COURT: Okay. All right. I'll be
11 glad to hear from you.

12 MS. HASTINGS: All right, Your Honor.
13 This is Brantley Clarke versus the United
14 States (sic) of South Carolina, Docket Number
15 2009-CP-32-4571.

16 The Applicant is not presently confined
17 but was previously, pursuant to the records
18 of the Lexington County Clerk of Court,
19 indicated at the April 2007 term of the
20 Lexington County General Sessions (sic) for
21 committing or attempting to commit a lewd act
22 on a child under the age of sixteen.

23 He was represented by David Culbertson.
24 On April 5th, 2007, he pled guilty as
25 indicted. The Honorable James Johnson, Jr.

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

4

1 sentenced the Applicant to confinement for a
2 period of ten years, provided upon the
3 service of seven years that the balance would
4 be suspended on five years probation.

5 The Applicant did not appeal his
6 conviction or his sentence.

7 He subsequently filed his PCR
8 application, which is why we are here today,
9 on October 9th, 2009. The Applicant filed two
10 amendments to his original application; the
11 first on February 16th, 2012, and the second
12 on March 25th, 2016.

13 His grounds are ineffective assistance of
14 counsel and newly-discovered evidence,
15 specifically electronic GPS monitoring.

16 The State is ready for his Motion to
17 Dismiss at this time.

18 THE COURT: All right. Be glad to hear
19 just a brief summary. You are ---

20 MR. MASELLA: Robert Masella, Your Honor.

21 THE COURT: Okay.

22 MR. MASELLA: Good morning. Your Honor,
23 the -- Mr. Clarke's position is that the
24 statute, the GPS statute that was passed went
25 into effect on July 1st, 2006. I have the

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

5

1 investigator here today who will tell the
2 court that no offense occurred after August
3 of 2005. So any offense that occurred that
4 Mr. Clarke has pled guilty to occurred before
5 the passing of the statute and, therefore,
6 when Judge Johnson sentenced Mr. Clarke, he
7 didn't put the mandatory GPS on -- he didn't
8 require him to have one. Sorry.

9 When Mr. Clarke -- so he was sentenced.
10 When he was in prison and was being released,
11 in speaking with his caseworker -- and this
12 is something else that we will provide you,
13 Your Honor, he was told on the 24th of
14 October, 2008, that he was going to have this
15 GPS. Then the PCR was filed within the year,
16 as the Attorney General told you, on October
17 of 2009.

18 So as far as the Motion to Dismiss goes
19 for the statute of limitations, I think our
20 memo addresses that.

21 We had a -- they did a conditional
22 dismissal and we -- we replied to it, and
23 it's in there.

24 Your Honor, you also have in your packet
25 a sentencing sheet. You have the plea. You

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

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1 also have -- I think that you have everything
2 except for the notice. We've discussed it --
3 and I don't believe that they have any
4 problem with me providing it as an exhibit.

5 THE COURT: Let me make sure, I don't --
6 (upon review), you say that you have a memo
7 in response to their Motion to Dismiss?

8 MR. MASELLA: No, Your Honor. It was --
9 there was a conditional dismissal that Judge,
10 uh, Judge McMahon (phonetic) signed, a
11 conditional Order of Dismissal. We replied
12 to it, and that's what I am referring to.

13 THE COURT: Do I have that in my packet?
14 I don't think that I have that. That's a
15 pretty crucial piece of paper.

16 MR. MASELLA: Yes, sir. We had a --
17 just to give you a little of the procedural
18 history, we had that -- those were filed and
19 then apparently the clerk lost the file and
20 -- wasn't put back on the right shelf, so
21 this case sat dormant for a couple of years.
22 Then we met with Judge Keesley and he had
23 Judge, uh, Hayes from Spartanburg -- Mark
24 Hayes -- have a hearing to determine if the
25 case should go forward or not, as far as the

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

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1 conditional ---

2 THE COURT: All right.

3 MR. MASELLA: It might be in there.

4 THE COURT: And this was a PCR
5 hearing. Okay.

6 MR. MASELLA: This is your actual
7 hearing.

8 THE COURT: Right, but you had another
9 proceeding in this PCR application?

10 MR. MASELLA: Oh, yes, sir, with Judge
11 Hayes.

12 THE COURT: And that's what I do not
13 have, I don't have anything regarding that.

14 MR. MASELLA: Well, I have a packet
15 that I can provide to the court which would
16 have that in there.

17 I also have to confess, Your Honor, that
18 I left my reading glasses at home. So -- I
19 have it in here.

20 THE COURT: This is all originals.

21 CLERK: Should I go get the file?

22 THE COURT: That'd be fine -- she'll go
23 get the file.

24 MR. MASELLA: Here is the paperwork,
25 shall I hand it up?

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

8

1 THE COURT: Thank you. She's (clerk)
2 has gone to get the file.

3 (SIDEBAR BETWEEN COUNSEL)

4 THE COURT: This doesn't have the
5 conditional?

6 MR. MASELLA: I have that as well, Your
7 Honor. Your Honor, Judge McMahon signed two
8 conditional Orders of dismissal. He signed
9 on January 31st, 2012, and then we replied
10 with what you have in your hand on February
11 21st. Then he signed the same Order on July
12 3rd of '12. So I think that's what caused the
13 confusion. I have the Order if Your Honor
14 would like for me to hand it up.

15 THE COURT: If you have that.

16 MR. MASELLA: Okay, (tenders).

17 CLERK: (Tenders file to judge).

18 THE COURT: Thank you for going to
19 get that.

20 CLERK: You're welcome.

21 THE COURT: (Upon review), okay.
22 Remind me of your name.

23 MS. HASTINGS: Caitlan Hastings.

24 THE COURT: Ms. Hastings, I'm reviewing
25 the Order of Judge Hayes. You've indicated

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

9

1 that there is a Motion to Dismiss but it
2 appears -- has that not already been
3 addressed, because in the file in January of
4 2016 Judge Hayes says that a, (reading)
5 *"...sufficient showing of material issue of*
6 *genuine fact has been made to warrant a*
7 *further review. I direct that an evidentiary*
8 *hearing be scheduled to allow for further*
9 *review of this PCR application."*

10 Does that not resolve the Motion to
11 Dismiss that was filed prior to this Order?

12 MS. HASTINGS: Yes, Your Honor.

13 THE COURT: All right. Much clearer
14 now. All right.

15 MR. MASELLA: Thank you.

16 THE COURT: All right. I think that
17 was addressed. And y'all weren't involved at
18 that point but -- it is quite an interesting
19 issue that was going on in 2009.

20 All right. So, therefore, based on that
21 Order it appears that the Motion has been
22 resolved and we will just have the
23 evidentiary issues raised -- and I think the
24 primary issue is whether he should be put on
25 electronic monitoring or not. Is that the

Brantley W. Clarke v State of South Carolina
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10

1 primary issue?

2 MR. MASELLA: Yes, Your Honor, that's
3 -- the ineffectiveness, I believe, is the not
4 limiting of dates because of what Probation
5 Pardon & Parole is doing, is saying that
6 because you had an action after -- that
7 something happened after the passing of the
8 statute that we're going to push that one
9 you, that we are going to make you wear it.
10 He shouldn't be on the electronic monitoring.

11 THE COURT: Let me ask you this, it
12 looks like the issues for me to determine is
13 that, one, there is *ex post facto* showing;
14 and also whether that is something for this
15 court -- that this court has jurisdiction
16 over that issue, as to whether it being
17 collateral or not. I don't know. It's a
18 very novel question.

19 MR. MASELLA: That's right.

20 THE COURT: So, in light of that,
21 I'll be glad to hear from you, Mr. Masella?

22 MR. MASELLA: Thank you, Your Honor.
23 If it please the court, I'll call
24 Investigator Pritchard.

25 (WITNESS TAKES STAND)

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11

1 DAVID PRITCHARD, having been sworn
2 to tell the truth, and nothing but the truth,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. MASELLA:

6 Q. Investigator Pritchard, you arrested
7 Mr. Clarke -- correct, you were the arresting
8 officer in this matter?

9 A. That's correct.

10 Q. And when you arrested him, you
11 prepared a warrant; is that correct?

12 A. That's correct.

13 Q. And on that warrant, you used some
14 dates; correct?

15 A. Correct.

16 Q. Have you had a chance to review your
17 file? When we subpoenaed you, you grabbed
18 your file and went through it?

19 A. Yes.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. And when you reviewed your file the
23 incident date, as far as the most recent
24 date, would be what that anything occurred?

25 A. Based off of statements that were

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12

1 provided to me, the date that probably most
2 accurately reflects the incident would be
3 August of 2005.

4 Q. Okay. And to your knowledge he was
5 not convicted of any activity that occurred
6 after August of 2005?

7 A. No, sir.

8 Q. In fact, you don't believe that
9 anything did occur after August of 2005?

10 A. Not based on the elements that I
11 had, correct.

12 Q. Now, you put in the warrant and the
13 indictment also reflected the August -- when
14 I say it, I mean you put the August 2006 in
15 the warrant and that was also reflected in
16 the indictment; is that right?

17 A. That's correct.

18 Q. Why did you do that?

19 A. Simply because of, uh, the timeframe
20 that the victim said he had been around Mr.
21 Clarke, just to kinda cover if those dates
22 were maybe a little bit skewed because the,
23 uh, victim wasn't completely sure when it
24 happened. He was kinda estimating around
25 August 2005. So I just put that window in

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13

1 there to make sure that any dates were
2 covered.

3 Q. But as far as you know nothing
4 happened after August of 2005?

5 A. That is correct.

6 MR. MASELLA: Beg the court's
7 indulgence, (sidebar with Applicant). Thank
8 you, Your Honor, that's all that I have.

9 THE COURT: All right. Cross
10 examination?

11 MS. HASTINGS: No questions, Your Honor.

12 MR. MASELLA: You have the indictment
13 in your packet and the warrant, Your Honor.

14 THE COURT: Okay. You may step down.

15 (WITNESS STEPS DOWN)

16 MR. MASELLA: Next I call Brantley
17 Clarke.

18 (WITNESS TAKES STAND)

19 BRANTLEY CLARKE, having been sworn to
20 tell the truth, and nothing but the truth,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MASELLA:

24 Q. Mr. Clarke, I'm handing you a piece
25 of paper. Can you identify it for me,

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Testimony of Brantley Clarke

14

1 please?

2 A. This is the note that I received for
3 my classification worker at Ridgeland
4 Correctional Institution.

5 Q. And what is the date on that note?

6 A. October 24th, 2008.

7 Q. Okay.

8 MR. MASELLA: May I make this
9 Petitioner's Exhibit 1.

10 COURT REPORTER: So marked as
11 Applicant's Exhibit 1.

12 MS. HASTINGS: No objection, Your
13 Honor.

14 (SO ENTERED AS APPLICANT'S EXHIBIT 1)

15 DIRECT EXAMINATION CONTINUED

16 BY MR. MASELLA:

17 Q. All right, Mr. Clarke. Can you tell
18 the court what that piece of paper means, why
19 we are presenting it.

20 A. When I was to be released, they --
21 there's a detainer, they had to hold me for
22 pick up by a sheriff's department or whoever.
23 Up until that point I did not know -- there
24 was no detainer placed on me. When I
25 received the note, received the note, I found

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15

1 out that I had the detainer for GPS. I
2 didn't actually even know what that was for.
3 So I had to request -- send a request to
4 staff and ask what that was for, and she
5 indicated that Lexington County placed a
6 detainer on me for GPS monitoring.

7 Q. And did Judge Johnson -- to the best
8 of your knowledge, Judge Johnson didn't click
9 off GPS monitoring on your sentencing sheet;
10 correct?

11 A. Did not, no.

12 Q. Did you have any knowledge of the
13 requirement to have a GPS device on you
14 before ---

15 A. No.

16 Q. --- you received that note?

17 A. No.

18 Q. Okay. And your application was
19 filed within a year of receiving that note?

20 A. Yes.

21 Q. Now, uh, have you been -- do you
22 have any problems -- you are on probation,
23 correct?

24 A. Yes.

25 Q. You didn't violate probation or

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Testimony of Brantley Clarke

16

1 parole, correct?

2 A. No, I did not.

3 Q. Was there any other reason other
4 than -- your conviction was done when? When
5 did you plead guilty? In 2007?

6 A. April 2007.

7 Q. Okay. And the last event occurred,
8 from all the statements and even during the
9 plea was what Investigator Pritchard
10 testified to, in August of 2005?

11 A. Correct.

12 Q. Is that right?

13 A. Correct.

14 Q. Now, why would you not consider this
15 to be a collateral issue for you? What does
16 that mean to you? What do you have to do to
17 have this ---

18 A. I have to pay sixty dollars (\$60) a
19 week to have the monitoring on me. Just last
20 weekend, I had to cancel a trip because I
21 forgot to get permission just to spend the
22 night out of town. So there's times when I
23 have to wake up during the middle of the
24 night and go outside so that the satellite
25 can pick me up. I've had to have the monitor

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1 fixed at 2:00 or 3:00 in the morning by an
2 agent from Probation Pardon & Parole.

3 Q. So ---

4 A. And there are places -- when I was
5 on probation there were places that I was not
6 allowed to go because I had the monitor on.

7 Q. As far as the dates on the
8 indictment, did your attorney talk with you
9 about limiting the dates to when the events
10 actually occurred? Did you ever have any
11 conversation ---

12 A. I didn't even realize that was an
13 issue until after I had pled and saw the
14 sentencing sheet that he sent me when I was
15 at Kirkland for intake.

16 Q. Okay.

17 A. And at that point he said that it
18 should not be an issue. I questioned it, I
19 just wondered why it was that long of a time
20 period.

21 Q. Okay. And at that point you didn't
22 know ---

23 A. No, we didn't know. He didn't
24 mention anything about it causing any problem
25 with the statute for GPS.

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18

1 Q. Okay. Now, Probation Pardon &
2 Parole is keeping the GPS on you; is that
3 correct?

4 A. Yes, I'm off probation and they've
5 kept it on me.

6 Q. Okay.

7 MR. MASELLA: That's all that I
8 have, Your Honor.

9 MS. HASTINGS: No questions, Your
10 Honor.

11 THE COURT: You may step down.

12 (WITNESS STEPS DOWN)

13 MR. MASELLA: That would be the
14 Petitioner's case, Your Honor.

15 THE COURT: Let me read the
16 statute right quick. (Upon review), okay.
17 Mr. Masella, have you reviewed the case of
18 *Jernigan v. State*?

19 MR. MASELLA: I might have, Your
20 Honor. I don't -- the name doesn't ring a
21 bell for me, but ---

22 THE COURT: I've done a cursory
23 review of that. Are y'all familiar with that
24 one? Is that one that you were going to
25 raise? It's one that you were going to

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19

1 raise, wasn't it?

2 MS. HASTINGS: No, Your Honor,
3 but we have a few others.

4 THE COURT: In *Jernigan v. State*,
5 uh, what happened there was that a person got
6 released on parole and they'd changed the law
7 from an annual review by the Parole Board to
8 a biannual review. They said in light of the
9 *Shahbaz* case that a PCR proceeding is not a
10 proceeding to determine *ex post facto* claims
11 against parole and that PCR claims and that
12 this is merely -- that a PCR can only affect
13 the validity of a conviction or sentence. So
14 -- I'm just saying that seems to be on point
15 but, again, I'd like to review that
16 carefully.

17 MR. MASELLA: Your Honor, my main
18 concern with this hearing is showing that the
19 attorney's ineffectiveness was -- which
20 obviously has impacted Mr. Clarke -- that he
21 didn't limit the dates on the indictment,
22 because that is what Probation is using to
23 make him wear the GPS.

24 THE COURT: Right.

25 MR. MASELLA: So if I can get the --

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20

1 if you can provide an Order or if there is an
2 order showing that date should have been,
3 from the testimony of the investigator,
4 August of 2005 instead of 2006, I think that
5 I can fix my problem. I think that's
6 appropriate in a PCR action for the, uh, to
7 show the ineffectiveness and impacted the
8 client.

9 It may not get the GPS off but it,
10 uh, gives me something that I can use to make
11 that happen, I guess.

12 THE COURT: All right. Does the
13 State have anything that they want to present
14 at this time?

15 MS. HASTINGS: Your Honor, we do
16 have some arguments consistent with our filed
17 Amended Return Motion to Dismiss.

18 THE COURT: I'm sorry it's been
19 kinda scattered in raising this, I just
20 didn't have all the documents. I realize
21 that is nobody's fault but -- but it is
22 really mainly a legal issue with a small
23 factual -- not small but a -- all right.
24 I'll be glad to hear from both sides.

25 MS. HASTINGS: All right, Your

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21

1 Honor. Our first argument would be that the
2 Applicant's application should be dismissed
3 simply for failure to comply with the filing
4 procedures of the Uniform Post-Conviction
5 Act, Section 17-27-45(a), which says that an
6 application for relief must be filed within
7 one year after entry of a judgment of
8 conviction. A South Carolina Supreme Court
9 relevant case says that the statute of
10 limitations period shall apply to all cases
11 filed after July 1st, 1996; which applies to
12 this case.

13 Here the Applicant pled guilty on
14 April 5th, 2007, which means that his
15 application for PCR relief should have been
16 filed no later than April 6th, 2008. This
17 application was filed October 9th, 2009, which
18 is over a year and a half past the statutory
19 period allotted. So the State would move
20 that based on these grounds alone the
21 application should be dismissed.

22 THE COURT: All right.

23 MS. HASTINGS: Then our second
24 argument, Your Honor, ---

25 THE COURT: Let's address this.

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22

1 Mr. Masella, would you like to address that?

2 MR. MASELLA: Yes, Your Honor.

3 The after-discovered evidence, he -- as we
4 stated in our reply to the conditional Order
5 of Dismissal, he did not know -- because
6 Judge Johnson didn't require him to have GPS,
7 and he didn't know until he received the note
8 which is in evidence that GPS was going to be
9 required of him. Therefore -- and that was
10 within a year of him filing his PCR
11 application, so therefore the after-
12 discovered evidence happened in October of
13 '08 and he filed -- that's when he knew that
14 -- that's when he knew that he was going to
15 have to use the GPS and he filed it within a
16 year of finding out. So I don't think that
17 it's the plea date, I think it is when he
18 found out that it was a problem. Nobody knew
19 until he found out.

20 MS. HASTINGS: Your Honor, if I
21 may, the State would like to address why we
22 believe this is not after-discovered
23 evidence. Section -- sorry. 23-3-545, which
24 is also commonly known in the U.S. as
25 Jessie's Law, was enacted in South Carolina

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1 January 1st, 2006, and took effect around July
2 1st, 2006; which was well before the Applicant
3 pled guilty. He pled guilty on April 15th,
4 2007. The State believes that is more than
5 adequate time, and the statute clearly says
6 that it shall apply to anyone that pleads
7 guilty, that the court must apply electronic
8 monitoring.

9 Again the State would say that
10 electronic monitoring, which has been
11 traditional held by the South Carolina
12 Supreme Court is a collateral consequence,
13 it's not a direct consequence of his
14 conviction. It's merely a civil precaution
15 taken by the State to prevent reoffending.

16 THE COURT: All right.

17 MR. MASELLA: May I address that?

18 THE COURT: Yes.

19 MR. MASELLA: Your Honor, the
20 Legislature took into account people who
21 would be affected by this in that they --
22 what they said is that if you violate --
23 you're on the sex registry, sexual registry
24 as a sex offender and if you violate
25 probation or parole or do any of these other

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1 acts that are in paragraph (a) of 540, that
2 you could -- that you may -- that the judge
3 may place GPS on you, but -- it doesn't
4 require the judge to do it. Also, this was
5 passed after the date of the offense, which
6 was, as the investigator and Mr. Clarke told
7 the Court, August of 2005. So this was
8 passed after any offense(s) occurred, or all
9 offenses had occurred.

10 I believe that it's just not a -- it
11 is not intended to affect anybody who is --
12 whose offense occurred prior to the enactment
13 and passing of the statute.

14 MS. HASTINGS: Your Honor, the
15 State would argue that the monitoring come
16 into effect more upon the release, not when
17 the offense took place. Again, it's a
18 collateral consequence. It's not relevant to
19 their sentence, their punishment.

20 Again, the South Carolina Supreme
21 Court in *State v Nation* addressed whether GPS
22 monitoring on a sex offender which committed
23 his offenses prior to the enactment of
24 Jessie's Law would violate any due process
25 violations and the Court said no.

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25

1 THE COURT: What case was that?

2 MS. HASTINGS: *State v. Nation*,
3 Your Honor. The citation is 408 S.C. 474.

4 THE COURT: Okay.

5 MS. HASTINGS: But the Court did
6 say that in cases such as these the offenders
7 would be entitled to judicial review ten
8 years after the imposition of the monitoring
9 and then five years after that.

10 MR. MASELLA: Your Honor, *State v.*
11 *Nation*, Ms. Nation violated probation
12 numerous times and that was why they put GPS
13 on her. It wasn't because the -- it was a
14 different set of circumstances. They did
15 have a good conversation about the monitoring
16 but it has to be a violation as hers was,
17 violation of parole, probation or community
18 supervision program that put on the GPS
19 monitoring, it was not required under the
20 statute. It's optional with the court.

21 And I have the Southeastern cite if
22 you require that.

23 THE COURT: I have it. The actual
24 reason they put the GPS monitoring on at that
25 time was the violation of probation, which

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Closing Arguemnts of Counsel

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1 occurred after the act?

2 MR. MASELLA: Yes, sir.

3 THE COURT: I guess.

4 MR. MASELLA: Yes, sir.

5 THE COURT: Okay.

6 MR. MASELLA: Her plea happened in
7 2002, but you're right.

8 THE COURT: All right. Anything
9 else?

10 MS. HASTINGS: Your Honor, the
11 State would just reiterate again that the key
12 language in the statute is, uh, you know,
13 when the plea took place, not the incidence.
14 So therefore electronic monitoring is
15 appropriate in this case and the Applicant is
16 entitled to judicial review at some point, so
17 it is not necessarily a permanent collateral
18 consequence.

19 THE COURT: I ---

20 MS. HASTINGS: And he pled after
21 the enactment of Jessie's Law.

22 THE COURT: --- guess that is
23 where Mr. Masella would say that his attorney
24 should have corrected the issue ---

25 MS. HASTINGS: But the State would

Brantley W. Clarke v State of South Carolina
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Ruling of The Court

27

1 maintain that doesn't matter.

2 THE COURT: You know, I have --
3 this is very unfortunate timing, Mr. Clarke.
4 You know, I have two problems. One, I have a
5 problem with whether this is the proper forum
6 for the relief that you're requesting. I
7 understand your issue about the ineffective
8 assistance of counsel.

9 And, secondly, it appears to be kind
10 of an *ex post facto* request.

11 This may be something that somebody
12 higher up than me needs to address. I just
13 don't feel like the petitioner's met his
14 burden as far as me being able to grant the
15 relief requested, so based on that I am going
16 to deny the request. Maybe the Court of
17 Appeals or the Supreme Court can address this
18 issue. Thank you.

19 (HEARING CONCLUDED)
20
21
22
23
24
25

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Certificate of Court Reporter

28

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF GREENVILLE)

I, the undersigned Deborah Garrison,
Circuit Court Reporter for the 13th Judicial
Circuit, hereby certify that the foregoing is a
complete and accurate transcript of the hearing
held in the within action heard on April 20th,
2016, before The Honorable Perry H. Gravely;

I further certify that I am neither kin nor
counsel to any of the parties and have no interest
in the outcome of this action.

Deborah Garrison

Greenville, South Carolina

CA 12A

Comment Sheet			
SCDC# 321118	Name of Inmate: Clark, Brantley	Name of Staff Member: MS. MYERS-CLASSIFICATION	Date: 10/24/08
Comments: The following detainer has been placed on you. Hold - Lexington Co. - GPS Monitoring Offense - Lewd Act/child			
SCDC 1840 phone 1945 EXHIBIT Applicant Exhibit #1			

ORIGINALSTATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarke,)

2009-CP-32-4571

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2016 OCT 18 A 10:59
BETH A. CANNIGG
CLERK OF COURT
LEXINGTON, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 9, 2009, and amended February 16, 2012. Respondent made its return and motion to dismiss on January 6, 2010, and amended on April 8, 2016. On January of 2016, the Honorable J. Mark Hayes, II, ordered an evidentiary hearing to be scheduled to allow for further review of the Applicant's application. An evidentiary hearing was held on April 20, 2016, at the Lexington County Courthouse. Applicant was present and represented by Robert M. P. Masella, Esquire. Caitlin Bazan Hastings, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant and the arresting officer involved in the case, David Pritchard, testified at the hearing. The Court had before it Applicant's guilty plea transcript, the Lexington County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, Respondent's Return, a signed Conditional Order of Dismissal, Applicant's response to the Conditional Order of Dismissal, and the notice provided to Applicant regarding the implementation of electronic GPS monitoring upon release.

[Handwritten signature]

PROCEDURAL HISTORY

The Applicant is not presently confined but was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen (2007-GS-32-1210). David Culbertson, Esquire represented the Applicant. On April 5, 2007, the Applicant pled guilty as charged. The Honorable James W. Johnson, Jr. sentenced the Applicant to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ineffective Assistance of Counsel

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRPC 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel’s performance “fell below an objective standard of reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal



cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, Counsel's deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) (“[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (“PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.”).

And “where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). “Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Id. (citing Caprood v. State, 338

S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). “Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel:

I. Alleged failure to correct the dates on the indictment

Applicant claims that his plea counsel was ineffective for failing to ensure the dates listed on the indictment were correct before Applicant was sentenced. Applicant testified that due to incorrect dates listed on his indictment, he became subject to electronic GPS monitoring pursuant to S.C. Code Ann. § 23-3-540, otherwise known throughout the United States as “Jessie’s Law.”

Investigator Pritchard testified that the reason for writing a longer time span on the indictment was due to the Victim’s uncertainty of when the offenses took place. (PCR Tr. p. 12, l. 4 – p. 13, l. 2.)

This Court finds Applicant has failed to meet his burden of establishing plea counsel was ineffective and failed to show that the implementation of GPS monitoring was directly related to plea counsel’s representation of Applicant.

Newly Discovered Evidence

I. GPS Electronic Monitoring

Applicant alleges that his application for post-conviction relief should not be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act because he has raised an allegation of newly-discovered evidence. Specifically, Applicant testified that he was not aware that he would be subject to GPS electronic monitoring

until he received a written notice on October 24, 2008. (PCR Tr. p. 15, ll. 12-15.) Respondent argues Applicant's allegation of after-discovered evidence is without merit because mandatory GPS electronic monitoring is a collateral consequence of a conviction or guilty plea and not a part of a criminal punishment; therefore, Applicant is not suffering from an *ex post facto* violation of his rights.

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975), overruled on other grounds by U.S. v. Whitley, 459 F.2d 327 (4th Cir. 1985); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976). Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007). When a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. See Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014).

In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

The Supreme Court has cautioned that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. Id.

“The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.” Brady v. United States, 397 U.S. 742, 757, 90 S.Ct. 1463, 1473 (1970).” A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.” Id.

Applicant testified that his sentencing judge, the Honorable James Johnson, Jr., did not check the electronic monitoring box on Applicant's sentencing sheet and, therefore, he should not be subject to wearing the ankle monitor now that he has concluded his sentence. (PCR Tr. p. 15, ll. 7-11.) Applicant also testified that he was not made aware that the Department of Corrections and/or the Department of Probation, Parole and Pardon Services had Applicant registered for Mandatory GPS monitoring pursuant to S.C. Code Ann. § 23-3-540(A) until after Lexington County placed a detainer on him after his release from prison. (PCR Tr. p. 14, l. 20- p. 15, l. 15.)

Pursuant to S.C. Code Ann. § 17-27-45(c), a claim of after-discovered evidence can be timely raised within one year of actual discovery or *within one year of when, by the exercise of due diligence, such evidence could have been ascertained.* On January 1, 2006, South Carolina

enacted its version, S.C. Code Ann. § 23-3-540, of what is commonly known as “Jessie’s Law.”

Pursuant to S.C. Code Ann. § 23-3-540(A),

“Upon conviction, adjudication of delinquency, *guilty plea*, or plea of nolo contendere of a person from committing criminal sexual conduct with a minor . . . in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when under the supervision of the Department of Probation, Parole, and Pardon Services shall be monitored by the Department of Probation, Parole, and Pardon Services with the active electronic monitoring device.”

Applicant pled guilty to his charges on April 5, 2007, *over one (1) year and three months* after the statute was enacted. While Applicant claims that his attorney should have corrected the indictment dates to avoid the application of Jessie’s Law, according to a plain reading of the statute, the key date that triggers application of Jessie’s Law is the date of the guilty plea and not the date of the offense. *See*, S.C. Code Ann. § 23-3-540(A) (“Upon conviction . . . guilty plea . . . of a person from committing criminal sexual conduct with a minor . . . in the third degree . . . the court must order that the person, upon release from incarceration . . . be monitored . . . with the active electronic monitoring device.” (emphasis added)). Regardless of the indictment dates, because Applicant entered a plea after the date of the statute being enacted, the Court was required to order mandatory monitoring.

This Court finds that an *ex post facto* claim is not cognizable under the Uniform Post-Conviction Relief Act. *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000). Accordingly, this Court is not the appropriate forum to consider Applicant’s allegation regarding mandatory GPS electronic monitoring. Furthermore, this Court finds that Applicant with due diligence should have been able to discover the enactment of “Jessie’s Law,” and, therefore, failed to meet his burden to establish a newly-discovered evidence claim.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

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FILED
14th OCT 18 A 06:59
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

DLR

CONCLUSION

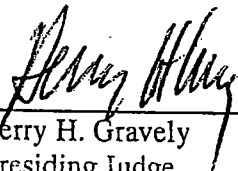
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings or effectively made a claim of newly discovered evidence. Counsel was not deficient in any manner and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 202, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 9th day of Oct, 2016.



 Perry H. Gravely
 Presiding Judge
 Eleventh Judicial Circuit

Greenville, South Carolina.

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 BETTIE A. CARRIG
 CLERK OF COURT
 LEXINGTON, SC

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
ELEVANTH CIRCUIT

BRANTLEY W. CLARKE,

Applicant.

2009-CP-32-4571

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(e), SCRPC**

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRPC, to alter or amend its Order of Dismissal, filed on October 18, 2016, ATTACHMENT A, in the above captioned Post-Conviction Relief, hereafter PCR, matter. Counsel for Applicant was not served with the clocked Order of Dismissal until November 7, 2016. Applicant now serves and files a timely Motion pursuant to Rule 59(e), SCRPC, requesting that the Order of Dismissal be Altered or Amended in light of the following.

PROCEDURAL HISTORY

The Applicant is not presently confined but was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. He was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen (2007-GS-32-1210). David Culbertson, Esquire, represented Applicant on that charge in the Court of General Sessions. On April 5, 2007, the Applicant pleaded guilty as charged. The Honorable James W. Johnson, Jr. sentenced the Applicant to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence. Applicant has successfully completed his term of probation.

This matter came before the Court by way of an Application for PCR, filed October 9, 2009 which was subsequently amended by pleadings filed February 16, 2012. Respondent made its return and motion to dismiss on January 6, 2010, and amended on April 8, 2016. On January of 2016, the Honorable J. Mark Hayes, II, ordered an evidentiary hearing to be scheduled to allow for further review of the Applicant's application. An evidentiary hearing was held on April 20, 2016, at the Lexington County Courthouse. Applicant was present and represented by Robert M. P. Masella, Esquire. Caitlin Bazan Hastings, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant and the arresting officer involved in the case, David Pritchard, testified at the hearing. The Court had before it Applicant's guilty plea transcript, the Lexington County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, Respondent's Return, a signed Conditional Order of Dismissal, Applicant's response to the Conditional Order of Dismissal, and the notice provided to Applicant regarding the implementation of electronic GPS monitoring upon release.

**PROBLEMS WITH ORDER OF DISMISSAL
PROCEDURAL HISTORY AS SET FORTH IN
ORDER OF DISMISSAL**

A Second Amended Post-Conviction Relief Application was filed, March 28, 2016. The Order of Dismissal filed October 18, 2016, does not reflect the filing of this second amendment. The Order of Dismissal fails to set forth the allegations articulated in the original application and in the two subsequent amendments thereto. Further, the Order fails to set forth the entire procedural history in this case. Specifically, the procedural history fails to reference a Conditional Order of Dismissal filed in this matter on January 31, 2012, Applicant's Reply to Conditional Order of Dismissal filed February 21, 2012, a Second Conditional Order of Dismissal filed July 3, 2012 and

the Order of the Honorable J. Mark Hayes, II, dated January 14, 2016 and filed the following day, denying the Respondent's Motion to Dismiss and granting Applicant an evidentiary hearing.

I. ALLEGED FAILURE TO CORRECT THE DATES ON THE INDICTMENT

The Order of Dismissal states that "Investigator Pritchard testified that the reason for writing a longer time span on the indictment was due to the Victim's uncertainty of when the offenses took place. (PCR Tr. p. 12, l. 4- p. 13, l. 2.)" Order pg. 4. Applicant most respectfully asserts that the Order of Dismissal failed to recognize that Investigator Pritchard's testimony very clearly indicates that the statements he received during his investigation reflected "the date that probably most accurately reflects the incident date would be August, 2005." He further testified that based upon his investigation he did not believe any activity in this "did occur after August, 2005." PCR Tr. p. 11, l. 16- p. 12, l. 11. His PCR testimony reflects that the evidence indicated the acts alleged took place in August, 2005, however, he expanded that window to on or about or between "January 1, 2004 and August 1, 2006" as reflected in Applicant's arrest warrant (J-081050) and his indictment (2007-GS-32-1210).

As noted in the Order of Dismissal, S.C. Code Ann. § 23-3-540 (A), commonly referenced as "Jessie's Law" was enacted on January 1, 2006. Thus, Applicant has established through the testimony of the investigator in this case, that there was no evidence of any lewd act by Applicant after August 5, 2005. Counsel's failure to move for the dates alleged to be conformed with the evidence after the conclusion of the case, exposed Applicant to the new requirements found in § 23-3-540 (A). Applicant respectfully asks that this Court reconsider it's ruling on this issue.

The Order of Dismissal essentially finds that the Applicant has failed to file a timely Application for PCR in this matter. In so ruling this Court noted that a claim of after discovered evidence can be timely raised within one year of actual discovery or within one year of, by the

exercise of due diligence, such evidence could have been ascertained. **ATTACHMENT A**, Order of Dismissal, p. 6. The Order goes on to note that Applicant pleaded to his charge on April 5, 2007, more than one year and three months after the statute in question was enacted. This Court essentially concludes that Applicant could have raised his claims in his current Post-Conviction Relief Application within the time limits found in S.C. Code Ann. Section §17-27-45 (a). Interestingly, the Order of Dismissal fails to reference a previous ruling by another circuit court judge, the Honorable J. Mark Hayes, II, concerning the timeliness of this application. Indeed, near the beginning of the evidentiary hearing held in this matter, this Court made specific note of the fact that an Order had already been issued by Judge Hayes on the State's Motion to Dismiss this application as untimely. At that time, the Respondent agreed with the Court that Judge Hayes' Order resolved the State's Motion to Dismiss. Tr. p. 8, l. 24 - p. 9, l. 14.

While the Form 4 Order, filed January 15, 2016, does appear to contemplate Applicant's PCR Counsel preparing an Order reflecting the Court's ruling, the Form 4 Order signed by Judge Hayes clearly indicates that a ruling was made on this issue. Not only was a ruling on the issue made, but the Respondent conceded that a ruling had been made on the State's Motion to Dismiss. See, January 15, 2016 Order; **ATTACHMENT B** and PCR Hearing Transcript; **ATTACHMENT C**.

As noted above, Applicant submits that the timeliness of his Application was ruled on by Judge Hayes in January, 2016. He further submits that the ruling made by Judge Hayes is the law of the case on this issue which could not subsequently be overturned by another circuit court judge. Assuming, *arguendo*, that the timeliness of Applicant's filing was properly before this Court, Applicant would respectfully argue that the ruling of this Court on this issue fails to take into account two important considerations. *First*, the issue is not whether or not Applicant could

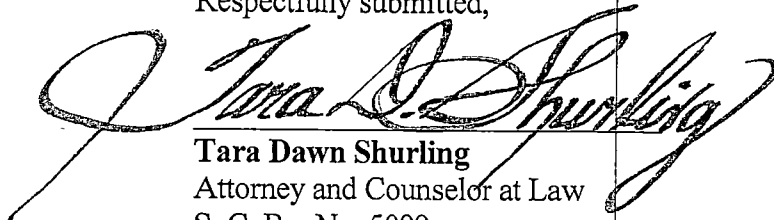
have researched GPS monitoring requirements for his offense and discovered the statute in question. On the facts of this case, Applicant has demonstrated that he had *no reason* to conduct such an inquiry and that his failure to do so did not constitute a failure to exercise due diligence. Specifically, the sentencing sheet entered by the Court of General Sessions has a box to be checked when a sentence includes mandatory GPS monitoring. That box was not checked in Applicant's case. Applicant had every right to believe that the plea he entered, and the sentence he received, did not require GPS monitoring. *Second*, Applicant asserts that because the portion of the sentencing sheet intended to be marked if mandatory monitoring applied was not checked, he had no cause to question whether he would be subject to mandatory GPS monitoring until he received written notice on October 24, 2008. Thus, Applicant's October 9, 2009 filing was timely.

Conclusion

Applicant respectfully asserts that he has established that the Order of Dismissal in this matter improperly ruled on the timeliness of his application where there was a previous circuit court ruling on that matter of law. In addition, he asserts that the Order of Dismissal erroneously interpreted the basis for his assertion that his application would be timely pursuant to §17-27-45 (C). Furthermore, he respectfully submits that he has demonstrated that the ruling on the merits of his PCR claim fails to take into account relevant testimony material to the question of whether Applicant's trial counsel was effective for failing to ensure that the indictment against his client was appropriately amended to reflect the proper time period during which the victim alleged the misconduct to have occurred. For all the foregoing reasons, Applicant respectfully asks that this Court reconsider its decision to deny Applicant relief as found in the Order of Dismissal filed in

this matter on October 18, 2016 and received by counsel for Applicant on November 7, 2016.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

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ATTORNEY FOR THE APPLICANT

This 17th day of November, 2016

FILED
2016 NOV 21 A 11:51
BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH CIRCUIT

BRANTLEY W. CLARKE,)
Applicant,)

2009-CP-32-4571

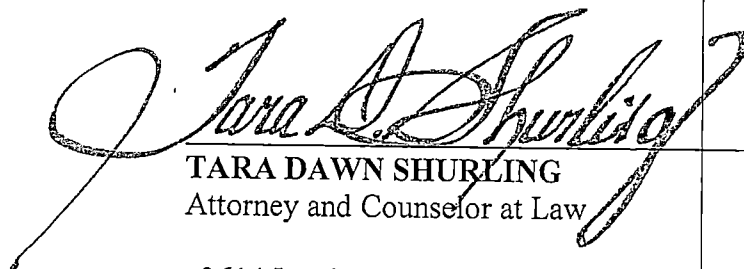
v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRPC, Motion to Alter or Amend in the above-entitled cause has been served upon, the Honorable Perry H. Gravely, Circuit Court Judge, by depositing in the U.S. Mail, postage prepaid, on this the 17th day of November, 2016 to:

The Honorable Perry H. Gravely
Circuit Court Judge
P. O. Box 219
Pickens, SC 29671

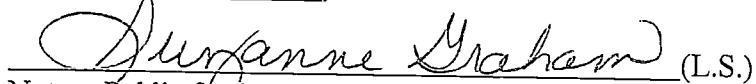

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 17th day of

November, 2016.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

BEITH A. CARTER
CLERK OF COURT
LEXINGTON, SC

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FILED

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH CIRCUIT

BRANTLEY W. CLARKE,)
Applicant,)

2009-CP-32-4571

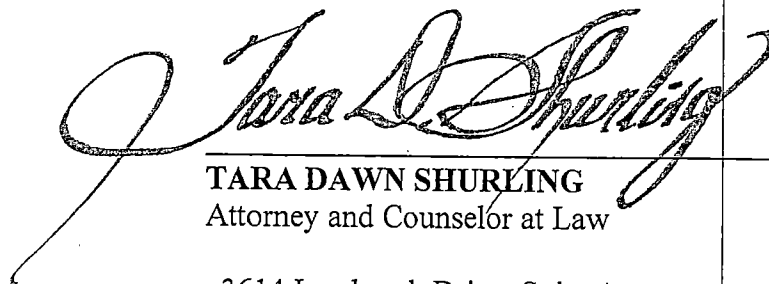
v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Rule 59(e) SCRPC, Motion to Alter or Amend in the above-entitled cause has been served upon, Assistant Attorney General, Johanna Valenzuela, by depositing in the U.S. Mail, postage prepaid, on this the 17th day of November, 2016 to:

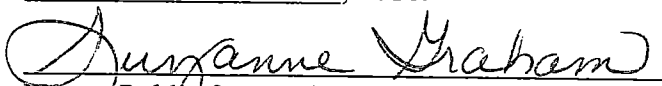
Johanna Valenzuela
Senior Assistant Deputy Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211


TARA DAWN SHURLING
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ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE ME this 17th day of
November, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

FILED
2016 NOV 21 A 11:51
BETH A. CANTRELL
CLERK OF COURT
LEXINGTON, SC

ORIGINALSTATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarke,)

2009-CP-32-4571

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)
_____)BETH A. GUTHRIE
CLERK OF COURT
LEXINGTON, SC

2016 OCT 18 A 10 59

FILED

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 9, 2009, and amended February 16, 2012. Respondent made its return and motion to dismiss on January 6, 2010, and amended on April 8, 2016. On January of 2016, the Honorable J. Mark Hayes, II, ordered an evidentiary hearing to be scheduled to allow for further review of the Applicant's application. An evidentiary hearing was held on April 20, 2016, at the Lexington County Courthouse. Applicant was present and represented by Robert M. P. Masella, Esquire. Caitlin Bazan Hastings, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Applicant and the arresting officer involved in the case, David Pritchard, testified at the hearing. The Court had before it Applicant's guilty plea transcript, the Lexington County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, Respondent's Return, a signed Conditional Order of Dismissal, Applicant's response to the Conditional Order of Dismissal, and the notice provided to Applicant regarding the implementation of electronic GPS monitoring upon release.

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PROCEDURAL HISTORY

The Applicant is not presently confined but was previously confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2007 term of the Lexington County Grand Jury for Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen (2007-GS-32-1210). David Culbertson, Esquire represented the Applicant. On April 5, 2007, the Applicant pled guilty as charged. The Honorable James W. Johnson, Jr. sentenced the Applicant to confinement for a period of ten (10) years, provided that upon the service of seven (7) years, the balance would be suspended with five (5) years probation. The Applicant did not appeal his conviction or sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing SCRCP 71.1(e)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal

cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; see Strickland v. Washington, 466 U.S. 668, 688, 692, 104 S. Ct. 2052, 2065, 2067 (1984) ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness [and] . . . any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) ("PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case.").

And "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338

S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

This Court will now address each allegation of ineffective assistance of counsel:

I. Alleged failure to correct the dates on the indictment

Applicant claims that his plea counsel was ineffective for failing to ensure the dates listed on the indictment were correct before Applicant was sentenced. Applicant testified that due to incorrect dates listed on his indictment, he became subject to electronic GPS monitoring pursuant to S.C. Code Ann. § 23-3-540, otherwise known throughout the United States as "Jessie's Law."

Investigator Pritchard testified that the reason for writing a longer time span on the indictment was due to the Victim's uncertainty of when the offenses took place. (PCR Tr. p. 12, l. 4 – p. 13, l. 2.)

This Court finds Applicant has failed to meet his burden of establishing plea counsel was ineffective and failed to show that the implementation of GPS monitoring was directly related to plea counsel's representation of Applicant.

Newly Discovered Evidence

I. GPS Electronic Monitoring

Applicant alleges that his application for post-conviction relief should not be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act because he has raised an allegation of newly-discovered evidence. Specifically, Applicant testified that he was not aware that he would be subject to GPS electronic monitoring

until he received a written notice on October 24, 2008. (PCR Tr. p. 15, ll. 12-15.) Respondent argues Applicant's allegation of after-discovered evidence is without merit because mandatory GPS electronic monitoring is a collateral consequence of a conviction or guilty plea and not a part of a criminal punishment; therefore, Applicant is not suffering from an *ex post facto* violation of his rights.

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975), overruled on other grounds by U.S. v. Whitley, 459 F.2d 327 (4th Cir. 1985); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976). Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007). When a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. See Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014).

In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

The Supreme Court has cautioned that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. Id.

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." Brady v. United States, 397 U.S. 742, 757, 90 S.Ct. 1463, 1473 (1970)." A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Id.

Applicant testified that his sentencing judge, the Honorable James Johnson, Jr., did not check the electronic monitoring box on Applicant's sentencing sheet and, therefore, he should not be subject to wearing the ankle monitor now that he has concluded his sentence. (PCR Tr. p. 15, ll. 7-11.) Applicant also testified that he was not made aware that the Department of Corrections and/or the Department of Probation, Parole and Pardon Services had Applicant registered for Mandatory GPS monitoring pursuant to S.C. Code Ann. § 23-3-540(A) until after Lexington County placed a detainer on him after his release from prison. (PCR Tr. p. 14, l. 20- p. 15, l. 15.)

Pursuant to S.C. Code Ann. § 17-27-45(c), a claim of after-discovered evidence can be timely raised within one year of actual discovery or *within one year of when, by the exercise of due diligence, such evidence could have been ascertained.* On January 1, 2006, South Carolina

enacted its version, S.C. Code Ann. § 23-3-540, of what is commonly known as "Jessie's Law."

Pursuant to S.C. Code Ann. § 23-3-540(A),

"Upon conviction, adjudication of delinquency, *guilty plea*, or plea of nolo contendere of a person from committing criminal sexual conduct with a minor . . . in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when under the supervision of the Department of Probation, Parole, and Pardon Services shall be monitored by the Department of Probation, Parole, and Pardon Services with the active electronic monitoring device."

Applicant pled guilty to his charges on April 5, 2007, *over one (1) year and three months* after the statute was enacted. While Applicant claims that his attorney should have corrected the indictment dates to avoid the application of Jessie's Law, according to a plain reading of the statute, the key date that triggers application of Jessie's Law is the date of the guilty plea and not the date of the offense. *See*, S.C. Code Ann. § 23-3-540(A) ("Upon conviction . . . guilty plea . . . of a person from committing criminal sexual conduct with a minor . . . in the third degree . . . the **court must order** that the person, upon release from incarceration . . . be monitored . . . with the active electronic monitoring device." (emphasis added)). Regardless of the indictment dates, because Applicant entered a plea after the date of the statute being enacted, the Court was required to order mandatory monitoring.

This Court finds that an *ex post facto* claim is not cognizable under the Uniform Post-Conviction Relief Act. Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000). Accordingly, this Court is not the appropriate forum to consider Applicant's allegation regarding mandatory GPS electronic monitoring. Furthermore, this Court finds that Applicant with due diligence should have been able to discover the enactment of "Jessie's Law," and, therefore, failed to meet his burden to establish a newly-discovered evidence claim.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

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FILED
OCT 18 AM 10:50
BETH A. CHAMBERS
CLERK OF COURT
LEXINGTON, SC

CONCLUSION

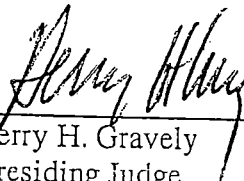
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings or effectively made a claim of newly discovered evidence. Counsel was not deficient in any manner and Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 202, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 9th day of Oct, 2016.



 Perry H. Gravely
 Presiding Judge
 Eleventh Judicial Circuit

Greenville, South Carolina.

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2016 OCT 18 A 10:50

FILED

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3204571

Brantley Clark

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code

11/2/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box or 2nd of November 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling
3614 Landmark Drive Suite A Columbia, SC 29204

Johanna Catalina Valenzuela PO Box 11549 Columbia, SC
29211-1549
Caitlin Bazan Hastings PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-32-04571

Brantley W. Clarke, #321118

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : See page 2 for additional information. Formal Order to follow.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

2132

Judge Code

Date

1/14/2016

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of Jan 20 16 to attorneys of record or to parties (when appearing pro se) as follows: 27

Robert M. P. Masella, 917 Calhoun St., Columbia,
SC 29201

Patrick L. Schmeckpeper, P.O. Box 11549,
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth Camgall
CLERK OF COURT

Court Reporter:

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This matter came before the court for a determination if further review of this Post Conviction matter should be conducted. After hearing from counsel for the State and the applicant, this court feels a sufficient showing has been made to warrant further review. Counsel for applicant is requested to prepare a brief order for the court to sign directing that further review of this PCR be conducted.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) COURT OF COMMON PLEAS

Brantley W. Clarke,)
Applicant,)
v.) Case No. 09-CP-32-04571
State of South Carolina,)
Defendant.)

TRANSCRIPT OF HEARING

The within Post-conviction Relief Hearing in the above-captioned matter was held April 20th, 2016, before The Honorable Perry H. Gravely in the Court of Common Pleas for Lexington County, South Carolina; attended by counsel as follows:

APPEARANCES:

Robert M. P. Masella, Esq.
....Appearing for Applicant

Johanna C. Valenzuela, Esq.
Caitlan Hastings, Esq.
OFFICE OF ATTORNEY GENERAL
...Appearing for State of South Carolina

ALSO ATTENDING:

Brantley W. Clarke, Applicant

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Before The Honorable Perry H. Gravely

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1 (APPLICANT PRESENT)

2 THE COURT: Let me get the packet --
3 (review). Okay. Are we ready? This is
4 the matter of Brantley Clarke versus the
5 State of South Carolina.

6 This is -- is this a Motion to Dismiss
7 and a merits hearing? Or is it an all-in-
8 one, or is it ---

9 MS. HASTINGS: Both, Your Honor.

10 THE COURT: Okay. All right. I'll be
11 glad to hear from you.

12 MS. HASTINGS: All right, Your Honor.
13 This is Brantley Clarke versus the United
14 States (sic) of South Carolina, Docket Number
15 2009-CP-32-4571.

16 The Applicant is not presently confined
17 but was previously, pursuant to the records
18 of the Lexington County Clerk of Court,
19 indicated at the April 2007 term of the
20 Lexington County General Sessions (sic) for
21 committing or attempting to commit a lewd act
22 on a child under the age of sixteen.

23 He was represented by David Culbertson.
24 On April 5th, 2007, he pled guilty as
25 indicted. The Honorable James Johnson, Jr.

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
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1 sentenced the Applicant to confinement for a
2 period of ten years, provided upon the
3 service of seven years that the balance would
4 be suspended on five years probation.

5 The Applicant did not appeal his
6 conviction or his sentence.

7 He subsequently filed his PCR
8 application, which is why we are here today,
9 on October 9th, 2009. The Applicant filed two
10 amendments to his original application; the
11 first on February 16th, 2012, and the second
12 on March 25th, 2016.

13 His grounds are ineffective assistance of
14 counsel and newly-discovered evidence,
15 specifically electronic GPS monitoring.

16 The State is ready for his Motion to
17 Dismiss at this time.

18 THE COURT: All right. Be glad to hear
19 just a brief summary. You are ---

20 MR. MASELLA: Robert Masella, Your Honor.

21 THE COURT: Okay.

22 MR. MASELLA: Good morning. Your Honor,
23 the -- Mr. Clarke's position is that the
24 statute, the GPS statute that was passed went
25 into effect on July 1st, 2006. I have the

Brantley W. Clarke v State of South Carolina
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Before The Honorable Perry H. Gravelly

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1 investigator here today who will tell the
2 court that no offense occurred after August
3 of 2005. So any offense that occurred that
4 Mr. Clarke has pled guilty to occurred before
5 the passing of the statute and, therefore,
6 when Judge Johnson sentenced Mr. Clarke, he
7 didn't put the mandatory GPS on -- he didn't
8 require him to have one. Sorry.

9 When Mr. Clarke -- so he was sentenced.
10 When he was in prison and was being released,
11 in speaking with his caseworker -- and this
12 is something else that we will provide you,
13 Your Honor, he was told on the 24th of
14 October, 2008, that he was going to have this
15 GPS. Then the PCR was filed within the year,
16 as the Attorney General told you, on October
17 of 2009.

18 So as far as the Motion to Dismiss goes
19 for the statute of limitations, I think our
20 memo addresses that.

21 We had a -- they did a conditional
22 dismissal and we -- we replied to it, and
23 it's in there.

24 Your Honor, you also have in your packet
25 a sentencing sheet. You have the plea. You

Brantley W. Clarke v State of South Carolina
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6

1 also have -- I think that you have everything
2 except for the notice. We've discussed it --
3 and I don't believe that they have any
4 problem with me providing it as an exhibit.

5 THE COURT: Let me make sure, I don't --
6 (upon review), you say that you have a memo
7 in response to their Motion to Dismiss?

8 MR. MASELLA: No, Your Honor. It was --
9 there was a conditional dismissal that Judge,
10 uh, Judge McMahon (phonetic) signed, a
11 conditional Order of Dismissal. We replied
12 to it, and that's what I am referring to.

13 THE COURT: Do I have that in my packet?
14 I don't think that I have that. That's a
15 pretty crucial piece of paper.

16 MR. MASELLA: Yes, sir. We had a --
17 just to give you a little of the procedural
18 history, we had that -- those were filed and
19 then apparently the clerk lost the file and
20 -- wasn't put back on the right shelf, so
21 this case sat dormant for a couple of years.
22 Then we met with Judge Keesley and he had
23 Judge, uh, Hayes from Spartanburg -- Mark
24 Hayes -- have a hearing to determine if the
25 case should go forward or not, as far as the

Brantley W. Clarke v State of South Carolina
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Before The Honorable Perry H. Gravely

7

1 conditional ---

2 THE COURT: All right.

3 MR. MASELLA: It might be in there.

4 THE COURT: And this was a PCR
5 hearing. Okay.

6 MR. MASELLA: This is your actual
7 hearing.

8 THE COURT: Right, but you had another
9 proceeding in this PCR application?

10 MR. MASELLA: Oh, yes, sir, with Judge
11 Hayes.

12 THE COURT: And that's what I do not
13 have, I don't have anything regarding that.

14 MR. MASELLA: Well, I have a packet
15 that I can provide to the court which would
16 have that in there.

17 I also have to confess, Your Honor, that
18 I left my reading glasses at home. So -- I
19 have it in here.

20 THE COURT: This is all originals.

21 CLERK: Should I go get the file?

22 THE COURT: That'd be fine -- she'll go
23 get the file.

24 MR. MASELLA: Here is the paperwork,
25 shall I hand it up?

Brantley W. Clarke v State of South Carolina
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8

1 THE COURT: Thank you. She's (clerk)
2 has gone to get the file.

3 (SIDEBAR BETWEEN COUNSEL)

4 THE COURT: This doesn't have the
5 conditional?

6 MR. MASELLA: I have that as well, Your
7 Honor. Your Honor, Judge McMahon signed two
8 conditional Orders of dismissal. He signed
9 on January 31st, 2012, and then we replied
10 with what you have in your hand on February
11 21st. Then he signed the same Order on July
12 3rd of '12. So I think that's what caused the
13 confusion. I have the Order if Your Honor
14 would like for me to hand it up.

15 THE COURT: If you have that.

16 MR. MASELLA: Okay, (tenders).

17 CLERK: (Tenders file to judge).

18 THE COURT: Thank you for going to
19 get that.

20 CLERK: You're welcome.

21 THE COURT: (Upon review), okay.
22 Remind me of your name.

23 MS. HASTINGS: Caitlan Hastings.

24 THE COURT: Ms. Hastings, I'm reviewing
25 the Order of Judge Hayes. You've indicated

Brantley W. Clarke v State of South Carolina
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9

1 that there is a Motion to Dismiss but it
2 appears -- has that not already been
3 addressed, because in the file in January of
4 2016 Judge Hayes says that a, (reading)
5 *"...sufficient showing of material issue of*
6 *genuine fact has been made to warrant a*
7 *further review. I direct that an evidentiary*
8 *hearing be scheduled to allow for further*
9 *review of this PCR application."*

10 Does that not resolve the Motion to
11 Dismiss that was filed prior to this Order?

12 MS. HASTINGS: Yes, Your Honor.

13 THE COURT: All right. Much clearer
14 now. All right.

15 MR. MASELLA: Thank you.

16 THE COURT: All right. I think that
17 was addressed. And y'all weren't involved at
18 that point but -- it is quite an interesting
19 issue that was going on in 2009.

20 All right. So, therefore, based on that
21 Order it appears that the Motion has been
22 resolved and we will just have the
23 evidentiary issues raised -- and I think the
24 primary issue is whether he should be put on
25 electronic monitoring or not. Is that the

Brantley W. Clarke v State of South Carolina
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10

1 primary issue?

2 MR. MASELLA: Yes, Your Honor, that's
3 -- the ineffectiveness, I believe, is the not
4 limiting of dates because of what Probation
5 Pardon & Parole is doing, is saying that
6 because you had an action after -- that
7 something happened after the passing of the
8 statute that we're going to push that one
9 you, that we are going to make you wear it.
10 He shouldn't be on the electronic monitoring.

11 THE COURT: Let me ask you this, it
12 looks like the issues for me to determine is
13 that, one, there is *ex post facto* showing;
14 and also whether that is something for this
15 court -- that this court has jurisdiction
16 over that issue, as to whether it being
17 collateral or not. I don't know. It's a
18 very novel question.

19 MR. MASELLA: That's right.

20 THE COURT: So, in light of that,
21 I'll be glad to hear from you, Mr. Masella?

22 MR. MASELLA: Thank you, Your Honor.
23 If it please the court, I'll call
24 Investigator Pritchard.

25 (WITNESS TAKES STAND)

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Post-conviction relief Hearing of April 20, 2016
Testimony of David Pritchard

11

1 DAVID PRITCHARD, having been sworn
2 to tell the truth, and nothing but the truth,
3 testified as follows:

4 DIRECT EXAMINATION

5 BY MR. MASELLA:

6 Q. Investigator Pritchard, you arrested
7 Mr. Clarke -- correct, you were the arresting
8 officer in this matter?

9 A. That's correct.

10 Q. And when you arrested him, you
11 prepared a warrant; is that correct?

12 A. That's correct.

13 Q. And on that warrant, you used some
14 dates; correct?

15 A. Correct.

16 Q. Have you had a chance to review your
17 file? When we subpoenaed you, you grabbed
18 your file and went through it?

19 A. Yes.

20 Q. Is that correct?

21 A. Yes, sir.

22 Q. And when you reviewed your file the
23 incident date, as far as the most recent
24 date, would be what that anything occurred?

25 A. Based off of statements that were

Brantley W. Clarke v State of South Carolina
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Testimony of David Pritchard

12

1 provided to me, the date that probably most
2 accurately reflects the incident would be
3 August of 2005.

4 Q. Okay. And to your knowledge he was
5 not convicted of any activity that occurred
6 after August of 2005?

7 A. No, sir.

8 Q. In fact, you don't believe that
9 anything did occur after August of 2005?

10 A. Not based on the elements that I
11 had, correct.

12 Q. Now, you put in the warrant and the
13 indictment also reflected the August -- when
14 I say it, I mean you put the August 2006 in
15 the warrant and that was also reflected in
16 the indictment; is that right?

17 A. That's correct.

18 Q. Why did you do that?

19 A. Simply because of, uh, the timeframe
20 that the victim said he had been around Mr.
21 Clarke, just to kinda cover if those dates
22 were maybe a little bit skewed because the,
23 uh, victim wasn't completely sure when it
24 happened. He was kinda estimating around
25 August 2005. So I just put that window in

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Testimony of Brantley Clarke

13

1 there to make sure that any dates were
2 covered.

3 Q. But as far as you know nothing
4 happened after August of 2005?

5 A. That is correct.

6 MR. MASELLA: Beg the court's
7 indulgence, (sidebar with Applicant). Thank
8 you, Your Honor, that's all that I have.

9 THE COURT: All right. Cross
10 examination?

11 MS. HASTINGS: No questions, Your Honor.

12 MR. MASELLA: You have the indictment
13 in your packet and the warrant, Your Honor.

14 THE COURT: Okay. You may step down.

15 (WITNESS STEPS DOWN)

16 MR. MASELLA: Next I call Brantley
17 Clarke.

18 (WITNESS TAKES STAND)

19 BRANTLEY CLARKE, having been sworn to
20 tell the truth, and nothing but the truth,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MASELLA:

24 Q. Mr. Clarke, I'm handing you a piece
25 of paper. Can you identify it for me,

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Testimony of Brantley Clarke

14

1 please?

2 A. This is the note that I received for
3 my classification worker at Ridgeland
4 Correctional Institution.

5 Q. And what is the date on that note?

6 A. October 24th, 2008.

7 Q. Okay.

8 MR. MASELLA: May I make this
9 Petitioner's Exhibit 1.

10 COURT REPORTER: So marked as
11 Applicant's Exhibit 1.

12 MS. HASTINGS: No objection, Your
13 Honor.

14 (SO ENTERED AS APPLICANT'S EXHIBIT 1)

15 DIRECT EXAMINATION CONTINUED

16 BY MR. MASELLA:

17 Q. All right, Mr. Clarke. Can you tell
18 the court what that piece of paper means, why
19 we are presenting it.

20 A. When I was to be released, they --
21 there's a detainer, they had to hold me for
22 pick up by a sheriff's department or whoever.
23 Up until that point I did not know -- there
24 was no detainer placed on me. When I
25 received the note, received the note, I found

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Testimony of Brantley Clarke

15

1 out that I had the detainer for GPS. I
2 didn't actually even know what that was for.
3 So I had to request -- send a request to
4 staff and ask what that was for, and she
5 indicated that Lexington County placed a
6 detainer on me for GPS monitoring.

7 Q. And did Judge Johnson -- to the best
8 of your knowledge, Judge Johnson didn't click
9 off GPS monitoring on your sentencing sheet;
10 correct?

11 A. Did not, no.

12 Q. Did you have any knowledge of the
13 requirement to have a GPS device on you
14 before ---

15 A. No.

16 Q. --- you received that note?

17 A. No.

18 Q. Okay. And your application was
19 filed within a year of receiving that note?

20 A. Yes.

21 Q. Now, uh, have you been -- do you
22 have any problems -- you are on probation,
23 correct?

24 A. Yes.

25 Q. You didn't violate probation or

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Testimony of Brantley Clarke

16

1 parole, correct?

2 A. No, I did not.

3 Q. Was there any other reason other
4 than -- your conviction was done when? When
5 did you plead guilty? In 2007?

6 A. April 2007.

7 Q. Okay. And the last event occurred,
8 from all the statements and even during the
9 plea was what Investigator Pritchard
10 testified to, in August of 2005?

11 A. Correct.

12 Q. Is that right?

13 A. Correct.

14 Q. Now, why would you not consider this
15 to be a collateral issue for you? What does
16 that mean to you? What do you have to do to
17 have this ---

18 A. I have to pay sixty dollars (\$60) a
19 week to have the monitoring on me. Just last
20 weekend, I had to cancel a trip because I
21 forgot to get permission just to spend the
22 night out of town. So there's times when I
23 have to wake up during the middle of the
24 night and go outside so that the satellite
25 can pick me up. I've had to have the monitor

Brantley W. Clarke v State of South Carolina
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Post-conviction relief Hearing of April 20, 2016
Testimony of Brantley Clarke

17

1 fixed at 2:00 or 3:00 in the morning by an
2 agent from Probation Pardon & Parole.

3 Q. So ---

4 A. And there are places -- when I was
5 on probation there were places that I was not
6 allowed to go because I had the monitor on.

7 Q. As far as the dates on the
8 indictment, did your attorney talk with you
9 about limiting the dates to when the events
10 actually occurred? Did you ever have any
11 conversation ---

12 A. I didn't even realize that was an
13 issue until after I had pled and saw the
14 sentencing sheet that he sent me when I was
15 at Kirkland for intake.

16 Q. Okay.

17 A. And at that point he said that it
18 should not be an issue. I questioned it, I
19 just wondered why it was that long of a time
20 period.

21 Q. Okay. And at that point you didn't
22 know ---

23 A. No, we didn't know. He didn't
24 mention anything about it causing any problem
25 with the statute for GPS.

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

18

1 Q. Okay. Now, Probation Pardon &
2 Parole is keeping the GPS on you; is that
3 correct?

4 A. Yes, I'm off probation and they've
5 kept it on me.

6 Q. Okay.

7 MR. MASELLA: That's all that I
8 have, Your Honor.

9 MS. HASTINGS: No questions, Your
10 Honor.

11 THE COURT: You may step down.

12 (WITNESS STEPS DOWN)

13 MR. MASELLA: That would be the
14 Petitioner's case, Your Honor.

15 THE COURT: Let me read the
16 statute right quick. (Upon review), okay.
17 Mr. Masella, have you reviewed the case of
18 *Jernigan v. State*?

19 MR. MASELLA: I might have, Your
20 Honor. I don't -- the name doesn't ring a
21 bell for me, but ---

22 THE COURT: I've done a cursory
23 review of that. Are y'all familiar with that
24 one? Is that one that you were going to
25 raise? It's one that you were going to

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

19

1 raise, wasn't it?

2 MS. HASTINGS: No, Your Honor,
3 but we have a few others.

4 THE COURT: In *Jernigan v. State*,
5 uh, what happened there was that a person got
6 released on parole and they'd changed the law
7 from an annual review by the Parole Board to
8 a biannual review. They said in light of the
9 *Shahbaz* case that a PCR proceeding is not a
10 proceeding to determine *ex post facto* claims
11 against parole and that PCR claims and that
12 this is merely -- that a PCR can only affect
13 the validity of a conviction or sentence. So
14 -- I'm just saying that seems to be on point
15 but, again, I'd like to review that
16 carefully.

17 MR. MASELLA: Your Honor, my main
18 concern with this hearing is showing that the
19 attorney's ineffectiveness was -- which
20 obviously has impacted Mr. Clarke -- that he
21 didn't limit the dates on the indictment,
22 because that is what Probation is using to
23 make him wear the GPS.

24 THE COURT: Right.

25 MR. MASELLA: So if I can get the --

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

20

1 if you can provide an Order or if there is an
2 order showing that date should have been,
3 from the testimony of the investigator,
4 August of 2005 instead of 2006, I think that
5 I can fix my problem. I think that's
6 appropriate in a PCR action for the, uh, to
7 show the ineffectiveness and impacted the
8 client.

9 It may not get the GPS off but it,
10 uh, gives me something that I can use to make
11 that happen, I guess.

12 THE COURT: All right. Does the
13 State have anything that they want to present
14 at this time?

15 MS. HASTINGS: Your Honor, we do
16 have some arguments consistent with our filed
17 Amended Return Motion to Dismiss.

18 THE COURT: I'm sorry it's been
19 kinda scattered in raising this, I just
20 didn't have all the documents. I realize
21 that is nobody's fault but -- but it is
22 really mainly a legal issue with a small
23 factual -- not small but a -- all right.
24 I'll be glad to hear from both sides.

25 MS. HASTINGS: All right, Your

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

21

1 Honor. Our first argument would be that the
2 Applicant's application should be dismissed
3 simply for failure to comply with the filing
4 procedures of the Uniform Post-Conviction
5 Act, Section 17-27-45(a), which says that an
6 application for relief must be filed within
7 one year after entry of a judgment of
8 conviction. A South Carolina Supreme Court
9 relevant case says that the statute of
10 limitations period shall apply to all cases
11 filed after July 1st, 1996; which applies to
12 this case.

13 Here the Applicant pled guilty on
14 April 5th, 2007, which means that his
15 application for PCR relief should have been
16 filed no later than April 6th, 2008. This
17 application was filed October 9th, 2009, which
18 is over a year and a half past the statutory
19 period allotted. So the State would move
20 that based on these grounds alone the
21 application should be dismissed.

22 THE COURT: All right.

23 MS. HASTINGS: Then our second
24 argument, Your Honor, ---

25 THE COURT: Let's address this.

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

22

1 Mr. Masella, would you like to address that?

2 MR. MASELLA: Yes, Your Honor.

3 The after-discovered evidence, he -- as we
4 stated in our reply to the conditional Order
5 of Dismissal, he did not know -- because
6 Judge Johnson didn't require him to have GPS,
7 and he didn't know until he received the note
8 which is in evidence that GPS was going to be
9 required of him. Therefore -- and that was
10 within a year of him filing his PCR
11 application, so therefore the after-
12 discovered evidence happened in October of
13 '08 and he filed -- that's when he knew that
14 -- that's when he knew that he was going to
15 have to use the GPS and he filed it within a
16 year of finding out. So I don't think that
17 it's the plea date, I think it is when he
18 found out that it was a problem. Nobody knew
19 until he found out.

20 MS. HASTINGS: Your Honor, if I
21 may, the State would like to address why we
22 believe this is not after-discovered
23 evidence. Section -- sorry. 23-3-545, which
24 is also commonly known in the U.S. as
25 Jessie's Law, was enacted in South Carolina

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
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Closing Arguemnts of Counsel

23

1 January 1st, 2006, and took effect around July
2 1st, 2006; which was well before the Applicant
3 pled guilty. He pled guilty on April 15th,
4 2007. The State believes that is more than
5 adequate time, and the statute clearly says
6 that it shall apply to anyone that pleads
7 guilty, that the court must apply electronic
8 monitoring.

9 Again the State would say that
10 electronic monitoring, which has been
11 traditional held by the South Carolina
12 Supreme Court is a collateral consequence,
13 it's not a direct consequence of his
14 conviction. It's merely a civil precaution
15 taken by the State to prevent reoffending.

16 THE COURT: All right.

17 MR. MASELLA: May I address that?

18 THE COURT: Yes.

19 MR. MASELLA: Your Honor, the
20 Legislature took into account people who
21 would be affected by this in that they --
22 what they said is that if you violate --
23 you're on the sex registry, sexual registry
24 as a sex offender and if you violate
25 probation or parole or do any of these other

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

24

1 acts that are in paragraph (a) of 540, that
2 you could -- that you may -- that the judge
3 may place GPS on you, but -- it doesn't
4 require the judge to do it. Also, this was
5 passed after the date of the offense, which
6 was, as the investigator and Mr. Clarke told
7 the Court, August of 2005. So this was
8 passed after any offense(s) occurred, or all
9 offenses had occurred.

10 I believe that it's just not a -- it
11 is not intended to affect anybody who is --
12 whose offense occurred prior to the enactment
13 and passing of the statute.

14 MS. HASTINGS: Your Honor, the
15 State would argue that the monitoring come
16 into effect more upon the release, not when
17 the offense took place. Again, it's a
18 collateral consequence. It's not relevant to
19 their sentence, their punishment.

20 Again, the South Carolina Supreme
21 Court in *State v Nation* addressed whether GPS
22 monitoring on a sex offender which committed
23 his offenses prior to the enactment of
24 Jessie's Law would violate any due process
25 violations and the Court said no.

Brantley W. Clarke v State of South Carolina
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Closing Arguemnts of Counsel

25

1 THE COURT: What case was that?

2 MS. HASTINGS: *State v. Nation,*

3 Your Honor. The citation is 408 S.C. 474.

4 THE COURT: Okay.

5 MS. HASTINGS: But the Court did
6 say that in cases such as these the offenders
7 would be entitled to judicial review ten
8 years after the imposition of the monitoring
9 and then five years after that.

10 MR. MASELLA: Your Honor, *State v.*
11 *Nation*, Ms. Nation violated probation
12 numerous times and that was why they put GPS
13 on her. It wasn't because the -- it was a
14 different set of circumstances. They did
15 have a good conversation about the monitoring
16 but it has to be a violation as hers was,
17 violation of parole, probation or community
18 supervision program that put on the GPS
19 monitoring, it was not required under the
20 statute. It's optional with the court.

21 And I have the Southeastern cite if
22 you require that.

23 THE COURT: I have it. The actual
24 reason they put the GPS monitoring on at that
25 time was the violation of probation, which

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Closing Arguemnts of Counsel

26

1 occurred after the act?

2 MR. MASELLA: Yes, sir.

3 THE COURT: I guess.

4 MR. MASELLA: Yes, sir.

5 THE COURT: Okay.

6 MR. MASELLA: Her plea happened in
7 2002, but you're right.

8 THE COURT: All right. Anything
9 else?

10 MS. HASTINGS: Your Honor, the
11 State would just reiterate again that the key
12 language in the statute is, uh, you know,
13 when the plea took place, not the incidence.
14 So therefore electronic monitoring is
15 appropriate in this case and the Applicant is
16 entitled to judicial review at some point, so
17 it is not necessarily a permanent collateral
18 consequence.

19 THE COURT: I ---

20 MS. HASTINGS: And he pled after
21 the enactment of Jessie's Law.

22 THE COURT: --- guess that is
23 where Mr. Masella would say that his attorney
24 should have corrected the issue ---

25 MS. HASTINGS: But the State would

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Ruling of The Court

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1 maintain that doesn't matter.

2 THE COURT: You know, I have --
3 this is very unfortunate timing, Mr. Clarke.
4 You know, I have two problems. One, I have a
5 problem with whether this is the proper forum
6 for the relief that you're requesting. I
7 understand your issue about the ineffective
8 assistance of counsel.

9 And, secondly, it appears to be kind
10 of an *ex post facto* request.

11 This may be something that somebody
12 higher up than me needs to address. I just
13 don't feel like the petitioner's met his
14 burden as far as me being able to grant the
15 relief requested, so based on that I am going
16 to deny the request. Maybe the Court of
17 Appeals or the Supreme Court can address this
18 issue. Thank you.

19 (HEARING CONCLUDED)
20
21
22
23
24
25

Brantley W. Clarke v State of South Carolina
Case Number 09-CP-32-04571
Post-conviction relief Hearing of April 20, 2016
Certificate of Court Reporter

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF GREENVILLE)

I, the undersigned Deborah Garrison,
Circuit Court Reporter for the 13th Judicial
Circuit, hereby certify that the foregoing is a
complete and accurate transcript of the hearing
held in the within action heard on April 20th,
2016, before The Honorable Perry H. Gravely;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Wm Lloyd Garrison

Deborah Garrison

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	2009-CP-32-04571
Brantley W. Clarke,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN TO MOTION TO ALTER OR
	)	AMEND PURSUANT TO RULE 59(e), SCRCP
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 9, 2009, and amended February 16, 2012. Respondent made its return and motion to dismiss on January 6, 2010, and amended on April 8, 2016. On January 26, 2016, the Honorable J. Mark Hayes, II, ordered an evidentiary hearing to be scheduled to allow for further review of the Applicant's application. An evidentiary hearing was held on April 20, 2016, at the Lexington County Courthouse. Applicant was present and represented by Robert M. P. Masella, Esquire. Caitlin Bazan Hastings, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

The Final Order denying Applicant's relief was filed on October 18, 2016. Applicant filed his motion to reconsider on or about November 21, 2016, and Respondent received it on or about November 21, 2016. This Return follows.

I. ARGUMENT

Procedural History

Applicant requests the Court amend the Order to acknowledge the filed amended PCR application, the procedural history of the Conditional Orders filed in this case, and the Order of

Judge Hayes, “denying the Respondent’s Motion to Dismiss and granting Applicant an evidentiary hearing.” (Motion to Alter or Amend, pp. 2-3.)

Respondent has no objection to amending the Court’s Order to include the additional procedural history related to the amended application and the Conditional Orders of Dismissal. However, the Court’s October 2016 Final Order does include Judge Hayes’ order and uses the exact phrasing from Judge Hayes’ Form 4, filed on January 15, 2016, and the formal order, filed on February 3, 2016, which does not deny Respondent’s Motion to Dismiss, but instead states the case “warrant[s] a further review . . . [and] direct[s] that an evidentiary hearing be scheduled to allow for further review of this Post-Conviction Relief Application.” (Feb 3, 2016 (filed date) Order, p. 2.)

Merits

Applicant has failed to set forth any sufficient reasons to persuade this Court to alter or amend the final order.

Indictment Dates

Applicant asks the Court to reconsider its ruling because Investigator Pritchard **also** testified he believed the date that most accurately reflects the incident date would be August of 2005. Applicant’s argument fails to account for the triggering date of Jessie’s Law. While Applicant claims that his attorney should have corrected the indictment dates to avoid the application of Jessie’s Law, according to a plain reading of the statute, the key date that triggers application of Jessie’s Law is the **date of the guilty plea** and not the date of the offense. *See*, S.C. Code Ann. § 23-3-540(A) (“**Upon conviction . . . guilty plea . . .** of a person from committing criminal sexual conduct with a minor . . . in the third degree . . . **the court must order that the person, upon release from incarceration . . . be monitored . . . with the active**

electronic monitoring device.” (emphasis added)). Regardless of the indictment dates, because Applicant entered a plea after the date of the statute being enacted, the Court was required to order mandatory monitoring.

Timeliness Ruled upon by Prior Judge

Applicant argues Judge Hayes previously ruled on Respondent’s Motion to Dismiss and references Respondent’s statement during the evidentiary hearing in support. However, the Court has both the Form 4 (Attached as Exhibit 1) and the formal order¹ (Attached as Exhibit 2) issued by Judge Hayes and neither state that Judge Hayes ruled on the motion to dismiss or the timeliness of the application. The orders specifically indicate a hearing is to be set to “allow for further review” of the PCR.

Newly Discovered Evidence Claim

Applicant argues that even if the timeliness of Applicant’s filing was properly before this Court, the Order fails “to take into account two important considerations.” The first being that Applicant had “no reason” to conduct an inquiry at the time he elected to plead guilty and that because the Court did not mark the sentencing sheet with the mandatory monitoring, Applicant had no reason to look into the monitoring until he received written notice on October 24, 2008.

Applicant is merely asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court). The Court considered and incorporated Applicant’s argument in its Final Order, noting Applicant was

¹ Applicant’s motion inadvertently fails to reference the formal order that followed Judge Hayes’ Form 4 order, signed by Judge Hayes on January 26, 2016, and filed on February 3, 2016.

alleging that until he received a written notice on October 24, 2008, he was not aware he would be subject to GPS monitoring. (Final Order, p. 5.) Applicant failed to establish that with reasonable diligence he could not have discovered the enactment of "Jessie's Law."

Applicant has not set forth any sufficient grounds to persuade this Court to alter or amend the judgment. However, if ordered by the Court, Respondent will prepare an amended order incorporating the procedural history to include the amended PCR application and the conditional orders of dismissal.

Respondent submits oral argument would not aid in the reconsideration of the original judgment as the Order of Dismissal in this case fully comports with the requirements of Rule 52(a), SCRPC.

CONCLUSION

WHEREFORE, having made its Return to Applicant's Rule 59(e) Motion to Reconsider, Respondent requests that the motion be denied and dismissed.

Respectfully submitted,

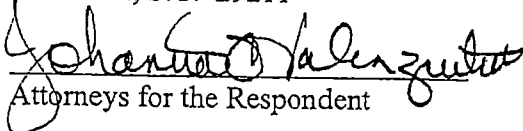
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondent

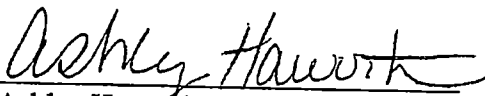
Columbia, South Carolina
9 Dec., 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
BRANTLEY CLARKE,	)	2009-CP-32-04571
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Ms. Tara Dawn Shurling, Esquire
Law Ofc. Of Tara Dawn Shurling, PA
3614 Landmark Drive Suite A
Columbia, SC 29204**

DATED this 9th day of December, 2016.


Ashley Haworth, paralegal
For Respondent

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

Brantley W. Clarke, #321118,)

Case No. 2009-CP-32-4571

Applicant,)

ORDER

vs.)

State of South Carolina,)

Respondent.)

Date: January 14, 2016
 Judge: J. Mark Hayes, II
 Counsel for Applicant: Robert M.P. Masella
 Counsel for Respondent: Patrick Lowell Schmeckpeper
 Court Reporter: Stacy Johnson

BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON, SC

2016 FEB - 3 A 11:40

FILED

PROCEDURAL POSTURE

This matter initially came before the court by Petitioner's filing of a Post-Conviction Relief Application on October 9, 2009. An amended application was filed by petitioner on February 16, 2012. The State filed a motion to dismiss on or about January 5, 2010. A Conditional Order of Dismissal was executed by the Honorable R. Knox McMahon on January 30, 2012 and filed January 31, 2012. A Reply to the Conditional Order of Dismissal was filed by Petitioner on February 21, 2012. A second (identical) Conditional Order of Dismissal was executed by Judge McMahon on June 29, 2012 and filed on July 3, 2012. A letter dated July 19, 2012 reaffirmed the previously filed Reply to the Conditional Order of Dismissal and was mailed on July 19, 2012 to the Lexington County Clerk of Court.

A status conference was held by the Honorable William P. Keesley on October 8, 2015. As a result of the conference, Judge Keesley set today's hearing for the court to determine if a further review of this Post-Conviction matter should be conducted.

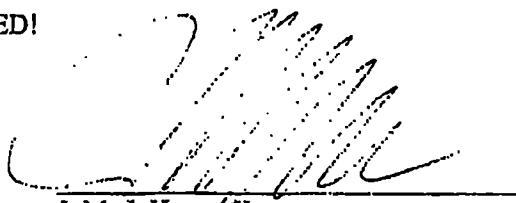
FINDINGS OF FACT AND CONCLUSIONS OF LAW

South Carolina Code §17-27-70 sets out the procedure the Court should apply upon receipt of a Post-Conviction Relief Application. As stated above, the State filed a motion for a dismissal of the application. Judge McMahon issued a Conditional Order of Dismissal and gave

Applicant twenty (20) days to show why his Order should not become final. Applicant provided a Reply to the Conditional Order of Dismissal within the specified time.

After reviewing the Applicant's Reply and after hearing from counsel for the State and the applicant, this court feels a sufficient showing that a material issue of fact has been made to warrant a further review. Therefore I direct that an evidentiary hearing be scheduled to allow for further review of this Post-Conviction Relief Application.

AND IT IS SO ORDERED!



J. Mark Hayes, II
Presiding Judge

January 26, 2016
Lexington, South Carolina

FILED
2016 FEB -3 A 11:40
BEITH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3204571

Brantley Clark

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code

2/9/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on February 9, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Robert M.P. Masella 917 Calhoun St. Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-32-04571

Brantley W. Clarke, #321118

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : See page 2 for additional information. Formal Order to follow.

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

2132
Judge Code

1/14/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of Jan 20 16 to attorneys of record or to parties (when appearing pro se) as follows: 27

Robert M. P. Masella, 917 Calhoun St., Columbia, SC 29201

Patrick L. Schmeckpeper, P.O. Box 11549, Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth Camargo /nh
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This matter came before the court for a determination if further review of this Post Conviction matter should be conducted. After hearing from counsel for the State and the applicant, this court feels a sufficient showing has been made to warrant further review. Counsel for applicant is requested to prepare a brief order for the court to sign directing that further review of this PCR be conducted.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

BRANTLEY W. CLARKE,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

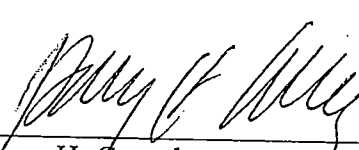
IN THE COURT OF COMMON PLEAS
OF THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2009-CP-32-04571

ORDER

This matter comes before the Court upon *Applicant's Motion to Alter or Amend* pursuant to Rule 59(e), SCRCP as to the *Order of Dismissal* filed October 18, 2016. After careful review of the record and matters, the Court finds that no hearing is necessary and denies the Applicant's Motion to Alter or Amend the Order of October 18, 2016.

AND IT IS SO ORDERED!


Perry H. Gravely
Presiding Judge

Greenville, South Carolina

February 15, 2017

COUNTY OF LEXINGTON
LISA M. COMER, CLERK OF COURT
LEXINGTON COUNTY JUDICIAL CENTER
205 EAST MAIN STREET
LEXINGTON, SC 29072-3494

FILED
2017 FEB 21 P 12:17

STATE OF SOUTH CAROLINA)

COUNTY OF Lexington)

Brantley W. Clarke,)

Petitioner,)

v.)

State of South Carolina,)

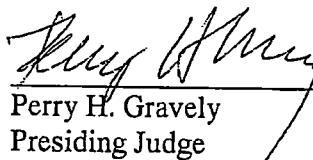
Respondent.)
_____)IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2009-CP-32-04571

ORDER OF DISMISSAL**ORIGINAL**

This matter comes before the Court upon Applicant's Motion to Alter or Amend the Order of Dismissal filed on October 18, 2016. The Court has reviewed the file and matters submitted and finds that oral argument would not aid in this Motion. After consideration of the issues, the Court denies Applicant's Motion and confirms the previous Order of Dismissal.

IT IS SO ORDERED.



Perry H. Gravely
Presiding Judge

Pickens, South Carolina

March 15, 2016

FILED
2017 MAR 17 AM 11:45
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3204571

Brantley Clark		State of South Carolina	
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box or 23rd of March 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Tara Dawn Shurling
3614 Landmark Drive Suite A Columbia, SC 29204

ATTORNEY(S) FOR THE PLAINTIFF(S)

Caitlin Bazan Hastings PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa A. Comer/mh

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

1 - RRA

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Perry H. Gravely, Presiding Judge

RECEIVED

APR 10 2017

2009-CP-32-04571

S.C. SUPREME COURT

BRANTLEY W. CLARKE,

Applicant,

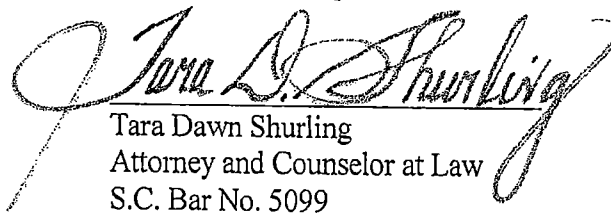
v.

THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

NOW COMES the Applicant in the above-captioned Post-Conviction Relief matter, acting by and through his undersigned counsel, giving notice of his appeal from the Final Order of Dismissal denying his Post-Conviction Relief filed October 18, 2016 and the Orders Denying the Applicant's Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. The initial Order Denying the 59(e) Motion was filed with the Lexington County Clerk of Court on February 21, 2017 and received by Counsel on March 16, 2017. A second Order Denying the 59(e) Motion was filed March 17, 2017 and was received by Counsel for Applicant on April 3, 2017.¹


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 FAX

This 6th day of April, 2017.

ATTORNEY FOR APPLICANT

Other Counsel of Record:

Jessica Kinard, Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

¹ The second Order is dated March 15, 2016, however that is an obvious typographical error since the Order of Dismissal was not filed until October 18, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Perry H. Gravely, Presiding Judge

2009-CP-32-04571

RECEIVED

APR 10 2017

S.C. SUPREME COURT

BRANTLEY W. CLARKE,

Applicant,

v.

THE STATE OF SOUTH CAROLINA,

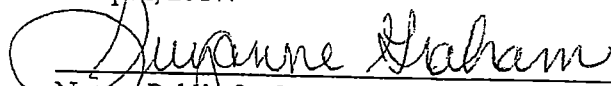
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Applicant's Notice of Appeal in the above-entitled cause has been served upon opposing counsel, Jessica Kinard, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 6th day of April, 2017.


Tara Dawn Shurling
Attorney for Applicant

SWORN TO BEFORE me this 6th day
of April, 2017.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24