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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
APPEAL FROM NEWBERRY COUNTY  
COURT OF GENERAL SESSIONS

THE HONORABLE DONALD B. HOCKER, CHIEF ADMINISTRATIVE JUDGE

Lower Court Case No:2013-GS-36-00498, & 00500.

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Appellate Case No:2020-001022

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Mario V.- Gonzalez Hernandez, #361963,

Petitioner,

V.

State of South Carolina,

Respondent,

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PETITION FOR A WRIT OF CERTIORARI

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/s/



Mr. Mario V.- Gonzalez Hernandez, #361963

ACI. Colleton Unit F-1 B#38

P.O. Box 1151

1057 Revolutionary Trail Hwy47

Fairfax, S.C. 29827

OTHER COUNSEL OF RECORD:

Ms. Taylor Daniel, Asst. Solicitor  
Eighth Circuit Solicitor's Office

P.O. Drawer 10

Newberry, S.C. 29108

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QUESTIONS PRESENTED

1. Did the Circuit Court err when it denied the Application by applying the seven year statute of limitations to the Petitioner's case under §17-28-30(B)?
2. Whether the Petitioner was denied fundamental fairness in regards to his procedural due process?
3. Was the Petitioner prejudiced by the actions of his Appointed Counsel and the State's Solicitor for depriving him of his constitutional rights to file any objections, motions, or his notice of appeal within the time frame by failing to serve an copy of the order?

STATEMENT OF THE CASE

On October 27-29th,2014, Petitioner, proceeded to trial by jury in Newberry South Carolina. At the conclusion of trial, he was found guilty of second-degree criminal sexual conduct with a minor, and found not guilty of first-degree criminal sexual conduct with a minor, (2013-GS-36-00498). He was sentenced by the Honorable Eugene C. Griffith,Jr., to imprisonment for a period of (16) sixteen years.

On August 2nd,2017, the South Carolina Court of Appeals unanimously affirmed Petitioner's conviction and sentence. See \* State v. Hernandez, OP. No:#2017-UP-263 ( S.C. Ct. App. filed August 2nd,2017). Petitioner subsequently submitted a petition for rehearing, which was denied on September 22nd,2017. Petitioner, subsequently submitted a Petition for a Writ of Certiorari. On March 28th,2018, this Court granted Certiorari. Petitioner, timely submitted his Brief and the S.C. Supreme Court denied on or about June of 2019. Petitioner, subsequently submitted an Application with the Court of General Sessions, in Newberry County for Forensic Post-Conviction DNA Testing in pursuant to §17-28-30(A). The Application was filed on November 21st,2019. On November 22nd,2019, Petitioner, received an Order from the Honorable Donald B. Hocker, Chief Judge, appointing Mr.Charles Verner Public Defender, for Newberry County Eighth Judicial Circuit to represent. Petitioner, wrote to the Clerk of Court's Office on July 1st, 2020, requesting the status on the case and received back an order of dismissal signed on May 7th,2020, and filed on May 12th,2020. Judge, specifically stated in his order, that the Petitioner, shall be served an copy of this order by the State, and he shall have (10) ten days to file any objections, or motions before this order shall become final. Appeals as follows:

## ARGUMENTS

1. The Circuit Court did err when it applied the seven year statute of limitations to the Petitioner's case when he pled not guilty and went to trial by jury. Circuit Court applied the wrong code of law §17-28-30(B). See \* Orlando Smith v. State of South Carolina, ( Opinion No:#5316 submitted March 4th,2015 - filed May 13th,2015 S.C. Ct. App. ).

Petitioner, argues that under §17-28-30(A), where there is no statute of limitations, he is entitled to prove his innocence according to the S.C. Rules of Criminal Procedures Rule#6, to test the DNA evidence in his behalf.

2. Petitioner, argues that he was denied fundamental fairness in regards to his Counsel and the State's Solicitor's Office depriving him of notice of an hearing, failure to serve an copy of the Order of Dismissal, violating the Post-Conviction DNA Testing Act, §17-28-90(G), which states, The Applicant and the Solicitor or Attorney General as applicable shall have the right to appeal a final order denying or granting DNA Testing by a Writ of Certiorari to the S.C. Court of Appeals or the S.C. Supreme Court as provided by the South Carolina Appellate Court Rules Rule#247.

3. Petitioner, was prejudiced by the actions of both the State Solicitor Ms.Taylor Daniel Wilson, and his Appointed Counsel Mr.Charles Verner, Public Defender. Petitioner, alleges prosecutorial misconduct and a denial of his Sixth Amendment right to receive effective assistance of counsel. Petitioner, is entitled to the Access to Justice Post-Conviction DNA Testing to prove his innocence, because the State cannot produce any physical DNA evidence or biological material of Mr.Hernandez, to substantiate or sustain their conviction for which Mr.Hernandez, is being held in custody unlawfully. According to the S.C. Rules of Criminal Procedures Rule#6 Rules for Chemical Analysis and Chain of Custody, (d). Waiver of Rights- Nothing in this rule shall preclude the right of any party to obtain an expert chemist or analyst to test a substance in his behalf provided it is tested under the supervision of the authority having custody of the substance or of SLED, nor shall it preclude the right of any party to introduce any evidence supporting or contradicting reports or papers entered into evidence.

ARGUMENTS CONTINUED

4. Attorney's failure to file notice of appeal held deficient. See \* Roe v. Flores-Ortega, 528 U.S. 470, 145 L.Ed.2d 985, 120 S.Ct. 1029 (2000), (filing a notice of appeal is a purely ministerial task and the failure to file reflects inattention to the client's wishes and cannot be considered a strategic decision. Counsel has a constitutionally imposed duty to consult with his client. Counsel knew or should have known that his client would have liked to appeal, and but for the counsel's errors, he would have timely appealed. Petitioner's counsel did not notify him before the hearing or after the decision to deny the Application for Forensic DNA Testing, depriving him limit in which he had (10) ten days in which to file the notice of appeal.

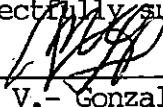
5. The Sixth Amendment right to effective assistance of counsel extends to direct appeals. The failure to file a notice of appeal deprives the Petitioner of his constitutional procedural due process. See \* Penson v. Ohio, 488 U.S. 75, 102 L.Ed.2d 300, 109 S.Ct. 346 (1988).

6. Access to Justice Post-Conviction DNA Testing Act, §17-28-50(c), states that at any time prior to entry of judgment the Court may, when appropriate issue orders for amendment of the application including, but not limited to, pleadings, motions, and requests for extentions of time. The Court, shall make specific findings of fact and expressly state its conclusions of law. The Applicant shall be given an opportunity to reply to the proposed dismissal.

CONCLUSION

WHEREFORE, Mario Valerio- Gonzalez Hernandez, #361963, the Petitioner, prays that this Honorable Court grants his Petition for a Writ of Certiorari, and give relief by way of order for reversal and remand with instructions of expungement of indictment #2013-GS-36-00498, for the offense of first-degree criminal sexual conduct with a minor, for which he was found not guilty as justice is so required as a matter of law.

Dated: Fri. August 14<sup>th</sup>, 2020. Respectfully submitted,

/s/   
Mr. Mario V.- Gonzalez Hernandez, #361963  
ACI. Colleton Unit F-1 B#38  
P.O. Box 1151  
1057 Revolutionary Trail Hwy47  
Fairfax, S.C. 29827

THE STATE OF SOUTH CAROLINA  
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Mario V.- Gonzalez Hernandez, #361963,

Petitioner,

V.

State of South Carolina,

Respondent,

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PROOF OF SERVICE

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I, Mario Valerio-Gonzalez Hernandez, #361963, the Petitioner, hereby certify that I, have served an true copy of the " Petition for a Writ of Certiorari", upon the Respondent, Ms.Taylor Daniel, Assistant Solicitor, for the Eighth Judicial Circuit, Solicitor's Office in Newberry County, P.O. Drawer 10, Newberry, S.C. 29108, on this 14<sup>th</sup> day of August, 2020.

Respectfully submitted,

/s/ 

Mr. Mario V.-Gonzalez Hernandez, #361963

ACI. Colleton Unit F-1 B#38

P.O. Box 1151

1057 Revolutionary Trail Hwy47

Fairfax, S.C. 29827

Dated: Mon. August 17<sup>th</sup> 2020

South Carolina Court of Appeals  
Jenny A. Kitchings, Clerk  
P.O. Box 11629  
Columbia, S.C. 29211

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AUG 20 2020

SC Court of Appeals

RE: Mario V. Gonzalez Hernandez #361963, Petitioner,  
-vs- State of South Carolina, Respondent.  
Appellate Case No: 2020-001022 Petition For Writ  
of Certiorari.

Dear Ms. Kitchings:

Enclosed you will find the original petition  
for a writ of Certiorari, plus (6) six copies to be  
filed with the South Carolina Court of Appeals.

Please send back an clocked stamped copy for my  
records.

Respectfully submitted,  
/s/ Mario V. Gonzalez Hernandez  
Mr. Mario V. Gonzalez Hernandez #361963  
ACI, Colleton Unit F-1 B#38  
P.O. Box 1151  
Fairfax, S.C. 29827

Mr. Mario Valerio - Gonzalez Hernandez # 361963

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