

State of South Carolina ) In the Court of Common Pleas  
County of Georgetown ) Civil No. 2019-CP-22-00424  
Barney B. Wilson # 307418 )  
Applicant ) Memorandum In Support of  
vs. ) Motion To Set Aside Order Under  
State of South Carolina ) Rule 60(b) South Carolina Rules  
Respondent. ) of Civil Procedure

Barney Wilson has moved pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("the Rules") for the Court to set aside the order of Dismissal filed April 20, 2021 and received by Applicant on April 26, 2021 (the order). The order appears to be a finalized ruling of the Honorable Benjamin H. Culberston denying post conviction relief to petitioner.

### The Factual Allegations

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County clerk of Court. Applicant was indicted at the July 2015 terms of the Georgetown County Grand Jury for attempted murder (2015-GS-22-00728) and discharging a firearm into a dwelling (2015-GS-22-00729). Margaret Ann Kneese, Esquire, represented Applicant. Richard D. Todd, Jr., Esquire, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On March 29, 2016, Applicant pleaded guilty to the lesser-included offense of assault and battery of a high and aggravated nature. The indictment for discharging a firearm into a dwelling was dismissed nolle prosequi as part of the plea. On March 29, 2016, the Honorable J. Derham Cole accepted a negotiated term and sentenced Applicant to imprisonment for a term of eight years. Applicant did not appeal his plea or sentence.

## Legal Argument

An order may be set aside pursuant to Rule 60(b) of the South Carolina Rule of Civil procedure. In a case where the matter is under appeal, The request should be made first to the Appellate Court for "Leave to make the motion," Rule 60(b) S.C.R.C.P. This motion is a request for leave to make the motion. In determining whether to grant a Rule 60(b) motion, The court use a two pronged process in determining whether a Judgment should be set aside: (1) an Equitable prong and (2) a legal prong. In this case an analysis of either of these prongs should result in the refusal to set aside the Judgment by default.

### 1. The Equitable Analysis.

The equitable elements for the court to consider have been outlined as follows:

First, the moving party must satisfy three requirements:

- (1) the motion must be timely filed;
- (2) the moving party must have a meritorious defense to the action;
- (3) the setting aside of the judgment must not unfairly prejudice the nonmoving party.

In re: Air South Airlines, Inc; Howis v. Grant/ Jacoby Inc. 249 B.R. at 112 (Citing National Credit Union v. Gray, 1 F. 3d 262, 264 (4th Cir. 1993). All three of these considerations are equitable considerations and all three favor the setting aside on the order.

1.1. is this motion Timely Filed?

This prong is not difficult for petitioner to satisfy. Thus, Barney File within one year of the entry of the order. The petitioner has timely filed this motion,

1.2. The meritorious defense.

The Second prong is whether the moving party has proffered evidence of a meritorious claim to this action. The moving party in this instance has shown a meritorious claim in this action.

The trial court lacked subject matter jurisdiction, because petitioner was never indicted by a legal Grand Jury on July 22, 2015, by a Georgetown County Court of General Session. According to the Title 14-5-810(2). As there no order sent down by the Supreme Court to substantiate the Solicitor to indict petitioner on July 22, 2015 outside of the Rules of statutes that ever took place. The plain and unambiguous language of Title 14-5-810(2) mandate that Georgetown County Court of General Session will be held on the specific term under this statute.

Petitioner contends that his indictment is void when been indicted ill-legal by the solicitor office would fall within the extrinsic fraud and prosecutorial misconduct. at 379 U.S. 83 (1963)

### 1.3. Prejudice to the Respondent

The last equitable prong is for the court to determine if setting aside of the Judgment may unfairly prejudice the nonmoving party. The state would suffer no prejudice as it relates to this action. The state should have provided a final order to petitioner objection to the conditioner order of dismissal. According to S.C. Code Ann § 17-27-80 (2003) the PCR court did not make specific finding of fact and fail to express its conclusion of law relating to the issue presented. Does not constitute a final order or Judgment under the PCR Act, and therefore is not reviewable by writ of certiorari code 1976. § 17-27-100; Appellate Court Rule 227(a)

Citing *Garner v. State*, 636 S.E. 2d 860, 371 S.C. 1 (2006) Any prejudice to the state is state's own doing. Again, there is no prejudice to the Respondent

### 2. The Legal Analysis

If the movant can establish the first three elements, the "moving party must next satisfy one of the five grounds for relief set forth in Rule 60(b)." *Park v. Lexington Ins. Co.* 812 F.2d 894 at 896. Rule 60(b) provides:

### (3) Extrinsic Fraud

It would fall within the extrinsic fraud category because the prosecution had a duty to indict petitioner according to title 14-5-810(2) on the specific term under this statute. It did not.

IF neither of these applies because of the one (1) year limitation. Under the Federal Rules of Civil Procedure, these courts have Rule 60(b)(6) stating the equitable power of the court to grant relief for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) Fed. R. Civ. P. Surely, South Carolina courts have the same equitable power that Federal courts have. The Federal Rule 60(b)(6) has been called a grand reservoir of equitable power to do justice in a particular case." *Radack v. Norwegian America Line Agency, Inc.* 318 F.2d 538, 542 (2nd Cir. 1963) As such, it is called upon the equitable power of a court. As one commentator has stated "whatever the stated intent of the drafters of the any other reason" clause may be. It is more reasonable to suppose it means other special reasons of such a nature that. Although the facts fit other subdivisions. They also compel the court to allow relief for equitable reasons. 11 Wright and Miller, Federal Practice and Procedure, § 2864, n 4, at p. 351 (1995). That is the exact situation here. We have circumstances that fit other subdivision but also should compel the court to allow relief for equitable reasons.

## Conclusion

Wherefore the Petitioner prays for leave to file the Rule 60(b) motion with the trial court and for such other and further relief as the court deems just and proper. Therefore, the motion must be granted and order must be set aside.

Date: June 3, 2021

Respectfully Submitted.

Bamey Wilson

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