

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER KING — PETITIONER
(Your Name)

vs.

STANLEY WILLIAMS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

LOWNDES COUNTY Superior Habeas Corpus Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROGER KING, GDC #119098
(Your Name)

SMITH STATE PRISON P.O. Box 726
(Address)

GLENNVILLE GA 30427
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

Georgia Supreme Court dismissed Application for Certificate of Probable Cause because their clerk did not file it March 31, 2013, returning it to petitioner stating he needed to add indigent affidavit before she could file it. Ga. S. Ct. S. 13 (3). However, Ga. S. Ct. Statutory Filing Rule 5. (1) states, Application for Pro se Prisoners are not required to provide indigent affidavit if they are incarcerated and unrepresented by counsel when they file CPC application.

1. Is 11th Cir. Court of Appeals required to conduct a factual determination of the district court's records and petitioner's pleading when he contends fraud and misrepresentation was committed on the district court which resulted in barring review of his constitutional claims?

2. Did the district court abuse its discretion dismissing petitioner's 28 U.S.C. § 2254 petition without making a factual determination on the contentions of misrepresentation and fraud committed on the court which resulted in the dismissal of Petitioner's federal petition on a void order of Ga. S. Ct. denying review of petitioner's constitutional claims?

3. When a clerk impedes or interferes with judicial pleading causing untimely filing that bars the state and federal review petitioner's constitutional claims, does the clerk violate petitioner's constitutional procedural Due Process rights to access to the courts?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defense Counse at Trial Ron L. Beckstrom
Counsel for the State, Bradford Rigby
Trial Judge Harvey Davis

Appellate Judges Andrews P. J. Phipps and Mikel EJ -
Andrews E. Berns and Doyle, JJ

Habeas Corpus, James E. Hardy, Judge

Benjamin H. Pierman, Counsel for the State

Georgia Sct. Clerk, Theres Barnes, CERTIFICATE for PROBABLE CAUSE

Georgia Dept of LAW CLINT C. MALCOLM Counsel for the State Fed. H. C.

Fed. Dist. Court THOMAS P. LANGSTAFF Magistrate Judge
W. Louis S. Sands, Dist Ct. Judge

ELEVENTH Circuit HULL, MACUS, and WILLIAM PRYOR, Circuit Judges
WILSON and ROSENBAUM Circuit Judges

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-A1 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C.C1 to the petition and is

☒ reported at King v. State, 275 Ga. App. 450, 295 Ga. App. 865, or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the King v. State, 295 Ga. App. 865 court appears at Appendix C1 to the petition and is

☒ reported at 275 Ga. App. 450, 620 S.E.2d 570 (2005); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 1- 2017.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: NA, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 10-7-2013. A copy of that decision appears at Appendix D.

☐ A timely petition for rehearing was thereafter denied on the following date: Nov. 13-2013, Jan 21-2014, and a copy of the order denying rehearing appears at Appendix E-E1.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Const. Amend. 14th 6th and 5th, 6-1,

Const. Amend. 14th 6th and 5th, 6-2,

Const. Amend. 14th 6th and 5th, 6-3,

Const. Amend. 14th, 6th and 5th, 6-4

Const. Amend. 14th, 6th, and 5th, 6-5.

Statutory Provisions:

Georgia Supreme COURT Rules. 5. 13(3), 5.(1)(2). 6-6, 7, 8, 11, 15,

FED. R. CIV. P. 60(b)(1)(3); 60(c)(1). 6-9, 7, 8, 9, 12, 13, 15,

28 U.S.C. § 2254, 28 U.S.C. § 2244(d)(1) 6-10, 12, 14

FED. R. CIV. P. 8(c) and 12(b). 8(c)(1). FED R. CIV. P. 82. 6-44, 15

FED. R. CIV. P. 8(b)(1)(A). 28 U.S.C. § 1655. 6-14, 15

28 U.S.C. § 2253(c)(2). 11th Cir. R. 22-1(b) 6-9,

O.C.G.A. § 9-14-52(b), 15-6-77(e)(1). 6-9, 11.

STATEMENT OF THE CASE

ON Nov 16, 2004 petitioner at a jury trial was tried on a two count indictment, Count(1), possession of cocaine with intent to distribute, Count(2), possession of marijuana with intent to distribute. The jury returned a verdict of Not guilty to both. Constructive amendment occurred during trial to the indictment and the jury found petitioner guilty of conspiracy. No motion for new trial was filed, yet petitioner found himself in a pro se direct appeal in which trial counsel appeared without petitioner's consent, as appellate counsel. King v. State, 275 Ga. App. 450, 620, SE2d 570 (2005), Affirmed. Cert. denied, Jan. 30, 2006. On June 5-8 motion to vacate void sentence 2007. Hearing was held on the motions April 10, 2008, the trial court allegedly denied the motions. King v. State, 295 Ga. App. 865, 673, SE2d 329 (2009). March 30, 2009 petitioner executed a timely State Habeas Corpus 09-cv-853 challenging the Worth County Nov 2004 conviction and sentence as being obtained in violation of all petitioner's constitutional rights to Due Process, to be tried only on the charges handed down by the grand jury. The habeas court denied habeas relief on 13 ineffective assistance counsel claims even though counsel testified he participated in an ex Parte proceeding where he, counsel for the state constructively amended petitioner's indictment to add a conspiracy offense, App. 2. H.C.T. 38:12-25, Habeas relief was denied March 11, 2013, Certificate for Probable Cause was executed March 31, 2013, in Georgia Supreme Court. The clerk, without an order of the court returned the CPC application alleging it was not in proper form as required by Ga. S. Ct. R. 5. and 13(3). The clerk instructed indigent affidavit be added and returned to the court, it was promptly.

CONTINUED FROM STATEMENT OF THE CASE

Ga. S. Ct. dismissed CPC application as untimely, Oct 7, 2013. date CPC application was docketed, April 18, 2013, App. F. Two timely motions for reconsideration was filed in Ga. S. Ct. explaining Ga. S. Ct.'s Clerk had erred in returning the CPC application. The court dismissed them both as untimely. App. G, G-1. Federal habeas corpus was executed Feb 24, 2014, Respondent moved to dismiss the Petition for Lack of Exhaustion, failure to exhaust state remedies, April 25, 2014. (Doc. 10). Respondent motion was meritless; the court denied it. (Doc. 18, 26). However, before the court issued its order, to deny respondent's motion, he filed a second motion to dismiss as untimely. Petitioner objected to Respondent's second defensive motion informing that Res. Ex. 6. Ga. S. Ct. order of Oct 7, 2013, dismissing Petitioner's CPC application based a mistake made by the Clerk on that court statutory procedural Rules and 13(3). The court did not respond (Doc. 21), (Doc. 24, 25). The Report and Recommendation was issued to dismiss the Petition as untimely. Petitioner again in a motion for reconsideration to inform the court Ga. S. Ct. Order dismissing Petitioner's CPC application as untimely based on Ga. S. Ct. R. 5, and 13(3) is a void Judgment. (Doc. 32); (Doc. 35, 37, 40). The court adopted the magistrate R & R, Petitioner again filed motion for reconsideration explaining order of Ga. S. Ct. based on Res. Ex. 6., Ga. S. Ct. R. 5, and 13(3), is void, The CPC application should not have been dismissed. The court recharacterized the motion as a Rule 60(b) and dismissed for lack of jurisdiction. (Doc. 49). The ELEVENTH Circuit Court of Appeals granted COA to determine if the district court procedural ruling was wrong. The district court order was affirmed Jan. 1, 2017, Petitioner filed Rule 60(b)(1)(3), misrepresentation and fraud the court overlooked.

The Magistrate Judge denied the rule 60(b) as untimely. Rule 60(c)(1). (Doc. 57). Petitioner objected in motions for reconsideration, demonstrating misrepresentation and fraud upon the district court, and demonstrated the Rule 60(b)(1)(3) motion was not untimely. The district court Judge made an inadequate determination on the issues of untimely filing, motion for appointment of counsel and gave petitioner in correct instructions as to how he should apply for a COA. (Doc. 58; 63). (Doc. 67). App. B. The ELEVENTH CIRCUIT Appeals denied petitioner COA. To wit: "King must demonstrate that, 'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong'..." *Slack v. McDaniel* 529 U.S. 473, 484 (2000). App. A. Petitioner filed motion for reconsideration to clarify his legal position, that he was appealing the district court's denial of his Rule 60(b)(1)(3), that he did not have to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The standard for applying for COA is, whether the district court's procedural ruling were wrong. The court still failed to address whether or not the rule 60(b) motion was

untimely App. A1.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because petitioner is innocent of the crime he stands convicted of, conspiracy to possess cocaine (WID). there is now respectable way to word what occurred in petitioner's trial and appeal to obtain and uphold this void judgment. First, the trial court lacked subject matter jurisdiction to try petitioner on the indictment returned by the grand jury. App 1. the indictment is devoid of the essential elements of the conducts of possession and knowingly possession (WID). App 1. Second, petitioner was acquitted of the charges in the void indictment. The county, Prosecutor, and defense counsel conducted an ex Parte hearing which allowed the jury to convict petitioner of an unchanged crime, (conspiracy). Then the same Officials got petitioner to file a pro se direct appeal. They failed to inform petitioner the court was required to appoint appellate counsel if he could not afford one. App. B. Three, The enumerated error on appeal was not challenged, objected to, specified as error in the trial court (No agreement to conspire). Defense counsel conducted appeal without petitioner's consent. Petitioner's conviction was affirmed, he file motion to vacate and correct void sentence because he was not indicted for conspiracy. The trial court denied the motion and the appeal court affirmed, changing the statutory nature of the offense from general conspiracy OCGA § 16-4-8 to OCGA § 16-13-33, even though the court has change the offense to a lesser included offense

1

without reversing its precedent which states conspiracy to possess (WID) is not a lesser included offense of possession (WID).⁶ Rowe v. State 166 Ga. App. 836, 838 (1) (305 SE2d 624 (1983)). Four, the habeas court did not decide any of petitioner's 20 constitutional claims even after it heard testimony from trial appellate counsel at an ex parte hearing that resulted to adding a conspiracy charge. H.C.T 38:12-25. Counsel also admitted conspiracy was not a lesser included offense of possession of cocaine (WID). The court denied habeas relief, App. Georgia S.Ct. dismissed application for Certificate of Probable Cause as untimely contrary to its own procedural Rules. 51 and 13 (3), 51 (1), App. D. Federal habeas corpus was timely filed and Respondent motion to dismiss as unexhausted state remedies, the court denied Respondent's motion. However, Respondent filed a second defensive motion to dismiss as untimely which the court allowed over petitioner's objection. The court dismissed petitioner's habeas corpus as untimely. 11th Cir. granted COA, and affirmed the district court's decision. Rule 60(b) motion was filed in the district court contending misrepresentation and fraud on the district court which resulted in federal habeas petition being dismissed as untimely. The Court again, dismissed the Rule 60(b) as untimely. App. B. the 11th Cir. denied COA upon the wrong application of law. That petitioner needed to demonstrate denial of a substantial constitutional right. App. A. A1.

For the reasons stated thus far, demonstrates the above mention courts are in great need of this Honorable judicial constitutional guidance in the matters of fundamental fairness in judicial proceeding. These court must be informed it is not the function of any court of law to take advantage of the weak, uninformed and unknowldgable in law. Rather, it is the duties of all courts to make sure the law of the united States constitution are being upheld and that no citizen of the State of Georgia is deprived of their liberty except upon Due Process of law. All the courts of concern has turned their minds of consciousness of fair pay-off and the constitutional laws are not being upheld as those judges promised they would. Equal Protection of the Law doctrine is not worth the paper its written on if the courts do not enforce it. The courts must judge us all the same and not see us differently if we are unprivilege and uneducated

Prior to the advent of the Antiterrorism and Effective Death Penalty Act doctrine there was no limitation of when federal habeas petition could be filed. The AEDPA introduced a hard fast statute of limitation that will not be compromise if a pro se prisoner fails to comply with this rule in meeting the one year statute of limitation. But when petitioners are in complaisance with the AEDPA rules the court should not aid the state against the woman or man who has overcame this hard fast rule upon nothing

but respondent's word. INCarcerate pro se litigants in Georgia prisons are an unrepresented group who are uneducated and unfamiliar with criminal or post-conviction civil law. The adversary, Georgia Department of Law has superior knowledge of criminal and civil law with access to vast legal technology and assistances at their sides. An inmate legal resources consist of 30 minutes may be on the prison library computer that may or may not be working on his library day, and does ^{not} have the current laws. I have petition the courts for almost 15 years seeking relief from this wrongful conviction, void judgment, and witness 100's of other inmates petition the courts trying to regain their liberty obtained by unfair trial or unlawful guilty pleas. The state get the courts to dispose of our petitions on a procedural default that does not exist, time bar. Almost all of us unwittingly believe the state has legally defeated our actions, when in actuality the court have illegally aided the state by stating they conducted a de novo review and found no error.

Reason and logic dictates if you have three opportunities to file petitions and two are time barred, odd are you will get the third one right. Petitioner has filed three Federal habeas petitions plus a rule 60(b), all were dismissed by the same court and judges as time barred. Judges Louis L. Sands, and Thomas Langstaff. The case numbers are, King v Thompson 1:11-cv-55 King v. Thompson, 1:10-cv-183, and King v. Williams 1:14-20, Fed. R 60(b)(1)(3). These Judges are not being fair to prose prisoner

litigants. As demonstrated in this present certiorari Ga. Sct. dismissal of petitioner's cpc application as untimely 10-7-2013 is a clear fundamental miscarriage of Justice by that court. The record demonstrates petitioner has executed three federal habeas petitions challenging state convictions. All denial of relief of habeas petitions by a Superior must be appealed to Ga Sct. before proceeding to Federal court. Petitioner has filed cpc applications in Ga. Sct. before and was never required to submit an indigent affidavit.

Petitioner was wrongfully convicted intentionally, the appellate courts has aided the trial court in upholding this void judgment. The integrity of the Worth County Superior court, Ga. court of appeals, Lowndes county county habeas court, Ga. Sct, Ga. court of appeals, united states district court, middle district Albany Ga. and the 11th Cir. Court of Appeals are all in question. Any citizen who should be unfortunate to find themselves before either of these courts is potentially in danger of losing their liberty without the protection of Due Process of law.

This Honorable Court should order a review of the judicial proceeding of these court to assure itself what has happen to petitioner has not and will not happen to any other citizen of the state of Georgia.

Respectfully Submitted

Roger King iv

6.

LEGAL ARGUMENT

A JUDICIAL ADJUDICATION THAT ALLOWS CONVICTION AND SENTENCE ON INDICTMENT DEVOID OF THE ESSENTIAL ELEMENTS OF THE CRIME, AND SENTENCED AS RECIDIVIST OFFENDER ON UNSUPPORTED FACTS, AND NO EVIDENCE, DOES NOT COMPORT WITH THE FUNDAMENTAL CONSTITUTIONAL REQUIREMENTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW. 6.

A. Constitutional Guarantees of Due Process and Equal Protection.

The Fourteenth Amendment guarantees that NO person should be deprived of life, liberty or property without due process of law nor should any person shall any person be denied equal protection of the law. The failure to afford these basic of constitutional protection is antithetical to the system of jurisprudence.

This Court and the United States, Courts of Appeals has repeatedly held that a party has a right "to be tried by a legally constituted court, not a kangaroo court." WILLIAMS v. UNITED STATES, 341 U.S. 97, 101 (1953); IN analyzing when a court system fails to pass constitutional muster, this Court has held that any court system lacking in due process protection violates the Fourteenth Amendment. IN RE: Gault, 387 U.S. 1, 28 (1967) [juvenile court system de-

void of due process protection constitutes an unconstitutional "Kangaroo Court"; *Spano v. New York*, 360 U.S. 315, 325 (1959). [Criminal procedural lacking due process protection invalidated as a "Kangaroo Court"].

Indeed, it is a fundamental notion of constitutional law that due process does not permit a court to make a finding based on no evidence, *Nixon v. Herndon*, 273 U.S. 536 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. *In re: Oliver*, 333 U.S. 257 (1948); *Turner v. Louisiana*, 379 U.S. 466 (1965).

The conviction and sentence of a conspiracy is a void judgment. The indictment expressly state the crime of possession of cocaine with intent to distribute. App. 1. (indictment). Fact 3. Furthermore, the indictment fails to set the essential elements that constitutes the crime of possession of cocaine (WID), conduct of possession, and knowingly possessing cocaine. The court lacked subject matter jurisdiction. If indictment does not contain every essential element of offense, it is invalid, and bill of particulars cannot cure the defect. Elements of an offense must be charged in the indictment,

submitted to the jury, and proven by the government beyond a reasonable doubt. JONES v. U.S. 526 US 227, 143 LEd2d 311, 119 Sct 1215 (1999).

The ~~at~~ worth county judgment Nov. 16, 2004 for conspiracy is clearly in conflict with this court's decision in JONES 526 US 227. Sentencing order states petitioner was convicted of count (1), conspiracy. App. 2 App. 1. This judgment is void, Constitutional Amendment 14, 5, and 6. When convicted of unchanged offense and (subject-matter jurisdiction never forfeited or waived; defects require correct regardless of whether error raised in district) see, e.g., U.S. v. Gatewood, 173 F.3d 983, 986 (6th Cir. 1999); U.S. v. Cotton, 535 U.S. 625, 630 (2002).

On the 16, of Dec., 2004, petitioner executed a pro se appeal. App. 3. The trial court and defense counsel failed to inform petitioner of his appeal rights. Trial counsel represented petitioner on appeal without his consent. As a matter of federal constitutional law, an indigent defendant is entitled to have legal counsel appointed to provide representation through the first level of appellate review. Petitioner was without counsel, Douglas v. California, 372 U.S. 353, 356-57 (1963); Weber v. State, 203 Ga. App. 356, 356, 416 S.E. 2d 868, 868 (1992). In addition, the appeal court

Violates constitutional Due Process when it review issues not present to and ruled upon by the trial court and properly presented to the appellate court. The trial record is devoid of any challenge to a conspiracy conviction, nor does trial-appellate counsel brief on appeal specify an objection to conspiracy. Counsel can not waive petitioner's constitutional 14th Amendment rights to Equal Protection of the law. The judgment of the trial court and affirmation of the appellate court are both void judgments. (H.C.R. # 218-25, Brief.) H.C.R. # 236-9, Opinion. App. C. King v. State, 275 Ga. App. 450 (620 SE2d 570 (2005).

Petitioner executed motions to vacate void sentence and void judgment, the court allegedly denied all motions April 10th 2008. Petitioner appealed the court ruling conspiracy a lesser included offense of possession of cocaine (WID). (H.C.R. # 358-362. Habeas # 09-cv-853), IN the appellate court's first affirmance it affirmed the conviction on general conspiracy statute, O.C.G.A. 16-4-8. conspiracy to possess cocaine (WID). ON its second affirmance of motions to vacate void sentence and judgment the appellate changed the code of conspiracy to O.C.G.A. §§ 16-13-30(b) and 16-13-33. Petitioner was not indicted under either of these code sections and.

Conviction on either is a violation of petitioner's Constitutional right to due process of the law, App. Ct, King v. State, 295 Ga. App. 865, 673, SE2d 329 (2009).

The Fifth Amendment requires that defendant be tried only on charges handed down by grand jury and, thus, after indictment has returned, its charges may not be broadened through amendment except by grand jury. JONES 526 U.S. 227; US v. HARRIS, 344 F3d 803 (8th Cir. 2003) CONST. 5th Amend.

State Habeas Corpus was filed March 30, 2009, partial hearing was held May 14, 2009, trial-appellate counsel testimony uncovered Ex Parte hearing outside of petitioner's presence and without his consent, a Conspiracy Charge was added to the special verdict form (H. C. # 09-CV-853). H.C.T. 38: 12-25. Being convicted of unindicted crime as here, amounts to Prosecutorial Vindictiveness and ineffective assistance of counsel. NORTH CAROLINA v. PEARCE, 395 U.S. 711, 23 LEd 2d 656, 89 S Ct 2072 (1969). Petitioner submitted 20 constitutional claims, in the habeas court final order of fact finding and conclusion of law, the court never resolved one claim. App. Ct. Final order 10-7, 2013. Notice of appeal was executed March 31, 2013, along with application for Certificate for Probable cause to appeal denial of habeas relief to Georgia Supreme Court. On April 10th 2013, the Clerk returned

the cpc application because it lacked an indigent affidavit, the clerk had instructed petitioner provide the affidavit he did so promptly. The court dismissed CPC application 6 months later as untimely pursuant to Ga. Sct. R. 5 and 13(3). Petitioner immediately filed two motions for reconsideration explaining Ga. Sct. R. 5 and 13(3) were inapplicable. The motions were dismissed as untimely also except unlike App. D. in which the specified the date cpc application was returned, the court failed to indicate when motion for reconsideration was received. App. F. F. 1. The clerk misrepresented Ga. Sct. R. 5 and 13(3), it does not require incarcerated pro se litigants, unrepresented by counsel to supply indigent affidavit with CPC application. Petitioner was incarcerated and unrepresented by counsel when he filed his CPC application. The clerk violated petitioner's due process right, denied access to the court. The State may not erect barriers that impede the right of access of incarcerated persons. *Lewis v. Casey*, 518 U.S. 343, 355, 116 S. Ct. 2174 (1996); *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992), cited in *Snyder*, 380 F.3d at 290-91.

ON Feb 24, 2014, petitioner filed Federal habeas to challenge his 2004 conviction and sentence. The State Respondent moved to dismiss For Lack of Exhaustion, Failed.

to exhaust state remedies, having state alleged habeas corpus pending. the state habeas at issue in Tattnell County contained one ground the Ex Parte hearing, that that was also decided in a final order March 11, 2013 Lowndes County habeas court App. 41. The district court denied respondent's motion. (Doc. 10^o 18, 26). Respondent filed a second defensive motion, untimely, using Ga. Supreme Court's order of 10, 7, 2013, the order is void due to the court and clerk's misrepresentation of Ga. S. Ct. R. 5 and 13 (3). Furthermore respondent waived this defense, failing to present it in his answer - Responds April 25, 2014, Oliver v. Wainwright, 795 F2d 1524, 1529. (11th Cir. 1986) (stating that timeliness alone in the filing of an appeal from denial of state post-conviction relief as the only state ground for refusing to consider the merits of petitioner's federal constitutional claims is inadequate. The court dismissed the petition. (Doc. 1, 41-42) The Eleventh Circuit granted COA and affirmed the district court's dismissal of petitioner's 28 USC § 2254 petition 1, 17, 2017.

On Feb 23, 2017, petitioner filed a Rule 60(b)(1)(3) motion contesting Ga. Sct. and its clerk misrepresented it R. 5 and 13 (3) and respondent committed fraud on the district court, representing Res. Ex. 6. as a adequate procedural bar. Said Ex. 6. of respondent is the Ga. Sct.

R. 5 and 13(3) this Rule or Rules is inadequate to dismiss petitioners CPC application. Also, Ga S.Ct. has a mail box rule ^{like} ~~much~~ Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L. Ed. 2d 245 (1988) ^{see}, Massaline v. Williams, 274 Ga. 552, 555, 554 S.E. 2d 720, 720 (2001). This is referred to as the "mailbox rule." The date on the certificate of service gives rise to rebuttable presumption that it was delivered to authorities on that date. Id. The Supreme Court has clarified that the mailbox rule is "judicially-created rule of accommodation" and that it only applies to appellate jurisdiction, to prisoners not represented by counsel, and in actions for habeas relief. Roberts v. Cooper, 286 Ga. 657, 661, 691 S.E. 2d 875 (2010). In the Supreme Court, all documents sent by pro se prisoners are considered filed on the date the prisoner delivered them to prison officials for mailing. Ga. S.-Ct. R. 13.

Petitioner Rule 60(b)(1)(3) contends (1) Ga S.Ct. and its clerk misrepresented R. 5 and 13(3) as a procedural bar to CPC application, it does not. Respondent is aware that these Rules speak nothing to a procedural bar, when he submitted his EX. 6. Ga. S.Ct. order dismissing the CPC application, he knew or should have known he was committing ^{Fraud} by using EX. 6. as a time bar defense. Rule 60(b)(3), if it determines that respondent engaged in fraud by entering evidence it knew to be fraudulent into the record of the federal habeas proceeding. (Doc. 9. Res. EX. 6.)

(Doc. 53, at 2-9). The magistrate judge denied the motion as being untimely June 1-2017. (Doc. 58). Petitioner filed two motion for reconsideration in objection to the court's error denying the motion as time barred Fed. Civ. P. R. 60 (c)(1). (Doc. 58, 63). The district judge affirmed, the denial, citing a 5th Cir. case, Transit Cas. Co. v. Sec. Trust Co., 441 F.2d 788, 791 (5th Cir. 1971), stating it is a binding precedent. (Doc. 67). Notice of appeal was executed as to 6Z Order affirming the magistrates order denying the Rule 60 (b)(1)(3) motion. (Doc. 68). Note, the court confused the appeal of the rule 60(b) motion, in stating petitioner was appealing a moot mandamus. (Doc. 69). App. B.

THE ELEVENTH CIRCUIT COURT OF APPEALS denied COA stating petitioner, To merit a COA, King must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issue deserve encouragement to proceed further." *Slack v. McDaniel* 529 U.S. 473, 484 (2000). App. A. Petitioner filed motion to reconsider App. A., explaining he was appealing the ~~was a~~ denial of a rule 60(b) which only requires he show an error, fraud or misrepresentation was committed on the district court, see, Application For Certificate of Appealability Pursuant To 28 U.S.C 2253(c)(2) 11th Cir. R. 22-1(b). The court again denied motion for reconsideration, contending it had, "In its order denying him a COA, this court correctly identified

that King sought to appeal the denial of two Fed. R. Civ. P. 60(b) motions that were seeking relief from a previous judgment, in his underlying 28 U.S.C. § 2254 proceeding." However, the record, App. A. defys App. A1. The standard of review is whether the district court was wrong in its procedural ruling, not if petitioner could demonstrate denial of a substantial constitutional right. This is not a requirement to decide a COA for denial of a Rule 60(b) motion. Rule 60(b)(3) permits a judgment to be reopened for fraud, and the savings clause of the rule specifies that it does not 'limit the power of a court... to set aside a judgment for fraud upon the court.' *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 1502, 140 L. Ed. 2d 728 (1998), *Slack v. McDaniel*, 529 U.S. 473.

In not following the United States above precedents, the court has denied petitioner Due Process, the constitutional 5th Amendment. The record is clear this petitioner is also entitled to be released immediately because he is actual and factual and legally innocent. The trial court, Appellate courts have all gone out of it ways to all petitioner's pleadings that demonstrates his innocence. Petitioner put his faith in hands of the protectors of the constitution, the judges, they have thus far failed to uphold their duties. Petitioner relies on this Honorable court as his last hope for justice he legally deserves.

Resolution Sought

The issue of petitioner's cpc application and Federal 28 U.S.C. § 2254 petition being time barred derived from the Clerk of Ga. Sup. Ct. unauthorized of returning the cpc application to petitioner unfiled. Georgia law requires all State Clerks to file all pleading regardless of proper or improper form. O.C.G.A. § 15-6-77(e)(1). (Doc. 24-1, at 3 and 8), (Doc. 53, 58, 63). The Ga. Sct. dismissed the cpc application as untimely, only because the Clerk impeded the filing of the application. The states in its order: "Petitioner's application for a certificate of Probable Cause to appeal could not be accepted for filing until April 18, 2013, when it was submitted with an affidavit of indigency, see Supreme Court Rules 5 and 13(3), which was more than 30 days... March 11, 2013 order, see O.C.A. 9-14-52(b).

Constitutional Amendment 14th, 6th and 5th, requires Due Process, which denies or grant relief on correct statutes of law govern by the Constitution. This procedural Bar based on App. D. constitutes constitutional violation of procedure due process. LET IT, be well noted the petitioner had voiced his opposition in every level of his appeals. The time bar was created to block review of the H.C.C. final order. App. 4. The denial of habeas relief upon this document could have never been defended, the

Court's reliance on Ga. S.Ct. order of Oct 7, 2013, Res. Ex. 6, as a violation of 28 U.S.C. § 2244(d)(1) as reason for time bar, should no longer apply. To uphold the district court's order of petitioner's Federal petition as time barred based solely on Ga. S.Ct. order of dismissal would be a fundamental miscarriage of justice, denying constitutional procedure Due Process. (Doc. 24-1, at 3 and 8).

The Eleventh Circuit Court of Appeals, denied O A to appeal denial of his rule 60(b) motion as untimely under Fed. R. Civ. P. 60(c)(1). The court applied to wrong application of law which is in conflict with this court's precedent. The court stated King must demonstrate he was denied a substantial constitutional right ^{for} COA could be granted. The court was informed the challenge was to denial of rule 60(b) motion which only requires a demonstration of a procedural error in the previous 2254 proceeding. *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed. 2d 542 (2000) *Slack* at 1265-6. App. A. The court second order stated it had correctly identified two Rule 60(b) motions in a two judge ruling. App. A1, App. B, B1.

The issue of time bar is simple to decide because Ga. S.Ct. can not and has not demonstrated this is a regular adequate procedure bar. *Gray v. Netherland*, 518 U.S. 152, 165 (1996) [S]tate-court procedural default... is an affirmative

defense?'). As an affirmative defense, the state must plead, and it follows, prove the default. As the Supreme Court stated in Gray, it is the obligation of the state to raise procedural default as a defense, or lose the right to assert defense thereafter.' Id. at 166;

Previous Request of Petitioner

Petitioner requested after several adverse rulings, where the court does compare the pleading of petitioner with those of the state and decide the issue only on what the state pleading says. The court was then asked to liberally construed all further pleading of petitioner. HAINES v. KERNER, 404 U.S. 519, 30 LEd2d 652, 92 S.Ct. 594 (1972), ARON v. U.S. 291 F3d 708 (11th Cir. 2001). It never did review liberally.

The matter before the court is, did the appellate court err in affirming the district court time bar of petition rule 60(b) motion and whether the court used the correct application of law in making this decision. GONZALEZ v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005); we view a district court's denial of a Rule 60(b) motion for abuse of discretion. JACKSON v. Crosby, 473 F.3d 1290, 1295 (11th Cir. 2006).

Fed. R. Civ. P. 60(b), A motion under this subdivision (b) does

not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. sec. 1653 or to set aside a judgment for fraud upon the court 28 U.S.C. § 1655. The record demonstrates, Ga. S. Ct. clerk notified petitioner of docketing of his cpc application in habeas case no. 08-cv-985, and when the record of the habeas court are received it would consider the application. But in cpc application habeas # 09-cv-853 the clerk gave no notice of awaiting habeas court record to consider the application.

ABUSE OF DISCRETION

The district court abused its discretion denying Rule 60(b)(1)(3) motion as untimely, Fed. Rule 60(c)(1). A motion under Rule 60(b)(3) must be brought within one year of the judgment under attack, Fed. R. Civ. P. 60(c)(1). However, this time limitation is not jurisdictional, Fed. R. Civ. P. 82, the state did not raise at all. A party should raise any defense it has in its responsive pleading, Fed. R. Civ. P. 8(b)(1)(A), including a statute of limitation defense. Fed. R. Civ. P. 8(c)(1). A party that fails to timely raise a non-jurisdictional statute of limitation defense loses the right to enforce it. Although a court may raise an overlooked statute of limitation sua sponte, a court is not required to enforce it unless the limitation

is jurisdictional. see Day v. McDonough, 547 U.S. 198, 209, 126 S. Ct. 1675, 164 L. Ed. 2d. 376 (2006).

ABUSE OF DISTRTION IN SUA SPONTE

The Magistrate judge ruled sua sponte the rule 60(b) motion filed Feb 23, 2017 was time barred. Fed. R. Civ. P. 60(c)(1). Respondent failed to respond to the rule 60(b) motion. Respondent waived statute of limitation and any other matter constituting an affirmative defense. Kiser v. Johnson, 163 F3d 326, 328 (5th Cir. 1999). Fed. Rules of Civil Procedure 8(c) and 12(b) require that the state raise the statute of limitation in its first responsive pleading to avoid waiving the defense. Fed. R. Civ. P. 8(c).

CLERK'S INTERFERENCE WITH FILING

As stated previously, a S.Ct clerk was caused the cpe application to be dismissed as untimely, mistaken. Ga. S Ct. Rules 8, and 13(3) requires pro se incarcerated prisoner to file indigent affidavit. Complaint was deemed filed when received even though return to plaintiff because he failed to enclose filing fee or in forma pauperis motion. Owens-Eli v. U.S. Attorney General, 759 F.2d 349, 350 (4th Cir. 1985). (Doc. 24-1, at 3 and 8). objection to Doc. 32. Also see Rule 60(b)(1)(3) motion. (Doc. 53, 58, and 63).

STATEMENT OF FACTS

1) A Not guilty verdict for possession of cocaine (WID) is a fact demonstrated by the grand jury in the indictment that does not cite the essential elements, subjectively or objectively App. 1. (Doc. 1.9/ App. 1.)
1:14-cv-00020, state H.C.R. 272-8) (indictment)

2) The conviction for conspiracy at petitioner's Nov 16, 2004, jury trial derived from the indictment in fact 1. above, which is contrary to the sentencing order, states, count(1) ONE is conspiracy. App. 2. sentence order,

3) Fatally defectived indictment returned by Worth County Grand jury March 22, 2004, rendered the conviction and sentence a void judgment. App 1. indictment.

4) Habeas Corpus hearing May 14, 2009, and September 16, 2010 would be void judgments. However, critical testimony by trial-appellate counsel revealed how petitioner was convicted of an unchanged crime is relevant. (H.C. T. 38:12-25). Lowndes County Habeas final order did NOT address one(1) of petitioner's 20 Constitutional Claims. see. App. 3. Final order Oct 7, 2013.

5. Certificate for Probable Cause to appeal denial

of habeas relief was executed March 31, 2013. The clerk returned the CPC application to petitioner with instructions to add indigent affidavit which the clerk states is required for a pro se incarcerated litigant to proceed in a CPC application before filing. App. D-order. Petitioner filed two motions for reconsideration to explain the clerk of Georgia Supreme Court on April 10th 2013, sent CPC application back to petitioner, pursuant to Ga. S. Ct. R. 5 and 13 C3). (Doc. 24-1, at 3 and 8). App. D-order CPC was dismissed as untimely Oct 7, 2013.

6. 28 U.S.C. § 2254 Federal Petition was filed Feb 24, 2014. (Doc. 1.). Respondent moved to dismiss the petition for failure to exhaust state remedies. (Doc. 10.). The court denied respondent's motion. (Doc. 18, 26). Prior to the court's dismissal of Res. motion, he filed a second motion to dismiss as untimely. (Doc. 21). Petitioner objected to respondent's second defensive motion because the motion relied on Ga S. Ct. Order of Oct 7, 2013, that was based on a mistake of its procedural Rules 5. and 13 C3). App. D-order. The court dismissed the petition as untimely. (Doc. 41, 42). Motion for reconsideration was filed, the court recharacterized it as a rule 60(b), the court dismissed based on lack of jurisdiction. (Doc. 43; 49).

7. The Eleventh Circuit Court of Appeals granted COA, and affirmed the district court's dismissal of Petitioner's petition.

Jan. 17, 2017, Petitioner executed a Rule 60(b)(1)(3), misrepresentation and Fraud on the district court. (Doc. 53). The magistrate dismissed the motion as untimely, Fed. R. Civ. 60(c)(1). (Doc. 57). Petitioner objected, his motion was filed less than 30 days from the court of appeals final order, Feb 23, 2017. (Doc. 58; 63). The district court judge affirmed the magistrate order. (Doc. 53; 67). App. B.

8. The Eleventh Circuit Court of Appeals denied COA, assuming petitioner must demonstrate the denial of a constitutional right. Petitioner informed the court all he was required to show to obtain a COA was the district court procedural ruling was wrong and the reasonable jurists would find it debatable on the matter deserves further review. Petitioner also informed the court he was appealing the denial of a Rule 60(b) motion, not a 2254 habeas petition. The denied the appeal for the same reason. App. A. A1.

And this Certiorari Follows,

TABLE OF AUTHORITIES CITED

CASES:

WILLIAMS v. United States, 341 U.S. 97, 101 (1955) Gault 387 U.S. 1, 28 (1966) 6-1.

Spano v. New York, 360 U.S. 315, 325 (1959), Nixon v. Herndon 273 U.S. 536 (1927), Cf IN: Oliver, 333 U.S. 257 (1948) Turner v. Louisiana 379 U.S. 466 (1965). 6-2.

Jones v. US 526 U.S. 227, 143 LEd2d 311, 119 S.Ct. 1215 (1999). 6-3.
U.S. v Gatewood, 173 F.3d 983, 986 (6th Cir. 1999), US v. Cotton, 535 U.S. 625, 630 (2000). Douglas v. California 372 U.S. 353, 356-57 (1963); Weber v. State, 207 Ga. App. 356, 356, 416 SE2d 868, 868 (1992).

King v. State, 275 Ga. App. 450 (620 SE2d 570 (2005)), 6-4.
King v. State, 295 Ga. App. 865, 673 SE2d 329 (2009). 6-5.
Jones 526 U.S. 227; U.S. Harris, 344 F.3d (8th Cir. 2003).
North Carolina v. Peace, 395 U.S. 711, 23 LEd2d 656, 89 S.Ct. 2072 (1966).

Lewis v. Casey, 518 U.S. 343, 355, 116 S.Ct. 2174 (1996); John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992); Cited in Snyder 380 F.3d at 290-91. 6-6.

Oliver, v. Wainwright, 795 F.2d 1524, 1529 (11th Cir. 1986). 6-7.

Houston v. Lack, 487 U.S. 266, 109 S.Ct. 2379, 101 LEd2d 245 (1988). 6-8
Massaline v. Williams, 279 Ga. 552, 555, 554 SE2d 720, 720 (2001).

Roberts v. Cooper, 286 Ga 657, 661, 81 SE2d 875 (2010), 6-8

Transit Gas Co. v. Sec. Trust Co., 441 F2d 788 791 (5th Cir. 1971) 6-9

Slack v. McDaniel, 529 US 473, 484 (2000).

Calderon v. Thompson, 523 US 538, 118 Sct 1489, 1502, 140 LEd -
2d 728 (1998), Slack v. McDaniel, 529 US 473. 6-10

Slack v. McDaniel, 529 US 473, 120 Sct 1395, 146 LEd 2d 524
(2000), Slack at 1265-6. 6-12.

Gray v. Netthenland, 518 US 152, 165 (1996). 6-13.

Harris v. Kerner, 404 US 519, 30 LEd 2d 652, 92 Sct 594 (1972).

Aron v. U.S. 291 F3d 708 (11th Cir. 2001).

Gonzalez v. Crosby, 545 US 524 Sct 2641, 162 LEd 2d 480 (2005).

Jackson v. Crosby, 473 F3d 1290, 1295 (11th Cir. 2006).

Day v. McDough, 547 US 198, 209, 126 Sct, 1675, 164 LEd 2d 376
(2006) 6-15.

Owens-EI v. Attorney General, 759 F2d 349, 350 (4th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roger King

Date: 9-25-2018