Appendix A

FILED: June 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6478
(1:18-cv-00108-FDW)

KENNETH KELLY DUVALL

Petitioner - Appellant

v.

CARLOS HERNANDEZ, Superintendent of Avery Mitchell Correctional

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

App. A

23

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6478

KENNETH KELLY DUVALL,

Petitioner - Appellant,

v.

CARLOS HERNANDEZ, Superintendent of Avery Mitchell Correctional,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Frank D. Whitney, Chief District Judge. (1:18-cv-00108-FDW)

Submitted: June 20, 2019 Decided: June 25, 2019

Before NIEMEYER, AGEE, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Kenneth Kelly DuVall, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth Kelly DuVall seeks to appeal the district court's order dismissing as untimely his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that DuVall has not made the requisite showing. Accordingly, we deny DuVall's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

App. A

24

FILED: July 17, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6478
(1:18-cv-00108-FDW)

KENNETH KELLY DUVALL

Petitioner - Appellant

v.

CARLOS HERNANDEZ, Superintendent of Avery Mitchell Correctional

Respondent - Appellee

MANDATE

The judgment of this court, entered June 25, 2019, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:18-cv-00108-FDW

KENNETH KELLY DUVALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
CARLOS HERNANDEZ,	)	
	)	
Respondent.	)	
	)	

THIS MATTER is before the Court upon Petitioner Kenneth Kelly Duvall's pro se Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. (Doc. No. 5.) Also before the Court are Petitioner's Amended Motion for Leave to Proceed In Forma Pauperis ("IFP") (Doc. No. 6) and Motion requesting the Court to include his previously filed Petition for Writ of Certiorari (Doc. No. 1) as evidence and argument in support of his § 2254 Petition (Doc. No. 9).

After reviewing the Amended IFP Motion and a printed summary of Petitioner's trust account balance (Doc. No. 7), the Court is satisfied Petitioner did not have sufficient funds to pay the filing fee when he filed his habeas Petition. Therefore, the Court shall grant the Amended IFP Motion.

I. BACKGROUND

Petitioner is a prisoner of the State of North Carolina, who pled guilty on March 28, 2012, in Burke County Superior Court, to one count of first-degree statutory rape, N.C. Gen. Stat. § 14-72.2(a)(1), one count of first-degree stat. sex offense, N.C. Gen. Stat. § 14-72.4(a)(1), and one count of first-degree statutory rape, N.C. Gen. Stat. § 14-72.7A(a). (§ 2254 Pet. 1, Doc. No. 5; J and Comm. Form, App'x D, Ex. 1, Doc. No. 1-1 at 35.) He was sentenced to 288-355 months in prison. (§ 2254 Pet. 1.) He did not file a direct appeal. (§ 2254 Pet. 2.)

On September 20, 2017, Petitioner filed a motion for appropriate relief ("MAR") in the Burke County Superior Court, which was denied on September 22, 2017. (§ 2254 Pet. 3.) In December 2017, he filed a state petition for writ of habeas corpus in the Burke County Superior Court, which was denied the same month. (§ 2254 Pet. 4-5.) On February15, 2018, Petitioner filed a petition for writ of certiorari in the North Carolina Court of Appeals, seeking review of the trial court's denial of his MAR; it was denied on February 19, 2018. (§ 2254 Pet. 4.)

On April 17, 2018, Petitioner filed a document in this Court titled "Petition for Writ of Certiorari," challenging the validity of his state court judgment. (Doc. No. 1.) Because it did not appear he previously had filed a § 2254 petition, the Court issued Petitioner notice of its intent to characterize the "Petition for Writ of Certiorari" as a petition for writ of habeas corpus under 28 U.S.C. § 2254, and provided him an opportunity to indicate whether he agreed to the Court's recharacterization. (Doc. No. 4 (citing United States v. Emmanuel, 288 F.3d 644, 649 (4th Cir. 2002), overruled in part on other grounds by Castro v. United States, 540 U.S. 375, 383 (2003), as recognized in United States v. Blackstock, 513 F.3d 128, 133 (4th Cir. 2008)).).

Pursuant to the Court's instructions, Petitioner indicated his agreement by filing the instant habeas Petition on the form proscribed for use in this district. (Doc. No. 5.) He claims the trial court did not have subject matter jurisdiction to enter judgment against him and that he was convicted under an unconstitutional statute that has since been abolished.

II STANDARD OF REVIEW

The Court is guided by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, which directs district courts to dismiss habeas petitions when it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief. Rule 4, 28 U.S.C.A. foll. § 2254. In conducting its review under Rule 4, the court "has the power to raise affirmative defenses sua sponte," including a statute of limitations defense under

28 U.S.C. § 2244(d). Hill v. Braxton, 277 F.3d 701, 706 (4th Cir. 2002). The court may dismiss a petition as untimely under Rule 4, however, only if it is clear the petition is untimely, and the petitioner had notice of the statute of limitations and addressed the issue. Id. at 706–707.

III. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a statute of limitations for § 2254 petitions by a person in custody pursuant to a state court judgment. 28 U.S.C. 2244(d)(1). The petition must be filed within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. The limitations period is tolled during the pendency of a properly filed state post-conviction action. 28 U.S.C. § 2244(d)(2).

Petitioner's judgment was entered, according to his habeas Petition, on March 28, 2012, when he was sentenced. (§ 2254 Pet. 1.) To the extent he retained the right to a direct appeal subsequent to his guilty plea, Petitioner had 14 days to file a notice of appeal in the North Carolina Court of Appeals. See N.C. R. App. P. 4(a)(2). Because he did not file a direct appeal, Petitioner's judgment became final on or about April 11, 2012, when the time for filing an appeal expired. See § 2244(d)(1)(A).

The statute of limitations then ran for 365 days until it fully expired on or about April 11, 2013, more than five years before Petitioner filed his "Petition for Writ of Certiorari," which

opened this habeas action. None of Petitioner's filings in the state courts after that date resurrected or restarted the federal statute of limitations. See Minter v. Beck, 230 F.3d 663, 665–66 (4th Cir. 2000) (recognizing that state applications for collateral review cannot revive an already expired federal limitations period). Consequently, absent application of § 2244(d)(1)(B), (C), or (D), or equitable tolling, the § 2254 Petition is barred by the statute of limitations. See § 2244(d)(1)(A).

Petitioner argues that his habeas Petition is not untimely because he is challenging the trial court's jurisdiction to enter judgment against him, and a defendant and/or prisoner may challenge a court's jurisdiction at any time. (§ 2254 Pet. 13-14 (citing United States v. Cotton, 535 U.S. 625, 630 (2002), et al.).) The Petition, however, challenges more than the trial court's jurisdiction; it also challenges the validity of one of the laws under which Petitioner was convicted (§ 2254 Pet. 7, 10). The one-year statute of limitations applies to the entire § 2254 Petition, on a claim-by-claim basis. See Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005). Liberally construed, Petitioner's claim that he is incarcerated for violating a law that has since been abolished implies § 2244(d)(1)(D), rather than § 2244(d)(1)(A), may apply to that claim. Accordingly, the Court shall address the timeliness of the individual claims.

A. Jurisdiction

Grounds One and Three of the Petition raise claims related to the trial court's jurisdiction to enter judgment. (§ 2254 Pet. 5, 8.) Petitioner's reliance on United States v. Cotton for the proposition that a prisoner or defendant may challenge a trial court's subject-matter jurisdiction at any time (§ 2254 Pet. 14), is misplaced.

In Cotton, the Supreme Court addressed whether an omission from a federal indictment deprived the federal district court of jurisdiction to impose an enhanced sentence, when the defendant did not raise an objection in the district court. See Cotton, 535 U.S. at 627. A

criminal defendant has no federal constitutional right to be charged by indictment in the state courts. See Hartman v. Lee, 283 F.3d 190, 195 n.4 (4th Cir. 2002) ("[T]he Fifth Amendment requirement of indictment by grand jury does not apply to the states). Since there is no federal constitutional right to an indictment in the state courts, state law governs whether defects in state indictments deprive trial courts of jurisdiction. Cotton did not address state court jurisdictional issues, much less hold that a prisoner or defendant may challenge a state court's subject-matter jurisdiction at any time in a federal court.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991). "[B]ecause it involves a court's power to hear a case," Cotton, 535 U.S. at 630, whether a state court has subject-matter jurisdiction over a state criminal matter is determined by state law. See e.g., State v. Wagner, 572 S.E.2d 777, 779 (2002) ("For a court to have jurisdiction, a criminal offense [must] be charged in the warrant or indictment upon which the State brings the defendant to trial." (citation an internal quotations omitted)). Since they are governed by state law, state jurisdictional issues generally do not fall within the scope of the Constitution, laws, or treaties of the United States. See Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998).

Simply put, Petitioner has not cited any statute or case allowing prisoners or defendants to challenge a state court's subject-matter jurisdiction at any time in federal court. Furthermore, the federal courts that have addressed whether the AEDPA recognizes an exception to the statute of limitations for claims challenging a state court's subject-matter jurisdiction, have held that it does not. See e.g., Wells v. Harry, No. 17-1476, 2017 WL 9248730, at *2 (6th Cir. Nov. 15, 2017), cert. denied, 138 S.Ct. 2605 (2018), reh'g denied, 139 S. Ct. 360 (2018) ("There is no authority supporting Wells's argument that the AEDPA's statute of limitations does not apply

where a petitioner asserts that the trial court lacked subject matter jurisdiction."); Jones-Bey v. Alabama, No. 2:14–cv–00376–AKK–HGD, 2014 WL 1233826, at *2 (N.D. Ala. March 25, 2014) (unpublished) ("There is no exception under AEDPA's statute of limitation for a § 2254 claim that the state court lacked jurisdiction.") (citation omitted)); Umbarger v. Burt, No. 1:08-cv-637, 2008 WL 3911988 (W.D. Mich. Aug. 19, 2008) (same); Griffin v. Padula, 518 F. Supp.2d 671, 677 (D.S.C. 2007) ("There is no exception under the AEDPA for subject matter jurisdiction claims.").

This Court, too, has held that the AEDPA makes no such exception. See Keever v. Perry, No. 3:16-cv-00066-FDW, 2016 WL 7192138, at *4 (W.D.N.C. Dec. 12, 2016) (unpublished). The Court reiterates that holding here. Absent equitable tolling of the statute of limitations, Petitioner's jurisdictional challenges to the trial court's subject-matter jurisdiction are time-barred, see § 2244(d)(1)(A).

B. Validity of Statute of Conviction

Grounds Two and Four of the habeas Petition raise claims related to a statute under which Petitioner was convicted. Specifically, Petitioner claims the statute is unconstitutional and was abolished by the North Carolina General Assembly, rendering his continued incarceration illegal. (§ 2254 Pet. 7, 10.)

As an initial matter, Petitioner was convicted of violating three different statutes: N.C. Gen. Stat. §§ 14-27.2(a)(1), 14-27.4(a)(1), and 14-27.7A. (§ 2254 Pet. 1.) He does not specify which of these statutes he believes is unconstitutional, but only one fits the description provided in Ground Two – "a statute that had two (2) acts in its title" (§ 2254 Pet. 7), -- and that is §14-27.7A. Section § 14-27.7A is also the only statute mentioned in Ground Four. (§ 2254 Pet. 10.) Consequently, the Court limits its discussion to that statute.

In case number 09CRS004208, Petitioner pled guilty to one count of statutory rape of a

child in violation of § 14-27.7A(a) (1995). (J. and Commit. Form, Doc. No. 1-1 at 35.) At the time, § 14-27.7A was titled "Statutory rape or sexual offense of person who is 13, 14, or 15 years old." Section 14–27.7A(a) criminalized either a "sexual act" (as defined in §14–27.1(4)) or "vaginal intercourse" with a person aged 13, 14, or 15 by an individual six or more years older and not married to the person.

Contrary to Petitioner's assertions (§ 2254 Pet. 10), the North Carolina General Assembly has not abolished, repealed, or impliedly repealed § 14-27.7A. In 2015, the General Assembly recodified all the offenses previously listed under Subchapter III Article 7a of North Carolina's criminal statutes.[1] See Does v. Cooper, 148 F. Supp. 3d 477, 483 n.2 (M.D.N.C. 2015) (unpublished) (noting that all the offenses previously listed under Article 7a are now codified under Article 7b (citing N.C. Session Law 2015-181)), aff'd sub nom. Doe v. Cooper, 842 F.3d 833 (4th Cir. 2016). Section 14–27.7A was recodified as 14-27.25 (effective Dec. 1, 2015). Section 14-27.25 criminalizes vaginal intercourse with another person who is 15 years of age or younger by an individual at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person. § 14-27.25(a). The General Assembly also added a statute -- § 14-27.30 (effective Dec. 1, 2015), which criminalizes a sexual act with another person who is 15 years of age or younger by an individual at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person. § 14-27.30(a). In sum, as of December 1, 2015, statutory rape of a child under 15 and statutory sex offense with a child under 15 are criminalized in separate statutes rather than one.

Under § 2244(d)(1)(D), the one-year statute of limitations begins to run on the date the factual predicate of the claim or claims presented could have been discovered through the

[1] Chapter 14 of the North Carolina General Statutes covers criminal law; Subchapter III covers criminal offenses against the person, and Article 7a, now codified as Article 7b, covers rape and other sex offenses.

exercise of due diligence. The recodification of § 14–27.7A took effect on December 1, 2015. Thus, the factual predicate for Petitioner's related claims arose, at the latest, on that day as well. Petitioner, however, did not file his MAR challenging his § 14–27.7A conviction until September 20, 2017, almost two years later, and his federal habeas action until April 23, 2018.

Even allowing a few months for Petitioner to discover what the General Assembly had done, his claims related to § 14–27.7A still are untimely under § 2244(d)(1)(D). Absent equitable tolling of the statute of limitations, then, Petitioner's challenges to his § 14–27.7A conviction are time-barred, see § 2244(d)(1)(D).

C. Equitable Tolling

Equitable tolling of the statute of limitations is available only when the petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). Under Fourth Circuit precedent, equitable tolling is appropriate in those "rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)) (internal quotation marks omitted).

Petitioner does not contend he is entitled to equitable tolling of the statute of limitations. Furthermore, the record before this Court does not indicate Petitioner pursued his rights diligently prior to initiating the instant habeas action. Therefore, equitable tolling of the statute of limitations is not appropriate, and the habeas Petition shall be dismissed in its entirety as untimely.

IV. MOTION TO CONSIDER "PETITION FOR WRIT OF CERTIORARI"

Petitioner has filed a request, which the Court construes as a Motion, asking that his

"Petition for Writ of Certiorari" (Doc. No. 1) be included as evidence and argument in support of his Petition for Writ of Habeas Corpus. (Doc. No. 9.) The Court shall deny the Motion for the following reasons: 1) the "Petition for Writ of Certiorari" is not a proper filing in the district court; 2) Petitioner does not specify what the "Petition for Writ of Certiorari" is evidence of; and 3) the "Petition for Writ of Certiorari" raises claims that are not raised in the Petition for Writ of Habeas Corpus.

The exhibits Petitioner filed with the "Petition for Writ of Certiorari," on the other hand, appear to be copies of documents filed in the state courts (Doc. No. 1-1) and, therefore, may be part of the state court record subject to review in the § 2254 action, see e.g. Rule 5 of the Rules Governing Section 2254 Cases (describing state court documents respondent is to file if ordered by the district court to answer a habeas petition). Accordingly, in its Castro Notice and Order, the Court informed Petitioner that the exhibits were part of the record and that the Court would consider them in its review if Petitioner filed a § 2254 petition. (Castro Order 2-3, Doc. No. 4.) The Court did, in fact, consider the exhibits filed with the "Petition for Writ of Certiorari," in its adjudication of the habeas Petition.

IT IS, THEREFORE, ORDERED that:

1. The Petition for Writ of Certiorari (Doc. No. 1) is **DISMISSED**;
2. The Petition for Writ of Habeas Corpus (Doc. No. 5) is **DISMISSED** as untimely under 28 U.S.C. §§ 2244(d)(1)(A), (D);
3. The Amended Motion to Proceed In Forma Pauperis (Doc. No. 6) is **GRANTED**;
4. The Motion requesting inclusion of the Petition for Writ of Certiorari as evidence and argument in support of the Petition for Writ of Habeas Corpus (Doc. No. 9) is **DENIED**; and
5. Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court declines

to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) (in order to satisfy § 2253(c), a petitioner 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. 474, 484 (2000) (holding that when relief is denied on procedural grounds, a petitioner must establish both that the correctness of the dispositive procedural ruling is debatable, and that the petition states a debatably valid claim of the denial of a constitutional right).

SO ORDERED.

Signed: April 1, 2019

Frank D. Whitney
Chief United States District Judge

United States District Court
Western District of North Carolina
Asheville Division

Kenneth Kelly DuVall,	)	JUDGMENT IN CASE
	)	
Plaintiff,	)	1:18-cv-00108-FDW
	)	
vs.	)	
	)	
Carlos Hernandez ,	)	
Defendant.	)	

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's April 1, 2019 Order.

April 1, 2019

Frank G. Johns, Clerk
United States District Court

United States Court of Appeal for the Fourth Circuit
Informal Brief for Habeas and Section 2255 Cases

No. 19-6478, Kenneth Kelly DuVall vs. Carlos Hernandez
1:18-cv-00108-FDW

1. Declaration of Inmate filing
Date Notice of Appeal deposited in institutions mail system: 04/04/2019

I am an inmate confined in an institution and deposited my Notice of Appeal in the institutions mail system. First-Class postage was prepaid by me.

I declare under penalty of perjury that the foregoing is true and correct. (see: 28 U.S.C. §1746; 18 U.S.C. §1621).
/s/ Kenneth Kelly DuVall, # 0115471, Date: 04/17/2019

2. Jurisdiction
Name of court that I am appealing: U.S. Federal District Court Western Division, Asheville, N.C.

Date (s) of order or orders you are appealing: 04/01/2019

3. Certicate of Appealability
Did the District Court grant a certificate of Appealability, Yes [ ] NO [✓]

2

Issue 1. Did Federal District Court Judge erroneously applied (AEDPA) to Petitioner's Claim in his 2254 Habeas?

Contention and objections:

- 1. The court stated on pages 4 and 5 of dismissal of Petitioners 2254 Habeas petition that a state Petitioner does not possess a constitutional Right to challenge a state conviction under invalid indictment, in that there is no constitutional Right of a state defendant to be tried upon indictment under 5th Amendment.
  The court disregards that 5th Amendment protections are enforced upon the state through the 14th Amendment's Due Process Clause, the court further failed to reach the merits, although possibly not particulary cited, but presented in totality that to imprison a United states Citizen without Due Process in a act of slavery and unlawful imprisonment to which Petitioner contends is a viable Federal issue.

- 2. At the same time the court is arguing State Rights under the Grand Jury indictment process against the Petitioner, the court fires a reverse bullet imposing the Federal Anti terrorism Death penalty Act to bar Petitioner under the Federal Statute of limitations, that at no privision of State Law imposes such sanction.

This would seem contrary to applied Law and Justice. The court is saying constitutional Rules does not apply, then an Unconstitutional Act abolishing the Habeas does apply - I am confused and beleive such Ruling would confuse the general public.

Judge Frank D. Whitney cited on page 4 and 5 of his denial of Petitioners Habeas that the Federal Court did not have authority to Rule over state indictment Jurisdictional issues. Under court reasoning that is a correct assumption, yet totally in error as to the United States Constitution which I may be reading overly broad, yet with the perimeters of Law as stated in United States Const. Art. III, sec. 2, Clause 1. Which reads in part, the judicial power shall extend to all cases, in Law --- and between a state, or the citizens thereof --- citizens or subjects. Reading that part of the constitution together with Art. IV, sec. 2, The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Judge Whitney's Ruling alleges that Federal citizens are not state citizens and/or that Petitioner a state citizen is not also a Federal citizen. That just doesn't make sense to this Petitioner.

4

North Carolina, under its Constitution Art. 1, sec. 22, has adopted the Federal Indictment provisions, in fact, the United States Constitution States in Amendment V, clearly states without any mention of it a Federal Right or State Right, that NO person shall be held to answer for a capital, or otherwise infamous: crime, unless on a presentment or indictment of a Grand Jury, there is no room in Amendment V, to distinguish between a Federal indictment or a State indictment, In fact, such innuendos was settled in the civil war, which N.C. has since been unionized, have we been expelled hence forth?

N.C. may well not be held to indictments, But, why would N.C. enact Statute 15A-641 under Art. 32, why would N.C. Jeopardize its warrant and imprison to use indictments under N.C. Const. Art. 1, sec. 22, If N.C. did not have to by Federal oversight. That does not make sense either way. The main part of this case lies not in jurisdiction of indictments except as to imprisonment and forced slavery by statute that declares state inmates must work regardless of age 12 thru 100 plus which is against U.S. Const. Amendment XIII, neither slavery, nor involuntary servitude, shall exist within the United States.

5

I contend: In the interest of justice when any State is enacting subversive and unconstitutional Law for the sole purpose of imprisoning its citizens, the Federal Courts have authority and in fact are constitutionally Bound to intercede. Or does that only apply to foreigners and border terrorists?

- 3. I would also object to the court not applying tolling as Petitioner did state newly discovered evidence. The appeal courts adverse Ruling in an unpublished opinion in State vs. Hicks (2015) The court has misread and misapplied Hicks. The court of appeal not only cited §14-27.7A., but included §14-27.4(a)(1), that Petitioner was indicted upon and other statutes stating that they were easily confused with others "statutory sexual offense, Then in a subversive and unconstitutional manner denying citizens the Right to know the Law, 1st and 14th Amendment violations used Dicta to order the legislature to modify, Redact, edit, rewrite, recodify, repeal and reenact BAD statutes in New Laws under New statutes when read in their totality is as misapplied Jargan as these Archaic Law were afore.

- 4. Whereas, the Petitioner being a state prisoner, was not afforded any access to these new provisions, nor was any change in the Laws posted in house on any of the 12 bulletin boards in Petitioner Unit, "In Fact", the court of Appeals made clear at the onset, "Unpublished Opinion", that state prison and also state citizens were not to be made known of this case and these Unlawful Acts. Nor has of yet has this state published any such notice in any news paper or court house. As Petitioner clearly stated in his Petition he first learned of this Hicks (2015) case by inadvertantly being housed on the same unit with Hicks 2017, clearly within an AEDPA time frame and the states denials exhibits clearly marked such tollings. See: Bounds v. Smith, 430 U.S. 817, 828 (1977) (prisoners have fundamental constitutional Right to adequate, effective, and meaningful access to courts to challenge violations of constitutional Rights).

- 5. There is also the matter of Res Judicata, Double Jeopardy, and Collateral Estoppel, where Petitioner learned and asserted as claim for Review and newly discovered evidence. As I was notified on July 2018 by the clerk of court of civil clerk that, "Unknown to me",

I had been appointed counsel Anthony Morrow in case #08CVD1998 that the court then held an exparte trial without my presence in which I was convicted of the offense of by the introduction of DNA evidence/results that could in all liKely hood been of a cousin, brother, son or other close family member. I was adjudicated guilty of said offenes and order restitution. Neither the state nor the court objected to the admission and submission of this newly discovered claim and evidence as to time bar this evidence.

Where criminal court was Estoppel due a prior conviction in civil court on the same cause-evidence and crimes to which Petitioner submitted documents. See: Exhibits of Habeas presentations. Designated by clerK "notice of events", which I submit for review and relief. See: Lynn vs West, (4th cir) between 1996-99.

- 6. I believe I have just cause to present this case for Relief, yet due to my inability to present legal issue and my existing mental disabilites. See: Gaddy vs. Linaham, cite at 780 F. 2d 935 (11th Cir. 1986) No. 83-8660 eg., See: Henderson vs Morgan, 426 U.S. 637, 645 n. 13, 96 S. Ct. 2253, 2257 n. 13, 49 L. Ed 2d 108 (1976). "A plea may be involuntary either because

the accused does not understand the nature of the constitutional protections that he is waiving ... or because he has such an incomplete understand of the charge, that his plea cannot stand as intelligent. As Petitioner is unable to more properly present these issues. See: Haines vs. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaint held to less stringent than formal paper drafted by lawyers);

In conclusion

Should United States vs. Cotton, 535 U.S. 625, 630 (2002), et. al.).). Be applied retroactive and/or be enforced upon the states in that since Federal Law forbids incarceration on invalid Federal indictments should not the constitution of State citizens on invalid state indictments, If not, the court are telling the state incarcerate by what ever means necessary. We will not intervene, that to me is contrary to Justice and common Law.

- Relief Requested: For Certificate of Appealability and to any and all Relief this Honorable Court deems proper and just.

- Prior Appeals:

Have you filled other case in this court? Yes [ ] NO [✓]

Kenneth Kelly DuVall

Kenneth Kelly DuVall

Certificate of Service

I certify that 04/17/2014, I served a copy of this Informal Brief on all parties addressed as shown below.

N.C. Attorney General
P.O. Box 629
Raleigh, N.C. 27602

Carlos Hernandez
In house mail

Kenneth Kelly DuVall

Kenneth Kelly DuVall

Exhibit-transcript

to contact him or his family, but he did not make any effort to contact her. And I advised him not to answer his phone at that point. I don't believe he did. I think his wife screened all the calls that, that came to his residence.

Your Honor, I'd just ask the Court to consider a sentence at the bottom of the mitigated range -- by our estimation that would be 14.4 years, 173 months -- given Mr. Duvall's health, given his willingness to come to court today, he's paying his child support, the other mitigating factors I've submitted to the Court.

I think Mr. Duvall understands that this is a problem for the Court, this is a problem for Ms. Yount, and, and I know that he has some sympathy for her for going through this. And I think that's what, what started everything to begin with, he was having a little too much sympathy for her.

But he is prepared to take responsibility for this today, Your Honor. And we just ask the Court, in your discretion, to consider accepting the plea to one charge. And we'd ask for -- and, of course, the Court is under no obligation to do so -- but we'd ask for a sentence as mitigated as the Court would find.

Stand up, Mr. Duvall. Is there anything you'd like to say to the Court?

THE DEFENDANT: No.

Exhibit Criminal trial transcripts

submitted to the DNA test. This was not as prompt as the State would've liked him -- for him to do so. But he did actually turn himself in.

He was charged with the first, first count. He was released on bond at a later date. There was a probable cause hearing Mr. Bellas referred to. He was indicted on the other charges and while he was out on jail he turned himself in.

Your Honor, I'm going to submit some other mitigating factors. As far as statutory mitigating factors, while not exactly fitting for this case, there is a statutory factor that he's made substantial or full restitution to the victim. I'm not sure if that's something that could ever be done, but to the extent that he can, he's been paying child support.

He actually is under an order to pay child support. And when he was out on the road, while he was out on bond for this case, he actually submitted child support payments for the benefit of the minor child. It's some small amount of restitution.

Your Honor, prior to an arrest, at an early stage of the criminal process, he voluntary acknowledged wrongdoing in connection with the offense to a law enforcement officer. There was -- There would be some evidence presented that two detectives came and knocked on

Civil Order

132

FILED

2012 DEC 21 PM 2:32

BURKE CO., C.S.C.

NORTH CAROLINA

BURKE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 08CVD1998
IV-D NO.: 6073660; 6198782

BURKE COUNTY CHILD SUPPORT ENFORCEMENT O/B/O,
NC FOSTER CARE, and
KEAGAN C YOUNT, Minor Child
Plaintiff,
vs.
KENNETH K DUVALL,
Defendant.

Add on

TERMINATION ORDER

THIS CAUSE COMING on to be heard before the undersigned judge presiding over the December 21, 2012, session of District Court, for Burke County. The Plaintiff being represented by and through the County of Burke by Anthony R Morrow.

THE COURT, inquiring into the matter and taking judicial notice of the record, finds the following facts:

(X) 1. On September 2, 2011, the Defendant was ordered to pay $50.00 in support for the above named minor child.
( ) 2. Effective _____ the Defendant is residing with the minor child/ren.
(X) 3. A $ 450.00 arrearage exists as of August 1, 2012.
( ) 4. The minor child/ren receive(s) Medicaid benefits, therefore, the insurance portion of the support order dated _____ should remain in full force and effect.
( ) 5. The caretaker wishes to suspend ongoing support and terminate DSS services at this time.
( ) 6. The caretaker wishes to forgive $_____ in arrears owed to him/her.
( ) 7. The caretaker wishes the Defendant to pay directly to him/her and to terminate DSS services at this time.
(X) 8. Other: On or about July 17, 2012, the minor child named above, Keagan C Yount, was adopted, therefore the ongoing child support should be terminated. Furthermore, the defendant was admitted to DOC custody on 4/4/2012, expected to be released on 05/02/2037.

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW THAT:

(X)1. The Defendant's ongoing support obligation should be terminated effective August 1, 2012.
( ) 2. The Defendant's ongoing support should be suspended effective _____ for so long as the Defendant continues to reside with the minor child/ren.
( )3. The Defendant's ongoing support should be suspended effective _____ for so long as the caretaker wishes, is not accepting DSS services, or is not accepting public assistance on behalf of the minor child/ren.
(X)4. The Defendant should be ordered to pay *$450.00* in child support arrearages which exist as of *August 1, 2012*, at the rate of *$50.00* per month beginning on August 1, 2012, pursuant to NCGS § 50-13.4(c).
( ) 5. The minor child/ren receive(s) Medicaid benefits, therefore, the insurance portion of the support order dated _____ should remain in full force and effect.
( ) 6. The caretaker may forgive $_____ in arrears owed to him/her.
( ) 7. The Defendant's ongoing support obligation should be suspended effective _____ for so long as the Defendant pays directly to the caretaker and he/she is not accepting public assistance on behalf of the minor child/ren.
( ) 8. Other: _____
_____
_____

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

(X) 1. The Defendant's ongoing support obligation is terminated effective August 1, 2012.

( ) 2. The Defendant's ongoing support is suspended effective _____ for so long as the Defendant continues to reside with the minor child/ren.

( )3. The Defendant's ongoing support is suspended effective _____ for so long as the caretaker wishes, is not accepting DSS services, or is not accepting public assistance on behalf of the minor child/ren.

(X) 4. The Defendant is ordered to pay $450.00 in child support arrearages which exist as of August 1, 2012, at the rate of $50.00 per month beginning on August 1, 2012.

( ) 5. The minor child/ren receive(s) Medicaid benefits, therefore, the insurance portion of the support order dated _____ shall remain in full force and effect.

( ) 6. The $_____ in arrears owed to the caretaker are hereby forgiven.

( )7. The Defendant's ongoing support obligation is suspended effective _____ for so long as the Defendant pays directly to the caretaker and he/she is not accepting public assistance on behalf of the minor child/ren.

( ) 8. Other _____

_____

_____

This the 21st day of December, 2012.

Andrea R. Morrow

A. R. Morrow

JUDGE PRESIDING