

COURT OF APPEALS OF GEORGIA

RETURN NOTICE

June 16, 2015

To: Mr. Damian C. Bernard, GDC1202354 D2-202T, Central State Prison, 4600 Fulton Mill Road, Macon, Georgia 31208

Case Number: \_\_\_\_\_ Lower Court: \_\_\_\_\_ County Superior Court

Court of Appeals Case Number and Style: \_\_\_\_\_

Your document(s) is (are) being returned for the following reason(s).

- There is no case pending in the Court of Appeals of Georgia under your name.
- A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37. Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
- The Notice of Appeal must include a proper Certificate of Service. A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.
- An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained. An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.
- An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate. An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals.
- Your appeal was disposed by opinion (order) on \_\_\_\_\_. The Court of Appeals \_\_\_\_\_ The remittitur issued on \_\_\_\_\_ divesting this Court of jurisdiction. The case decision is therefore final.
- Your mailing/documents indicate that you intended to file your papers in another court rather than the Court of Appeals of Georgia. The address of the Clerk of the \_\_\_\_\_ is: \_\_\_\_\_
- If an attorney has been appointed for you and you are concerned with the representation provided by that attorney, you should address that issue to the trial court. As long as you are represented by an attorney, you cannot file pleadings on your own behalf. Your attorney must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court.
- A request for an out-of-time appeal should be made to the trial court from which you are appealing. If your motion is denied by the trial court, you can file an appeal of that decision by filing a Notice of Appeal with the clerk of the superior court.

IN THE GEORGIA COURT OF APPEALS

STATE OF GEORGIA

DAMIAN C. BERNARD,

MOVANT,

VS.

HONORABLE, JUDGE.

SAMUEL D. OZBURN,

DEFENDANT.

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CASE # 2005-CR-0037-3

RECEIVED IN OFFICE  
2015 JUN 15 PM 2:37  
CLERK/COURT ADMINISTRATION  
COURT OF APPEALS OF GA

MOTION TO ENFORCE THE PROPER USE OF

IN PURSUANT TO O.C.G.A. §5-5-24 (C), ET SEQ.

O.C.G.A. §§5-6-34, 5-6-35(A) (7).

AN OUT-OF-TIME APPEAL SERVES AS THE REMEDY

FOR A FRUSTRATED RIGHT OF APPEAL FOR A

CRIMINAL DEFENDANT WHOSE CONVICTION HAS NOT

BEEN LEGALLY REVIEWED BY AN APPELLATE COURT:

Comes now, Damian C. Bernard, movant in the above styled action and moves this court

To allow movant to file this motion: A "VOID JUDGMENT" IS AN LEGAL NULLITY.

THE DISTRICT ATTORNEY HAS NO LEGAL AUTHORITY TO RETURN AN INDICTMENT INTO COURT FOR THE GRAND JURY, BUT IF THE GRAND JURY IS PRESENT IN A BODY IN OPEN COURT AND THE INDICTMENT IS HANDED TO THE DISTRICT ATTORNEY IN THE PRESENCE OF THE JUDGE AND HE / OR SHE HANDS IT TO THE CLERK, THE RETURN IS VALID. IF THE MINUTES OF THE COURT SHOWS THAT THE "TRUE BILL" WAS RETURNED AT THAT TERM OF COURT, THERE IS A PRESUMPTION THAT IT WAS REGULARLY RETURNED, ALTHOUGH THIS PRESUMPTION MAY BE REBUTTED. IF A GRAND JURY RETURNS A "NO BILL," THE CASE IS PROBABLY TERMINATED. HOWEVER, IT IS LEGALLY POSSIBLE FOR THE SAME GRAND JURY TO RECONSIDER THE CASE AND RETURN A "TRUE BILL" OR AN INDICTMENT, AGAINST THE ACCUSED AT THAT TERM. ALSO, AFTER AN EARLIER "NO BILL" IT IS POSSIBLE FOR A GRAND JURY AT A LATER TERM OF COURT TO INDICT THE DEFENDANT. MOVANT CLAIM THAT COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE THE INDICTMENT O.C.G.A. §17-7-113, THE TRIAL COURT WOULD PROPERLY DENY A MOTION FOR AN OUT-OF-TIME APPEAL...AS FRIVOLOUS. DEMURRER TO THE EVIDENCE IS THE EQUIVALENT TO A DIRECTED VERDICT OF ACQUITTAL, OF WHICH IS IMPROPER METHOD TO ATTACK THE INDICTMENT. THE TWO METHOD OF ARMED ROBBERY IS ARMED ROBBERY AND ROBBERY BY INTIMIDATION; NOT BEING A PARTY TO A CRIME. AS WHAT IS ON THE FACE OF SAID INDICTMENT CASE# 2005-CR-0037-3... ARMED ROBBERY AND PARTY TO A CRIME. TO DISREGARD THE LIMITING LANGUAGE OF O.C.G.A. §17-7-53.1 WOULD BE TO RENDER SUCH LANGUAGE MEANINGLESS. A STATUTE IS TO BE INTERPRETED SO AS TO GIVE MEANING TO ITS ENTIRE CONTENT RATHER THAN TO FIND PARTS TO BE IRRELEVANT...ROBBERY BY INTIMIDATION IS NOT IRRELEVANT TO ARMED ROBBERY.

IN CHARGING THE JURY RESPECTING THE CHARGE OF ARMED ROBBERY AND ANY LESSER INCLUDED OFFENSE, THE BETTER PRACTICE IS TO CHARGE THE BURDEN OF PROOF IS ON THE STATE, THE DEFINITION OF REASONABLE DOUBT; THE DEFINITION OF ARMED ROBBERY, THE JURY'S AUTHORITY TO FIND A DEFENDANT GUILTY OF ARMED ROBBERY IF CONVINCED BEYOND A REASONABLE DOUBT; THE JURY'S AUTHORITY TO CONSIDER THE LESSER-INCLUDED OFFENSE IF THE DEFENDANT IS FOUND NOT GUILTY OF ARMED ROBBERY, FOLLOWED BY THE DEFINITION OF THE LESSER-INCLUDED OFFENSE.

SEE ZACKERY VS. STATE, 257 GA.442, 360 S.E.2D269. ALSO SEE DAMARE VS. STATE, 257 GA. APP. 508,571 S.E.2D 507(2002), FLEMING VS. STATE, 276 GA. APP. 491,623 S.E. 2D 696(2005), HENDERSON VS. HAMES, 287 GA.534, 697 S.E.2D 798 (2010).

ABUSE OF DISCRETION WILL GO UNNOTICE IF THIS MOTION TO ENFORCE PURSUANT TO O.C.G.A. § 5-5-24(C) ET SEQ... IS NOT GRANTED. CONSEQUENTLY, THE INDICTMENT WOULD NOT HAVE WITHSTOOD

A TIMELY SPECIAL AND/ OR GENERAL DEMURRER, WHERE TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT IN HIS FAILURE TO TIMELY CHALLENGE THE VALIDITY OF THE INDICTED CHARGE ARMED ROBBERY AND PARTY TO A CRIME CHARGE AS THE TWO METHOD TO COMMIT ARMED ROBBERY. THIS FAILURE TO DO SO NECESSARILY CONTRIBUTED TO MOVANT'S CONVICTION ON A VOID COUNT BEING O.C.G.A. § 16-2-20(C) INDUCED. THE RECORD WILL CLEARLY REFLECT THE TRIAL JUDGE REMOVED PARAGRAPH (A) FROM THE EVIDENCE. (TR.P.809). O.C.G.A. § 17-8-57. See Jackson vs. State, 273GA.320, 540 S.E.2d 612 (2001).

ENCLOSED IS EXHIBIT (1) AND (2).

THIS 12 day of June, 2015

RESPECTFULLY SUBMITTED,

*1/s/ Damian C. Bernard*

DAMIAN C. BERNARD, pro se.

CENTRAL STATE PRISON

D2-202-T GDC# 1202354

4600 FULTON MILL ROAD

MACON, GEORGIA 31208

**CERTIFICATE OF SERVICE**

This is to certify that I have served the Clerk of Georgia Court of Appeals, 47 Trinity Avenue Suite 501 Atlanta, Georgia 30334 and Clerk of Superior Courthouse Newton County, 1132 Usher Street NW. rm. 338 Covington Georgia 30014 as well as District Attorney of Newton County Layla Zon. 1132 Usher Street rm.313 Covington Georgia 30014. with a complete and accurate copy of documents Placing the same in an envelope and with sufficient postage affixed, placed in the United States Mail Therefore addressed as above stated.

This 12 day of June, 2015

1s/ Damian C. Bernard

INDICTMENT NO. 2005CR 0037-3

PLEA

WARRANT NO. 04MGW4120  
WARRANT NO. 04MGW4122

The Defendant waives formal arraignment, copy of indictment / accusation, list of witnesses, and waives indictment by the Grand Jury where applicable, and also waives trial by jury and pleads:

NEWTON SUPERIOR COURT

OCTOBER TERM, 2004

GUILTY

NOT GUILTY

STATE OF GEORGIA

This 3<sup>rd</sup> day of October, 2005

v.

DAMIEN CHRISTOPHER BERNARD

[Signature]  
Defendant

[Signature]  
Defendant's Attorney

COUNT 1: ARMED ROBBERY  
COUNT 2: POSSESSION OF A FIREARM  
DURING COMMISSION OF A FELONY

[Signature]  
(Assistant) District Attorney

True Bill

VERDICT

[Signature]  
Foreperson

We, the jury, find the Defendant:

EZELL BROWN, Prosecutor

This \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

W. KENDALL WYNNE, JR.  
DISTRICT ATTORNEY

Foreperson

FILED IN OPEN COURT  
This 3<sup>rd</sup> day of Oct., 2005  
[Signature] CLERK  
Newton County Superior Court,  
Alcovy Circuit

135

096

Exhibit #(1)

STATE OF GEORGIA  
NEWTON COUNTY

BILL OF INDICTMENT

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors selected, chosen, and sworn for the County of Newton, to-wit:

Linda R. Sparacino, Foreperson

Lisa Adams  
Jennifer Delane Bogle  
Gregory C. Carter  
Jerry Ray Crews  
Adriane M. Gotel  
Haskell Johnston  
Cherie L. Mote  
Cynthia Maria Perry  
John Trenor Rice  
Jennifer L. Tuchscherer  
Cynthia L. White

Barbara G. Aiken  
Jamia Leigh Brown  
Jacquelynn Michelle Cox  
William D. Elliott  
Jeremy E. Hays  
Judith A. Mollus  
Richard-G. Nelson  
Rickie Eugene Reed, Jr  
Joseph Francis Shoemaker, IV  
Dexter L. Vason

COUNT 1

in the name and on behalf of the citizens of Georgia, charge and accuse:

**DAMIEN CHRISTOPHER BERNARD**

with the offense of: **ARMED ROBBERY (O.C.G.A. Sec. 16-8-41)**

for that the said accused on **September 20, 2004**, in the County aforesaid, did then and there, unlawfully:

with intent to commit theft, did take property, to wit: U.S. currency, from the person and immediate presence of Carl Simpson, by use of an offensive weapon, to wit: a handgun, in violation of O.C.G.A. Sec. 16-8-41 and 16-2-20,

contrary to the laws of said State, the good order, peace, and dignity thereof.

Newton Superior Court  
October Term, 2004

W. Kendall Wynne, Jr.  
District Attorney

COUNT 2

in the name and on behalf of the citizens of Georgia, charge and accuse:

**DAMIEN CHRISTOPHER BERNARD**

with the offense of: **POSSESSION OF A FIREARM DURING COMMISSION OF A FELONY**

for that the said accused on **September 20, 2004**, in the County aforesaid, did then and there, unlawfully:

while in the commission of a felony, to-wit: Armed Robbery, have on his person and within arm's reach of his person a certain firearm, to-wit: a handgun, in violation of O.C.G.A. §16-11-106,

contrary to the laws of said State, the good order, peace, and dignity thereof.

Newton Superior Court  
October Term, 2004

W. Kendall Wynne, Jr.  
District Attorney

IN THE SUPERIOR COURT OF NEWTON COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
	)	
vs.	)	Indictment No. 2005-CR-0037-3
	)	
DAMIEN CHRISTOPHER BERNARD	)	
Defendant	)	

VERDICT

Count One: Armed Robbery

We the jury find the defendant Guilty.

Count Two: Possession of a Firearm During the Commission of a Felony

We the jury find the defendant Not Guilty.

This the 5<sup>th</sup> day of October, 2005.

Marc A. Powe  
Jury Foreperson

Marc A. Powe  
Print Name Here

**FILED IN OPEN COURT**  
This 5<sup>th</sup> day of Oct 2005  
Linda D. Hays CLERK  
Newton County Superior Court,  
Alcovy Circuit

1 will be kept in an adjoining room and will  
2 not participate in your deliberations  
3 unless for some reason one of you is  
4 unable to complete your service as a  
5 juror.

6 Now, you may now, except for Ms.  
7 Walden and she will be shown to this other  
8 room, you may now retire to the jury room;  
9 but do not begin your deliberations until  
10 you receive the indictment, any evidence  
11 that has been admitted in the case, the  
12 verdict form and a copy of this charge.

13 You may now go to the jury room.

14 (Jury exited the courtroom)

15 THE COURT: All right. Counsel, I  
16 want to point out now that the jury is in  
17 the jury room and the alternate juror has  
18 gone to her room. I want to point out one  
19 thing. If you followed me, you may have  
20 seen when I got to party to a crime,  
21 there's no evidence in this case that the  
22 defendant directly committed these two  
23 crimes, so I took out Paragraph A under  
24 parties to a crime and limited it to the  
25 two instances where intentionally helped

Exhibit #(2)

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