



**Court of Appeals of Georgia**

May 8, 2015

TO: Eugene Jerome Howard, GDC1131513 F-2, Johnson State Prison, Post Office Box 344, Wrightsville, Georgia 31096

RE: **A15D0283. Eugene Jerome Howard v. The State**

**CHECK RETURN**

- Your check number \_\_\_\_\_ in the amount of \_\_\_\_\_ written on the account of your firm for the filing fee in \_\_\_\_\_ is enclosed. Please be advised that this Court is returning your check since the filing fee was already paid by \_\_\_\_\_.

**APPLICATION - DISPOSED**

- The referenced appeal was dismissed on March 19, 2015. A copy of the order is enclosed, as a courtesy, for your review.**

**Your "Motion to Void and Vacate Judgments of Convictions" is being returned to you.**

**CASE STATUS - PENDING**

- The above referenced appeal is pending in your name before this Court. The appeal was docketed in the \_\_\_\_\_ Term and a decision must be rendered by the Court by the end of the \_\_\_\_\_ Term which ends on \_\_\_\_\_.

**APPLICATION FOR PERMISSION TO APPEAL A PROBATION REVOCATION**

- To appeal a probation revocation, you will need to file a Discretionary Application with this Court. Rule 31 of the Rules of the Court of Appeals of Georgia describes a Discretionary Application and the items you would need to include with your application.

A Discretionary Application must be filed within 30 days of the stamped filed date on the order that you are appealing and the application must be accompanied by a proper Certificate of Service and a pauper's affidavit or the \$80.00 filing fee. You must also comply with all the other applicable rules of Court regarding filing with the Court of Appeals of Georgia.

Enclosed, please find a copy of the Rules of the Court of Appeals for your review.

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IN The Georgia Court  
of Appeals  
State of Georgia

Eugene Jerome Howard  
Pro Se, Defendant  
Vs.  
The State of Georgia

Indictment Numbers:  
Whitfield Co. 45077B  
Catoosa Co. 2002.SU.CR.632.

Motion to Void and Vacate  
Judgements of Convictions

COMES Now, Defendant Eugene Jerome Howard Pro Se;  
With his motion to Void and Vacate Judgements of his  
Convictions for two different Convictions, in two different  
Judicial Circuits, all Within the State of Georgia, With  
the Understanding this Court has Jurisdiction over this  
Case for the following reasons:

(1)

The defendant Was Convicted by two different Judicial  
Circuits, With his Sentences to run Concurrent; However, his  
Catoosa County Conviction Should be Void Under O.C.G.A §  
16-1-6 thru §16-1-8 The actual evidence test, the focus is  
on the evidence actually Presented and Whether the Same evidence  
is being Use to return two Convictions. The defendant believes  
Catoosa Co. Used Whitfield Co evidence to get a Conviction; IF the  
Same evidence is the Only evidence of two Crimes, they are  
Constitutionally the Same Crimes and double Conviction is Not  
Allowed. The defendant Was Charged in Whitfield Co. With  
two Counts of AGGravated Sodomy However, Catoosa Co.

Charged the defendant With four Counts of Aggravated Sodomy by breaking down the acts, only because the defendant did live in that Judicial Circuit Within one Year time. Whitfield Co. returned a guilty Verdict and a Year and half. Catcoosa accepted a plea deal, telling the defendant they would Use the Same Evidence as Whitfield Co. to get another Conviction of a 40/20 Sentence.

(2)

The defendant believes that Ab-Initio the Charges that were given of Aggravated Sodomy were Void because the State failed to Prove all Standards for the Charge the defendant also believes Under § 26-45 an Illegal Sentence was handed down and this Court has the Authority to order the lower Court to Vacate the defendant's Conviction of Said offense of Aggravated Sodomy because the State failed to Prove force for a Conviction.

Eddleman v. State 247 GA App 753(2) 545 SE.2d 122(2001)

(3)

The defendant believes that the Court will See that OCGA § 5-5-24(C) Provides that Appellate Court shall Consider and review erroneous Charges Where there has been a Substantial error in the Charge Which was harmful as a matter of law, regardless of Whether objection was made.

Young v. State 238 GA App 555, 556(2) 519 SE.2d 481

(1999)

(4)

Both the Georgia Supreme Court and the Court of Appeal have Concluded Failure to Object to Such an argument, Constitutes deficient Performance by the defense Counsel; The defendant's Counsel took the stand and told the Court of his deficient Performance and it also Shows, because the defendant's Counsel, Was the Appellant Counsel, in a 1999 Case, Brewer V. State and Knew, force must be Proven to Convict for Aggravated Sodomy, the lower Court of Whitfield turned down Motion for New trial.

MASON V. State 274 GA 79 (2) (e) 548 SE 2d 298 (2001)

(5)

The defendant Claims that based on a defect in the radical Change in Georgia laws. The Outcome of his trial and Sentence Would of been different had his Counsel raised a 1999 Case that the defendant's Counsel took Part in as a appellant Counsel, In Brewer V. State that deals With Aggravated Sodomy and force Issues Which Caused a Change and a Substantive Criminal law Was Establish

Brewer V. State 271 GA. 605, 607 523 SE 2d 18 (1999)

(6)

The defendant was Convicted January 29, 2003 in Whitfield Co Case With two Counts of Aggravated Sodom Charge. The Court Used the age of the Victim to Prove it Charges by establishing the Victim Was a Minor,

However, IN order to get a Conviction of Aggravated Sodomy the STATE MUST Prove Actual Force, Which the State failed to do, Even in Cases Involving Victims Under the age of Consent.

Brewer V. State 271 GA 605, 607, 523 SE.2d 18 (1999)  
(7)

The defendant believes Brewer V. State (1999) Constituted a Substantial Change in the law and is retroactively, the Courts agreeing, ruled that Brewer, had effected a Substantive Change in the law and not Merely in the Procedure

Luke V. Battle 275 GA 370, 565 SE.2d 816 (2002)  
(8)

No evidence was Presented Showing the Victim WAS forced or Injured [even by a Medical Doctor's Statement: "He found nothing."] Other than during the act of Oral Sodomy to a Child Under 16. The lower Court failed to Considered the question of Whether evidence of the Victim's Previous access to Pornographic films could be Used by the defendant to Show that the Victim acquired Knowledge of Sexual acts allegedly Perpetrated by the defendant, from a Source other than the defendant. The Court Observed that although a Victim experience With Pornographic films would generally be inadmissible Under the rape shield Statute, Such evidence was relevant for the Purpose of explaining the Victim's ability to make the Charges Used to indict the defendant.  
Payne V. State, 267 GA App 498 (1) 600 SE.2d 422 (2004)

(9)

Under § 1-27 Variance rule the Present rule was stated to be as follows: "The general rule that allegations and Proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the Charges against him... and (2) that he may be protected against another Prosecution for the same offense. This is what Catoosa County did to the defendant after his Conviction of Whitfield County which means the defendant was not protected against another Prosecution for the same offense.

DUNN V. United States, 442 U.S. 100, 107, 99 S.Ct 2190, 60 L Ed 2d 743 (1979), 25 Cr. L. 3105, the Supreme Court pointed out that a MAJOR Variance is a Violation of due Process.

(10)

The Defendant feels his Sentence of 40/20 to Serve was a Very harsh Sentence because there was no force, no Physical or Emotional injury to the Victim, no Proof of any DNA evidence. And yet other Cases get less time but, Proof of force, Physical injury and DNA; but only got a 30 year Sentence 12 to Serve in Prison. The Defendant must do 20 years in Prison 20 probatu See: Shabazz V. State 273 GA App 389, 390 (1) (615 S.E.2d 211 (2005) Here the State had Proof of lacerations, fresh blood on her genitalia consistent with forcible intercourse. Shabazz was found Guilty of Agg. Child Molestation and only has to do 12 years in Prison remainder on Probation.

(11)

The defendant believes that he may be given a lesser included offense. The Georgia Supreme Court said "that the correct rule is, that a written request to charge a lesser included offense must be always given, if there is any evidence that the defendant is guilty of the lesser included offense. The failure to charge on a lesser included offense, doesn't prevent an appellate court from reversing a conviction where the omission was "clearly harmful" and "erroneous" as a matter of law in that the charge of aggravated sodomy fails to provide the jury with the proper guidelines for determining guilt or innocence of said charge.

Jackson v. State 239 GA 40, 42, 235 S.E.2d 477 (1977)

Wherefore, the defendant comes before this court and contends that the evidence to prove aggravated sodomy presented at the trial was insufficient because the state failed to prove any type of force and was unable to support the verdict. The defendant using *Luke v. Battle* (2002) and *Brewer v. State* (1999) *Luke*, gives the retroactive issue and *Brewer* gives proof force must be a issue with the defendant's charge. The Supreme Court of Georgia ruled that the state could no longer prove the essential element of force simply by establishing the victim was a minor. The defendant believes the conviction of aggravated sodomy is void and a lesser included offense should be granted.

Respectfully Submitted

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IN The Georgia Court  
of Appeals  
State of Georgia

Certificate of Service

I Hereby Certify that I have this day Served  
the respondent(s) with a copy of the foregoing by  
placing the same in the United States Mail in a  
proper envelope with adequate postage attached  
properly addressed to:

District Attorney: Mr. Kermit N. McMANUS  
of Whitfield County: P.O. Box 1086 Dalton, GA 30722

District Attorney: Mr. Herbert E. "Buzz" Franklin  
of Catoosa County: 108 East Villanow St.  
Lafayette, GA 30728

This 30<sup>th</sup> day of April 2015

By:

Eugene Jerome Howard

GDC #1131513 F-2

Johnson State Prison

P.O. Box 344

Wrightsville, GA 31096

# Court of Appeals of the State of Georgia

ATLANTA, March 19, 2015

*The Court of Appeals hereby passes the following order:*

## **A15D0283. EUGENE JEROME HOWARD v. THE STATE.**

Eugene Jerome Howard seeks appellate review of the trial court's order denying his extraordinary motion for new trial. The trial court's order was entered on November 11, 2014, and Howard filed his application on January 7, 2015.<sup>1</sup> We lack jurisdiction because the application is untimely.

An application for discretionary appeal must be filed within 30 days of the entry of the order or judgment to be appealed. See OCGA § 5-6-35 (d). The requirements of OCGA § 5-6-35 are jurisdictional, and this Court cannot accept an application for appeal not made in compliance therewith. See *Boyle v. State*, 190 Ga. App. 734 (380 SE2d 57) (1989). Here, Howard filed his application 57 days after entry of the order he seeks to appeal. Therefore, his application is untimely, and it is hereby DISMISSED for lack of jurisdiction.



*Court of Appeals of the State of Georgia*

*Clerk's Office, Atlanta, 03/19/2015*

*I certify that the above is a true extract from  
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court  
hereto affixed the day and year last above written.*

*Stephen E. Costello*, Clerk.

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<sup>1</sup> Howard filed his application in the Supreme Court, which transferred the case here.