

**COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR APPLICATIONS**

March 20, 2015

To: James E. Smith, #560429, Wheeler C.F., P.O. Box 466, Alamo, GA 30411

Docket Number: **Style:** James E. Smith v. The State

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

1. Your Application was not accompanied by the statutory filing fee, \$300.00 civil; \$80.00 criminal, or a sufficient pauper's affidavit. OCGA§5-6-4 and Rule 5 Please be advised that your pauper's affidavit should be notarized by a notary public.
2. Portions of the record included were not tabbed and indexed. Rules 30 (e) and 31 (c).
3. **A stamped "filed" copy of the trial court's order to be appealed was not attached to your Application. Rules 30 (b) and 31 (e)**
4. A stamped "filed" copy of the Certificate of Immediate Review was not attached to your Interlocutory Application. Rule 30(b)
5. Your document(s) was (were) not signed by counsel (No signatures with expressed permission are permitted). Rule 1 (a)
6. There were an insufficient number of copies of your document. Rule 6
7. No Certificate of Service accompanied your document(s). Rule 6 You should provide a copy of your filing to the District Attorney and include his/her name and address on your Certificate of Service.
8. Your Certificate of Service did not include the complete name and /or mailing address of each opposing counsel and pro se party. Rule 1(a) and 6
9. Your document exceeds page limits. Rules 24(f) , 30(e) and 31(c)
10. Your request for court action must be submitted in motion form. Rule 41 (a)
11. No extension of time for filing an interlocutory application will be granted . Rule 30 (g) . No extension of time will be granted for filing a discretionary application unless the motion for extension is filed on or before the due date of the discretionary application.
12. The type font was smaller than 10 characters per inch; type was not double-spaced or/and type was on both sides of the paper. Rules 1(c), 24(b), 37(a) and 41(b).
13. Your motions were submitted in an improper form (joint, compound, or alternative motions in one document). Rule 41 (b)
14. Margins were too small or paper size was incorrect. Rules 1(c), 24(c), 30(e), 31(c) and 41(b).
15. Your document was submitted for filing more than 30 days after the date of the order granting, denying or dismissing the application or the order granting, denying or dismissing the Motion for Reconsideration. Rules 30(j) and 31(j).
16. Other:

For Additional information, please go to the Court's website at: www.gaappeals.us

COURT OF APPEALS OF GEORGIA
DOCUMENT RETURN NOTICE FOR APPLICATIONS

3/19/15

CA

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15. Your document(s) was (were) not securely bound at the top with staples or round head fasteners. Rules 1(c), 30 (e) and 31 (c)
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In The Court of Appeals
State of Georgia

JAMES E. SMITH,

} Docket No.

} State of Georgia
} SEVEN County Case
} No. 1592 CR140 M

RECEIVED IN OFFICE
20FFEB 24 PM 2:39
CLERK OF SUPERIOR COURT
STATE OF GEORGIA

RECEIVED IN OFFICE
2015 MAR 10 PM 8:40
CLERK OF SUPERIOR COURT
STATE OF GEORGIA

Application For Discretionary Appeal

RECEIVED IN OFFICE
2015 MAR 10 AM 10:43
CLERK OF SUPERIOR COURT
STATE OF GEORGIA

Jurisdiction

Jurisdiction of this criminal case for discretionary appeal is pursuant to O.C.G.A. § 42-12-8, and 5-6-35.

In The Court Below

During the October, 1992 Term of Court, James Smith was indicted by the SEVEN County Grand Jury for burglary, armed robbery, felony murder, and murder, on Indictment No. 1592 CR140M.

ON February 4, 1993, District Attorney amended the indictment by "blacking out" material elements in Counts Two and Four then Nolle Prossing the Indictment altogether with approval of Judge Faye S. Martin on the Nolle Pross order.

AFTER the Nolle Pross Order was filed on the record, the Superior Court accepted a plea of guilty to all counts of indictment and a life sentence was imposed.

IN May of 2013 James Smith filed a petition for

case records when he discovered on his Computation Sheet given to him by the Georgia Dept. of Corrections that his sentence did not show this case no. but instead another case number.

The Clerk of Court of Superior Court of Screven County sent Case No. 1593 CR 023 M, a case that involved (1) eleven burglary counts.

On May 3, 2013, James Smith filed a Motion To Vacate A Void Judgement attacking the issue of a defective indictment.

On May 30, 2013, said motion was denied by order of Judge F. Gates Ford.

On June 10, 2013 a timely Notice of Appeal was filed and the case was Docketed by the Georgia Court of Appeals; Docket No. A1140285.

Only at this time was James Smith made aware of the first case no. 1592 CR 140 M when the Clerk of the Appeals Court informed him of this case number.

Under Case Number 1592 CR 140 M, James Smith filed a Motion To Set Aside A Void Judgement arguing that the indictment was null and void prior to the entry of a guilty plea, thus subject matter jurisdiction could not be conferred on a trial court that otherwise didn't have it when an indictment did not exist. This motion was filed with the Superior Court of Screven County on October 23, 2013.

On April 30, 2014, Asst. District Attorney filed the State's Response to Mr. Smith's motion, in it no mention is made of the nol pros order signed by Judge Faye Martin.

After repeated efforts in accordance with the Rules of Superior Court, State of Georgia, that include a Rule Nisi, Production order, Motion To Compel, Notice

of Hearing, and a writ of Mandamus, the Superior Court of Screven County refuses to make a Ruling and Order on Mr. Smith's Motion To Set Aside A Void Judgement.

Argument And Citation of Law

The ONE constant in this criminal case on appeal is the fact that statutory law and mandates have been negated when the superior court fails to make a Ruling and Order on a motion that shows clear and plain defects on the face of the indictment and in the body of the indictment. O.C.G.A. § 17-7-70.

Smith v. Hardrick, 266 Ga. 54, 55, 464 S.E. 2d. 198 (1995).

A manifest injustice occurred in 1993 when Mr. Smith entered an unintelligent plea of guilty to a non-existent criminal indictment that charged him with capital felonies.

The O.C.G.A. § 17-7-70 provides in relevant part: Without an indictment, trial court has no subject matter jurisdiction to dispose of a capital felony case, and any judgement that court renders is void.

Mayo v. State, 277 Ga. 645, 594 S.E. 2d. 333 (2004).

To follow legislative intent and the record of this criminal case, the trial court has not lost the jurisdiction or the obligation to correct the proceeding that occurred in 1993 and reverse the judgement imposed that is nothing more than a mere nullity.

Croubley v. State, 261 Ga. 610 (1991); Jackett v. State, 209 Ga. App. 112, 432 S.E. 2d. 586 (1993).

In this case at chief, the defendant entered a plea of guilty with assistance of counsel to avoid

the death penalty, a sentence that could not have been imposed when the alleged victim died due to pneumonia 8 months after being shot. No medical certainty placed his death because of the gunshot.

Relief Requested

JAMES SMITH respectfully requests a proper review of the procedure and a ruling on the conduct of the Superior Court of Screven County in hearing this case on appeal and producing a ruling and an order on MR. SMITH'S Motion To Set Aside A void judgement.

Respectfully submitted,

JAMES E. SMITH, Pro se

Certificate of Service

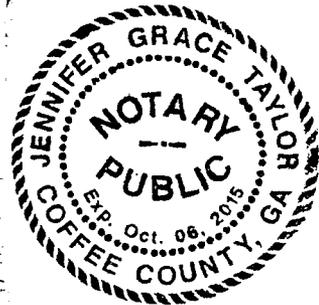
I hereby certify I have sent true copies of Discretionary Appeal to the Georgia Court of Appeals and the Screven County District Atty. by U.S. Postal Service, mailed to:

Georgia Court of Appeals
Suite 501
47 Trinity Ave.
Atlanta, Georgia 30334

Screven Co. District Atty.
P.O. Box 156
Sylvania, Georgia 30467

James E. Smith, Pro se James E. Smith
Wheeler C.F.
P.O. Box 466
Alamo, Georgia 30411

Notary Public Jennifer Grace Taylor
2-19-15



IN THE SUPERIOR COURT OF SCREVEN COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

JAMES E. SMITH,

DEFENDANT.

*
* CASE NUMBER 1S92CR0140M
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STATE'S RESPONSE TO MOTION TO SET ASIDE VOID JUDGMENT

COMES NOW the State of Georgia, by and through Richard A. Mallard, District Attorney, Ogeechee Judicial Circuit of Georgia, and files this brief in response to the Defendant's Motion to Set Aside as follows:

The trial court is not required to hold an evidentiary hearing on any of the issues defendant has raised. Defendant's challenge to the indictment can be resolved against him on the existing record, and he is not entitled to the relief he requests.

The indictment alleged that defendant did unlawfully and with malice aforethought cause the death of another human being. That allegation is sufficient to allege the crime of malice murder in violation of O.C.G.A. § 16-5-1(a). Defendant is not entitled to an appeal on the issues he raised nor to the relief he seeks because the issues either can be resolved adversely to him based on the existing record or can not be the subject of an appeal from a guilty plea since they could not be resolved based on the existing record. Marion v. State, 287 Ga. 134, 695 S.E.2d 199 (2010).

Smith alleges he pleaded guilty to indictment number 1S92CR0140M to charges of murder and armed robbery. As is the custom in this judicial circuit, he agreed "to waive and give

up any right he may have to appeal the terms of this agreement." He does not set forth in his motion either the date he entered his plea or the date he filed his motion. On some unknown date, Smith filed this extraordinary motion to set aside a void judgment.

Smith asserts that the indictment to which he pled was fatally defective and alleges defects with the grand jury composition. The indictment alleged that Smith "did unlawfully and with malice aforethought cause the death of another human being . . . These allegations are sufficient to allege the crime of malice murder. See O.C.G.A. § 16-5-1 (a); Wright v. Hall, 281 Ga. 318, 319 (2006). An indictment fails to sufficiently allege a crime only if the defendant can admit all the allegations contained in it and still not guilty of a crime. Therefore, Smith's challenge to the indictment can be resolved against him on the existing record, and he is not entitled to a direct appeal on the issue.

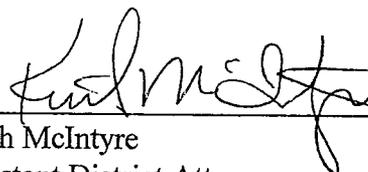
Smith also contends that his trial counsel provided deficient performance by failing to inform him of the allegedly defective indictment and appears to contend that his guilty plea was not entered knowingly and voluntarily because of his lack of knowledge about the defective indictment. Because, as just explained, the indictment did not fail to allege a crime, these contentions can be resolved adversely to Smith on the existing record, and the trial court therefore would not err in denying the motion on these issues.

All objections as to the composition of the grand jury were waived by the entry of this guilty plea. Defendant's motion to challenge the array of the grand jury was not timely filed. "In order for such a motion to be entertained by the trial court, it must be made prior to the return of the indictment or the defendant must show that he had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned; otherwise the objection is deemed to be waived. [Cits.] No such showing was

made in this case, and it is clear that the motion . . . was filed subsequent to the return of the indictment. . . ." Sanders v. State, 235 Ga. 425 (219 SE2d 768), cert. den., Sanders v. Georgia, 425 U.S. 976 (1976). 1 See also Garrett v. State, 133 Ga. App. 564 (211 SE2d 584) (1974), cert. den., Garrett v. Georgia, 423 U.S. 846 (1975). Defendant's arguments to the effect that actual and/or constructive knowledge of the asserted illegal composition of his grand jury is difficult to ascertain is not sufficient to excuse his untimeliness in presenting his challenge. See Williams v. State, 210 Ga. 665 (1) (82 SE2d 217) (1954), remanded, Williams v. Georgia, 349 U.S. 375 (75 S. Ct.814, 99 L. Ed.1161), original opinion adhered to, 211 Ga. 763 (88 SE2d 376) (1955); Lumpkin v. State, 152 Ga. 229 (9) (109 SE 664) (1921).

WHEREFORE, the State prays that the Court deny the extraordinary motion to set aside the judgment.

This 30 day of April, 2014.



Keith McIntyre
Assistant District Attorney
Ogeechee Judicial Circuit of Ga.

1 Courtland Street
Statesboro, GA 30458
912-764-9924

IN THE SUPERIOR COURT OF SCREVEN COUNTY

STATE OF GEORGIA

THE STATE OF GEORGIA

VS.

JAMES E. SMITH,

DEFENDANT.

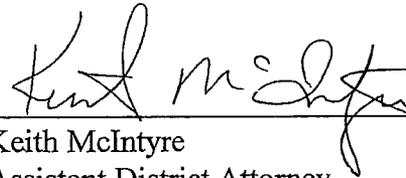
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CASE NUMBER 1S92CR0140M

CERTIFICATE OF SERVICE

I, KEITH MCINTYRE, ASSISTANT DISTRICT ATTORNEY, hereby certify that I have this date served a copy of the foregoing State's Brief Opposing Motion to Set Aside via first class U.S. Postal Service in a correctly addressed envelope with appropriate postage thereon to James Smith, Wheeler C.I., P.O. Box 466, Alamo, GA 30411

Dated this 30 day of April, 2014.



Keith McIntyre
Assistant District Attorney
Ogeechee Judicial Circuit of Georgia
State Bar Number 494050

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912-764-9924