State of South Carolina
The Circuit Court of the Fourteenth Judicial Circuit

Carmen Tevis Mullen
Judge

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December 17, 2014

Beulah G. Roberts
Clarendon County Clerk of Court
Post Office Box 136
Manning, SC 29102-0136

Re: State of South Carolina v. George Stinney, Jr.

Mrs. Roberts,

Please see attached order in regards to the above referenced case. To expedite the filing of this order, Judge Mullen would ask that you file this copy and the original will be placed in the mail today. If you have any further questions please do not hesitate to contact me. Thank you for your attention to this matter.

Jamie Thompson
Administrative Assistant
To the Honorable Carmen T. Mullen
Fourteenth Judicial Circuit

BEULAH G. ROBERTS
CLERK OF COURT
CLARENDON COUNTY, SC
2014 DEC 17 AM 10:57

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DATE 12/17/14
Beulah G. Roberts
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CLARENDON COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON	)	IN THE COURT OF GENERAL SESSIONS THIRD JUDICIAL CIRCUIT
State of South Carolina vs. George Stinney, Jr., Defendant.	)	**ORDER**

This Order follows a January 21-22, 2014 hearing held in Sumter, South Carolina on a Motion for New Trial and a Petition for Writ of *Coram Nobis* brought by late Defendant George Stinney, Jr.'s surviving siblings, Bishop Charles Stinney, Catherine Stinney Robinson and Amie Ruffner. At the conclusion of the two-day hearing, Defense counsel withdrew its Rule 29(b) Motion and asked to proceed only on the Writ of *Coram Nobis*.

The Defense argues that the conviction was based on numerous and serious errors and omissions denying Stinney fundamental due process and that there is no other remedy available to right the wrong committed by the State in 1944. The State argues that the Defense lacks standing to make this petition; that the Post Conviction Relief Act effectively eliminated the use of other writs in South Carolina; the Doctrine of Laches applies; and that the appropriate jurisdictional venue to hear this matter is not the Circuit Court, but instead the South Carolina Supreme Court.

This Court finds fundamental, Constitutional violations of due process exist in the 1944 prosecution of George Stinney, Jr. and hereby vacates the judgment.

STATEMENT OF THE FACTS

On the afternoon of March 23, 1944, Betty June Binnicker, age 11, and Mary Emma Thames, age 7, failed to return home in the rural town of Alcolu, South Carolina. The next morning, their bodies were discovered lying in a ditch. Both girls' skulls had been crushed and one of the girls' bicycle was lying on top of their bodies, its front wheel detached. George Stinney, Jr. was taken into custody a few hours later, and confessed to murdering the girls within hours of his apprehension.

The Defendant was tried for the murder of Betty June Binnicker on April 24, 1944, just one month after being taken into custody. An all-white male jury was selected and the trial concluded that same day during a special term of court with Judge P.H. Stoll presiding. Appearing on behalf of the State was Solicitor Frank McLeod, who presented evidence from law enforcement that the Defendant confessed to the crime. While law enforcement testified that a confession occurred, no written confession exists in the record today.

Solicitor McLeod's trial notes identify the murder weapon as a spike. While the coroner's inquest records do not describe the murder weapon, the indictments identified the weapon as an iron rod. Investigative notes taken by Deputy Sheriff H.S. Newman refer to the weapon as an approximately fifteen-inch long piece of iron. Dr. C.R.F. Baker testified on behalf of the State as to a written external medical report of the victims signed by Dr. A.C. Bozard, but not by Dr. Baker himself. Nothing remains from documentary evidence indicating whether a murder weapon, bloody clothes or other demonstrative evidence were admitted at trial.

Charles H. Plowden, Esq. was appointed to represent the Defendant. The capital murder trial, lasted one day. As such, I am best left to conclude that few or no witnesses were called by the Defense and little to no cross examination conducted. After ten minutes of deliberation by the jury of twelve, the Defendant was found guilty of the murder of Betty June Binnicker and was that same day sentenced to death by electrocution. No appeals were filed and no stays of execution were requested by counsel. On June 16, 1944, George Stinney, Jr. was executed. He was fourteen years old.

Less than three months passed between the death of the girls and the Defendant's execution. Since that date, seventy years have passed. Today, no formal case file exists nor trial transcript remains as testimonial of the criminal adjudication that took place in 1944. The entire collection of documents maintained by the Clarendon County Clerk of Court and the South Carolina State Archives relating to the Defendant's arrest, indictment, and trial are composed of the following:

(a) Handwritten notes of Deputy Sheriff H.S. Newman

(b) Handwritten Order issued following the conclusion of the coroner's inquest

(c) The arrest warrant for Defendant George Stinney, Jr.

(d) Indictments for the murders of Betty June Binnicker and Mary Emma Thames

(e) Typewritten medical report signed by Dr. A.C. Bozard

(f) Sworn affidavit of Beulah Roberts, Clarendon County Clerk of Court

(g) Aerial photographs obtained from Clarendon County Surveyor's Office

(h) Handwritten notes of Solicitor Frank McLeod

Counsel for both parties have consented to the admission of the aforementioned documents as evidence, as well as a stipulation of facts entered into by both parties, dated January 22, 2014. Despite the admission of these documents into evidence, the compilation does not offer a substantive account of the investigation and adjudication that occurred in 1944. Because no trial transcript survives, the presentation of these documents to the original trial court and cross-examination delving into their completeness or validity cannot be established. Whether or not physical evidence from the trial was retained cannot be said; however, its inexistence today is due likely to the passage of time. Possibly, because no appeal was filed, the trial transcript may never have been completed or filed with the court.

Of note, Defense counsel's motion and first supplemental memorandum and supplemental motion dated and filed October 25, 2013, and November 7, 2013, include as attachments various newspaper articles spanning from the incident's occurrence in 1944 to recitations published in 1989. Such articles no doubt have been referenced by counsel as a means of attempting to establish a background and factual supplementation given the lack of hard evidence in this case. The weight to be given the newspaper articles offered to the Court as attachments cannot be in the form of the facts they may portray. *Trustees of Erskine Coll. v. Cent. Mut. Ins. Co.*, 270 S.C. 118, 123-24, 241 S.E.2d 160, 162 (1978) (citing Circuit Court Rule 44(d), 6 Moore's Federal Practice, Section 56.22(1), N. 24 (1976)); *see generally State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), rev'd on other grounds by *State v. Blurton*, 352 S.C. 203, 352 S.E.2d 802 (2002). They were simply reviewed by the Court in its attempt to reconstruct a decades old prosecution.

DEFENDANT'S PETITION FOR WRIT OF *CORAM NOBIS*

The Writ of *Coram Nobis* is a holdover of old English law which has been infrequently used in this country. The writ "was available at common law to correct errors of fact" occurring in proceedings before the King's Bench. *United States v. Morgan*, 346 U.S. 502, 507 (1954) (citation omitted). At its inception, the writ was utilized in both civil and criminal cases and there was no time limitation for presenting facts that affected the "validity and regularity" of a previous judgment. *Id.* (citation omitted). As recognized by the United States Supreme Court in *United States v. Morgan*, the writ "has had a continuous although limited use also in our states . . . with and without statutory authority but always with reference to its common law scope . . . ." *Id.* The South Carolina Supreme Court has also recognized this historic function of *coram nobis*:

> The principal function of the writ of *coram nobis* is to afford the Court an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered and which could not have been presented by a motion for a new trial, appeal or other existing statutory proceeding. It lies for an error of fact not apparent on the record, not attributable to the appellant's negligence, and which if known by the Court would have prevented rendition of the judgment. It does not lie for newly discovered evidence or newly arising facts or facts adjudicated at the trial. It is not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial or where at the trial the accused or his attorneys knew of the existence of such facts but failed to present them. . . . A person seeking relief by a writ of *coram nobis* has the burden of sustaining the allegations of his petition by a preponderance of evidence.

State v. Liles, 246 S.C. 59, 73-74, 142 S.E.2d 433, 440 (1965) (citing *Shelton v. State*, 239 S.C. 535, 123 S.E.2d 867 (1962)).

Additionally, *coram nobis* was and is a limited remedy. *Coram nobis* relief is appropriate only if no other remedy is available to the applicant. *Mendoza v. United States*, 690

F.3d 157 (3d Cir. 2012). Thus, the writ of *coram nobis* cannot be asserted as an alternative for a motion for new trial, a motion to vacate a judgment, an appeal, a writ of habeas corpus, or another available action. *See id.* In other words, if an issue in the case, concerning which relief is sought by the defendant, could have been raised by a remedy other than *coram nobis*, the issue cannot be reviewed in a *coram nobis* proceeding. 18 Am. Jur Trials 1 § 4.

Ultimately, *coram nobis* is predicated on doing justice.

> A writ of *coram nobis* must be allowed, where such a remedy is available, when a conviction is wrongful because it is based on an error of fact or ***was obtained by unfair or unlawful methods and no other corrective judicial remedy is available.*** The writ of error *coram nobis*, which is available on a proper showing for the purpose of reviewing a judgment after the time for an appeal has expired, meets the requirement of due process of law under the Fourteenth Amendment of the United States Constitution. Such a writ must be allowed where a conviction is wrongful because based on an error of fact or obtained by unfair or unlawful methods and no other corrective judicial remedy is available.

16C C.J.S. Constitutional Law § 1693 (emphasis added).

As a result of the United States Supreme Court's decision in *Mooney v. Holohan*, the use of *coram nobis* today assures that the guarantees of due process of law under the Constitution will not be denied due to technicalities of other remedies. 294 U.S. 103 (1935) (finding that state courts must furnish postconviction remedies for defendants who have been convicted without due process of law). *See also* 18 Am. Jur. Trials 1 § 1.

Standard of Review

A petition for the writ should be considered by the court that rendered the judgment because the writ aims to bring to the trial court's attention an alleged factual error and ask the trial judge to determine the validity of that petition. *United States v. Denedo*, 556 U.S. 904, 912-13 (2009). The remedy for a successful petition under the writ of *coram nobis* is not a

retrial of the factual issues relating to the defendant's guilt or innocence. Should the petition be granted, the judgment should be vacated based upon a showing of fundamental error in the initial prosecution.

The United States Fourth Circuit Court of Appeals has set forth the standards for relief under the writ of *coram nobis* as requiring a showing that: 1) no other legitimate remedy is available; 2) there are valid reasons for not attacking the conviction earlier; 3) adverse consequences exist from the conviction that are sufficient to satisfy the Article III case or controversy requirement; and 4) the error alleged is of the most fundamental character. *United States v. Mandel*, 862 F.2d 1067, 1077 (4th Cir. 1988). Stinney meets all four requirements for review.

Standing to Proceed Pursuant to the Writ of Coram Nobis

To address the issue of standing, *coram nobis* is an extraordinary remedy, designed to protect fundamental due process rights. The United States Supreme Court has long recognized that a third-party litigant has standing to assert the constitutional rights of another where the litigant "can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Edmond v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 629 (1991); *See also Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). A writ of *coram nobis* by its very nature is not encumbered by procedural and legal hurdles like other writs and motions for post conviction relief. The standards are different.

Stinney's execution rendered him unable to bring the challenge himself and assert his own constitutional rights before the Court today. Therefore, the only available means through which to challenge his prosecution lies in third-party standing.

Laches

Moving before this Court, nearly seventy years after injury, begs the consideration that laches may bar such extreme posthumous relief. "Laches is 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002)). The standard for determining whether a claim is barred by laches should be decided "in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Id.*

The writ proved successful forty-five years after conviction in *Hirabayashi v. United States*. 828 F.2d 591 (9th Cir. 1987). In *Hirabayashi*, an American citizen of Japanese ancestry was convicted in 1942 of violating the military's imposed curfew for all persons of Japanese descent. Forty-five years later, the Ninth Circuit reversed that conviction and remanded with instructions to grant Hirabayashi's petition to vacate and granted relief pursuant to a writ of *coram nobis*. *Hirabayashi v. United States*, *supra*, at 593, 608. The 1982 discovery of racial motivation behind the military curfew violation that led to Hirabayashi's conviction predicated that writ's success. *Id.* Had the Supreme Court known the true prejudicial basis for the curfew, "the ultimate decision in the case would probably have been different." *Id.*

Time-barring an action based upon a lengthy delay in petitioning for relief under a writ of *coram nobis* must be evaluated case-by-case. The circumstances in the instant case are unique. The prosecution that occurred is wholly indicative of another time in history. Since the time of trial, the Jim Crow era evolved into the Civil Rights era. Both have come and gone, resulting in great social, legal and administrative progress in this region. While this Court would have preferred this motion been brought twenty-five years earlier, when there were more living witnesses who could recount the investigation and adjudication that took place, it is only now that legal counsel has offered pro bono services in an attempt to remedy a potential injustice. As such, I feel compelled to review whether Defendant's conviction was properly sought and adjudicated.

HEARING TESTIMONY

At the January 2014 hearing on the petition, the Defendant's living relatives each offer testimony of their recollection of the events leading up to the Defendant's apprehension and offered alibi testimony through the same. Each state they were with the Defendant on the date of the alleged incident and that the Defendant could not have strayed from their home or otherwise was unaccompanied long enough that afternoon to commit such a crime. Collectively, the testimony recounts that the Stinney's were forced to immediately leave town to Pinewood and then Sumter following the Defendant's apprehension, fearful that locals would seek violent revenge against the Stinney family.

a. Live testimony by Catherine Stinney Robinson

Ms. Robinson is 79 years old and has been a resident of New Jersey since graduating Morris College. When questioned in regards to her memory of what occurred on March 24,

1944, Ms. Robinson, who was nine or ten years old at the time, testified that she was in the yard that day and saw the victims' coming and going riding their bikes, but did not know their identity. She offered conflicting testimony as to whether she had personal knowledge of the victims stopping to talk to her brother and sister, the Defendant and Amie Ruffner. When the Defendant was taken into custody, Ms. Robinson was at the beauty shop with her brother, Charles. She further testified that neither law enforcement nor Stinney's attorney, Charles Plowden, interviewed her about the day's events. Ms. Robinson was not called as a witness in the 1944 trial.

b. Sworn affidavit and live testimony by Amie Ruffner

The youngest of the Stinney siblings at 77, eight years old in 1944, testified that she was with the Defendant grazing the family cow when the victims crossed their path and that she, the Defendant and the family cow all returned home together for the remainder of the afternoon. Ms. Ruffner testified that when uniformed men arrived at her family home, she hid in the chicken coop, recalling their arrival and their departure with the Defendant in handcuffs. When asked if she spoke with her third brother, Johnny Green, about his interrogation in relation to the same incident, she testified that attempts to speak with him about the March 1944 events proved futile. Johnny Green has since passed away. She also further testified that neither law enforcement nor Stinney's attorney, Charles Plowden, interviewed her about the day's events. Ms. Ruffner was not called as a witness in the 1944 trial.

c. Sworn affidavit and video deposition testimony by Bishop Charles Stinney

Due to frailty and illness, it was relayed Bishop Stinney could not travel to Sumter for the hearing. Video of his deposition testimony was played at the hearing. Bishop Stinney testified

that he recalled law enforcement searching the family home and recalled that his little sister, Catherine, was not at home at that time. He could not recall if law enforcement took anything from the home.

d. Sworn Affidavit of Search Party Member Reverend Francis Batson

The matter currently before the Court has received local and national news coverage prior to the hearing date. After witnessing such coverage, Reverend Francis Batson came forward to Defense counsel offering his resurfaced recollection of his involvement in the Alcolu search party assembled to find the missing victims. He states that he "did not look" for a murder weapon and that he "do[es] not remember seeing very much blood," and that he "would guess" that about three to four hundred yards separated the field where the victims were found from the Green Hill Baptist Church. Batson Aff. at 2. Reverend Batson was fifteen at the time of the trial. He further testifies that Scott Lowder, another search party member with whom the Reverend discovered the victims, did testify at trial. The Reverend includes in his affidavit that George W. Burke was another search party member. Other documents offered as part of the record of the matter now before the court indicate that Mr. Burke was also involved in the coroner's inquest and listed as a witness on the Grand Jury Indictment.

e. Sworn affidavit from Wilford "Johnny" Hunter

Much like Reverend Batson, Wilford "Johnny" Hunter made himself available to Defense counsel, following recognition of the pending matter through media coverage. The remaining affidavit includes Mr. Hunter's observations and impressions of his interaction with the Defendant during their time in jail between Stinney's conviction at trial and his execution. Mr. Hunter recalls that the Defendant appeared small and frail, that he played games with the

Defendant while in jail, and that when he asked the Defendant why he was there, Stinney told him that he was accused of killing two white girls: "George told [Mr. Hunter] that they were going to electrocute him . . . and that he didn't kill the girls, and that they made him say those things." Hunter Aff. at 2.

f. Live Testimony by Paul Fann

The State's witness, Mr. Paul Fann, was born two miles outside of Alcolu in 1935 and was about nine years old in March 1944. Mr. Fann worked for his father's grocery store delivering ice in Alcolu and recalls being part of the search party assembled to find the victims. Mr. Fann testified as to his presence outside the Stinney home at the time of the Defendant's apprehension. Mr. Fann witnessed a white man exit the Stinney home with a "big ball" of things in his arms and then put those items in a car outside the home; he then witnessed the Defendant being taken from the home, put into a car, and driven away from the home.

g. Live Testimony by Robert Ridgeway

Robert Ridgeway lived in Alcolu in 1944 at the age of thirteen. He went on to garner over sixty years experience as a railroad engineer. The State called Mr. Ridgeway to identify what is commonly referred to in the railroad industry as a drift pin, the approximately twelve-inch long, two-inch wide piece of metal or iron that hitches railroad cars together. According to Mr. Ridgeway, drift pins were commonplace on log-carrying railroad cars in the 1940s. Log carts hauled logs from swamp to sawmill, such as the former Alderman lumber yard in Alcolu. Drift pins would have been found along lines running to and from lumber mills, and would more likely be found in lumber storage yards. Such storage yards, according to Mr. Ridgeway, could only be accessed by individuals with mill access. Conversely, another type of metal or iron, a

railroad spike, could have been found near spurs, the location where trains can be switched from track to track.

h. Report and Deposition by Forensic Pathologist Dr. Peter J. Stephens

Defense counsel offered Dr. Stephens' deposition testimony, which draws conclusions from Dr. A.C. Bozard's 1944 report through the lens of a forensic pathologist and opines that the victims appeared to lack wounds indicative of both putting up a defense to an assault and of being dragged across brush or terrain. Stephens Depo. at 26-29. His testimony states that due to lack of detail in the report provided, it is difficult to tell the number of head wounds that the victims sustained. Stephens Depo. at 14, 31-32. His testimony also states that without any pieces of evidence used during the prosecution, he remains unable to ascertain to a reasonable degree of certainty what the murder weapon actually was. Stephens Depo. at 14, 32-34, 37.

Also, deposition testimony includes the opinion that Stinney and the older victim were similarly matched in size, indicating an attack from the rear, perhaps with an element of surprise, in order for such head wounds to be sustained without evidence of a struggle. Stephens Depo. at 37, 40 (objections omitted). Additionally, Dr. Stephens explained that if the holes in the victims' skulls were round as if they had been punched into the skull, that type of wound is more likely caused by a hammer than by a rectangular spike. Stephens Depo. at 14-17.

i. Live Testimony by Forensic Psychiatrist Dr. Amanda Salas

The Defense's final witness, Dr. Amanda Salas, offered expert testimony as to the reliability of Stinney's confession. Dr. Salas is a board-certified child, adolescent and forensic psychiatrist and is familiar with the Stinney case from her 2010 thesis on the same topic.

According to Dr. Salas' testimony, false confessions can be examined by looking at factors of reliability inherent in a confession. Specifically, Dr. Salas looked to analyze whether 1) the confession fit the evidence; 2) the confession contains internal consistencies; 3) the character of the interrogator-suspect interaction; and 4) the confessor's psychological make-up. Only the first two factors are described as objective factors. Dr. Salas testified that without an adult present during the alleged confession, a fourteen year old is highly suggestible during custodial interrogation, and may be more likely to give a false confession due to a desire to comply with law enforcement. Factors examined indicating suggestibility were the Defendant's age, the power differential between the Defendant and the interrogator, and the custodial condition in which a confession was obtained.

Dr. Salas relied on racial interactions in her analysis of the Defendant's suggestibility at the time of the confession. Because the Defendant was apprehended by white men and placed into a custodial environment in a segregated, 1944 South Carolina, the fourteen-year-old Defendant would not have been accustomed to being in the presence of either, adding pressure to comply by giving a confession and otherwise indicating a large power differential between the accused and authority figures. Based on all of the above, Dr. Salas concluded to a reasonable degree of psychiatric certainty that any confession given was a coerced, compliant false confession and is unreliable.

In her analysis of motivation for the crime, Dr. Salas stated that based upon interviews with the Defendant's sisters, she determined that Stinney was likely of average education and intelligence for someone of his age and class in rural, 1944 South Carolina. Nothing she reviewed indicated a low IQ. She was informed of the Defendant's interest in art and airplanes.

According to Dr. Salas, nothing she reviewed about the Defendant's disposition pointed towards the Defendant being sexually motivated to commit the crimes that occurred and noted that a fourteen year old in 1944 did not mature at the same speed as today's fourteen year olds.

LEGAL ANALYSIS

Fundamental Deprivations of Due Process

In 1922, our Supreme Court affirmed the granting of a new trial "under peculiar circumstances," not entirely unlike the circumstances currently before the Court. In *State v. Thompson*, 122 S.C. 407, 115 S.E. 326 (1922):

> [T]he defendant contended that he had been rushed to trial, without any opportunity to see his friends or to engage counsel, or to in any way prepare for his defense, in consequence of the courtroom being crowded by a multitude hostile to him, whose exhibition of hostility was calculated to, and did, overawe the jury, and that because of the presence of this crowd, and of verbal threats, which had come to the ears of counsel appointed by the court to defend the defendant, such counsel did not demand the time to which defendant was entitled for preparation of his defense, for fear that the defendant would be dealt with by violence, and defendant was thus forced to trial with his counsel hopelessly unprepared and not having any proper knowledge of his defense. The motion was based on affidavits tending to show a trial under such circumstances, and was heard by the judge upon such affidavits and others contradictory thereto. After considering them, along with his own recollection of the trial before him, the trial judge held:
>
> "That the proceedings, while apparently true to all formal requirements, were void of vitalizing justice."

State v. Thompson, *supra*, 115 S.E. at 333 (internal citations omitted).

The *Thompson* Court affirmed the order granting that defendant a new trial "not on the ground that the judgment against him was wrong on the merits, but that the courts have failed in a capital case to discharge their proper functions with due regard to the constitutional safeguards

in the administration of justice." *Id.* at 335 (citing *State v. McNinch*, 12 S.C. 89 (1879); *State v. Washington*, 13 S.C. 453 (1880); *State v. Green*, 48 S.C. 147, 26 S.E. 234 (1897)).

In March of 1931, the nine young black males who came to be known as the Scottsboro Boys were accused of raping two young white women on a train traveling to Memphis, Tennessee. Michael J. Klarman, *Scottsboro,* 93 MARQ. L. REV. 379 (Winter 2009). They were tried just twelve days later in three separate trials of three or four co-defendants. *Id.* Each trial lasted no more than a few hours and each defendant was sentenced to death, with the exception of the sole 13-year-old. *Id.* Counsel filed an appeal to stay the executions, despite zealous representation of their client being labeled as meager in many accounts. *Id.* After three appeals to the United States Supreme Court resulted in three remands, the Scottsboro Boys were exonerated by Alabama's governor in November 2013. *Scottsboro Trials*, ENCYCLOPEDIA OF ALABAMA, http://www.encyclopediaofalabama.org/face/Article.jsp?id=h-1456 (last visited May 1, 2014).

In each opinion, the United States Supreme Court found a violation of the defendants' due process rights a basis for vacating the conviction and remanding for retrial. The first remand resulted from the Court's determination that counsel appointed on the eve of trial was ineffective in defending the young, illiterate defendants in such a high profile matter. *Powell v. Alabama*, 287 U.S. 45, 66 (1932). Two other opinions resulted in vacating convictions and remanded for retrial due to the exclusion of blacks from Alabama juries. *Norris v. Alabama*, 294 U.S. 587 (1935); *Patterson v. Alabama*, 294 U.S. 600 (1935).

In any death penalty case, it is now recognized and established that our Constitution places special constraints on the procedures used to convict and sentence an accused in a capital

case. "Greater protection is afforded in capital cases due to the unique character of the death penalty." *State v. Stewart*, 288 S.C. 232, 235, 341 S.E.2d 789, 791 (1986); *Murray v. Giarrantano*, 492 U.S. 1, 8-9 (1989). In a death penalty trial, a court must be "particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Because of the nature of the death penalty, a court must go "to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (stating the oft-quoted "death is different").

If *coram nobis* offers a method of bringing relief to the situation at hand, it is best suited as a basis for vacating the Defendant's conviction based upon constitutional violations proven by a preponderance of the evidence to have existed in the Defendant's adjudication. Regardless of whether the law surrounding procedural due process was fully developed in the spring of 1944, there did exist a basis in the law protecting a defendant from certain prosecutorial actions. A sentence can "only be secured after a trial surrounded by every statutory and constitutional safeguard." *State v. Maes*, 127 S.C. 397, 397, 120 S.E. 576, 579 (1923).

Today in our State, each capital case resulting in a sentence of capital punishment must be appealed to the Supreme Court. S.C. Code Ann. § 16-3-21(A) (effective 1996). It has long been the court's "duty *in favorem vitae* to closely scrutinize the entire record for the purpose of determining whether all of the rights of the accused were protected on his trial." *State v. Scott*, 209 S.C. 61, 61, 38 S.E.2d 902, 903 (1946); *State v. Simmons*, 208 S.C. 538, 38 S.E.2d 705

(1946); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). The defendant must be given "the benefit of any errors in the conduct of the trial which affect the merits of the cause." *State v. Simmons*, 208 S.C. 538, 544, 38 S.E.2d 705, 707 (1946). The following analysis of standard constitutional protections touches upon facts known regarding the disposition of this case, and results in an overwhelming basis to grant a writ of *coram nobis.*

Miranda *Rights, Custodial Interrogation and Voluntariness of Confession*

The Fifth and Fourteenth Amendments to the Constitution of the United States "stands as a bar against the conviction of any individual in an American court by means of a coerced confession." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944). At the time of the Defendant's detainment, interrogation and subsequent arrest, *Miranda v. Arizona* had not been decided. That decision serves as the benchmark for procedural safeguards that must attach to any custodial interrogation in order for an accused's inculpatory statements to be used during his prosecution. 384 U.S. 436, 444 (1966).

Even though *Miranda*'s mandated use of these procedural safeguards against an accused's self-incrimination had not yet been decided, "the use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment." *Payne v. Arkansas*, 356 U.S. 560 (1958). If an involuntary confession is introduced at trial, the conviction must be reversed, even where there is other evidence in the record to justify a guilty verdict. *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (issued June 5, 1944, less than three months after a verdict was reached in the instant case). This is so because where a coerced confession becomes part of the evidence before the jury and where a guilty verdict is

returned, the credit and weight given that confession by the jury is unknown. *Payne v. Arkansas*, *supra*, 356 U.S. at 585.

As a result, "a defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury." *State v. Salisbury*, 330 S.C. 250, 271, 498 S.E.2d 655, 666 (Ct. App. 1998); *Jackson v. Denno*, 378 U.S. 368 (1964). The trial judge must determine if under the totality of the circumstances and by a preponderance of the evidence whether the defendant's statement was knowingly, intelligibly, and voluntarily made. *State v. Miller*, 375 S.C. 370, 382, 652 S.E.2d 444, 450 (Ct. App. 2007); *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 694-95 (1996). "The test of voluntariness is 'whether a defendant's will was overborne' by the circumstances surrounding the given [statement]." *State v. Miller*, *supra*, at 384, 652 S.E.2d at 451 (quoting *Dickerson v. United States*, 530 U.S. 428, 434 (2000)). The judge must consider among the totality of the circumstances "both the characteristics of the accused and the details of the interrogation." *Id.*

Also for consideration are "the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition and mental health," as well as the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (internal citations omitted). South Carolina's appellate courts have further delineated those considerations to include the accused's background, experience and conduct, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence and promises of leniency. *State v. Miller*, *supra* at 386, 652 S.E.2d at 452.

Based on the facts presented to this Court, methods employed by law enforcement in their questioning of the Defendant may have been unduly suggestive, unrestrained, and noncompliant with the standards of criminal procedure as required by the Fifth and Fourteenth Amendments. Testimony by Dr. Amanda Salas, MD, suggests that it is highly likely that the Defendant was coerced into confessing to the crimes due to the power differential between his position as a fourteen-year-old black male apprehended and questioned by white, uniformed law enforcement in a small, segregated mill town in South Carolina. Harkening back to Dr. Salas' testimony, a fourteen year old is highly suggestible during custodial interrogation, especially without an adult by his side, and may be more likely to give a false confession due to a desire to comply with law enforcement. We know that law enforcement separated the Defendant from his parents and otherwise took advantage of his age and stature to garner a result they predetermined to be true and just. This confession simply cannot be said to be known and voluntary, given the facts and circumstances of this case highlighting the Defendant's age and suggestibility.

Right to Effective Assistance of Counsel

The Fifth, Sixth and Fourteenth Amendments have long been interpreted by our courts to guarantee a right to effective assistance of counsel at all critical stages in a criminal prosecution. *Powell v. Alabama*, 287 U.S. 45, 66 (1932); *Glasser v. United States*, 315 U.S. 60, 76 (1942); *State v. Williams*, 263 S.C. 290, 210 S.E.2d 298 (1974); S.C. Code of Crim. P. Ch. 62, § 996 (1942). "Certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a

criminal prosecution." *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936)).

The *Gideon* Court went on to state its familiar landmark holding that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344. "It is the duty of the court, whether requested or not, to assign counsel for a capital defendant as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *State v. Grant*, 199 S.C. 412, 19 S.E.2d 638, 640 (1941) (overruled on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

Defense counsel has an obligation to conduct a reasonable investigation on behalf of his client, including, at minimum, a duty to interview potential witnesses and to make an independent investigation of the facts. *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). In order to aid in providing the best defense, counsel "should ever be mindful of their grave responsibility" during representation. *Cummings v. Tweed*, 195 S.C. 173, 187, 10 S.E.2d 322, 328 (1940). Assistance of counsel is measured as effective or ineffective first by examining the reasonableness of counsel's representation including whether counsel's assistance conforms to prevailing professional norms, and second by examining whether the outcome of counsel's representation would have been different but for ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Watson v. State*, 287 S.C. 356, 357-58, 338 S.E.2d 636, 638 (1985).

We know that the Defendant was appointed at least one attorney, Charles H. Plowden. However, it appears he did little to nothing in defending Stinney. Stinney's appointed counsel made no independent investigation, did not request a change of venue or additional time to prepare the case, he asked little or no questions on cross-examination of the State's witnesses and presented few or no witnesses on behalf of his client based on the length of trial. He failed to file an appeal or a stay of execution. That is the essence of being ineffective and for these reasons the conviction cannot stand.

a. Pre-Trial Motions

Where public sentiment becomes aroused in a particular case, a motion for change of venue proves a prudent, reasonable means of defending one's client. Failing to grant a motion for change of venue where appropriate is reversible error. *See State v. Jackson*, 110 S.C. 273, 273, 96 S.E. 416, 416 (1918). In *Jackson*, the court reversed the trial court's denial of change of venue where twenty affidavits were submitted from "prominent and respectable citizens of the county to the effect that it was impossible for him to get a fair and impartial trial . . . on account of prejudice against him, the inflamed state of the public mind, and the popularity and influence of the prosecutor." *Id.* In another case, failure to grant change of venue constituted reversible error where the original motion was grounded by that defendant's being "hunted by bands of armed men, intense feeling being manifested against him, and that members of these bands threatened him with death on sight; that the deceased was very popular, and a man of standing and important in the county." *State v. Davis*, 138 S.C. 532, 532, 137 S.E. 139, 139 (1927).

In short, a motion for change of venue often stems from pretrial publicity and is appropriate upon a showing of actual juror prejudice. *See State v. Stanko*, 402 S.C. 252, 741

S.E.2d 708 (2013). Assistance of counsel may be ineffective if a motion for change of venue was appropriate yet not raised. It is a prevailing professional norm to move for change of venue where pretrial publicity garners a passionate response in local citizens. *See e.g., State v. Jackson, supra*; *State v. Davis, supra.*

Testimony shows actions were taken to recruit the small mill town of Alcolu for organization into search parties, suggesting widespread local knowledge. Mr. Paul Fann testified as to recalling a group of adults and children alike gathering outside of the Stinney home and watching the boy's apprehension. Mr. Fann also testified as to standing with others, watching the victims' removal from the ditch. Both recollections suggest an inflamed public sentiment regarding the nature of the allegation. The mere existence of vast newspaper coverage in 1944 of the events indicates pretrial publicity making a motion for change of venue an appropriate element of defending one's client. Additionally, that the Stinney family fled to nearby Pinewood and Sumter for fear of retribution further highlights the community's sentiment regarding the girls' deaths.

Similar to moving for change of venue, moving for a continuance where only a short time passes between appointment of counsel and being called for trial is a prevailing professional norm. A defendant must be afforded enough time for counsel to prepare his defense for trial, particularly in a capital case. "A defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." *Powell v. Alabama, supra*, 287 U.S. at 58.

Defense counsel must have time to identify important issues which may greatly affect the outcome of his client's case so that they may present a defense at a meaningful time and in a meaningful manner. *Lankford v. Idaho*, 500 U.S. 110, 127 (1991); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Cameron & Barkley Co. v. S.C. Procurement Review Panel*, 317 S.C. 437, 454 S.E.2d 892 (1995); *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 846 (1995); *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002). "[A] defendant in a criminal case is not precluded from asking for a continuance of his case, when public feeling is so aroused against him as to deny him a fair and impartial trial, by his failure to move first for a change of venue." *State v. Rasor*, 168 S.C. 221, 221, 167 S.E. 396, 399 (1933).

The events giving rise to this case expired in less than three months: law enforcement apprehended the Defendant on March 24, 1944, and his trial occurred just one month later on April 24, 1944, during a special term of court ordered for purposes of the trial at issue. Given the nature of the case, Defense counsel should move for a continuance at least until the next regularly scheduled General Sessions term of court.

b. Lack of Investigation and Presentation of Defense Case

A defendant has the right to cross-examine the witnesses against him. *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002). "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *State v. Graham*, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E. 2d 401, 402

(1986)). The Sixth Amendment having been incorporated to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

The fact that the entire jury selection, trial and sentencing occurred in less than one day demonstrates Defense counsel did little to nothing to defend his client. He did not conduct an independent investigation. Defense counsel did not interview, nor call as a witness in the trial, any of the family members as potential alibi witnesses. He presented little to no evidence and cross examined few to no witnesses. A fourteen-year-old boy cannot confront his accusers; he needed his lawyer to help.

c. Appeal and Stay of Execution

Today, as in 1944, an appeal stays an execution. S.C. Code Ann. § 18-1-70 (1942 Code § 1031). Defense counsel's failure to file an appeal constitutes ineffective assistance of counsel. With only fifty-three days passing between sentence and execution, and given the age of the Defendant, an appeal should have been filed in order to preserve the constitutional rights of the Defendant.

Selection of an Impartial Jury of the Defendant's Peers

Improper jury composition is violative of a defendant's constitutional right to an impartial jury of his peers, and is further evidence of ineffective assistance of counsel. First, a jury venire must represent a fair cross-section of the community. *Holland v. Illinois*, 493 U.S. 474 (1990). Additionally, a defendant has a right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (abrogated on other grounds) (holding it

unconstitutional for an African American defendant to "submit to a trial for his life" by a jury selected on a racially discriminatory basis).

In a discriminatory environment, there is a risk that racial bias may "infect the entire proceedings," thus endangering receipt of a fair trial. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005) ("[R]acial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."). It is clear Stinney was tried by a jury of twelve white men in violation of his constitutional right to be tried by an impartial jury of his peers.

Execution of a Minor

The execution of an individual who was a minor at the time of committing a capital crime is prohibited by the Eighth and Fourteenth Amendments. *Roper v. Simmons*, 543 U.S. 551 (2005); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that the Eighth and Fourteenth Amendments prohibit execution of a defendant who was 15 years old at the time of committing the offense leading to his conviction); *State v. Morgan*, 367 S.C. 615, 626 S.E.2d 888 (2006) (vacating a 17-year-old's capital sentence in light of *Roper v. Simmons*). At the time of the events giving rise to this action, a minor was any person less than 16 years of age. *E.g.*, S.C. Probate Code Ch. 4, § 255(3) (1942). Due to the nature of the human life impacted by the *Roper* opinion, the precedent it establishes cannot apply retroactively. Regardless, the Eighth Amendment prohibition against cruel and unusual punishment and the Fourteenth Amendment's protection of fundamental notions of due process were the same in 1944 as today. Sentencing a fourteen year old to the death penalty constitutes cruel and unusual punishment.

CONCLUSION

The circumstances serving as the impetus for the motion now before the Court are indicative of a truly unfortunate episode in our history. As Judge, my responsibility to the court and to this State is to apply the law and see that justice is served. I am mindful that in 1947 litigation began in this very county in the matter of *Briggs v. Elliott* that culminated in the landmark decision *Brown v. Board of Education*, the preeminent case in our nation's history emanating equality for all. 347 U.S. 483, 486 n.1 (1954). Regardless of that progress, from time to time we are called to look back to examine our still-recent history and correct injustice where possible. Our common law provides for extraordinary relief, equitable in nature, where great and fundamental injustice has occurred. "A void judgment gains no validity from the passage of time." 18 Am. Jur. Trials 1 § 27. If found void, *coram nobis* relief serves to ensure that "[a]ll legal disabilities attaching to [the defendant] or his survivors as a result of his wrongful conviction are forever removed." *In the Matter of a Court of Inquiry*, No. D1-DC 08-100-051, 16 (299th Dist. Ct. Tex. Apr. 7, 2009). I can think of no greater injustice than a violation of one's Constitutional rights which has been proven to me in this case by a preponderance of the evidence standard.

A scant trial record serves as a constant reminder that without newly discovered biological evidence, seeking relief from a decades-old conviction is impossible in most cases. The motion now before me cannot become a mechanism by which grieving families should expend resources with hopes of redeeming a loved one that has since long passed. The extraordinary circumstances discussed herein simply do not apply in most cases.

Given the particularized circumstances of Stinney's case, I find by a preponderance of the evidence standard, that a violation of the Defendant's procedural due process rights tainted his prosecution. For that reason, the Court hereby grants relief in the form of a writ of *coram nobis*, "not on the grounds that the judgment against him was wrong on the merits, but that the courts have failed in a capital case to discharge their proper functions with due regard to the constitutional safeguards in the administration of justice." *State v. Thompson, supra,* 122 S.C. 407, 115 S.E. 326, 335 (1922). Based on the foregoing, I hereby vacate the Defendant's conviction.

AND IT IS SO ORDERED.

C Mullen

Carmen Tevis Mullen
Presiding Circuit Court Judge

This 16 day of Dec, 2014.
Sumter, South Carolina