IN THE SUPERIOR COURT OF MONROE COUNTY
STATE OF GEORGIA

GENARLOW WILSON **Petitioner**	:	
V.	:	**CIVIL CASE NO. 2007CV-299**
CARL HUMPHREY, Warden **Respondent**	:	

ORDER

The Clerk of Court, the parties and the attorneys, are directed by the Court not to release any orders in the above entitled case until 12:00 p.m., Monday, June 11, 2007.

SO ORDERED, this the 11 day of June, 2007.

THOMAS H. WILSON
CHIEF JUDGE, SUPERIOR COURT
TOWALIGA JUDICIAL CIRCUIT

FILED & RECORDED
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MONROE COUNTY GA

JUN 11 2007 AM 8:46

LYNN W. HAM
CLERK
BY:

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ORDER GRANTING HABEAS CORPUS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner Genarlow Wilson's properly filed habeas corpus having come before this Court on a regularly scheduled calendar on the 6th day of June, 2007, in which Petitioner was present and represented by attorneys Brenda Joy Bernstein, Rodney S. Zell, and Franklin J. Hogue, and the Respondent was represented by Assistant Attorneys General Paula Smith and Benjamin Pierman, and after reviewing the record, hearing argument from both parties, and reviewing the briefs, of both parties, the transcripts and the tape, the Court finds the following:

Petitioner was incarcerated in February 25, 2005, on a Douglas County conviction and split sentence, ten years to serve and the balance on probation. This sentence was a result of a jury verdict of guilty of aggravated child molestation. The conviction has since been appealed and affirmed. Wilson v. State, 279 Ga. App. 459, 631 S.E.2d 391 (2006), cert. denied. No. S06C1689, 2006 Ga. LEXIS 1036, recons. denied, 281 Ga. 447 (2006).

This case began when a group of teenagers rented a motel room to have a New Year's Eve party. Petitioner was a participant at the party and 17- years-old at the time. The morning after the party, one of the party participants, a 17-year-old L.M., told her mother that she had been raped. Police were notified and searched the hotel room to find a videotape and video camera. The tape showed Petitioner having sexual intercourse with the 17-year-old L.M. and receiving oral sex from T.C., a 15-year-old.

Petitioner was found to be in violation of O.C.G.A. §16-6-4(c), which at the time of conviction, read that a person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy. Petitioner was punished under O.C.G.A. §16-6-4(d), which at the time stated that a person convicted of the offense of aggravated child molestation shall be punished by imprisonment for not less than 10 nor more than 30 years, and is subject to the sentencing and punishment provisions of O.C.G.A. §17-10-6.1. Under O.C.G.A. §17-10-6.1, aggravated child molestation is a "serious violent felony" carrying a minimum mandatory sentence of ten years without the possibility of parole.

Petitioner has challenged the constitutionality of OCGA §16-6-4(c), §16-6-4(d) and §17-10-6.1 because, under these provisions, a 17-year-old who engages in sodomy with a female under the age of 16 is guilty of aggravated child molestation and subject to a mandatory sentence of 10 years without the possibility of parole. But if the same 17-year-old has intercourse with that female, he is guilty of a misdemeanor statutory rape, because under OCGA §16-6-3(b) if the victim is

14 or 15 years of age, and the person so convicted is no more than three years older than the victim, this is a misdemeanor.

Petitioner claimed on appeal that this sentencing disparity violates equal protection. The Georgia Court of Appeals reviewed this claim and dismissed it because, "the General Assembly could reasonably conclude that the psychological well being of minors is more damaged by acts of sodomy than by acts of intercourse, and that such acts warrant a greater punishment for child molestation by sodomy." The General Assembly has since passed a revision to OCGA §16-6-4, namely, §16-6-4(b)(1), which reads that if the victim is at least 14 but less than 16 years of age and the person convicted of child molestation is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor and shall not be subject to the sentencing and punishment provisions of Code §17-10-6.2. This provision is also applied to the sodomy provision in §16-6-4(d)(1).

A habeas claim is procedurally barred if the claim was raised on direct appeal. Schofield v. Palmer, 279 Ga. 848, 851, 621 S.E.2d 726 (2005). A habeas claim is procedurally defaulted if the claim could have been raised earlier but was not. Id. It is also not procedurally defaulted if Petitioner can show cause and prejudice to excuse the procedural default. Id. See also OCGA § 9-14-48(d).

On April 18, 2005, Petitioner was convicted of aggravated child molestation under O.C.G.A. § 16-6-4, which required a mandatory 10 years in prison without the possibility of parole. On April 26, 2006, the Governor signed House Bill 1059, which amended O.C.G.A. § 16-6-4 making a consensual act of oral sex between a

17-year-old and a 15-year-old a misdemeanor. On April 28, 2006, Petitioner's direct appeal was denied, and, on May 18, 2006, his Motion for Reconsideration was denied. In his Motion for Reconsideration, the Petitioner argued for the first time that his constitutional rights were violated based on the change in the law. On June 7, 2006, Petitioner filed his Petition for Certiorari. On July 1, 2006, the amended aggravated child molestation statute became effective. Both parties agree that had Petitioner committed the act underlying his conviction on or after July 1, 2006, he could have only been sentenced under O.C.G.A. § 16-6-4 to a misdemeanor.

In his habeas corpus, Petitioner raises that his right to be free from cruel and unusual punishment under the United States and Georgia Constitutions was violated as a result of this change in the law. Respondent argues that Petitioner is procedurally defaulted from raising this constitutional challenge in a habeas corpus because he raised it in his Motion for Reconsideration to the Georgia Court of Appeals.

This argument is without merit. Georgia appellate law is clear that new claims can not be raised for the first time on appeal. Holland v. State, 240 Ga.App. 169, 171, 523 S.E.2d 33 (1999). "Inherent in a motion for reconsideration is a request to the court to reconsider an issue previously raised and/or ruled on," and issues raised for the first time in a motion for reconsideration are not proper for the preservation of an issue for appeal. ESI v. WestPoint Stevens, 254 Ga.App. 332, 334-35, 562 S.E.2d 198 (2002). Further, the denial of a writ of certiorari is not

binding precedent in another case. Johnston v. Ross, 264 Ga.App. 252, at footnote 25, 590 S.E.2d 386 (2003).

Since the aggravated child molestation statute was not amended until after Petitioner's direct appeal was filed, Petitioner could not have reasonably argued that the amended statute resulted in a constitutional violation of his right to be free from cruel and unusual punishment. This Court finds that his claim is not procedurally defaulted.

Under the cause and prejudice standard, cause exists for not raising Petitioner's claims earlier because of the passage of the law after his conviction, which is an external factor to the defense in that the legal basis for Petitioner's claim was not readily available to Petitioner. Turpin v. Todd, 268 Ga. 820, 825, 493 S.E.2d 900 (1997). Since Petitioner's habeas claim is constitutional, "the underlying claim and the prejudice analysis necessary to satisfy the cause-and-prejudice test are co-extensive." Schofield at 851. If Petitioner can prevail on his constitutional issue, there likewise would be no procedural default.

Petitioner alleges his right to be free from cruel and unusual punishment under the Eight and Fourteenth Amendments to the United States Constitution and Article I, § I, ¶ XVII of the Georgia Constitution was violated when the act violating the statute for which he was convicted was amended to be a misdemeanor with no sex offender registration.

A punishment is cruel and unusual if it, "(1) makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of

proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). "Legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment." Fleming v. Zant, 259 Ga. 687, 690, 386 S.E.2d 339 (1989).

In Fleming, the Georgia Supreme Court considered the issue of whether applying an amended statute specifically made prospective instead of retroactive as cruel and unusual punishment. The Georgia Legislature amended a state statute prohibiting the execution of mentally retarded defendants on or after July 1 in the year the statute was amended. Id at 687-88. Similarly, the crime for which Petitioner was convicted was amended, so as to apply to defendants on or after July 1 of the year the amendment was passed. In Fleming, "the legislative enactment reflects a decision by the people of Georgia that the execution of mentally retarded offenders makes no measurable contribution to acceptable goals of punishment."

Citing Fleming, the Georgia Supreme Court considered whether death by electrocution was cruel and unusual punishment in Dawson v. State, 274 Ga. 327, 554 S.E.2d 137 (2001). The Georgia Legislature amended O.C.G.A. § 17-10-38, making lethal injection the manner of execution effective May 1, 2001, the year the statute was amended. Id at 328. Contemplating that the Georgia Supreme Court would find death by electrocution to be unconstitutional, the Georgia Legislature stated that lethal injection should be applied if the Supreme Court makes such a finding. Id at 329. Quoting Fleming at 330, the Supreme Court held that the amended statute represents, "the clearest and most objective evidence of how

contemporary society views a particular punishment" as such a significant amendment to the law "amount[s] to evidence of the shifting or evolution of the societal consensus."

The standard of reviewing an issue of cruel and unusual punishment does not turn on whether the statute amended applies to a procedural or substantive change in the law as the Respondent argued. The standard set forth in Fleming and Dawson is clear that a significant change in the law by the Legislature reflects this State's view that a particular punishment "makes no measurable contribution to accepted goals of punishment" or "is grossly out of proportion to the severity of the crime."

Applying this standard to Petitioner's case, it is clear that Petitioner was convicted of the felony aggravated child molestation requiring a 10-year prison sentence with no parole and registration as a sex offender. Soon after Petitioner's conviction, this same Legislature that passed the original statute changed the statute, making Petitioner's conduct a misdemeanor with a maximum 12 months in jail and no sex offender registration. This is a significant change to the statute under both Fleming and Dawson. This significant change shows this State's clear views as to how persons convicted of Petitioner's conduct should be punished. Under both federal and state standards, the imposition of a felony conviction and sex offender registration is cruel and unusual punishment under the circumstances of this case.

Likewise, in the case of Luke v. Battle, 275 Ga. 370, 565 S.E.2d 816 (2002), the Supreme Court used a new rule of substantive law created in Brewer v. State,

271 Ga. 605 (1999), and reversed a defendant's conviction for aggravated sodomy. In Luke, the Court held a new rule of substantive criminal law must be applied retroactively to cases on collateral review.

A new rule of substantive law was created when O.C.G.A § 16-6-4 was amended, making the conduct for which Petitioner was convicted a misdemeanor. Substantive law is defined according to Black's Law Dictionary's as "the positive law, which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action."

In Dixon v. State, 278 Ga. 4, 596 S.E.2d 147 (2004), the Supreme Court encouraged the Legislature to examine the Dixon case to

> make a more recognizable distinction between statutory rape, child molestation and the other sexual crimes and to clarify the sort of conduct that will qualify for a ten-year minimum sentence accompanying a conviction for aggravated child molestation. The conflicting nature of the statutory scheme relating to sexual conduct, especially with respect to teenagers, may lead to inconsistent results. Under the statutes as they are now written, it is entirely possible that teenagers could be convicted of aggravated child molestation, and receive the concomitant ten-year minimum sentence, if they willingly engage in sexual activity, but stop short of the actual act of sexual intercourse.

Unfortunately for Petitioner, the Legislature did not act quickly enough to modify the code and this teenage Petitioner was engaged in a sexual act with a willing participant for which he was sentenced to 10 years in prison without the possibility of parole. Petitioner's case is a prime example of what the Dixon case warned against.

In Haygood v. State, 225 Ga.App. 81, 483 S.E.2d 302 (1997), the Georgia Court of Appeals, citing Fleming, held that, "among the tests devised to measure

whether a sentence is legally acceptable or not is to question whether it is 'grossly out of proportion to the severity of the crime.'" The Haygood Court held that this

> is not a static concept but evolves as society matures. Thus the courts must consider objective evidence such as legislative enactments. These are "the clearest and most objective evidence of how contemporary society views a particular punishment.

"'[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Atkins v. Virginia, 122 S. Ct. 2242, 2246 (2002) (quoting Weems v. United States, 217 U.S. 349, 367 (1912)). An excessive claim is judged by currently prevailing standards of decency. Atkins, 122 S. Ct. at 2247.

In the Petitioner's case, the imposition of the mandatory minimum 10-year prison sentence without parole and sex offender registration for consensual oral sex between teenagers would be viewed by society as "cruel and unusual" in the constitutional sense of disproportionality, especially in light of Petitioner's having never been convicted of a prior crime.

In Valenzuela v. Newsome, 253 Ga.793, 796, 325 S.E.2d 370 (1985), the Georgia Supreme Court decided not to define "miscarriage of justice." Instead, the Supreme Court stated that a miscarriage of justice should be determined on a case-by-case basis, "and will depend largely upon the sound discretion of the trial judge." Id. "Hence, on rare occasion, the writ must pass over procedural bars and the requirements of cause and prejudice, when that shall be necessary to avoid a miscarriage of justice." Id. The fact that Genarlow Wilson has spent two years in prison for what is now classified as a misdemeanor, and without assistance from this Court, will spend eight more years in prison, is a grave miscarriage of justice. If

any case fits into the definitive limits of a miscarriage of justice, surely this case does.

If this Court, or any Court, cannot recognize the injustice of what has occurred here, then our court system has lost sight of the goal our judicial system has always strived to accomplish...Justice being served in a fair and equal manner.

Finally, the question arises as to what remedies this Court is authorized to grant. "A habeas court is statutorily authorized to 'discharge, remand, or admit the person in question to bail . . . as the principles of law and justice may require." Hogan v. Nagel, 276 Ga. 197, 198, 576 S.E.2d 873 (2003), citing O.C.G.A § 9-14-19. The principles of law and justice determine that Petitioner is guilty of misdemeanor aggravated child molestation. In so much as the elements of that crime were found by the Douglas County jury, this Court can impose such sentence under Dorsey v. State, 259 Ga.App. 254, 257, 576 S.E.2d 637 (2003), Hill v. State, 253 Ga.App. 658, 662, 560 S.E.2d 88 (2002), Clark v. State, 245 Ga.App. 267, 269-270, 537 S.E.2d 742 (2000), and Anderson v. State, 225 Ga.App. 727, 729, 484 S.E.2d 783 (1997).

IT IS HEREBY ORDERED that:

a) Petitioner's Writ of Habeas Corpus is **GRANTED;**

b) Petitioner's previous sentence is declared **VOID;**

c) Petitioner's sentence is amended to a misdemeanor aggravated child molestation;

d) Petitioner shall not be subject to the sentencing provisions of O.C.G.A. § 17-10-6.2, specifically Petitioner is not required to register as a sex offender; and

e) Petitioner is hereby sentenced to 12 months to serve with credit for time served.

SO ORDERED, this the 11 day of June, 2007.

THOMAS H. WILSON
CHIEF JUDGE, SUPERIOR COURT
TOWALIGA JUDICIAL CIRCUIT

IN THE SUPERIOR COURT OF MONROE COUNTY
STATE OF GEORGIA

GENARLOW WILSON **Petitioner**	:	
V.	:	**CIVIL CASE NO. 2007CV-299**
CARL HUMPHREY, Warden **Respondent**	:	

ORDER RELEASING PETITIONER

IT APPEARING that this Court having granted Petitioner's Writ of Habeas Corpus and Petitioner having more than served his maximum sentence in custody; further, a habeas court is statutorily authorized to 'discharge, remand, or admit the person in question to bail... as the principles of law and justice may require." Hogan v. Nagel, 276 Ga. 197, 198, 576 S.E.2d 873 (2003), citing O.C.G.A § 9-14-19 and there being no appeal pending;

IT IS HEREBY ORDERED that the Department of Corrections release Genarlow Wilson, GDC # 1187055, instanter.

SO ORDERED, this the 11 day of June, 2007.

THOMAS H. WILSON
CHIEF JUDGE, SUPERIOR COURT
TOWALIGA JUDICIAL CIRCUIT

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