IN THE SOUTH CAROLINA SUPREME COURT

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S.C. SUPREME COURT

Jawan White, Appellant

Vs.

State of South Carolina, Respondent

Lower case No. 2019-CP-26-06870

On Writ of Certiorari I the South Carolina Supreme Court

From Order by the Honorable H. Steven DeBerry, IV, of

Horry County, Court of Common Pleas, in a PCR matter.

Requesting "Leave" to file Pro-se Brief in

Addition to counsel's brief for "Extraordinary

Reasons" that this Court will agree is in the interest of justice.

By: Jawan R. White

INTRODUCTION AND SUMMARY

This matter is humbly and respecfully being reluctantly brought before this Supreme Court, fully understanding the details of hybrid restrictions. Yet, Appellant can find no other avenue to obtain his "full and fair bite" at the PCR. When a central issue was brought to counsel's attention far in advance of the construction of the PCR application and the evidentiary hearing. Yet was omitted, that according to the PCR judge. Was to the detriment of Appellant.

Comes now, under Aice v. State, 409 S.E2d at 385. This Court explained that every PCR Applicant is entitled to a full adjudication on the merits of his PCR application or "one bite at the apple" which includes the right to appeal the denial of a PCR application and the right to assistance of counsel in that appeal.

Thus, Appellant errors on the side of caution by respecfully requesting leave to submit the omitted PCR issue, requesting a ruling on it by this Court. Where the lower court records clearly demonstrates such issue came to the surface several times by former Solicitor Spratlin, the PCR attorney. But more importantly, Judge DeBerry, opining "such issue was a win under the circumstances of this case". As opposed to the issues raised on PCR.

Question One.

Whether the Defendant received ineffective assistance of counsel

Where trial counsel failed to object on "the theory" of 'sentence entrapment'?

Question Two.

Whether Appellant claim is of the type and kind so substantial that

The failure to rule on the claim would be manifested injustice

Where a prisoner stands convicted and sentenced based on

Circumstances in which he's actually innocent of supplanted by the

State that Violates Appellant's Due Process And Fair Trial Rights?

In regard to "omission of an important claim" that should have been ruled on during the PCR decision. Appellant relies on SCRCP, Rule 15(b), where it states in pertinent part: "that pleadings may be amended even after the judgement to conform to issues tried by "expressed or implied consent", but not raised in the original pleadings". See Mangal v. State, 421 S.C. 85, 805 S.E2d 568 (S.C. 2017); see also Simpson v. Moore, 367 S.C. 587, 627 S.E. 2d 701 (2006).

Facts Surrounding the Omitted Claim.

Here, Appellant was involved with a reverse sting operation involving the Fifteenth Judicial Circuit's Drug Enforcement Unit, headed by Agent Randy Miller, and Chavez, his C.I. The drugs involved in this case were not actual drugs. Instead, they were imitation heroin. The evidence introduced during the PCR irrefutably demonstrate according to Solicitor Spratlin's testimony, was although Appellant was looking to purchase a quantity of heroin. Agent Miller sent his C.I. to meet with White (Appellant), and explain they don't sell amounts "less than four ounces".

John Hilliard, Appellant's trial attorney requested the defense of entrapment based on this admission by the State. However, the state argued White was predisposed to buy drugs. Without fully understanding that the Controlled Substance statue under South Carolina law. Has graduated offenses, that according to the amount involved, place a defendant in different sentencing ranges. In other words, Appellant could be accountable for trying to buy a quantity of drugs. Without being accountable for the threshold amount which triggers Trafficking. Thus, in this case, Appellant is "actually innocent" based on

the circumstances of this case, of Trafficking heroin. Because the state rather than the Defendant, set the necessary "element" (being there amount) in a drug Trafficking crime. Sentence Entrapment finds its support based on several key circumstances arising in the Judiciary. Which a national consensus concluded: " the state couldn't set the amount of drugs in a drug Trafficking case". Then hold the defendant responsible for that amount". Whereas, drug quantity determines the sentence in graduated drug statute's, such as that found at 44-53-370-75, S.C. Code of laws.

Supporting Argument to Question One.

During Appellant's trial, Appellant's trial counsel failed to "contemporaneously object" to the drug amount submitted to the jury, where the landscape for a meritorious "sentence entrapment" objection and argument had already been set, had counsel exercised adequate knowledge in law to explain exactly what the request for the entrapment defense would be based on. In other words, "sentence entrapment", akin to South Carolina's "hand of one hand of all". Are both "theories to explain to juries to demonstrate adequate grounds for which they may acquit or convict".

Sentence Entrapment, is all but a new circumstance. In United States v. Burg, 178 f.3d 976 (8th Cir. 1999). It exposes overbearing government conduct which violates a Defendant's right to due process, which usually involves these particular "sting or reverse sting operations". See United States v. Cannon, 88 f.3d 1495 (8th Cir. 1996). Berg raised the "sentence entrapment issue", claiming the C.I. requested him to manufacture more meth than he normally would. In order to place Berg into a heightened sentence bracket, thereby the C.I. could receive a more favorable sentence reduction for their cooperation. But because Berg was shown to engage in larger quantities of drugs without government inducement. Berg's claim failed.

Here however, in the instant case at bar. The record before this Court, even when asked and answered by the solicitor which prosecuted Appellant. Could not elude to any such circumstance. Thereby, as the PCR Judge DeBerry, noted in the instant case. This should have been the claim pursued on PCR. See Tr. P. 82, lines 20-25; p. 83, lines 1-7. (PCR transcript) where it reads as follows:

> ***The Court: And let me just ask you something because it certainly seems like he elicited that testimony certaintly in an attempt to put forth a defense that maybe the jury would consider "that it wasn't Mr. White's idea that he wanted four ounces of heroin", that maybe Mr. White was just trying to buy "some quantity" of heroin that would have put him below some trafficking threshold where he had to be sentenced to no less than 25 years. You know and certainly that would have been "a win" in this situation compared to what ultimately took place, and what the Court's sentence was, and without discretion with that sentence to a large extent. As far as the conspiracy Issue goes, I mean I'm having trouble because what was charged was the statute.*** **Id.**

But moreover, the United States Supreme Court affirmed the Fourth Circuit Court of Appeals decision in United States v. Promise, 255 F3d 150 (4th Cir. 2001). That stood for the law turning the corner concerning drug trafficking crimes, based on Apprendi v. New Jersey, 540 U.S. 466 (2000) . To mandate "all courts treat drug quantity **'as an essential element'** of any drug trafficking offense". With that being said and done. Appellant's sentence cannot fall consistent with the rudimentary demands of due process and fair play. Thus, requiring reversal as a matter of law.

Supporting Argument for Question Two.

For starters, as an element the state has the burden of "proving" beyond a reasonable doubt. The State cannot be accused of both "supplying that element", to eliminate their burden of proof. While relying on its construction of drug type or quantity for which the defendant is to be sentenced by. See Matthews v. United States, 485 U.S. 58, 63 (1988). Such would amount to no less than "outrageous government conduct"; United States v. Berg. In violation of a Defendant's Fifth and Fourteenth Amendment right of Due Process. So the PCR Court was absolutely correct in its assessment of what should have been in the original application. See Tr. Tr. p. 36, lines 21-25 (Testimony by former Solicitor Spratlin). It reads as follows:

> ***My understanding and recollection, like I said I did read the transcripts, I'm not intimately familiar with it, but I believe Mr. Hilliard at this point is trying to kind of go with "an entrapment argument" where the state essentially made him buy this large quantity of drugs so they kind of (p.37) entrapped him into buying four ounces of heroin". And Agent Miller is explaining or offering up why the four ounces of heroin became an issue, and why was the amount that they focused on.*** **Id.**

Here, the facts are irrefutable and clearly on the record from the PCR hearing which permits this Honorable Court, in the interest of justice, to yield to the notion of comity and finality. Or cause and

prejudice, in favor of correcting a unjust conviction or sentence of a prisoner that has clearly demonstrated his **"actual innocence"** of attempt or conspiracy to purchase four ounces of heroin. See Murray v. Carrier, 477 U.S. 488 (1986); House v Bell, 547 U.S. 518 (2006); and United States v. Maybeck, 23 F3d 888 (4th Cir. 1994).

In Maybeck, the Fourth Circuit held; "Frady rule that petitioner who had defaulted procedurally in seeking correction of errors about which he complains in collateral proceedings must show 'cause and prejudice' with respect to default, applies to collateral challenges to unappealed guilty plea; (2) "actual innocence exception" to "cause and prejudice" requirement for consideration of issue despite procedural default extends to non capital sentence enhancement cases; and (3) defendant was prejudiced by career offender sentence designation for which he was 'actually innocent' and therefore, was entitled to relief despite procedural default. Since the record clearly and conclusively shows that Maybeck was actually innocent of one of the predicates required for classification as a career offender, We Reverse and Remand with Instructions.

See also United States v. Mikalajunas, 186 F3d 490 (4th Cir. 1999). Where this Court extends the "actual innocent exception in non capital sentencing context". Where a petitioner can demonstrate " he is not guilty of the facts to support the sentence increase which was relied upon by the court during sentencing.

For example, if Appellant was robbing stores with trickery as opposed to employing a weapon. And the police in charge of Investigations sent in their C.I. However, the police wants this suspect off the streets for a longer period of time. So he tells his C.I. to convince the suspect to use a weapon this time around. Once arrested, the suspect is charged with "armed robbery", as opposed to "common law

robbery". For which carries much harsher punishment, as well as mandatory minimum sentencing.

However, the in above example. Could the defendant be "legally or lawfully" held accountable for the increased penalty for armed robbery. When defendant "was not predisposed" to use or employ the weapon to commit the robbery?

The same is said and argued in this case and point. Appellant Jawan R. White, was never predisposed to purchase four ounces of heroin. Although he was seeking a "quantity thereof". But the crux of the challenge depends on whether the state could have proved Appellant attempted to purchase four ounces, "consistently in line with Appellant's Sixth Amendment right". In light of the facts of the case, "that Agent Randy Miller told his C.I. to tell Mr. White, they would sell no less than four ounces". In order to control, entrapment and manipulate Appellant's sentence.

Because the Fifth, Sixth and Fourteenth Amendments, required "all essential elements of a crime to be charged, submitted to a jury, and proven beyond a reasonable doubt". In re Winship, 397 U.S. 358, 364 (1970). This case presents a critical error by allowing such conviction and sentence to stand, whereas, "the state and not the defendant", supplied the most "essential element" being **"QUANTITY"**, in this drug trafficking offense. Coupled with, "the Defendant's actual innocence" of the element being "quantity", (four ounces) in this drug trafficking offense.

Moreover, it is more reasonable than not. Had defense counsel objected to the "indictment" , on the bases of quantity, or the submission of such outrageous government conduct to the jury as evidence attributable to Appellant. There is a reasonable likelihood, as Judge DeBerry so eloquently put it. Appellant could have been sentenced under the threshold of a drug trafficking offence.

IN CONCLUSION

Appellant respectfully request this Honorable Court to exercise it's supervisory authority to overturning this case by granting relief as required by law, only after carefully considering that such claim should have been resolved in the lower court. In addition, Appellant does not argue that PCR counsel and himself have any perceived or actual conflicts of interest, where such issue may have been inadvertently omitted for various reasons.

For these reasons, it is requested in the interest of justice and scarce judicial resources. To resolve this important matter. And Grant relief warranted as a matter of law.

Respecfully Submitted,

By: Jawan R. White, #337138