

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
CASE No. 2012-213159

Thurman V. Lilly,

Petitioner,

v.

The State of South Carolina,

Respondent.

PETITION FOR REHEARING AND FOR
REHEARING EN-BANC

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DEC - 6 2012

S.C. Supreme Court

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SUGGESTION FOR REHEARING EN-BANC

- 1). Consideration by the full court is necessary to secure and maintain a prior decision of this court.

- 2). Consideration by the full court is necessary to maintain uniformity of its decisions.

- 3). The proceedings involves questions of exceptional importance which affect the fairness and integrity of the administration of justice, and finality of judicial proceedings.

In reference to ground No. 1 above:

"Consideration by the full court is necessary to secure and maintain a prior decision of this court."

This Court Ruled in *Garner V. State*, 371 s.c. 1, 636 S.E.2d 860 (s.c. 2008), That an order in a postconviction matter which does not include specific findings of fact and conclusions of law relating to [Each] issue presented... does not constitute a final order or judgment... Id., cf. S.C. Code of Law §17-27-80.

In situations such as petitioner's where one must demonstrate to the PCR Court why the statute of limitation should not be applied; and when petitioner sets forth specific reasons supported by authority. Whether, the PCR judge is required to address [Each] specific issue, and state specifically its findings of fact and conclusions of law relating to each issue presented?

In reference to ground No. 2 above:

"Consideration by the full court is necessary to maintain uniformity of its decision."

As to where this court's decisions relates to the requirement to provide an "Explanation" why the PCR Court's decisions was improper. (SCACR) Rule 243 (c). The only standard to determine if a petitioner made a "Sufficient Showing", is whether the explanation [c]ontains sufficient facts, argument, citation to legal authority and that there is an arguable basis, that the determination by the lower court was improper.

This Court have not published or stated otherwise, what constitute a "Sufficient Showing" and what [does not] comport with the above mentioned standard. There are no examples or guide to follow that will allow a petitioner seeking review by this Court to comply with Rule 243 (c), and any applicable standard under the rule. This may not provide sufficient protection of due-process, without a guide or a case law to follow, or some type of opinion determining what constitute a "Sufficient Showing". The standard will remain vague and ambiguous. No one could ever meet or satisfy the standard or make a sufficient showing without knowledge of what constitute a sufficient showing.

Rule 243 (c) (SCACR) does not seem to be in uniform with other methods of appealing decision from a PCR Court. Compare Rule 243 (i). Id. However, in *Dennison-V.-State*, 371 s.c. 221, 639 S.E.2d 35 (s.c. 2006), this Court alluded to the fact that a well trained attorney may not be able to satisfy the standard to set forth any arguable basis for asserting that the trial Court's findings were improper. Id (citation ommitted). How much more would a pro-se petitioner be unable to meet the standard without some kind of example, guide or opinion of this Court.

In reference to ground No. 3 above:

"The proceedings involves questions of exceptional importance which affect the fairness and integrity of the administration of justice, and finality of judicial proceedings."

Petitoiner raised several issues in the PCR court that need to be answered in the interest of justice and finality, namely:

1). Whether filing a PCR in South Carolina [p]rior to filing a Federal Writ of Habeas Corpus, [Mandatory]?

2). If so, what happens to those exhausted Direct Appeal issues, whether or not they are automatically put in abeyance pending the outcome of the PCR? see final order of dismissal page 1 and 2, issues #'s 1,3, and 5.

3). Whether, South Carolina Rules of Civil Procedures, Rule 71.1 (b) impede and prevent certain constitutional claims from being presented in a timely fashion, and requires application of equitable Tolling as a result? see Final Order (F/O) of dismissal page 2 and 3.

4). If S.C. Code of Law §17-27-45(A) is mandatory, that a PCR must follow Direct Appeal. Whether, §17-27-45(A) conflict with and obstruct application of Title 28 USCA §2244 (d)(1)(A). see F/O Page 2.

5). Whether the impediment of (SCRCP) Rule 71.1(b) and the State's failure to make known that the PCR process following Direct Appeal is "Mandatory" should estop the state from asserting the statute of limitation? see F/O page 2.

6). Whether the Rules of Discovery apply, where the factual basis did not accrue until the PCR process became necessary and available? see Final Order (F/O) of dismissal page 2.

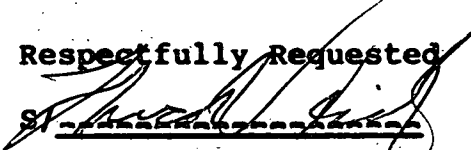
7). Whether Green V. State, 353 s.c. 29, 576 S.E.2d 182 (s.c. 2003) and S.C. Code §17-27-45(A) should be modified, overruled in whole or in part? see F/O of dismissal page 2.

8). Whether or not, the numerous asserted exceptions to the one (1) year statute limitation applicable and sufficient to excuse the mandate of §17-27-45(A)? see F/O page 2.

For the foregoing reasons and those petitioner will fully brief if this Court grant the Rehearing En-Banc, petitioner respectfully request that this honorable Court consider the suggestion for rehearing en-banc to secure and maintain the uniformity of its decisions and to consider the novel issues of exceptional importance affecting the fairness and integrity of the administration of the judicial system.

This 3rd day of DECEMBER, 2012.
At Fairfax County, S.C.

Respectfully Requested



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STATEMENT OF THE CASE

This case presents that petitioner was convicted at the October 27-31, 2003 term of General Sessions Court for Georgetown County by the honorable judge Steven H. John, and a Jury. Petitioner filed timely notice of appeal. Petitioner's conviction was affirmed by the Court of Appeals in April 2007 (UP-222). Petitioner's conviction became final for purpose of this petition June 2007, when the remittitur was sent. Petitioner filed for Federal Writ of Habeas Corpus 28 USCA §2254 on those direct appeal issues exhausted in South Carolina Court of Appeals. Petitioner's federal habeas review was denied and petitioner appealed to the fourth 4th circuit Court of Appeals and to the U.S. Supreme Court on Writ of Certiorari. Petitioner's federal habeas process became final November 29, 2009 when the time to petition for rehearing expired in the U.S. Supreme Court. On November 22, 2010 petitioner filed the present PCR application respondent made a return and motion to dismiss as barred by the statute of limitation. The case came before the honorable Larry B. Hyman, Jr. Circuit Court Judge, in which he issued a conditional order of dismissal. Petitioner filed an objection to the conditional order of dismissal citing several reasons why the one year statute of limitation should not apply. A final order was issued disposing of the PCR application with prejudice. Petitioner filed a Rule 59(e) motion to alter or amend the final order. An order denying the 59(e) motion to issued August 30, 2012. A timely notice of appeal along with a letter of explanation was filed in this court case No. 2012-213159. An order dismissing the appeal for failure to provide a sufficient letter of explanation. And this petition for rehearing and for rehearing en-banc follow.

PETITION FOR REHEARING

ISSUES PRESENTED FOR REHEARING

- 1). The Court overlooked several material facts of this case.
- 2). The Court overlooked several important principles of law.
- 3). Petitioner take exception to the Court's Ruling that he failed to provide a sufficient letter of explanation.

STANDARD OF REVIEW

The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time. **Herron-V.-Century, BMW**, 395 s.c. 461, 719 S.E.2d 640 (2011). A rehearing will be denied where it does not appear that the court has overlooked any material fact or important principle of law. **Thompson-V.-Brown**, 34 S.E. 411 (s.c. 1899). In order for the Supreme Court to affirm circuit Court's judgment, there must be evidence which reasonably supports judge's findings. **Steeger-V.-Otto Zollinger, Inc.**, 336 S.E.2d 870 (s.c. 1985). Appellate Court gives great difference to the Post-Conviction Relief (PCR) Court's findings of fact and conclusions of law. Appellate Court will uphold the findings of the postconviction

relief (PCR) judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law. *Jones V. State*, 382 s.c. 589, 677 S.E.2d 20 (s.c. 2009). In *State V. Sweat*, 379 s.c. 367, 665 S.E.2d 645 (s.c. App. 2008) rehearing denied and certiorari granted. The Court held: "when an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts; in such cases, the appellate court is not required to defer to the trial Court's legal conclusions." In a case raising a novel question of law regarding the interpretation of a statute the appellate court is free to decide the question with no particular deference to the lower court. *Id.* When addressing novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state and the Court's sense of law, justice, and right. *Id.*

In reference to Issue No.1 above:

"The Court overlooked several material facts of this case."

Petitioner contends that the Court overlooked the fact that the PCR Court's order does not comport with the requirements of S.C. Code §17-27-80 and this Court's holding in *Garner V. State*, 371 s.c. 1, 626 S.E.2d 860 (2008).

S.C. Code of Law §17-27-80:

"A PCR Court [shall] make specific findings of facts, and state expressly its conclusion of law relating to [each] issue presented. This order is the final order." Id.

In **Garner**, supra., this Court reversed and remanded for a final order, holding that, "an order in a Post-Conviction matter which does not include specific findings of fact and conclusions of law relating to [each] issue presented, but instead dismisses [some] of the issues without prejudice to them being raised in a future post-conviction proceeding does not constitute a [final order] or judgment." Id.

Petitioner submit that the Court overlooked the specific exceptions to the statute of limitation enumerated in "Issue No. 3" of the original letter of explanation (pages 18-21), Id. Further, petitioner contended in the supplemental letter of explanation Issue No.8 (pages 12-15), Id.

While South Carolina Appellate Court Rules (SCACR) Rule 243(c) does not provide a sample form of a letter of explanation, nor does it specify what constitute a sufficient showing, it does however, provide information indicating the content of a sufficient letter of explanation. i.e., Facts, Argument, and Legal Authority, to show that there is a arguable basis to challenge the determination by the lower court, that it was improper.

This information is the only source petitioner have to go by to understand what is required to provide a "Sufficient Showing". It is reasonable to believe that if petitioner substantially complied with the requirements of Rule 243(c) he would have also provided a sufficient letter of explanation.

While the order filed by this Court states, "Based on the failure of petitioner to show that there is an arguable basis for asserting that the determination by the lower court was improper...", It clearly have overlooked the issue of several exceptions to the one (1) year statute of limitation and or entitlement to equitable tolling. Petitioner in the original and supplemental letter of explanation, supported his contentions with legal authority and good faith arguments to support his claims.

This Court overlooked the fact that the lower court never considered any of petitioner's exceptions, and therefore its determination was improper according to Garner V. State, 371 s.c. 1, 636 S.E.2d 860 (s.c. 2008), because the PCR Court order of dismissal does not even discuss the issues.

In reference to Issue No.2 above:

"The Court overlooked several important principles of law."

Petitioner advanced several principles of law in the PCR court to demonstrate why the one (1) year statute of limitation should not apply. Namely: (1) Violation of the Supremacy Clause

Art. 6 cl.2 U.S. Constitution; (2) Equitable Estoppel;
(3) Equitable Tolling; (4) Unconscionable breakdown of the appeal
and PCR process; (5) Miscarriage of justice; and (6) Actual
innocences. see (final order (F/O) of dismissal pages 1 and 2).

The final order of dismissal either did not address these
issues and or lacked specificity of facts and conclusions of
law to support dismissal.

Petitioner raised two (2) additional issues in the letter
of explanation "Abuse of discretion" on two separate issues.
This principle of law is of great importance to petitioner,
which this Court overlooked. see Letter of explanation (Issues
4 and 5, page 23). Id.

STANDARD OF REVIEW

"The Law of The Land" is that all state judges [must] be
sworn to uphold the U.S. Const. Art. VI. see *Robb-V.-Connolly*,
111 u.s. 624, 636, 4 S.Ct. 544, 551, 28 L.Ed. 542 (1884).

Petitioner contends that he was entitled to a full and
fair hearing in the state PCR court, and that the state judiciary
system failed.

In *Rose V. Mitchell*, 443 u.s. 545, 99 D.Ct. 2993, 61 L.Ed.2d 739 (1979), The U.S. Supreme Court held: "Since the same Trial Court will be the court that initially must decide the merits of such claim, and since the claim involve an assertion that the state judiciary itself purposely violated the equal protection clause, no opportunity for a full and fair hearing existed." *Id.* at 561, 99 S.Ct. at 3003.

Aside from the fact that this Court will uphold the findings of the PCR Court when there is any evidence of probative value to support them, and will reverse the decision, when it is controlled by an error of law. *Jones V. State*, 382 s.c. 589, 677 S.E.2d 20 (s.c. 2009); this Court will also review the lower Court's decision under the principles of law "an abuse of discretion".

Petitioner in the instant case sub-judice raised an arguable issue in the letter of explanation see (Issues # 4 and 5 pages 21-24), alleging that the PCR Court failed to comply with S.C. Code §17-27-80 and that its failure to comply, was controlled by an error of law and lacking specificity. *Id.* Petitioner also claimed that the PCR Court abused its discretion by implementing a "New Rule of Law" and applying it retroactively to petitioner's case in applying the S.C. one (1) year statute on limitation. *Id.* see (issue # 5 page 23 of L/O Explanation). Clearly this is an arguable issue, and in important principle of law overlooked, "Abuse of discretion".

The term "Abuse of discretion" has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support. **State V. Corey**, 339 s.c. 107, 529 S.E.2d 20 (s.c. 2000). An abuse of discretion occurs when the conclusions of the Trial Court either lack evidentiary support or are controlled by an error of law. see **State V. Sweet**, 374 s.c. 1, 647 S.E.2d 202 (s.c. 2007), An abuse of discretion occurs when the decision of the Trial Court is based upon an error of law or upon factual findings that are without evidentiary support. see **State V. Anderson**, 378 s.c. 243, 662 S.E.2d 462, rehearing denied (s.c. App. 2008).

Inherent in the issue of "abuse of discretion" as it relate to petitioner's case, is the important principle of law that require Judges and Justices to have more clarity to their decisions and judgments, is the bed-rock principle to a fair and just judicial system. Compare the mandate of S.C. Code §17-27-80 and South Carolina Appellate Court Rules, (SCACR) Rule 220(b).

Rule 220(b) (SCACR):

"In [every] decision rendered by an appellate court, [every] point distinctly stated in the case which is necessary to the decision of appeal and fairly arising upon the record of the court [must] be stated in writing and [must], with the reason for the Court's decision, be [p]reserved in the record of the case." Id.

S.C. Code §17-27-80:

"A PCR Court [shall] make [s]pecific findings of fact, and state [e]xpressly its conclusions of law [relating] to [each] issue presented."

The PCR Court refusing to address and rule upon all issues presented by petitioner to show cause why the one (1) year statute of limitation should not apply, was a denial of due-process and an abuse of discretion. These principles of law was overlooked by this Court in its decision to dismiss the appeal without addressing the merits.

In reference to Issue No. 3 above:

"Petitioner take exception to the Court's Ruling that he failed to provide a sufficient letter of explanation."

The Court had before it, petitioner's letter of explanation, and supplemental amendment to the explanation, also the final order of dismissal and order denying Rule 59(e) motion to alter or amend the judgment of the PCR Court.

This Court's order of dismissal state: "Based on the failure of petitioner to show that there is an arguable basis for asserting that the determination by the lower court was improper, this matter is dismissed." This order resembles the order of the lower Court, in that, it lack clarity and specificity and fail to comport with Rule 220(b) (SCACR).

Without sounding redundant, or without repeating all the arguable issues cited above, suffice it to say that the real question here is, "By what standard has this Court determined that the issues presented does not amount to an arguable basis, sufficient to warrant review? Unless it is presumed that all issues and points are manifestly without merit. (lacking any basis in fact or law), (Frivolous). Then the question again is by what standard was it determined that the issues raised by the letter of explanation is frivolous?"

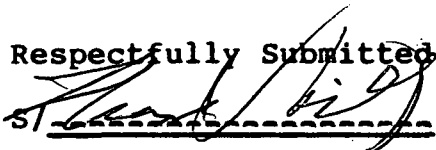
As stated previously, the only example or standard to determine whether a letter of explanation is sufficient is found in the Rule itself (SCACR) Rule 243(c), and the general definition of its terms. The only language of the Rule 243(c) indicating a standard to be met is: "This explanation [must] contain sufficient facts, argument, and citation to legal authority, to show that there is an arguable basis..."

Petitioner contends that each one of these points were met with particularity, specificity and on "all fours", every point distinctly stated is supported by the record of this case and was necessary to a proper decision on the appeal. However, was overlooked or misapprehended by this Court, to petitioner's detriment. Further, the record of this Court's decision is not properly preserved for lack of clarity and specificity.

For the foregoing reasons petitioner pray that this honorable court will grant the herein mentioned petition for rehearing and for rehearing en-banc. Re-hear the issues and points distinctly stated in the letter of explanation, that are fairly supported by the record and grant whatever relief deemed appropriate according to law.

This 3RD day of DECEMBER, 2012.
At Allendale County, S.C.

Respectfully Submitted



Thurman V. Lilly

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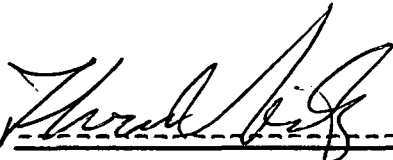
I know that this is not a perfect World we live in, and the Judicial system is far from being perfect, but it works. It's been ten (10) years for me trying to overcome the injustice that has been worked on me. All I want is my "One Bite at the Apple" A day in court to prove that I was unjustly convicted.

CERTIFICATE OF SERVICE

I Thurman V. Lilly, do certify that I have this day served on the attorney for the respondent a copy of "Petition for Rehearing and for Rehearing En-Banc" by depositing the same in the U.S. Mail postage pre-paid to the following address:

Office of Attorney General
Alan B. Wilson, Attn. Gen.
P.O. Box 11549
Columbia, S.C. 29211

This 3rd day of DECEMBER, 2012.
At Allendale County, S.C.

S/ 

Thurman V. Lilly, 297494
A.C.I. F1-A16
P.O. Box 1151
Fairfax, S.C. 29827

Pro-Se

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S.C. Supreme Court

Hon. Daniel E. Shearouse,
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Mr. Thurman V. Lilly, 297494
A.C.I. Box 1151 F1-A16
Fairfax, S.C. 29827

December 3, 2012

RE: Lilly V. State, Case No. 2012-213159 (PCR)

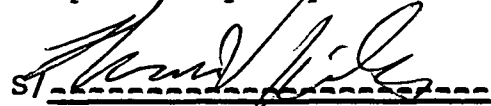
Dear Mr. Shearouse,

Please find enclosed an original of a "Petition for Rehearing and for Rehearing En-Banc", along with a certificate of service for filing in your office.

Your cooperation and assistance in this very important matter will be greatly appreciated, I thank you in advance and will await your response to the filing at your earliest convenient time.

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S.C. SUPREME COURT~~

Respectfully Requested


ST. _____

Mr. Thurman Lilly, 297494
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