

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston  
County Common Pleas Court  
Kristi L. Harrington, Circuit Court  
Judge  
Appellate Case No. 2013-000692

Larry G. Harvin, #253468, Appellant,

Vs.

State of South Carolina, Respondent.

INITIAL BRIEF OF APPELLANT AND  
DESIGNATION OF MATTER

LARRY G. HARVIN, #253468

M.C.I. F-1-125-B

386 Redemption Way

McCormick, SC 29899

- PRO. SE. APPELLANT

MATTHEW J. FRIEDMAN  
- Asst. Atty. Gen.  
P.O. Box 11549  
Columbia, SC 29211

ATTORNEY FOR RESPONDENT

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SC Court of Appeals

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. Did the lower court abuse its discretion in failing to issue 'findings of fact and conclusions of law' pursuant to SCRCP 52(a) within Order denying relief on Motion brought under SCRCP 60(b)(4)?

II. Did the lower court abuse its discretion by denying an Evidentiary Hearing upon Habeas Corpus petition, when Appellant made required 'allegations' for the Evidentiary Hearing as is dictated by State-Created Law, to ultimately constitute a Procedural Due Process Violation?

## APPELLANT'S STATEMENT OF THE CASE

Relevant to this Appeal are proceedings attendant to the 'Motion For Relief Of Judgment' brought under South Carolina Rules of Civil Procedure ("SCRPC") 60(b)(4), where the Appellant ("Harvin") moved before the Honorable Kristi L. Harrington, Administrative Judge of the Ninth Judicial Circuit, for Judge Harrington to vacate the prospective operation of her November 8, 2011 'Conditional Order Of Dismissal' and December 16, 2011 'Final Order' because neither Order gave 'findings of facts and conclusions of law' as required by SCRPC 52(a) which would've gave Harvin 'clear notice' of 'why' he couldn't receive the entitled Evidentiary Hearing upon his Petition For A Writ Of Habeas Corpus (filed in Charleston Common Pleas Court, under C.A No.: 2010-CP-10-4462, on June 1, 2010); as well, Harvin moved for Judge Harrington to vacate those two (2) Orders due to Harvin's Procedural Due Process rights being violated. Judge Harrington issued an Order on February 28, 2013, Denying Harvin's January 31, 2013 'Motion For Relief', brought under SCRPC 60(b)(4), yet, Judge Harrington's Order also does not set forth 'findings and conclusions' as required by SCRPC 52(a) on matters Harvin raised in the 'Motion'. Considering adequacy of process, the instant Appeal follows.

## ARGUMENT

- I. Judge Harrington committed an Abuse of Discretion by failing to state 'findings of fact and conclusions of law' in conformity with SCRPC 52(a), in Denying Harvin's 'Motion For Relief [Of] Judgment' under SCRPC 60(b)(4).

It has been stated that the Petition for a Writ of Habeas Corpus is a 'Constitutional Remedy' whose purpose is "to test the legality of the prisoner's present detention". See *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (S.C. 1998).

(citing SOUTH CAROLINA CONSTITUTION ARTICLE I, § 18).

Also stated is, in order to be entitled to an Evidentiary Hearing for claims supporting the Habeas Corpus petition, the "[p]etitioner must present sufficient factual allegations" and "allege petitioner has exhausted all other remedies" —

*Gibson*, 329 S.C., at 40, 495 S.E.2d at 427-428 (citation omitted).

A Circuit Court Judge possesses authoritative discretion to entertain then "grant a writ of habeas corpus, under the seal of such court" < S.C. Code Ann. § 17-17-30 >, and in the exercise of that discretion must treat the allegations

in the Habeas Corpus petition as true. See *Gibson*, supra (citing *Tillman v. Manning*, 241 S.C. 221, 127 S.E.2d 721 (S.C. 1962)

). That same authoritative discretion grants Circuit Court Judges, sitting in a 'non-jury' setting, the power to write their findings of the Habeas Corpus allegations, which must be treated as true, separately and specially; in fact, it has been stated that, as

an explanation of SCRCP 52(a) that:

"The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

See In re Treatment and Care of Luckabaugh, 351 S.C. 122, 132, 568 S.E.2d 338, 343 (S.C. 2002) (quoting reference(s) omitted).

Luckabaugh further stated that while the Circuit Court Judge are not required to "set out findings on all the myriad factual questions arising in a particular case", the findings "must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below", wherein the "absence of factual findings makes our task of reviewing the court order impossible" because "the reasons underlying the decision [are] left to speculation." (351 S.C. at 133, 568 S.E.2d at 343 (quoted in relevant part)).

Relevant to this appeal is the portion of Luckabaugh elucidating that "[t]o leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to

whose factual determinations we give deference" (Id., citing Welsh Co. of California v. Stroelee of California, Inc., 290 F.2d 509 (9th Cir. 1961.)), wherein the 'unfair to the litigants' wording accords with the essential claim Harvin presented to Judge Harrington in the appended 'Notice Of Motion And Motion For Relief Of Judgment' [ROA 2, Pg. 2] seeking an Order Vacating the prospective operation of the 'Conditional Order Of Dismissal' and 'Final Order' Judge Harrington rendered on Harvin's Habeas Corpus petition; where neither Order gives Harvin 'clear notice' of the change in law(s) relied upon by Judge Harrington to now require Harvin's 'NON-PCR allegations' [Insufficient Evidence (Proof) to Support Convictions; Prosecutor (Solicitor) Misconduct; Judicial Misconduct] to be raised in the PCR Court only, contrary to provisions underlying S.C. Code ANN. § 17-27-20 (a) & (b), Harvin asserted that Judge Harrington "acted in a manner inconsistent with Due Process" in the signing of the 'Conditional Order of Dismissal' and 'Final Order' although both orders failed to comply with SCRPC 52(a). Further, even within the 'February 28, 2013 Order' upon Harvin's Motion For Relief Of Judgment [ROA 1], Judge Harrington failed to comply with SCRPC 52 (a) and Luckabaugh and give 'findings of fact and conclusions of law' concerning why the 'Conditional Order Of Dismissal' and 'Final Order' should not be vacated under "void" subsection of SCRPC 60(b)(4). Because a Petition for a Writ of Habeas Corpus is the core of the instant action, Harvin is entitled to know what PCR amended laws Judge Harrington was relying on to

deny Harvin's entitled Evidentiary Hearing by way of the 'Conditional Order Of Dismissal' and 'Final Order' when, if Harvin's allegation(s) of the Habeas Corpus claims being 'NON-PCR allegations' are to be "treated as true", then Judge Harrington must have relied upon something which makes Harvin's allegation(s) 'false' — and it is only fair for Harvin to have 'clear notice' of that 'something' Judge Harrington went off of to not treat Harvin's allegation(s) (of raising 'NON-PCR allegations' in the Habeas Corpus petition) as "true"; SCRCP 52(a) is the vehicle which Judge Harrington was required to reveal that 'something' in both the 'Conditional Order Of Dismissal' and 'Final Order'.

#### STANDARD OF REVIEW — Abuse of Discretion

"Discretion" clearly denotes "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law..." < BLACK'S LAW DICTIONARY, Pg. 499 (8<sup>th</sup> ed., 2005) >; South Carolina's Courts of Review find the proper exercise of 'discretion' as being lower court decisions being supported by facts and law appearing within Order's rendered upon matters presented to those lower courts < see, e.g., In Re Care and Treatment of Corley, 365 S.C. 252, 257, 616 S.E. 2d 441, 443 (S.C. App. 2005) (Order of Circuit Court finding NO

probable cause existed to order trial on fitness for release of a sexually-violent prisoner: "...a review of this record clearly documents a factual basis for concluding that probable cause was lacking.... we need not speculate as to the basis of his decision..."; but see Luckabaugh, supra, 351 S.C. at 133, 568 S.E.2d at 343 ("Our review of the record cannot save the order from its deficiencies due to the contradictory testimony presented below.") >, and, likewise, this Court has issued decisions reversing and remanding back to the lower court(s) for that lower court's failure to exercise its warranted discretion < see Schmidt v. Courtney, 357 S.C. 310, 322-323, 592 S.E.2d 326, 332-333 (S.C.App. 2003); Fields v. Regional Medical Center Orangeburg, 354 S.C. 445, 457-458, 581 S.E.2d 489, 495-496 (S.C.App. 2003) > in line with the South Carolina Supreme Court's viewpoint as well < see State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (S.C. 1981) (finding Trial Judge error in failing to exercise discretion on motion to alter, amend or change sentence (judgment) when Trial Judge had authority to do so) >.

As relevant in the instant case, SCRCP 52(a) requires findings of facts and conclusions of law, when denial to the benefits of a 'Constitutional Remedy' are involved, to give the reviewing Courts an adequate record for determining error in the lower court's decision upon presented pleadings, as well, to give 'clear notice' to the litigants of what is available for raising to the reviewing Court(s) on Appeal.

## ANALYSIS

Harvin's claim is simple: Judge Harrington denied Harvin his 'clear notice' of the law(s) being relied upon to deny Harvin's entitled Evidentiary Hearing for the State Habeas Corpus petition, when Judge Harrington had the discretion to give Harvin such 'clear notice' through issuing 'findings of facts and conclusions of law' pursuant to SCRPC 52(a) upon the 'Conditional Order Of Dismissal' and 'Final Order' denying the Evidentiary Hearing initially.

As Harvin asserted that the 'Conditional Order Of Dismissal' and 'Final Order' are both "void" for purposes of SCRPC 60(b), (4), because Judge Harrington "acted in a manner inconsistent with Due Process" by issuing both aforesaid Orders without giving Harvin 'clear notice' of 'why' [see ROA 2, P. 6-10 (subsection (b))], it follows that Judge Harrington further abused her Discretion by failing to issue any 'findings of fact and conclusions of law' as required by SCRPC 52(a) in issuing the Order denying relief on Harvin's Motion brought under SCRPC 60(b)(4) [see ROA 1].

II. Judge Harrington committed an Abuse of Discretion by Denying Harvin's Procedural Due Process Right to an Evidentiary Hearing upon his Habeas Corpus Petition when Harvin made the necessary allegations for the Hearing as required by State-Created law.

As outlined in the preceding Argument I, the Habeas Corpus Petition is a 'Constitutional Remedy' that requires Harvin to only "present sufficient factual allegations" and "allege [petitioner] has exhausted all other remedies". Gibson, *supra*.

Prior to Gibson, the South Carolina Supreme Court stated clearly that "the writ will issue only under circumstances where there has been a "violation, which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice"". See *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (S.C. 1990). Gibson relies on *Butler* in also clearly stating that, considering the allegations in the petition "are to be treated as true" (Gibson, 329 S.C. at 40, 495 S.E.2d at 427), "If the petition, on its face, meets these requirements, petitioner is entitled to a hearing." — Gibson, 329 S.C. at 40, 495 S.E.2d at 428 (emphasis added).

This very Court of Appeals expounded further that if a petitioner raised a matter which could have been raised in a PCR application, they are "procedurally barred from petitioning the circuit court for a writ of habeas corpus...". See *Keeler v. Mauney*, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (S.C. App. 1998).

And the underlining principles of Procedural Due Process of Law require 'receiving all applicable State - Created 'entitlements' (see, e.g., *Green v. Catoe*, 220 F.3d 220 (4th Cir. 2000)).

## ANALYSIS


Harvin notified Judge Harrington's Court sufficiently, concerning the allegations being cognizable in the Evidentiary Hearing of the Habeas Corpus petition, where clear provisions of the PCR Act (codified under S.C. Code Ann. §§ 17-27-10 to 17-27-160) state that the 'Insufficient Evidence (Proof) To Support Convictions', 'Prosecutor (Solicitor) Misconduct', and 'Judicial Misconduct' allegations cannot be raised in a PCR application as dictated by § 17-27-20 (a), (b) — notification was initially given in the 'Petition For A Writ Of Habeas Corpus' [see ROA 3, Pp. 2-4], also in the 'Motion For Relief Of Judgment' [ROA 2, Pp. 4-6]; the Habeas Petition was Harvin's only procedural avenue for raising the above-noted non-PCR issues.

It follows that Judge Harrington committed an abuse of discretion by denying Harvin's procedural due process right to an Evidentiary Hearing, where the law states that Harvin is 'entitled' to the Evidentiary Hearing upon making "allegations" which were "to be treated as true". Gibson, 329 S.C. at 40, 495 S.E.2d at 427.

CONCLUSION

• For all the foregoing reasons, this appeal should be  
Granted, Reversed and Remanded to the Circuit Court for  
an Order Denying the Entitled Habeas Corpus Evidentiary  
Hearing which sets forth findings of fact and conclusions  
of law' as required by SCRPC 52(a), and ultimately,  
Remanded with Instructions for the Circuit Court to grant  
Harvin an Evidentiary Hearing on his Habeas Corpus action.

Respectfully Submitted,

1s/ L. Hamm 

Larry G. Harvin, # 253468

M.C.I. F.1 - 125.B

386 Redemption Way

McCormick, SC 29899

9 - 19 - 13  
DATE