

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 LARRY G. HARVIN, # 253468,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2010-CP-10-4462

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 JULIE J. ARMSTRONG
 CLERK OF COURT

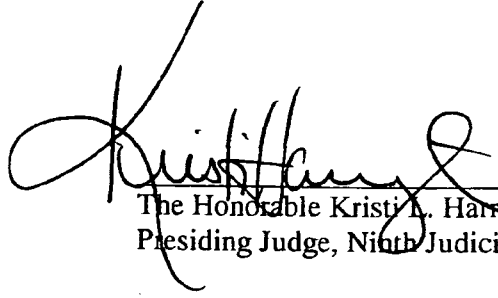
ORDER

THIS MATTER IS BEFORE THE COURT on Applicant's Motion for Relief from Judgment dated January 31, 2012. The Applicant filed a Petition for Writ of Habeas Corpus on June 1, 2010. The Court issued a Conditional Order of Dismissal signed November 2, 2011 and filed November 8, 2011, provisionally denying and dismissing this action. Subsequently, the Court issued a Final Order of Dismissal signed December 8, 2011 and filed December 16, 2011.

In the Motion currently before the Court, the Applicant requests that the Court vacate its Conditional Order of Dismissal and Final Order and hold an evidentiary hearing on the Petition for Writ of Habeas Corpus. Upon review of the Motion for Relief from Judgment, the Applicant's Memorandum in Support, as well as the original pleadings and the records attached thereto, the Applicant's Motion for Relief from Judgment is respectfully DENIED.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is DENIED.

IT IS SO ORDERED.


 The Honorable Kristi L. Harrington
 Presiding Judge, Ninth Judicial Circuit

February 22 2013
 Charleston, South Carolina

bar due to Harvin failing to so raise his allegations in any prior PCR application.

On December 16, 2011, Judge Harrington apparently maintained the same position in the 'Final Order' by stating "... the allegations are not sufficient to warrant a hearing." [see ATTACHMENT A, Pg. 2 <Highlight>], and, again, does not clearly specify any law(s) which require 'Insufficient Evidence', 'Solicitor' and 'Judicial' Misconduct' allegations to be raised in a PCR application at all.

• Harvin thus brings the instant Motion attacking the integrity of the Denial and Dismissal with Prejudice, of his entitled Evidentiary Hearing upon allegations within his Habeas petition, where Judge Harrington "acted in a manner 'inconsistent with Due Process'" by failing to give Notice of what law(s) she was relying upon that contravenes the laws governing Harvin's entitled Evidentiary Hearing (created by clearly-established state law) of Habeas allegations, also Harvin moves for relief from operation of the 'Conditional Order of Dismissal' and 'Final Order' based upon Judge Harrington's denial of Harvin's procedural due process right to an Evidentiary Hearing upon non-PCR allegations brought in a Petition for a Writ of Habeas Corpus in accord with prescribed state law(s) governing that procedural vehicle.

I.

2.

DISCUSSION

(a) - Harvin is 'Entitled' to an Evidentiary
Hearing upon Allegations brought in
a Petition for a Writ of Habeas
Corpus pursuant to laws which
Establish, and Interpret, S.C. Code
Ann. § 17-17-10, et. seq.,

The South Carolina Constitution ARTICLE I, § 18 is
interpreted as providing a 'constitutional remedy' to test the
legality of a prisoner's present detention. < see Gibson
v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 427-428 (S.C. 1998) >.

Gibson expounds that all Habeas Corpus petitions' allegations "
are to be treated as true" in making out a "prima facie
case showing petitioner is entitled to relief" < 329 S.C. at
40, 495 S.E.2d at 427 (internal citations omitted) >.

Further, in clearly stating that the petition "must set
out a constitutional claim that meets the standard
delineated in Butler v. State, 302 S.C. 466, 397 S.E.2d 87,
cert. denied, 498 U.S. 972, 111 S.Ct. 442, 112 L.Ed.2d 425 (1990)"
< 329 S.C. at 40, 495 S.E.2d at 428 > - which states, "

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" <
Butler, 302 S.C. at 468, 397 S.E.2d at 88 (in

relevant part) > —, Gibson also requires the petitioner to allege that all other remedies have been 'exhausted', meaning, presently "unavailable" < 329 S.C. at 41, 495 S.E.2d at 428 >. Gibson finally states that "[i]f the petition, on its face, meets these requirements, petitioner is entitled to a hearing." < 329 S.C. at 40, 495 S.E.2d at 428 (Emphasis Added) >. Accord Simpson v. State, 329 S.C. 43, 45-47, 495 S.E.2d 429, 430-431 (S.C. 1998).

The Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (S.C. App. 1998) Appellate Court holding summed up the matter thus:

"The import of the holdings in Gibson and Simpson is clear. A person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application."

- Keeler, 330 S.C. at 571, 500 S.E.2d at 124.

• S.C. Code Ann. § 17-27-20 outlines matters which may, as well as may not, be brought before the court in any PCR application.

Therefore, the statutory authority of S.C. Code Ann. §

17-17-10 is supported by the S.C. Constitution, and clearly-established Appellate decisions, in standing useful for entertaining matters which cannot be brought before the court in a PCR application.

(i)-GROUND ONE of Harvin's Habeas petition clearly alleges 'INSUFFICIENT EVIDENCE (PROOF) TO SUPPORT CONVICTIONS' [ATTACHMENT C, Pg. 2], sets out an allegation which refers to the conjoined 'Notice And Memorandum Of Jurisdiction...' giving the court an 'expanded 'Prima Facie' showing on this Ground' [Id.], and also cites § 17-27-20 (a)(6) in alleging "[p]rocedurally, claims of 'Sufficiency of Evidence' cannot be brought on an Application for Post-Conviction Relief" [Id.].

(ii)-GROUND TWO of Harvin's Habeas petition clearly alleges 'PROSECUTOR (SOLICITOR) MISCONDUCT' [ATTACHMENT C, Pg. 3], sets forth an allegation also in reference to the 'Notice And Memorandum Of Jurisdiction...' for an 'expanded 'Prima Facie' showing' [Id.], and cites § 17-27-20 (b) in alleging "[p]rocedurally, the claim of prosecutor misconduct raises a direct appeal issue that is barred from Post-Conviction Relief" [Id.].

(iii)-GROUND THREE of Harvin's Habeas petition clearly

alleges 'JUDICIAL MISCONDUCT' [ATTACHMENT C, P. 3-4], outlines an allegation in reference to the 'Notice And Memorandum Of Jurisdiction...' for an 'expanded 'Prima Facie' showing' [Id.], and cites § 17-27-20 (b) in alleging "procedurally, this Judicial Misconduct claim is also barred... because it raises a direct appeal issue" [Id.].

Now, pursuant to the fact that Harvin's above-noted Habeas allegations "are to be treated as true" < Gibson, 329 S.C. at 40, 495 S.E. 2d at 427 (citing Tillman v. Manning, 241 S.C. 221, 127 S.E. 2d 721 (S.C. 1962)), it follows that those Habeas allegations are, in essence, 'NON-PCR allegations', and Harvin is entitled to an Evidentiary Hearing as accorded under state law.

Harvin's entitlement to the Evidentiary Hearing upon the Habeas Corpus petition is protected under the 'procedural Due Process' clause constructions of the Fourteenth (14th) Amendment provision that no state "may deprive any person of life, liberty, or property, without due process of law". See, e.g., Green v. Catae, 220 F.3d 220 (4th Cir. 2000).

(b) - Judge Harrington's Conditional Order Of Dismissal and Final Order both are "Void", for

purposes of SCRCP 60(b)(4), where neither Order gives Harvin 'clear Notice' of change in law(s) relied upon by Judge Harrington to now require Harvin's 'non-PCR allegations' to be raised in a PCR action, in order to facilitate Judge Harrington's decision of denying Harvin's procedural due process right to an Evidentiary Hearing in a State Habeas Corpus petition.

Harvin's use of the phrase 'clear notice' is congruent with "due notice" — being, "... notice that is legally adequate given the particular circumstance" < see BLACK'S LAW DICTIONARY, 8th ed.; Pg. 1090 (2005) (quoted in part) > — , where, as no Appellate Court decisions have concisely defined 'clear notice' in the collateral-proceeding context, District Judge David C. Norton, District Court of South Carolina, found that an Admiralty / Maritime law contractual lien was not enforceable as asserted due to lack of "clear notice" < see Finora Co., Inc. v. Amitie Shipping, Ltd., 852 F.Supp. 1298, 1306 (D.S.C. 1994) > . Harvin, here, submits that if one peruses Judge Harrington's 'Conditional Order Of Dismissal' [ATTACHMENT B, Pp. 1-5] and the 'Final Order' [ATTACHMENT A, Pp. 1-2], they will find no statute, court rule, or any decisional law(s) stating 'Insufficient Evidence', 'Prosecutor Misconduct', or 'Judicial Misconduct' are cognizable PCR claims.

Because a Petition for a Writ of Habeas Corpus is "in its nature a civil rather than a criminal proceeding" < see Grant v. MacDougall, 244 S.C. 387, 390, 137 S.E. 2d 270, 272 (S.C. 1964) >, applicable S.C. Rules of Civil Procedure ('SCRPC') are required to "be construed to secure the just, speedy, and inexpensive determination of every action." SCRPC 1. Thus, SCRPC 52(a) is clear that "the court shall find the facts specially and state separately its conclusions of law thereon".

Appellate decisions, venturing to construe Rule 52(a), clearly require lower court orders to delineate the specific law(s) which was allegedly violated, and the specific facts which constitute such a violation < see, e.g., In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E. 2d 338 (S.C. 2002) (finding lower court order did not substantially comply with Rule 52(a) where "[t]he order did not find any facts to support its legal conclusion that the State failed to carry its burden of proof" >. 351 S.C. at 131, 568 S.E. 2d at 342; citing State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 198, 525 S.E. 2d 872, 884 (S.C. 2000), the Luckabaugh Court "found the magistrate's order "clearly set out what statute was violated and how the machines violated it." Id. Therefore, we found the order substantially complied with Rule 52(a), SCRPC." - 351 S.C. at 132, 568 S.E. 2d at 342-343 >. In the same vein, Rule 52(a) required Judge Harrington to clearly state the South Carolina law(s) mandating allegations of 'Insufficient Evidence', 'Prosecutor Misconduct', and 'Judicial Misconduct', to only be raised in a PCR application; a concise

denial would give 'clear notice' of what law(s) support Judge Harrington's factual findings and conclusion(s) of law against granting Harvin a Habeas Corpus Evidentiary Hearing. And as Luckabaugh itself stated, a non-jury Trial Court writes out their findings specially and separately "to allow a reviewing court to determine from the record whether the judgment — and the legal conclusions which underlie it — represent a correct application of the law.... 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." < 351 S.C., at 132, 568 S.E.2d, at 343 (internal citations omitted) >. This interest goes along with Harvin's statutory right to appeal any decision affecting his Petition for a Writ of Habeas Corpus < see S.C. Code Ann. § 17-17-140 >, which, said appeal can only be effectively brought off of matters that were clearly adjudicated in accord with SCRCP 52(a).

Now, to align SCRCP 60(b)(4) "void" judgment clause up with SCRCP 52(a) constructions, outlined above, Judge Harrington's failure to give Harvin 'clear notice' of whatever law(s) she was relying on to deny Harvin's entitled Evidentiary Hearing cannot exist as a 'just, speedy, and inexpensive determination' of Harvin's Habeas action, as required by SCRCP 1; the state-created right to an Evidentiary Hearing on a Petition for a Writ of Habeas Corpus sets the floor for Harvin's procedural due process right to that Hearing once Harvin satisfies Butler,

supra, only! Harvin only needed to make allegations for relief in order to receive an Evidentiary Hearing; Judge Harrington denied an Evidentiary Hearing through Orders that contain no 'Notice' of legal support for the 'WHY', of the denial.

• SCRCP 60(b)(4), provides Relief from Judgments upon 'civil' actions if such judgments are "void". For interpretive purposes here, the United States Court of Appeals, Fourth Circuit, interpreted 'void' under Fed. Rules Civ. Proc. Rule 60(b)(4) as being a judgment rendered by a Court which "acted in a manner inconsistent with due process of law" < see Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861, 871 (4th Cir. 1999) >. Also, the United States District Court for the Western District of Virginia, following Eberhardt, denied relief on a 60(b)(4) challenge saying "[a]bsent a due process violation, any objection Molinary might have to the procedures in Molinary I falls outside the scope of Rule 60(b)(4)" < see Molinary v. Powell Mountain Coal Co., Inc., 76 F.Supp. 2d 695, 704 (W.D. Va. 1999) >.

Thus, where Judge Harrington's 'Conditional Order of Dismissal' and 'Final Order' both fail to give clear Notice of what law(s) require 'Insufficient Evidence', 'Prosecutor Misconduct', and 'Judicial Misconduct' allegations to be raised in a PCR application only, Judge Harrington's Orders denying Harvin's Habeas Corpus Evidentiary Hearing is "void", for purposes of SCRCP 60(b)(4).

A • GROUND ONE :

INSUFFICIENT EVIDENCE (PROOF)

TO SUPPORT CONVICTIONS

Petitioner alleges his current convictions stand upon 'insufficient (false / perjured) evidence', and that the State's burden of proof is never satisfied beyond a reasonable doubt upon such circumstances. [For the expanded 'Prima Facie' showing on this Ground, please see the conjoined "NOTICE AND MEMORANDUM OF JURISDICTION ...", Pp. 3-16 under "GROUND ONE ..."].

- Procedurally, claims of 'Sufficiency of Evidence' cannot be brought on an Application for Post-Conviction Relief (see § 17-27-20 (a)(6), S.C. Code of Laws (1996, as Amended)); so, this action under § 17-17-10, et. seq., is properly retained in law as the Constitutional remedy for challenging the Sufficiency of Evidence. See Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (S.C. 1998).

B • GROUND TWO :

PROSECUTOR (SOLICITOR)

MISCONDUCT

Petitioner alleges the Solicitor's Misconduct (in 'knowingly' presenting false/perjured evidence to the jury after the false nature of the evidence was made known (or, was cognizable) to the Solicitor, arguing matters outside scope of case against Petitioner, and used prejudicial references calculated to produce a wrongful conviction) denied him a Fair Trial. [For the expanded 'Prima Facie' showing on this Ground, please see the conjoined "NOTICE AND MEMORANDUM OF JURISDICTION...", Pp. 16-22 under "GROUND TWO..."].

- Procedurally, the claim of prosecutor misconduct raises a direct appeal issue that is barred from Post-Conviction Relief under § 17-27-20(b) (1996, as Amended) (accord Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974)). The instant action is therefore proper for entertaining Petitioner's Prosecutor (Solicitor) Misconduct claim. Simpson, supra.

- C. GROUND THREE

JUDICIAL MISCONDUCT

Petitioner alleges the Trial Judge's Misconduct (in giving instructions 'Hand of One, Hand of All' and 'Inferred Malice from use of Deadly Weapon' to jury, when no evidence existed in the record to support those instructions to the jury) denied him a Fair Trial. [For the expanded 'Prima Facie' showing on this Ground, please see the conjoined "NOTICE AND MEMORANDUM OF JURISDICTION ..." , Pp. 22-28 under "GROUND THREE ..."] .

- Procedurally, this Judicial Misconduct claim is also barred under § 17-27-20(b) because it raises a direct appeal issue; yet, the instant action is proper for entertaining Petitioner's Judicial Misconduct claim. SIMPSON, *supra* .

ENTITLEMENT TO
PETITION

In June, 2009, sometime therein, Ms. Mary Mc Cabe (Library Services, SCDC) was conducting an inquiry into Mc Cormick C.I.'s Law Library Inventory for Missing and Damaged Legal Materials; Mc Cormick