THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert M. Young, Circuit Court Judge

Cause No. 09-CP-10-4264

Harold Simmons, Jr.....Plaintiff-Appellant,

v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown, ...Defendants-Appellees.

Appellate Case no. 2011-186587

APPELLANT'S MOTION TO RECALL REMITTITUR

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MOTION TO RECALL THE REMITTITUR OR, IN THE ALTERNATIVE MOTION FOR NEW TRIAL

TO THE HONORABLE PRESIDING JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

Appellant/petitioner, Harold Simmons, Jr., respectfully moves this court for an order recalling the remittitur and permitting him to reinstate his appeal in this case.

This motion is based upon the following background and points and authorities.

Dated: 12-09-2013

Respectfully submitted,

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BACKGROUND

On July 10, 2009, this action was brought by Harold Simmons alleging false imprisonment and violations of his civil rights by the Charleston County Family Court: Judge Paul W. Garfinkel and South Carolina Department of Social Services: Attorney Pamela Brown. Due to the fact that when he appeared before the court on August 16, 2006 for a previously ordered review of his Workers' Comp cases, the review was turned into a Rule to Show Cause hearing on issues that were already resolved and he was subsequently found in civil contempt and imprisoned. This action was amended on December 7, 2010 in order to include negligent infliction of emotional distress.

The respondent's moved for a Motion for Summary Judgment arguing that they were entitled to judicial immunity. On December 10, 2010, the case came before Judge Roger M. Young, who granted the respondents' Motion for Summary Judgment. During the hearing of the case Judge Young stopped Mr. Simmons from giving his argument and ruled on the case. Mr. Simmons did not fully know, comprehend, or understand exactly as to why he was not given the proper time as the Defendants were allowed and exactly how the court proceedings should have been handled. Mr. Simmons has always requested a jury trial and yet has not received one until this day. Mr. Simmons inquired with the court clerk that informed him of the fact the he has to wait for the court to send him information on the next step of process in the form of a pre post order and the actual court order. On February 22, 2011, Mr. Simmons served the Notice of Appeal on Respondent's after he had reviewed the Appeal Chart for guidance on the next step in the process since the court clerk never sent him proper papers as were stated to him.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECALL REMITTITUR

Following the order and judgment entered on December 26, 2010, in Charleston County No. 2009-CP-10-4264, appellant filed a notice of appeal on February 22, 2011.

On February 22, 2011 the appellant submitted a notice of appeal as pro se, appellant is limited and lack literary ability with a feeble intellect along with the trial court failure to give the proper rules according to South Carolina Code of Laws Section 14-17-260 (b) which clearly states that the clerk shall issue all processes and sign all judgments. The clerk shall (b) issue all rules and notices ordered in the common pleas, The Panel should be willing to consider and determine if the clerk failed to comply with the South Carolina Code of Laws. This contributed to the appellant to be unaware of the Rule 59(e) after inquiry with the court clerk concerning the rules and next step in the process, no preorder was sent to appellant. The appellant proceeded to file a notice of appeal on February 23, 2011 believing that the clerk direct him accurately in the process and had given him all of the rules at that time, not realizing that the clerk did not give him the rule of 59(e).

Appellant received correspondence from the South Carolina Court of Appeals advising him that he should submit a brief. On September 31, 2012, appellant certified mailed in his brief. Appellant contends that he immediately submitted the brief based on his best ability according to the issues that were raised in the lower court. Appellant received a letter dated November 6, 2013, that advised him of the South Carolina Court of Appeals affirmed opinion.

The panel's conclusion that the losing party failed to comply with and file Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review and that the appellant raised first time issues on appeal, and that the issues were never raised and ruled upon in trial court was an accurate opinion without consideration of the fact that the Appellant was Pro Se and therefore falls in the category of a non-professional in a professional system and could have not been made aware of the Rule and or given the next proper process step or documents, coupled with the denial to finish arguments and have limited or lack of literary ability otherwise known as being feeble intellect is a huge oversight.

Powell v. Alabama, 287 U.S. 45 (1932), involved the conception of the due process of law clause. "While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character. It never has been doubted by this court, or any other, so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that, by "the law of the land" is intended "a law which hears before it condemns" have been repeated in varying forms of expression in a multitude of decisions." The rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard.

Bute v. Illinois, 333 U.S. 640 (1948), involved the due process of law clause "The

right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

The Panel did not consider the Pro Se Context, federal courts overlooked the non-professional in a professional system and the limited literary ability of appellant along with the denial of a jury trial puts the decision in direct conflict with the decision of other circuits.

On November 21, 2013 the appellant submitted a petition for panel rehearing or rehearing en banc as pro se, to the best of his ability considering appellant is limited and lack literary ability with a feeble intellect. Appellant submitted the petition in a timely manner by certified mail.

Appellant received correspondence on November 09, 2013 from the South Carolina Court of Appeals advising him that a remittitur was sent to the lower courts. On December 4, 2013 the appellant received correspondence from the South Carolina Court

of Appeals advising him that his petition for panel rehearing or rehearing en banc as pro se was submitted to late. The petition was submitted a day before the remittitur was sent to the lower courts.

The practical implications of the panel's decision further support granting review. By opening the door to suits against officials challenging official government actions, the panel's decision potentially creates jurisdiction in this Circuit over every human rights case in the world—an outcome that, is very needed in the legal system. Indeed, if a Pro Se litigant with limited literary abilities could be heard and obtain judicial review of virtually any official government action simply "by (the) artful pleading" of suing the responsible officer (person in their official capacity), the statute would become "optional." And the flood of potential suits allowed by the panel decision may well include challenges to the actions of important allies of the Official persons. See Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

If the Due Process Law Clause applies to Pro Se litigants that have been denied the right to equal time in the court of law to present argument and the right to be given the proper rules and documents along with being limited and or lack the literary abilities and if such application is unconstitutional, rehearing should be granted to determine the proper remedy. If the Due Process Law Clause does apply than the appellant should be granted the opportunity to properly submit Rule 59 (e) and be allowed to resubmit the appellant brief. See US Constitution Amendment Article Fourteen.

During this period of time, appellant was taking a medication, Oxycodone, prescribed by his physician, Dr. Richardson, of the Southeastern Spine Institute. Appellant suffers from severe back pain due to back surgery. Appellant was taking an

additional medication, cymbolta, prescribed by his physician, Dr. Richardson of the Southeastern Spine Institute. Appellant suffers from major depression disorder due to medical condition.

Appellant immediately telephoned the South Carolina Court of Appeals to ask for assistance in reinstating his appeal.

Appellant, a layperson of the law, should not be penalized for being ignorant of appellate procedures. (*People v. Davis* (1965) 62 Cal.2d 806.) Moreover, the court must consider appellant's state of health and the bewilderment he must have felt in attempting to provide the court with the proper filings. Appellant sincerely believed that he had proceeded properly and that he had done his best as legal representation on appeal. (*People v. Hickok* (1949) 92 Cal.App.2d 539.)]

Appellant respectfully requests this court to consider his filings in light of the standards announced in *People v. Ribero* (1971) 4 Cal.3d 55, 65, that the power of appellate courts to grant relief from default ". . . is to be liberally construed to protect the right to appeal."

Dated: 12-09-2013

Respectfully submitted,

Harold Simmons Jr.

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