

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LANCASTER COUNTY

Clifton Newmon, Circuit Court Judge

Randolph Frazier, Petitioner,

v.

State of South Carolina, Respondent.

Appellant Case No. 2013-002758

PRO SE RESPONSE TO PETITION

OR IN THE ALTERNATIVE

PETITION FOR HABEAS CORPUS

Petitioner herein files this Pro Se Petition in response to Johnson Petition filed by Petitioners Attorney as he herein asserts ineffective assistance of counsel by counsel at trial and at all levels of appeal. Appellant has suffered injustice due to the irregularities in the proceedings below, and prior underlying proceedings to a degree that is shocking to the conscience of fundamental justice... Petitioner has been denied liberty and property interest, equal protection of laws, benefits of controlling law the right to effective assistance of counsel at trial, Direct Appeal, PCR, PCR Appeal, access of courts and due process of law in violation of SC Constitution Article, I, §3, 9, 14, 15, Article VII, §2 and First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the US Constitution. Petitioner invites this Court to convert this Petition into writ of Habeas Corpus, and grant Petitioner the relief he is entitled to upon the records and proceedings in this case.

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Hereafter, Petitioner sets forth briefing of standard to be applied to claims of ineffective assistance of counsel Petitioner does so as to Trial Counsel, Direct Appeal Counsel, PCR Counsel, and PCR Appeal Counsel. For upon the foregoing, and below, if the Court does not grant the first relief Petitioner seeks of unconditional release due to the degree of deprivations he has suffered from denial of his constitutional rights, then in the very least Petitioner is entitled to a hearing at which he must be allowed to raise all claims as to ineffective assistance of trial counsel, direct appeal counsel, PCR counsel, and PCR appeal counsel, in conjunction with being denied his First, Sixth, and Fourteenth Amendment rights of the United States Constitution, South Carolina Constitution Article I, §2, §3, and §9 as set forth herein. As the analysis also applied to claims set forth hereinafter. All claims/issues raised by Petitioner must be addressed to determine the degree of deprivations and harms suffered due to the combined violations of his constitutional rights.

INEFFECTIVE ASSISTANCE OF COUNSEL

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATIONS OF HIS GUARANTEED RIGHTS OF ARTICLE I, §3, §12, and §14 OF THE SOUTH CAROLINA CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

STANDARD OF REVIEW

The burden of proof is on the Applicant in a post-conviction proceedings to prove the allegations in his application. Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 428 (1983). Where the

allegations of ineffective assistance of counsel are made, the question becomes "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2064.

Ineffective assistance of counsel is not always the result of trial counsel, for such may also be denied by the (State) trial court. Fields v. Peyton, 375 F.2d 624 (4th Cir. 1976). "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." United States v. Valequez-Bernal, 458 U.S. 858 (1982).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, the United States Supreme Court states that error and prejudice were two facts that must be considered in evaluating claims for ineffective assistance of counsel. To meet the first requirement, "[d]efendant must show that counsel's representation fell below an objective standard of reasonableness under the prevailing norms." Turner v. Bass, 753 F.2d 348 (4th Cir. 1985), quoting Strickland, supra. In Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992), this Court held to establish a claim of ineffective assistance of counsel, petitioner must show: (1) Counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors there is a reasonable probability that the result of the trial would have been different. Here "there has been a denial of Sixth Amendment rights which makes adversary process itself presumptively unreliable." United States v. Chronic, 104 S.Ct. 2039 (1984).

In meeting the second prong of the inquiry, a complaining defendant must show that he was prejudiced before being entitled to reversal. In that regard, Strickland requires that:

...the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.

... a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct ... the identified acts or omissions were outside the wide range of professionally competent assistance. Id. 694 & 695.

In considering the error prong of Strickland, the court must avoid viewing the actions and decisions by the attorney in hindsight. Counsel's decisions must be viewed in light of the circumstances at the time the decisions were made.

The prejudice requirement is satisfied by demonstrating that but for trial counsel's ineffectiveness, a defendant's trial, but not necessarily its outcome would have been altered in a way helpful to him. See e.g. Praylow v. Martin, 761 F.2d 179 (4th Cir. 1985), cert. denied, 474 U.S. 1009, 106 S.Ct. 535, 88 L.Ed.2d 466 (1985).

In every case the prosecution has the advantage, they gather all the evidence through police officers whom they have immediately available to testify. Evidence gathered by police is slanted toward prosecution. Police officers' function is to arrest and gather evidence for conviction, not the defense.

Counsel's first task is to become thoroughly acquainted with

the facts: questioning the witness, friends, relatives and police officers. During these interviews, counsel should not only look for holes in the State's evidence, but should look for favorable circumstances and possible affirmative defenses. Counsel must study the law of the case. This involves an understanding of the theory of the State's case, the elements of the offense charged, counsel cannot accurately appraise the case without an in depth familiarity with the requirements of the substantial law.

Even though interviewing the client is a must, to ascertain all relevant information of the case, counsel cannot solely rely upon the client. As observed by the Court in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932): "If charged with a crime, his 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 issues or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he may have a perfect one." That "laymen defendant requires the guiding hand of counsel at every step in the proceeding against him." These standards apply equally, as to trial and whether to plead guilty, in seeking a plea agreement, and in preparing for sentencing.

Trial attorneys have been found ineffective for failing to properly investigate the case and prepare for trial, in a number of ways. Including but not limited to: For failing to investigate, and find that defendant was suffering from post-traumatic stress, because he had killed women and children

in the war, failed to talk to wife and to find defendant has diminished capacity defense, was found to be miscarriage of justice. Glass v. Vaughn, 860 F.Supp. 201 (E.D. Pa. 3rd Cir. 1984). The failure to recognize a legal defense is not a product of sound trial strategy, rather it reveals a lack of strategy. Even a strategic decision based upon a misunderstanding of the law is not a "reasonable" strategic decision. Ostrander v. Green, 46 F.2d 427, 35 (4th Cir. 1995)("We cannot expect criminal lawyers to be seers, but we must demand that they at least apprise themselves of the applicable law and provide their clients with a reasonable accurate description of it.") It is evident that before an attorney can make sound decisions, they must first investigate all facts of the case, applicable law, potential defenses, and consult with experts relevant to the case. This standard applies to both trial and in making intelligent decisions concerning pleas.

Courts across the nation view investigation of the facts and law to be one of counsel's primary and most important duties, because without such, intelligent decisions cannot be made. "Defendant had a right to have evidence, in court of [rape victim's] her prior accusations, and counsel was ineffective for failing to bring this evidence." Carrigan v. Arvoni, 871 F.Supp. 222 (N.J. 3rd Cir. 1994).

Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. Kenly v. Armonstrout, supra. An attorney's "strategic choice made after less than complete investigation are reasonable precisely to the

the extent that reasonable professional judgments support the limitations on investigation." Id. (Quoting Strickland v. Washington, 466 U.S. 688, 690-91, 104 S.Ct. 2052, 2066 (1984).) A reviewing court closely "scrutinizes an attorney's preparatory activities. Chambers v. Armonstrout, 907 F.2d 285, 831, 835 (8th Cir.)(en banc), cert. denied, 498 U.S. 950 (1990). "A tactical decision to pursue one defense does not excuse failure to present another defense that would bolster rather than detract from the primary defense." Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993)

The right to counsel is fundamental right to criminal defendants, that assures the fairness, and is the legitimacy of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair." Strickland, supra, at 2063. For "it is through counsel that the accused secures his other rights." Main v. Moulton, 474 U.S. ___, 106 S.Ct. 477 (1985). Also see, Shafer, Federalism and State Criminal Procedure, 70 Harv. L. Rev., 1, 8 (1956). ("of all rights that an accused person has, the right to be represented by counsel is by far the most persuasive, for it affects his ability to assert any other right he may have.").

Counsel ineffective for not using witnesses' prior statements and there was a Brady violation. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986)(741 F.2d 1248; 799 F.2d 142). Counsel ineffective for failing to investigate alibi witnesses and failed to prepare for trial defendant denied a fair trial. Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). The

defendant was arrested and charged with statutory rape, and plead not guilty to attempted rape. Defendant was found guilty and sentenced to 30 years. Court ruled that defendant was denied effective assistance of counsel-lawyer failed to appeal, failed to investigate, failed to bring up any mitigating evidence at sentencing. Bryant v. Peton, 270 F.Supp. 353 (W.D. Va. 1976).

Counsel ineffective because he never tried to get a psychiatrist to see defendant. Wood v. Zahradnick, 430 F.Supp. 107, 578 F.2d 980 (1978), 611 F.2d 1383 (4th Cir. 1980). Counsel ineffective for agreeing to maximum 20 years for malicious wounding. Jennings v. Iahradrick, 455 F.Supp. 495 (W.D. Va. 1978). Counsel ineffective for failing to use the defense of intent and malice, and did not know the laws of criminal procedure. Young v. Zant, 677 F.2d 782 (11th Cir. 1982). Counsel ineffective for failing to investigate, bring up illegal arrest, did not question make-up of grand jury, had poor attitude about the defense, and told jury he was court appointed. Due to all errors counsel made during trial and sentencing, death sentence vacated-and court gave improper jury instructions. Goodman v. Balkam, 684 F.2d 794 (11th Cir. 1992).

Counsel ineffective for telling jury defendant was guilty of the crime. Francis v. Spraggins, 720 F.12d 1190 (11th Cir. 1990). Counsel ineffective, because he did not investigate, failed to prepare and failed to provide defendant a viable defense. Stevens v. Johnson, 575 F.Supp. 881 (ED N.C. 4th Cir. 1983). Counsel ineffective for failure to investigate an insanity defense to being insane at the time of the crime. Walker v. Mitchell, 587 F.Supp. 1432 (4th Cir. 1999).

As the cases above show, courts have repeatedly held that an attorney must effectively investigate the case, applicable law, consult with, secure needed experts and properly prepare and present a defense. As to both the guilt and sentencing phase, whether the case is tried or plead. Though there may be unusual cases where an attorney can make rational decision that investigations in unnecessary, as a general rule an attorney must investigate a cause in order to provide minimally competent professional representation. Crips v. Dickworth, 743 F.2d 580, 583 (7th Cir. 1984), cert. denied, 469 U.S. 1226 (1985). Thomas v. Lockhart, 739 F.2d 308 (8th Cir. 1984).

As the above cited federal cases have held, so has the South Carolina Supreme Court, consistently applying the Strickland, supra, standard: Counsel ineffective for giving erroneous advice-drug case. Alexander v. State, 402 S.E.2d 484 (S.C. 1991). Ineffective assistance for failing to suppress a statement. Dupree v. State, 408 S.E.2d 215 (S.C. 1991).

Counsel found to be ineffective for giving erroneous advice about appeal. Boseman v. State, 414 S.E.2d 144 (S.C. 1992). Failure to subpoena a witness. Martinez v. State, 204 S.C. 39, 403 S.E.2d 113 (1991). Failure to raise a viable double jeopardy claim. Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991). Erroneous advice about offense. Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 154 (1991). Sixth Amendment protects criminal defendants against ineffective assistance of counsel during plea bargaining process; even if they reject the offered plea. Judge v. State, 471 S.E.2d 146, reh. den. (S.C. 1996). Failure to prepare and present a complete defense upon failure to

investigate and call witness. Thomas v. State, 471 S.E.2d 32 (S.C. 1992). Failed to make a motion to suppress. Sikes v. State, 448 S.E.2d 560 (S.C. 1994). Erroneous advice to have defendant plead guilty but mentally ill. Davenport v. State, 398 S.E.2d 649 (S.C. 1990). Failure to seek a ruling on admissibility of criminal record. Horton v. South Carolina, 411 S.E.2d 223 (1991).

Therefore, both State and Federal Courts are applying the Strickland standard make clear that reasonable performance of counsel includes adequate investigation of facts, consideration of viable theories, and development of evidence to support those defense, theories. And, an attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. Kenly v. Armonstrout, 937 F.2d 1298, 1304 (8th Cir.), cert. denied, 112 S.Ct. 431 (1991).

The foregoing is submitted in support of all claims raised herein involving ineffective assistance of counsel, trial, appeal and PCR whereas applicable. The issues presented below are presented in addition to the claims raised in Petitioner's previous applications for Post Conviction Relief, and incorporates hereof as if repeated in full verbatim. The following adds to those claims, or clarifies those claims, as Petitioner presents miscarriage of justice due to ineffective assistance of trial, appeal attorneys, PCR attorneys and denial of constitutional rights by the courts. That demands that Petitioner's sentence and conviction be vacated and he be unconditionally released.

In State v. Ramsey, 267 S.C. 236, 226 S.E.2d 894 (1976), our

Supreme Court upon holding that the death penalty provisions of §16-52 of the 1974 Act 1177 was unconstitutional observed:

As mandatory death provisions under the aggravated circumstances enumerated in §16-52 are unconstitutional, in line with the procedure permitted in Ferman and used in State v. Gibson, 259 S.C. 459, 192 S.E.2d 720 (1972), we affirm appellant's conviction of murder and reverse only imposition of the death penalty, leaving him subject to the constitutional life sentence provision of §16-52. Accordingly, the case is remanded to the General Sessions Court of Greenville County for the purpose of sentencing the appellant to life imprisonment.

As was the case in Gibson, Petitioner herein alleges he to was sentenced under an unconstitutional statute, and was sentenced under the non-existent punishment scheme, (unconstitutional law is void), then Petitioner's sentence is automatically void, mandating that Petitioner be released, or at the most tried for the lesser included offense of involuntary manslaughter, or voluntary manslaughter. The only result that may be constitutionally reached in petitioner's case is that his sentence is void and he must be released or resentenced.

Furthermore, because the provisions of laws under which the Petitioner was sentenced were unconstitutional and void, subject matter jurisdiction is lacking. For jurisdiction cannot exist upon an unconstitutional law.

If the Court lacks jurisdiction to enter a criminal judgment ... if the judgment is predicated upon an unconstitutional (or indictment) or otherwise invalid statute, the judgment is void. See Herrera v. Commonwealth, 483 S.E.2d 292, 494 (Va. App. 1997).

Court lacking subject matter jurisdiction has no authority to act, regardless of consent of litigants. Dove v. Gold Kist Inc., 442 S.E.2d 598, 314 S.C. 235 (S.C. 1994); Tisdale v. Williamsberg County Sch. Dist., 433 S.E.2d ____, 315 S.C. 377 (S.C. App. 1993); Pascal v. Causey, 420 S.E.2d 863, 309 S.C. 206, reh. den. (S.C. App. 1992). That depends upon authority granted by the Constitution and laws of the State. Pascal v. Causey, Id. Acts by courts as to matters over which it has no jurisdiction are void. Chet Adams v. James F. Anderson, 418 S.E.2d 37, 308 S.C. 410, reh. den. and cert, denied. (S.C. App. 1998).

Subject matter jurisdiction may be raised anytime. State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998); Carter v. State, 329 S.C. 335, 495 S.E.2d 773 (1998); Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995); Lillard v. Searson, 170 S.C. 304, 170 S.E.2d 449 (1993). Subject matter jurisdiction, first and foremost, depends on the authority granted the court by the Constitution and laws of this State. State v. Castleman, 219 S.C. 136, 64 S.E.2d 250, 252 (1951).

In order to understand the meaning of any statute or phrase of law, it is necessary to determine the meaning of the language as it is used in the particular context. Robinson v. Shell Oil Company, 117 S.Ct. 843, 946 (1997). In order to understand the meaning of any word, phrase, or sentence, "the cardinal rule . . . is that the words . . . should be given their plain and ordinary meaning unless something in the [text] requires a different interpretation." Seckinger v. The Vessel Exclibur, 483 S.E.2d 775 (S.C. App. 1997). Also see, United States v. Ron Pair Enterprises, Inc., 109 S.Ct. 1026, 1030 (1989).

Petitioner was denied entitlements of PCR, and for the Court to understand Petitioners position of claims of being denied entitlements of PCR, it is necessary to include a discussion of post-conviction law and argument, prior to setting forth specific issues, as follows:

ENTITLEMENTS OF POST CONVICTION:

S.C. Code of Law §17-27-110 of the PCR Act provides that: "The Supreme Court may adopt such rules as it shall deem necessary to effectuate the purpose of this chapter." under this authority Rule 71.1 was included in the South Carolina Rules of Civil Procedure, September 1, 1990, taking the place of former Supreme Court Rule 50 (1) - (8).

The question arises as to what does "necessary to effectuate the purpose of this chapter" mean? Provisions of the PCR Act sheds light on the meaning. §17-27-40, provides that Clerk of Court "shall" docket the application and provide the Respondents with filed copies, in recognition that an applicant may not be capable to complying with rules of proper service. §1-27-50 requires that the application shall be on form prescribed by the Supreme Court. Recognizing that an applicant may not possess the ability to prepare a proper application, to present needed information to begin the process. §17-27-70 provides that: "In considering the application, the court shall take account of substance, regardless of defects of form." Recognizing that the applicant may not possess skills or education needed to properly state his claims. Therefore, the purpose of the PCR Act is to provide an applicant a fair opportunity to present his claims to the court.

Therefore, the PCR Act, (ACT), professes to provide an applicant with a fair opportunity to present their claims. Therefore, Rule 71.1 (d), SCRCF, was established to effectuate the purpose of the PCR Act, that it be fair and meaningful, that provides:

If, after the State filed its return, the application presents question of law or facts which requires a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall ensure that all available grounds for relief are included in the application and shall amend the application if necessary.

Rule 71.1 (d), SCRCF, means to assist an applicant in presenting their claims, so as to meet their burden of proof by a preponderance of the evidence, Rule 71.1 (e), SCRCF, as §17-27-40 provides for funding for legal services, experts, etc., and §17-27-150 provides for discovery with leave of court. Rule 71.1 (d), SCRCF, clearly mandates that PCR counsel investigate, research and present "all available grounds for relief." However, no matter how incompetent a PCR attorney maybe, the applicant is held strictly accountable for any failures to present their claims, making the entitlement of Rule 71.1 (d), SCRCF, of no effect and meaningless, and flies in the face of the averments of the PCR Act, recognizing that an applicant probably lacks the ability or means to present their claims, and meet their burden of proof. In Rule 71.1 (f), SCRCF, provides that: "A final judgment entered under the Act shall be reviewed by the Supreme Court upon petition pursuant to Rule 227 SCACR. However, if the applicant's claims are not presented, any review becomes meaningless.

South Carolina Law expressly provides for the appointment of counsel in PCR once the court determines that there exists question of law or issues of fact that require a hearing. Wood v. State, 275 S.C. 179, 184 S.E.2d 702 (1971). However, an applicant has no per se right to effective assistance of PCR Counsel. In otherwords, an applicant cannot subsequently use a "Sixth Amendment Claim" against the attorney as a justification for successive PCR application. Aice v. State, 409 S.E.2d 392 (1991). However, this Court has carved out two narrow exceptions, of holding PCR Counsel to be ineffective, in regard to appeal matters. In Austin v. State, 409 S.E.2d 385 (1991), this Court held PCR counsel was ineffective for failing to file a notice of intent to appeal. In Austin, this Court held:

The right to seek appellate review of the denial of PCR is expressly authorized by state law. S.C. Code Ann. §17-27-100 (1985); Supreme Court Rule 50 (9). Whether such review is granted is discretionary with this Court. Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985).

While we are aware the constitutional right to counsel does not extend to discretionary appeals on collateral attack, we have ruled that Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), shall continue to apply in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988); compare Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Anders, requires appellate counsel to brief arguable issues, despite counsel's belief the appeal is frivolous, as a safeguard of the right to appeal. In applying Anders on PCR, we have recognized a prisoner's right to the assistance of appellate counsel in seeking review of the denial of PCR. Supreme Court 50 (6) expressly provides for the appointment of counsel to seek appellate review on PCR.

Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must craft a remedy, to correct the unfairness which has occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance. (Footnote omitted).

Austin only addressed the issue of PCR counsel failing to

file a notice of intent to appeal, so as to preserve a client's statutory right to appeal. However, the Austin Court also reaffirmed its holding in Johnson v. State, 294 S.C. 310, 364 S.E.2d 210 (1998), wherein this Court declined to adopt the holding in Pennsylvania v. Finley, supra, and adhere to its long standing policy that the withdraw of counsel in meritless post conviction relief appeals must be accomplished through the procedure outlined in Anders.

Even though this Court expressly recognized that the United States Supreme Court in Pennsylvania v. Finley, supra, held that the Sixth Amendment Right to counsel does not extend to discretionary appeals on collateral attack, the South Carolina Supreme Court continues to recognize a statutory right to effective assistance of counsel on appeal from denial of PCR. Upon remanding for a hearing in Austin, the Court held: "In deciding this question, we shall use an analysis akin to that of Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." In otherwords, the statutory right to PCR appeal counsel is to be analyzed under the Sixth Amendment standards set forth in Strickland v. Washington, Id. And therefore, the State of South Carolina has provided for right to counsel, and the right to effective assistance of counsel in PCR appeals, as envisioned and guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution. Therefore, if Petitioner can show the same entitlements in Rule 71.1 (d), SCRCPP, he has the right to effective assistance of PCR counsel throughout the PCR proceedings.

As shown the statutory right to PCR counsel under South

Carolina Law is the right to effective assistance of PCR Appeal counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985).

A second narrow exception that the South Carolina Supreme Court carved out "to correct unfairness" was a finding that PCR counsel was ineffective in failing to file a Rule 59 (e), SCRPC, Motion, when the PCR Order failed to address the issues raised at the hearing. Pruitt v. State, 432 S.E.2d 127 (1992). The court in Pruitt, remanded for a new PCR hearing because the PCR Order failed to address issues raised in the PCR application and about which evidence was presented during the PCR hearing. The Court urged that PCR orders be cautiously prepared in order to address all issues raised by an applicant. Also see, McCray v. State, 408 S.E.2d 241 (1992).

Therefore, the South Carolina Supreme Court has recognized that a PCR applicant has the right to effective assistance of counsel in three regards:

(1) In ensuring the final PCR order makes findings as required by Rule 52 (a), SCRPC, and §17-27-80 of the PCR Act. If the order failed to do so, and counsel failed to file a Rule 59 (e), SCRPC, motion to preserve issues raised for appeal review, then counsel is ineffective;

(2) When PCR counsel failed to file a notice of appeal, so as to preserve right of appeal;

(3) On appeal in presenting the issues, raised and ruled on in the lower court.

While the South Carolina Court recognizes the statutory right to effective assistance of counsel in matters of appeal, the Court has refused to extend such to PCR counsel in regard to

PCR Act. That Petitioner has a substantial property and liberty interest involved in this entitlement.

"[R]ules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). Federal Rules of Procedure are as binding as any statute duly enacted by Congress and federal courts have no more discretion to disregard a rule's mandate than they do to disregard the constitutional or statutory provisions. Atchison v. Topeka, and Santa Fe Ry Co. v. Hercules, Inc., 1456 F.3d 1071 (Ca. 9 1998). The same would apply to state rules of procedure.

Therefore, Petitioner could not be denied the entitlements of Rule 71.1 (d), SCRPC, without due process of law. "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes. Therefore, the words of the [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." State v. Brown, 334 S.C. 302, 337, 543 S.E.2d 568, 571 (Ct. App. 2001)(Quoting Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994).

The language of Rule 71.1 (d), SCRPC, with the use of "shall" makes clear that there is no discretion not to do what the rule commands PCR counsel to do. "Use of the word 'shall' in a statutory provision indicates that the provision is mandatory." Seckinger v. The Vessel Excalibur, 326 S.C. 382, 283 S.E.2d 775 (Ct. App. 1997). "We look to the statute's language, structure, subject matter, context, and history-factors that typically help courts determine a statute's objectives and thereby illuminate

its text." Almendarez-Torres v. United States, 118 S.Ct. 1219 (1998).

Therefore, not only does Petitioner have a clear entitlement to all that is mandated by Rule 71.1 (d), SCRCF, he also is entitled to seek to have the court compel PCR counsel to comply, and if denied those rights, he is entitled to seek redress for wrongs suffered thereby. These entitlements have become more precious than ever, due to the fact that an applicant only has one year to bring an application, changes within the Department of Corrections that present severe impediments to access of courts, and Respondent convincing the lower courts to apply Jones v. State, of Order of S.C. Supreme Court, dated January 10, 2002, etc., to prevent an applicant from being heard, except strictly through PCR counsel. On appeal a petitioner may have both skilled counsel, and right to effective assistance, whereas he has neither in a PCR, where he may be appointed an attorney who possesses no skills needed, or is hostile toward being appointed, or simply does not care, or is otherwise incompetent. In subjudice, all of the above allegations are alleged in this case.

Petitioner has substantial property and liberty interest in the entitlements of PCR provisions of Rule 71.1 (d), SCRCF, that is protected and preserved by the due process clause and equal protection clause of the Fourteenth Amendment of the U.S. Constitution, that has been denied, and protected and preserved by the South Carolina Constitution Article I, §3's mirror protections of our State's due process clause and equal protection clause protections for this contract with the people of this State.

In South Carolina, there are two distinct forms of post-conviction relief: the Uniform Post-Conviction Act (§17-27-10, et seq.); and Habeas Corpus, §17-17-10, et seq., S.C. Constitution Article V, §5, Article I, §18.

In Butler v. State, 397 S.E.2d 87 (1990), Butler filed a writ of habeas corpus after exhausting all of his state remedies, including post-conviction relief. The Court granted the writ, finding that the trial judge had coerced the defendant to take the stand in his defense.

In Pennington V. State, 441 S.E.2d 315 (S.C. 1994), the Court explained:

In Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965), we held that the writ of habeas corpus cannot be used as a substitute for appeal or other remedial procedure. Of course, a petitioner may still obtain a writ of habeas corpus from this Court, after exhausting all other sources of relief, "where there has been a denial of fundamental fairness shocking to the universal sense of justice." State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)(Toal, A.J. concurring); Butler, supra.

In Slack v. State, 429 S.E.2d 801 (1993), the Court granted a writ of habeas corpus on issues of subject matter jurisdiction, after Slack exhausted his post-conviction remedies. In State v. Torrence, the Supreme Court, while abolishing the doctrine of in favorem vitae review in capital cases significantly stated:

"However we do not relinquish entirely our ability to provide relief to those who have, for whatever reason, been utterly failed by our criminal justice system. While we abolish in favorem vitae review as an outdated doctrine to easily abused, an imprisoned individual may obtain a Writ of Habeas Corpus from this court after exhausting all other sources of relief. 'where there has been a violation, which, in the setting, constitutes

a denial of fundamental fairness shocking to the universal sense of justice.'" State v. Butler, Supra.

Article I, §18 of the South Carolina Constitution provides:

The privilege of the writ of habeas corpus shall not be suspended unless when, in case of insurrection, rebellion or invasions, the public safety may require it.

Any judge and any South Carolina Court may hear a petition for writ of habeas corpus. S.C. Code of Laws, §17-17-30, §17-17-100, S.C. Constitution Article V, §5.

In Baskins v. Moore, 363 F.Supp. 187 (D.S.C. 1973), the court, while addressing the continued viability of the writ of habeas corpus in South Carolina stated: "petitioner's claim is of the core of habeas, petitioner must exhaust either by way of the statutory procedural device-Section 17-601, et seq. (the predecessor statute to §17-27-20)-or, if Section 17-601 be deemed inadequate or ineffective, by way of the writ of habeas corpus files with the South Carolina Supreme Court." Id, at 192 n. 5.

"The curtailment, when read in light of Baskins, is merely the requirement to exhaust the avenues available under post-conviction relief prior to filing of a petition for writ of habeas corpus." Pennington v. State, supra.

Therefore, the only requirement that Petitioner must meet and show is that he has exhausted his post-conviction relief remedies, or they are not available to him. Furthermore, the Court clearly held that the "statutory remedy" of §17-17-10, et seq., to petition for a writ of habeas corpus is available to Petitioner, and the right is secured by S.C. Constitution Article I, §18.

In Simpson v. State, 495 S.E.2d 429 (1998), holdings of Pennington v. State, supra, was reaffirmed, but for the first time specifically held: "we now hold that a matter which is cognizable under the Act may not be raised by a petition for writ of habeas corpus before the circuit or other lower courts." In Simpson, the lower court found that a claim existed that Simpson could raise under the Act, and therefore, he had not fully exhausted his post-conviction remedies.

In Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998), the Court held and directed that:

A habeas corpus must support the requested relief.

It must allege petitioner has exhausted all other remedies, and it 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). However, habeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles. --- Habeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable.

Procedurally, a petitioner seeking habeas corpus must first exhaust all available remedies. --- Further, petitioner must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate.

Because petitioners are attempting to raise an issue not raised in their prior PCR applications, we remand to the lower court so that petitioners may have the opportunity to show why their applications should not be dismissed as successive. Petitioners will bear the burden to prove a sufficient reason why the present claims were not raised in their previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). If they are unable to meet their burden of proof, the applications may be dismissed as successive.

Further, if petitioners can show upon remand that PCR is unavailable, all other remedies have been exhausted, and the issues raised now could not have been raised in their prior PCR applications, the lower court may treat the applications as habeas corpus and provide a hearing on their constitutional claim. (Emphasis added by Petitioner).

Dicta in recent habeas corpus precedents could lead one to misapprehend these holdings and conclude that one must meet a standard of violation, which, in the setting, "constitutes a denial of fundamental fairness shocking to the universal sense of justice." 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). However, this is not the standard to be applied by the lower courts, to claims raised for the first time, pursuant of statutory right of §17-17-10, et seq., S.C. Code of Laws (1976). The standard of "constitutes a denial of fundamental fairness shocking to the universal sense of justice" is when claims would otherwise be barred as successive, under the doctrine of res judicata, when addressed by the South Carolina Supreme Court, under provisions of S.C. Constitution Article V, §5. If a petitioner can show that PCR is not available or inadequate, and his claims are not barred as successive, the standard of burden of proof he must meet is that of a "preponderance of the evidence." "The person seeking relief by a writ of habeas corpus has the burden of sustaining the allegations of his petition by a preponderance of the evidence." Bailey v. McDougall, 162 S.E.2d 177 (1968).

Courts have entertained habeas and granted hearings on petitions when a prima facie showing was made and granted reliefs

if the petitioner met his burden of proof of a "preponderance of the evidence", for a variety of reasons. One such reason was set forth in Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (S.C. 1962): "The effective assistance of counsel in such a case is a necessary requisite of due process. State v. Grant, 199 S.C. 412, 19 S.E.2d 638; and the denial of such constitutes valid ground for the issuance of the writ of habeas corpus." Also, see Watson v. Leeke, 194 S.E.2d 128 (S.C. 1973)(involuntary guilty plea); Richards v. Crump, 260 S.C. 133, 194 S.E.2d 575 (1973);(legality of sentence under jurisdictional theory of habeas; Calloway v. Leeke, 256 S.C. 167, 181 S.E.2d 481 (1971)(denial of preliminary hearing under jurisdictional theory, right to counsel constitutional claim); Williams v. Leeke, 257 S.C. 104, 184 S.E.2d 441 (1971)(in which court held cognizable in habeas three constitutional claims concerning evidence is the product of illegal arrest, and right to confrontation under the United States Supreme Court decision in Bruton v. United States,); McCrary v. State, 294 S.C. 14, 152 S.E.2d 23 (1967)(the court considered whether the evidence was sufficient to support the verdict.)

Therefore, the primary difference in a PCR and a habeas is the right to counsel. In a PCR the court "shall" appoint counsel, Rule 71.1(d), SCRCP. In a habeas action, the appointment of counsel is discretionary. However, if the habeas is construed as a PCR, and a hearing is convened, counsel is required. Gibson v. State, supra.

Therefore, if the petition is brought in the lower court under §17-17-10 et seq., and petitioner shows he is entitled to a

hearing on his constitutional claims, his burden of proof is by a "preponderance of the evidence." If brought under the S.C. Constitution Article V, §5, then the petitioner must establish that the violation "constitutes a denial of fundamental fairness shocking to the universal sense of justice." It is obvious that the lower courts cannot exercise jurisdiction under S.C. Constitution Article V, §5, but must under §17-17-10, et seq., common law, and S.C. Constitution Article I, §18.

The court in State v. Torrence, 305 S.C. 45 at 69, 406 S.E.2d 315, at 328 (1991), revealed that it reserves the right to exclusively to address claims presented in a petition, in the Court's original jurisdiction, S.C. Constitution Article V. §5, and grant relief if the Court deems justice requires, regardless of any prior judicial decisions or how successive the claims may be. However, the Court also made clear, that normally, it will not entertain a petition in its original jurisdiction, unless "all other sources of relief" have been exhausted. In otherwords, not only must PCR be unavailable or inadequate, so must habeas corpus in the lower courts, under §17-17-10, et seq.

Therefore, if PCR under the PCR Act is no longer available to a petitioner, he may petition the lower court for a writ of habeas corpus, pursuant to his guaranteed constitutional right, S.C. Constitution Article I, §18, and statutory right, §17-17-10 et seq., if he meets the standard set forth in Gibson v. State, supra: "grant a hearing on their constitutional claim."

Being the statutory right to seek a writ of habeas corpus remains a "viable remedy" that was clearly recognized in Gibson v. State, supra, directing the lower court to "provide a hearing

on their constitutional claim", a petitioner is not only entitled to seek relief by Petition for Writ of Habeas Corpus, in the lower court, he appears to be required to do so, before seeking same in the original jurisdiction of the South Carolina Supreme Court. Especially when an evidentiary hearing is required. And, as shown the burden of proof on a petitioner in the lower court is by a "preponderance of the evidence." The allegation that the Petitioner's rights to effective assistance of counsel was violated will trigger an evidentiary hearing. Rogers v. State, 261 S.C. 288, 199 S.E.2d 7671 (1973). A hearing should be held to: (1) determine if any of the petitioner's claims are barred under PCR, and if such claims may be heard as habeas corpus, pursuant to S.C. Constitution Article I, §18, §17-17-10 et seq., and Gibson v. State, supra.

"The overall framework of the habeas corpus reflects the fact that the writ of habeas corpus is no ordinary civil proceeding. This uniqueness includes a species of trump-card power-a-check on the government's restraint supplemental to other checking mechanisms." United States v. Frady, 456 U.S. 152, 166 n. 15, 102 S.Ct. 1584, 1593 n. 15 (1982). A principle this Court clearly recognized and applied in Slack v. State, 429 S.E.2d 801 (1993); State v. Torrence, 305 S.C. 45, at 69, 406 S.E.2d 315, at 328 (1991), and Butler v. State, 301 S.C. 347, 392 S.E.2d 153, cert. denied, 111 S.Ct. 229 (1990).

Therefore, since habeas corpus is no ordinary civil proceeding, with necessary requisites of due process, and since Petitioner meets the prerequisites for this court, the Petitioner is properly before this court.

Petitioner challenges his conviction and sentence in this action, that it is void for lack of subject matter jurisdiction for his life sentence imposed after a jury trial, as Petitioner was tried pursuant to S.C. Code of Law ~~16-9-31(A)(a)~~ for the Natural Life ~~Law~~ which does not comport with and is repugnant to South Carolina Constitution Article XII, §2, (hereafter SCCA12§2), as ..., where there is a conflict between the statute and the State Constitution, the Constitution overrides the statute. State v. Whitener, 225 S.C. 244, 81 S.E.2d 784 (1954).

Petitioners sentence is void due to the multiple violations of SCCA12§2, and the due process clauses, equal protection clauses, prohibitions against ex post facto and bill of attainder laws, of S.C. Constitution Article I, §3, §4, §15 and Article I, §10, and the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution...

South Carolina Constitution Article XII, §2

PETITIONERS SENTENCE IS UNCONSTITUTIONAL IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE S.C. CONSTITUTION ARTICLE I, §3 AND THE FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, IN THAT THE SOUTH CAROLINA LEGISLATURE EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY ENACTMENTS OF LAWS IN VIOLATIONS OF SCCA12§2, FOR THE FOLLOWING REASONS:

DISCUSSION

The Petitioner is seeking through this Petition for Writ of Habeas Corpus to have his sentence vacated because the effects that flow from enactments of laws [discussed below at argument] do not comport with the mandates of SCCA12§2 that the State "shall provide for ... education and rehabilitation of [its] inmates". Enactments of statutory provisions that puts Petitioner to Life ~~Life~~, impose life sentence that deny parole ~~parole~~ eligibility/liberty interest, work release, extended work

release, supervised furlough, educational opportunities, meaningful employment or vocational training, credits of reduction in sentence, inter alia.

Petitioner alleges he is entitled to vacation of his sentence under Uniform Post Conviction-Procedure Act, §17-27-10, et seq., Section 17-27-20 of the act follows:

(a) Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) That the conviction or the sentence was in violation of the Constitution or laws of this State;

(2) That the Court was without jurisdiction to impose sentence;

(3) That the sentence exceeds the maximum authorized by law;

(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice;

(5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore, available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying filing fee, and proceeding under this chapter to secure relief. Provided however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

Petitioner does not raise a challenge to the conditions of his confinement in presenting this claim in any regard. But raises challenges to unconstitutional laws enacted by the General Assembly. Therefore, the South Carolina Department of Corrections has no jurisdiction in this matter and Al-Shabazz, does not apply. Nor does Tutt v. State, 90 S.E.2d 414, 415 (S.C. 1982)(noting that the provision of the PCR Act may be invoked only by someone who is claiming the right to have sentence

vacated, set aside or corrected.) Tutt, held that the Petitioners' claims regarding solitary confinement and denial of medical care did not pertain to his sentence). "The core issue in determining whether a prisoner must pursue habeas corpus relief rather than a civil rights action is to determine whether the prisoner challenges the 'fact or duration' of his confinement or merely the rules, customs and procedures affecting 'conditions' of confinement." Cook v. Texas Dept. of Criminal Justice, 37 F.3d 166 (5th Cir. 1994).

In raising this claim Petitioner alleges that his sentence is per se unconstitutional and void. And Petitioner seeks unconditional release from his unconstitutional confinement.

The SCCA12§2 places substantial limitation on the manner in which the State may punish a defendant. SCCA12§2, provides: THE GENERAL ASSEMBLY SHALL ESTABLISH INSTITUTIONS FOR THE CONFINEMENT OF ALL PERSONS CONVICTED OF SUCH CRIMES AS MAY BE BE DESIGNATED BY LAW, AND SHALL PROVIDE FOR THE CUSTODY, MAINTENANCE, HEALTH, WELFARE, EDUCATION AND REHABILITATION OF THE INMATES." (1970) (56) 2583; 1971 (57) (46). (Emphasis added by Petitioner).

In order to understand the meaning if any statute or phrase of law, it is necessary to determine the meaning of the language as it is used in the particular context. Robinson v. Shell Oil Company, 117 S.Ct. 843, 846 (1997). SCCA12§2 utilizes the words "shall provide for..." In this text "shall" is mandatory. See United States v. Myers, 106 F.3d 936, 941 (CA 10 1997). In order to understand the meaning of any word, phrase, or sentence, "the cardinal rule ... is that the words ... should be given their plain and ordinary meaning unless something in the [text]

requires a different interpretation." Secklingler v. The Vessel Excalibur, 483 S.E.2d 775 (S.C. App. 1997). Also see, United States v. Ron Pair Enterprises Inc., 109 S.Ct. 1026, 1030 (1989).

Article XII, §2 of our State Constitution is clear and unambiguous: "shall" is mandatory. See Carson v. State, 317 S.C. 430, 431, 454 S.E.2d 888, 889 (1995). Thus, it is the stated (constitutional) policy of South Carolina that Petitioner shall be provided education and rehabilitation-at some point restored to society. Petitioner was tried under a statute that required the State to execute Petitioner, not "provide for" his health, welfare, maintenance and rehabilitation.

The legal meaning of "rehabilitation" is found in Black's Law Dictionary (6th Edition 1990): "Investing or clothing again with some right, authority, or dignity; Restoring person or thing to a former capacity; reinstating; qualifying again. In re Coleman, (D.C. Ky.), 21 F.Supp. 923, 924. Restoring mentally, socially or vocationally. Jones v. Grinell, 362 A.2d 139, 142." EDUCATION: "Comprehends not merely the instruction received at school, or college, but the whole course of training; moral, religious, vocational, intellectual, and physical. Education may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all. Acquisition of all knowledge tending to train and develop the individual."

Accordingly, there can be no doubt that "shall" provide--- rehabilitation, of SCCA12§2 means restoring the prisoner to a capacity where he can physically, mentally, socially and vocationally reenter society as a productive member and that

education includes instruction on the whole course of training-moral, religious, vocational, intellectual and physical. that is reinforced by "shall provide for ... welfare, health, and education" with "rehabilitation."

This means that SCCA12§2, commands restoring the prisoner to a capacity where he can physically, mentally, socially and vocationally reenter society as a productive member. And, "all persons convicted of such crimes as may be designated by law" means that no prisoner may be excluded.... Once the commands of SCCA12§2 are given their proper interpretation and analysis, there is an unavoidable conclusion that the State is commanded to provide "rehabilitation" to "all persons convicted of such crimes as may be designated by law." thus since ~~§16-11-31v~~ required the State to impose Life, and the Constitution commands I be rehabilitated, the constitution overrides the statute, making it a void law, with the court lacking subject matter jurisdiction to take Petitioner to trial.

In Article I, §23, the S.C. Constitution dictates: "THE PROVISIONS OF THE CONSTITUTION SHALL BE TAKEN, DEEMED, AND CONSTRUED TO BE MANDATORY AND PROHIBITORY, AND NOT MERELY DIRECTORY OR PERMISSORY BY ITS OWN TERMS." In regards to SCCA12§2 the legislature can pass any law providing education and rehabilitation, but legislature does not have the authority to codify legislation denying education and rehabilitation, to prisoners. "Our constitution is not a grant of power, but a limitation on what, absent limitations therein, would be plenary power in the people or their elected representatives. Accordingly, it is not sufficient for us to find that an act is

offensive to what may be prevailing notions of the proper sphere for state governments. It is necessary, in order for us to strike down an act of the general assembly to find that it offends specific provisions of the state constitution which have limited and circumscribed legislative action in that area." Bauer v. S.C. State Housing Authority, 246 S.E.2d 869, 873 (1978).

Hence, "[t]he Constitution of South Carolina is a limitation upon, rather than a grant of legislative powers." Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947). Accordingly, any legislation which can be shown to deny education and rehabilitation to Petitioner, offends SCCA12§2 and is unconstitutional. "[W]here there is a conflict between the statute and the State Constitution, the Constitution overrides the statute." Anton v. S.C. Coastal Council, 469 S.E.2d 604 (1996). Thus, the statute ~~16-11-31(A)(2)~~ upon which Petitioner was tried upon, that the state intended to get Natural Life and ~~state~~ the Petitioner, and the life sentence that was imposed upon Petitioner is in conflict with, does not comport with and is repugnant to the commands of SCCA12§2, and overrides this statute, its unconstitutional, thus void, leaving the trial court without jurisdiction in Petitioners trial. Furthermore, given its ordinary plain meaning, rehabilitation includes the restoration of an individual to his greatest potential, whether physically, mentally, socially or vocationally, and §. ~~is~~ is in opposition to all mandates of SCCA12§2, wherein the State was seeking the death penalty.

Petitioners sentence is constitutionally void, in that the sentencing court lacks jurisdiction to enter a criminal judgment

if the judgment is predicated upon an unconstitutional jurisdiction, voiding the sentence. Herrera v. Commonwealth, 483 S.E.2d 492, 494 (1997).

In Abbeville County School District, et al., v. State of South Carolina, et al., Op. No. 24939 (Filed April 22, 1999), our Supreme Court, in a declaratory judgment action held: "We hold today that South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education." In relevant parts, to this decision, the court observed:

The novel issue in this case involves the education clause of the State Constitution Article XI, §3 is entitled "System of free public schools and other public institutions" and provides:

"The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable."

At the heart of this controversy is the question of the duty imposed upon the General Assembly by the Constitution provisions.

It is the duty of this Court to interpret and declare the meaning of the Constitution. State v. Erawlinson v. Anson, 76 S.C. 395, 57 S.E. 185 (1907).

In determining the meaning of the education clause's language, "the General Assembly shall provide for the maintenance and support of a system of free public education . . .," the Court must not be guided not only by the "ordinary and popular meaning of the words used." (footnote omitted) but also by S.C. Constitution Article I, §23: "The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory or promissory by its own terms." See also, Washington v. Salisbury, 279 S.C. 306, 306 S.E.2d 600 (1983)(Plain language of the [educational clause] places the responsibility for free public education with the General Assembly...").

In Brandon v. State of Alaska Department of Corrections, 938 P.2d 1029 (1997), in holding that prisoner's fundamental

constitutional right to rehabilitation was implicated, decided that: "Brandon asserts a fundamental constitutional right to rehabilitation under the Alaska Constitution. DOC correctly concedes that there is a fundamental right to rehabilitation." The right was found based on Alaska Constitution Article I, §12, that states: "CRIMINAL ADMINISTRATION SHALL BE BASED UPON THE FOLLOWING: THE NEED FOR PROTECTING THE PUBLIC, COMMUNITY CONDEMNATION OF THE OFFENDER, AND THE PRINCIPLE OF REFORMATION."

As set forth above, it is clear that SCCA12§2 places much greater limitations of punishment, than the Alaska Constitution. The SCCA12§2, commands that "shall provide --- rehabilitation."

The S.C. Legislature as well as all branches of the State government and officials are limited to the terms granted to them in the Constitution, because the Constitution is the Supreme Law. Anton v. S.C. Coastal Council, 469 S.E.2d 604 (1996): "... , where there is a conflict between the statute and the State Constitution, the Constitution overrides the statute." State v. Whitener, 225 S.C. 244, 81 S.E.2d 784 (1954)(Legislature may not take away powers specifically granted to the Supreme Court by the Constitution)."

Therefore, the General Assembly in 1969-70 included the provisions of SCCA12§2 in the Constitution, they could have elected instead to provide the same by statute, that legislature would be free to change in the future, without popular vote, and being the provision was included in the Constitution shows that it was the will of the citizens of South Carolina that the provision was complied with. The General Assembly of representatives of the people at the time that SCCA12§2 was made

a provision of the Constitution, understood that groups may rise up driven by passions of the time, and that future representative of the General Assembly may be influenced to enact laws contrary to the rehabilitation of prisoners. In other words, SCCA12§2 was included in the Constitution in clear and precise words of mandatory language to command that all prisoners "shall" be rehabilitated, not executed.

When a State violates its own Constitution and the mandate of its people, that is "truly irrational" in violation of the substantive due process clause. Thompson v. Ellenrecker, 935 F.Supp. 1037, 1040 (DC S.C. 1995). The equal protection clause also requires more protection as South Carolina has elevated its prisoners to a protected class. See Personal Adm's of Mass. v. Feeney, 99 S.Ct. 2282, on remand Feeney v. Comm. of Mass., F.Supp. 109 Affirmed, 100 S.Ct. 1075 (1980).

While the facts are different in Cooper v. Gwinn, 298 S.E.2d 781 (W.Va. 1981), and the court was dealing with the statutory, rather than a constitutional provision regarding rehabilitation, the reasoning and considerations of the court have application here:

It is thus the duty of courts to administer justice consistent with the organic law created by the people. It is in the performance of this duty that we are of necessity called upon to interpret the meaning of the law enacted by the legislature in order to ensure that justice is done and the benefits of law are bestowed upon the people as intended by the legislature.

In summary, statutory law is the public policy statement of the people acting through the legislative branch of the republican form of government. By the terms of our organic law the people are entitled to the benefit of law enacted by their legislative representatives. The responsibility to see that the law

enacted by the people is enforced rests primarily upon the executive department.

It is often said that we in America live in a land where we have a government of laws and not of men. What is commonly meant by this phrase is that we live by rule of law -- a concept of utmost importance, but having no defined nor readily definable content. The concept of a system governed by rule of law implies the subordination of all authorities, principles which would generally be accepted as characteristic of law. These principles include the fundamental concepts of justice morality and fairness. [Citations omitted].

In any legal system, the concept of rule of law further implies limitations on legislative power, safe-guards against abuse of executive power, proper protection of individual rights and liberties, equality before the law, and due process. Government by rule of law means more than that government has the duty to maintain law and order; it also means that the government itself is subject to rules of law, and cannot disregard the law, or remake it to suit itself without heeding those procedures specified by law.

Petitioner alleges the [H]is "sentence [is] in violation of the United States Constitution and the Constitution of this State." That ["State is] was without jurisdiction to impose [enforcement] sentence." That "[T]here exists evidence of material facts, not previously presented and heard, that requires vacation of the ... sentence in the interest of justice." That ["H]e is otherwise unlawfully held in custody." See §17-27-20 of the PCR Act and above (entitlements of PCR). Because, inter alia, the S.C. Legislature exceeded its Constitutional authority, in enacting the provisions of law discussed below, at argument.

Because it would violate the separation of powers doctrine contained in Article I, §8 of the S.C. Constitution, the Department of Corrections a component of the executive branch has no authority over a court imposed sentence, nor the authority to determine the constitutionality of laws enacted by the legislature. Nor can the legislature enhance the punishments of a

sentence already imposed by a court: "No authority to enhance a probationer's sentence ... [T]he imposition of sentence is a judicial function." Nor can the General Assembly enact a law that violates the Constitution, as the legislature has in violation of SCCA12§2. Therefore, since the acts of the S.C. General Assembly has enacted legislation that makes Petitioners sentence unconstitutional, the Petitioners sentence is void.

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This case was a textbook case of a illegal Pretextual Stop. When the court looks to consider whether a stop was pretextual, "The court is required to look "to what a reasonable officer would do rather than what an officer validly could do...."Tarwid v. State, 104 Ga. App. 853, 855, 363 SE2d 63 (1987); quoting Clark v. State, 432 SE2d 220, at 222 (Ga. App. 1993), "If officers were permitted to conduct terry-stops based on what conceivably could give rise to reasonable suspicion of minor violations, the necessary connection between a seizure's justification and its scope would inevitable unravel." Clark, Supra, at 222. See ISSUE ONE: PETITION FOR REHEARING ARGUMENT ON: "Officer Hunter stated "She agreed that she had already determined to stop appellat" simply because she knew him. Hunter "embarked upon this expedition for evidence in he hope that something might turn up. Dunaway V. New York, 442, US 200, 99 Sct 2248, therefore the stop of Appellat violated the narrow constraints of terry, was a pretextual stop, a lawless invasion, violating Fourth Amendment protections. In Dunaway, supra, There was an arrest without probable cause which lead one to think detectives were on a fishing expedition, hoping something would turn up. Just as Officer Hunter did in this case using nothing more than an illegal pretextual inarticulble hunch insufficient to justify a seizure under the Fourth Amenedment. Counsel was ineffective assistance of counsel as all failed to proffer this issue that such "pretextual stop" violates the Fourth Amendment prohibition against unreasonable searches and seizures which should have been used in conjunctions with Terry.

When the mandated controlling law of the Fourth Amendment is ignored by the court would be "an encouragement of, substantial interference with the Liberty and personal security by police officers whos judgment is necessarily colored by their primary involvement in "The often competitive enterprise of

This structural defect in the trial was an error of law, an abuse of discretion, by making decisions in suppression hearing without detailed findings or elaborated conclusions of law to support courts conclusions, as an "An abuse of discretion arises from an error of law or factual conclusions that is without evidentiary support." State v. Irick, 545 SE2d 282, 344 SC 460 (2001), as "abuse of discretion may be found in conclusions reached by lower courts that are without reasonable factual support." Runyon, 471 SE2d 160 SC (1996), which effected the outcome of the trial from beginning to end, clearly prejudiced Petitioner and requires a reversal of conviction, as "An abuse of discretion occurs where the trial court is controlled by an error of law." Eargle v. Horry County, 545 SE2d 276, 344 SC 449 (2001).

The trial judge erred in ruling he found reasonable or articulable suspicion for the seizure and detention wherein all evidence should have been considered fruit of the poisonous tree and should have been suppressed, as should have been the tainted, impermissible suggestive roadside show-up were unduly suggestive while Petitioner was in custody, in handcuffs, surrounded by police when no witness could prior to such could give a correct description of suspect, none could give a facial description. This judge erred in finding that the show-up process was not unduly suggestive, that the identifications were sufficiently reliable for admission under the totality of the circumstances, failing to meet the 5 prerequisites required in State v. Moore, 540 SE2d 445, 448-449, 343 SC 282, 289 (2000), an error of law and an abuse of discretion by the judge. (See Issue 2 in SC Court of Appeals Petition for Rehearing).

The judge abused his discretion when he refused counsel's motion for mistrial on the legitimate grounds of prosecution's failure to comply with its legal mandates discovery obligations under rules of court and Brady v. Maryland, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215 (1963). (See Issue 3 in SC Court of Appeals Petition for Rehearing).

The trial judge erred in refusing the motion for mistrial wherein the Petitioner's Brady claim was complete with cause of structural error in trial resulting as Rule 5 (a)(1)(C), SCRPC and the Brady rule require the prosecution to disclose any and all evidence in its possession which is favorable to the accused and material to guilt or punishment and is grounded in fundamental rights to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments, especially when the witness could not identify Petitioner was a gross miscarriage of justice, an error of law, an abuse of discretion, a structural defect of trial by refusing motion for mistrial.

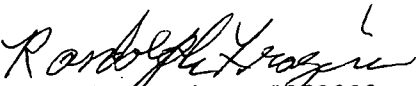
Furthermore, Petitioners Fifth, Sixth and Fourteenth Amendment rights were violated where trial counsel failed to move for a continuance to allow his sufficient time to properly prepare, investigate the case in order to prepare for trial. Upon 9-16-08 start of trial, Petitioner found himself facing 2 indictments, not the one he was made aware of for trial. Not only was he informed of 2 indictments, the one he expected to go to trial on was not the one the Solicitor chose to go forward with on this date. Wherein Petitioner was not prepared for this case, counsel had not investigated, nor prepared for this case amounting to trial by ambush, strikingly simular to Crow v. State, 2007-CP-37-730, (S-2008), overturned by Judge J. Cirdekk Maddox which were exact claims of Petitioner as Crows attorney came to trial ready for one case and the State called another - the attorney informed the court he was not prepared for that case but the judge allowed toe case to go forward.

Defense counsels many errors and the totality of circumstances of counsels representation combined to deny Petitioner due process and a fair defense. The SC Court has held that error can have a cumulative effect which requires reversal of a judgement, wven when no single aspect if error otherwise would. "Although each point of error raised alone is insufficient to warrant a new trial, the cumulative effect is enough to require that relief. Myers v. Moffett, 213, SW2d 59, 65 (1958)(Conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial), also see Ryan v. US Parcel Service, 205 F2d 262, 365 (1953)(Although perhaps no one of the errors standing alone would call for reversal, in their totality they so). We are aware that every instance of trial error does not entitle an applicant to prevail on appeal. However, the aggregation of errors may produce a cumulative effect of prejudice, where indivisually, the prejudice is insufficient to justify reversal. State v. Freeman, 459 SE2d 867 (SC App. 1995).

WHEREFORE, Petitioner prays that this Honorable Court will grant his reliefs requested heretofore in this action and all other reliefs the Court deems just and appropriate. Including but not limited to vacation of Petitioners conviction and sentence, Ordering that Petitioner be unconditionally released from his unlawful confinement.

Signed on this 15th day of September, 2014.

Respectfully submitted,


Randolph Frazier, #968822
Perry Correctional Institution
430 Oaklawn Rd. ALU-192
Pelzer, SC 29669

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

SEP 19 2014

S.C. SUPREME COURT

DETIORARI TO LANCASTER COUNTY
CLIFTON NEWMAN, CIRCUIT COURT JUDGE

FANDOLPH FRAZIER, PRITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

APPELLANT CASE NO. 2013-002758

CERTIFICATE OF SERVICE

I Randolph Frazier, do herein certify that on the below signed date, did serve a copy of (Pro Se Response to Johnson Petition, or in the Alternative, Petition for Writ of Habeas Corpus), upon the below by depositing such into theUS Mail Service, postage prepaid upon:

Signed on this 15th day of September,, 2014.

State of South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

Respectfully submitted,

Randolph Frazier
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SEP 16 2014
P.C.'S MAILROOM

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