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S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

Certiorari From Dillon County
Court of Common Pleas
Paul M. Burch, Circuit Court Judge

Case Number 2013-CP-17-054

Gary Steven Scott #282106 __________ Petitioner

Versus

The State of South Carolina __________ Respondent

Petition for Writ of Certiorari

Gary Steven Scott Pro Se
Gary Steven Scott
430 Oak Lawn Rd
Pelzer, S.C. 29669

Questions Presented

I. Whether the PCR Judge erred by summarily dismiss- the Petitioners second PCR as successive and untimely as being barred by the statute of limitations which asserted a valid claim to an evidentiary hearing on his right to Appellate review under Austin?

II. Whether the right to appeal the denial of 1st PCR was denied when Counsel who represented Petitioner (who also handled Petitioners appeal) failed to file a 59(e) when one was required thus procedurally defaulting Petitioners issues?

III. Whether Petitioner received a Complete adjudication on the merits of his original application, including an appeal?

IV. Whether Petitioner suffered Prejudice from first PCR's Counsel's failure to file a 59(e)?

V. Whether the PCR Judge erred in failing to find trial counsel ineffective for failing to:

a. Sufficiently challenge Judge James E. Lockemy's ruling on statements allegedly made by Petitioner while in custody of the Dillon County Sheriffs Office;

b. Sufficiently challenge Judge Lockemy's ruling that Certain evidence found on the Petitioner should have been excluded at trial, including the Victims keys and drivers license;

C. Sufficiently investigate a defense for the Petitioner that the Victims car was vandalized one month Prior to her murder.

VI. Whether the P.C.R. Judge erred in refusing to find Appellate Counsel ineffective for failing to file a meritorious brief on Appeal?

VII. Whether the Petitioner was entitled to a directed Verdict for Armed Robbery and Murder?

VIII Whether the alleged Confession was corroborated and substantial independent evidence introduced to establish trustworthiness of alleged Confession?

Questions Presented Continued

IX. Whether the alleged Confession was Voluntary, knowing and intelligent? Whether 5 & 6 amendments violated?

X. Whether waiver of right to Counsel once invoked voluntary, knowing and intelligent or valid?

XI. Whether the investigator's initiated Communication with the Petitioner after the innocation of the right to Counsel during Custodial interrogation?

XII. Whether the trial Court abused its discretion as to initiation And whether statement should have been suppressed?

XIII. Whether the Uniform Post Conviction Relief Act is the Appropriate Forum in which to Challenge PCR Counsel's failure to file a 59(e) when one is required?

XIV Whether the PCR Court erred in stripping the Petitioner of Counsel after one had been appointed when the Case Presented issues of law and fact to be determined?

XV Whether the amendment to the murder indictment changed the nature and seriousness of the offense Charged from murder to killing by stabbing? Whether trial Court was deprived of jurisdiction?

XVI. Whether Petitioner suffered due process violations throughout the history of his Case?

Statement of the Case

In October and November of 2000, Applicant was indicted by the Dillon County Grand Jury for the offenses of Murder, Armed Robbery and Grand Larceny in excess of $5,000.00. Applicant stood before Judge James E. Lockemy and a jury in February of 2002. Petitioner was represented by A. Labon Leggette Jr. at the trial and was convicted of all charges and received a life sentence for Murder; twenty years for Armed Robbery; and five years for grand larceny.

Petitioner appealed his conviction and was represented by Joseph L. Savitz III who erroneously filed an Anders brief pursuant to Anders V. California 386 U.S. 738 arguing that the Petitioner's right to counsel was violated. The Court of Appeals dismissed the direct appeal without reaching the merits of Petitioners case. The Petitioner did file a Pro se brief in accordance with Anders. See State V. Scott 2004-UP-229 (Ct. App. 2004). The Petitioner then filed a Pro se Petition for Writ of Certiorari in the S.C. Supreme Court that was subsequently denied on June 5, 2005.

On October 14, 2005, Petitioner filed his first application for Post Conviction relief (2005-CP-17-0363). Petitioner was given an evidentiary hearing. At the hearing the Petitioner was represented R. Scott Joye. The first PCR was dismissed by Judge Paul M. Burch on November 7, 2007. Petitioners first PCR Counsel failed emphatically to file a rule 59(e), S.C.R.C.P. to adequately preserve Petitioners issues.

Petitioner appealed the denial of his first application for PCR and on Appeal was represented by R. Scott Joye the same attorney who represented the Petitioner at his first PCR, but failed to file the much needed 59(e). Mr. Joye filed a Petition for Certiorari Pursuant to Johnson V. State 364 S.E. 2d. 201 which was clearly erroneos, because in the Petition Mr. Joye argued five issues of merit in a no merit brief. Certiorari was denied March 10, 2013.

Statement of Case Continued

On August 20, 2010, Petitioner sought a Writ of Habeas Corpus in U.S. District Court. Summary Judgment was granted in his federal habeas case on September 30, 2011. Petitioner appealed the denial of habeas to the Fourth Circuit Court of Appeals. The Fourth Circuit affirmed Summary Judgment and Petitioner appealed to the United States Supreme Court. The United States Supreme Court denied Certiorari on October 15, 2012.

Petitioner filed a second PCR on February 12, 2013 pursuant to Austin v. State 409 S.E. 2d. 395 and Counsel Tristan Shaffer was appointed to represent the Petitioner but was later rescinded merely because the state sought to seek summary dismissal. Once Counsel was informed of the rescinding of the appointment a Motion to reconsider was filed and denied 9 months later. On May 16, 2014 a Conditional Order of Dismissal was filed and a timely Motion In Opposition of Conditional Order of Dismissal / Motion To Alter / Amend Judgment Pursuant To Rule 59(e) SCRCivP was filed on June 16, 2014 and a Motion To Amend Motion Opposing Conditional Order of Dismissal / 59e was filed July 10, 2014. On August 15, 2014 Judge Paul Burch signed a final Order dismissing the Petitioner's PCR as successive, untimely as barred under the statute of limitations and failing to state a claim upon which relief can be granted.

This Petition for Writ of Certiorari follows.

Argument

Issues 1-4 The Petitioner contends that the lower court erred in summarily dismissing his PCR as successive and untimely under the statute of limitations because he asserted a valid claim that would prompt an evidentiary hearing where his PCR was raised or filed pursuant to Austin v. State 409 S.E. 2d. 395. The S.C. Supreme Court has stated that the one year statute of limitations do not apply to applications for PCR filed pursuant to Austin. Under Austin a defendant can appeal the denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review or did not knowingly and intelligently waive the right to appeal. The recently filed PCR was not successive in that the first PCR was not finally adjudicated in accord with 17-27-80 and 17-27-90. Burgess v. State 738 S.E.2d 264 and Marlar v. State 653 S.E.2d 266

The Petitioner contends that he requested and was denied an opportunity to seek appellate review of the denial of his first PCR in that counsel failed to file the much needed 59(e). Thus, the Petitioners issues became procedurally defaulted thereby denying the Petitioner his right to seek appellate review. Thus the Petitioner was not afforded complete access to the Appellate Process. The Petitioner contends that he has not obtained a complete adjudication on the merits of his original application (because the order denying relief did not comply with 17-27-80 and 17-27-90 thus requiring the filing of the 59(e)) including an appeal (because the S.C. Supreme Court simply will not hear cases whose issues have not been properly preserved for appellate review). Odom v. State 523 S.E.2d 753

The Petitioner contends that he suffered prejudice in that had it not been for counsels deficient performance in refusing to file a 59(e) the result of the appeal would've been different.

Issues #5(a)(b)(c) and Issue #6

*** Please note that the issues discussed in this Section are the issues 1st PCR Counsel failed to file a 59(e) for and placed before the S.C. Supreme Court Erroneously in a no merit brief. These issues were raised and ruled on at trial and were properly preserved for Appellate review, but Joseph Savitz erroneously filed a no merit brief too. These issues were raised at first PCR.

5A. Trial Counsel was ineffective for failing to sufficiently challenge Judge Lockemy's ruling on statements allegedly made by the Petitioner while in custody, after the invocation of the right to Counsel had been made during Custodial interrogation. Miranda V Arizona 384 U.S. 436 and Edwards V Arizona 451 U.S. 477.

A. Trial Counsel failed to sufficiently object to the trial Courts ruling that the Petitioner initiated communication with the authorities after he exercised his fifth and six amendment right to have an attorney present during Custodial interrogation.

The Supreme Court of the United States has held that once an Accused in Custody requests Counsel Police interrogation must cease unless the accused himself initiates communications. Edwards 451 U.S at 485. Interrogation encompasses not only express questioning, but also its functional equivalent, which includes words or actions on the Part of the Police that the Police should know are reasonably likely to elicit an incriminating response. Rhode Island V. Innis 446 U.S. 291

In State V. Anderson 593 S.E.2d. 820 The South Carolina Supreme Court stated that the sixth amendment guarantees that in all Criminal Prosecutions the accused shall enjoy the right to... have the assistance of Counsel for his defence. U.S. Const. Amend VI. Once a Criminal defendant invokes his sixth amendment right to Counsel, a subsequent waiver of that right - even if voluntary, knowing and intelligent under traditional standards is Presumed invalid if secured Pursuant to Police initiated

communication and statements obtained in violation of that rule may not be admitted as substantive evidence in Prosecutions case in chief. Michigan v. Harvey 494 U.S. 344 stating the holding in Michigan v Jackson 475 U.S. 625; State v. Kennedy 510 S.E. 2d. 714

Likewise the S.C. Supreme Court has held; when the sixth amend right to counsel has attatched; if Police initiate interrogation after a defendants assertion at an arraignment or other similar proceedings of his right to counsel any waiver of the defendants right to counsel for that Police initiated interrogation is invalid unless the defendant initiates the contact himself. See also State v. Council 515 S.E. 2d 508

In the Present case, the Police approached the Petitioner and asked him to come to the Police station for questioning in a pending investigation to which he agreed. ROA P. 66 lines 10-14. The Petitioner was hand-cuffed and taken to the Williamsburg County Sheriff's office where he was questioned by Dillon County investi-gator's. ROA P. 75 lines 1-13. Petitioner was arrested later that afternoon when the Victims (Petitioners girlfriend at the time) car keys and drivers licence (which were in a pouch attatched to the key chain) were found in his Possession. ROA P. 144 line 15 - P. 145 line 3. Petitioner was advised of his rights Pursuant to Miranda and clearly invoked his right to counsel. ROA P. 40 line 17 - P. 42 line 3. Once a copy of the arrest warrant was faxed from Dillon County and served on Petiti-oner he was transported to the Dillon County Detention Center. ROA P. 83 lines 15-16

The following day, the same investi-gator's returned to the detention center ostensibly to serve a copy of the original warrant that the Petitioner never got. ROA P. 45 lines 12-21. It is undis-puted that the Petitioner did not initiate this contact with law enforcement. ROA P. 1062 lines 8-21; ROA P. 122 lines 12-15; ROA P. 256 lines 14-17. * Please note that the Petitioner never asked anyone whether it was too late to cooperate after a warrant was read when the officers came to the jail the next day. I never said

that and the Petitioner was never served a copy of the original warrant. The state came up with that theory when they found out via a 1983 lawsuit against the investigator's that the Petitioner intended to challenge the alleged Confession.

The Evidence is uncontested that the Petitioner did not initiate further communication with law enforcement. The evidence is uncontested that the investigator's initiated further contact with the Petitioner after he exercised his right to have an attorney present during interrogation. The serving of the copy of the warrant was plainly pretextual and constituted the functional equivalent of interrogation under Innis. This error was not harmless as the statement, which was obtained in violation of Petitioners constitutional rights, formed the Cornerstone of the states case at trial. The trial Courts ruling as to initiation was without evidentiary support and constituted an abuse of discretion. Thus the PCR Judge erred in failing to find trial counsel ineffective for insufficiently challenging the Judge's ruling as to initiation and "Voluntariness" (Which will be discussed later in this Petition for Writ of Certiorari).

B. Trial Counsel was ineffective for failing to sufficiently challenge Judge Lockemy's ruling that certain evidence found on Petitioner should have excluded at trial including the victims keys and drivers license.

At the time the Victims keys and drivers license were found on Petitioner, the Police had no warrant and no probable cause to search him and their policy of searching anyone who used the restroom in question was plainly pretextual. ROA P. 437 lines 8-11. The Petitioner contends that searching one's pockets is akin to searching one's luggage, a common repository for one's personal effects. Arkansa v. Sanders 442 US 753, 758. As the Supreme Court noted in Sanders a search of one's private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of the search assessed in light of the surrounding circumstances is not a substitute of a judicial warrant required under the fourth amendment.

See also United States v. United States District Court 407 U.S. 317, 318 (Providing exceptions for cases where the societal costs for obtaining a warrant, such as a danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate). Because the Police had no warrant and Petitioner was not under arrest at the time the items were seized, the search and seizure were unlawful and should have been excluded from evidence at trial. Arrest was based solely on this finding. Because trial Counsel failed to sufficiently object to the trial Courts ruling on this issue, Counsels assistance was ineffective and the PCR Judge erred in not finding him so.

C. Trial counsel was ineffective for failing to sufficiently investigate a defense for the Petitioner that the Victim's car was vandalized one prior to her murder.

Trial Counsel failed to sufficiently investigate and reveal to the Court that approximately one month or so prior to the Victims death an unknown person vandalized her car while she and the Petitioner were at work at Perdue Farms and carved the word traitor into the paint across the trunk of the car and scratched lines down both sides from fender to fender. The Petitioner informed trial Counsel of this event and that the information could be verified through the Victims insurance agency (Braddy Insurance Company, 300 W. Harrison, St. Dillon S.C. 29536 - She is a State Farm Insurance Agent. This information is on file still) who was subsequently contacted by the Victim so that the automobile could be repaired. The Petitioner was prejudiced in that Counsels refusal to inform the Court of these events (The insurance agency is one block or less from the Dillon County Courthouse) deprived the Petitioner the opportunity of an additional defense that another person other than the Petitioner was responsible for the death of Alunis Page. Had it not been for trial Counsel's deficient performance as to A, b.C, there's a reasonable probability the result of the proceeding would have been different. Thus, the PCR Judge erred in failing to find trial Counsel ineffective for insufficiently investigating an additional defense for Petitioner. These issues were not finally adjudicated in accordance with 17-27-80 and 17-27-90 and were out of place in a no merit brief.

Issue #6 The PCR Judge erred in refusing to find appellate Counsel ineffective for filing an Anders Brief, as the trial Court record clearly reflected issues that were properly preserved for appellate review.

Appellate Counsel filed a no merit Anders brief when there were several meritorious issues in Petitioners case. While Counsel is not required to raise every non-frivolous claim and may choose which issues to appeal in order to maximize the likelihood of a favorable outcome, Petitioners appellate Counsel did not directly appeal any issue, Choosing instead to submit an Anders brief to the Court. Smith v. Robbins 528 U.S. 259, 288 (Citing Jones v. Barnes 463 U.S. 745). Petitioner argues that appellate Counsel should have briefed both the directed Verdict issue and whether the Victims keys and drivers license were improperly seized from his Person. Appellate Counsel should have explained to Petitioner that he had a right to file a Petition for Writ of Certiorari to the state Supreme Court.

As to the issue of directed Verdict, the Supreme Court has clearly stated that by bringing the Case, the State assumes the burden of Proving that the accused was at the scene of the Crime when it happened and that he Committed the Criminal act. State v. Schrock 322 S.E.2d. 450. Petitioner argues the evidence in the Current Case was insufficient to establish his presence at the scene at the time of the murder or that he Committed the Criminal act; that nothing throughout the Course of trial Points to him as the guilty Culprit absent the alleged Confession; that the State Convicted him solely on the alleged Confession. Indeed, trial Counsel moved for a directed Verdict on the grounds that the only evidence the state had against him was the alleged Confession, ROA P. 804 lines 3 - P. 805 line 7; ROA P. 1004 line 7 - P. 1006 line 11. Thus, the issue of directed Verdict was Properly preserved for appellate review. By filing an Anders brief, appellate Counsel's assistance was ineffective in failing to Pursue the issue. Absent

Counsel's error there is a reasonable Probability that Petitioner would have Prevailed on appeal; the outcome of the appeal would have been different.

Additionally, trial counsel objected to the introduction of the alleged Confession as well as items seized from Petitioner including the victims keys and drivers license Pursuant to Edwards v Arizona 451 U.S. 485, United States v. Chadwick 433 U.S. 1, and Arkansas v. Sanders 442 U.S. 753 thereby preserving the issues for appellate review. Due to the meritorious nature of these issues, appellate Counsel was ineffective for failing to make the record sufficient for review. Because of Appellate Counsel's ineffectiveness the Petitioner's contention is that he was forced to rely on the Prospect of Post Conviction Relief when relief could have been attained on direct appeal.

Post conviction relief should be granted when the applicant demonstrates that Counsel failed to render reasonably effective assistance under Prevailing professional norms, and that he was Prejudiced by Counsel's ineffective Performance. Strickland v. Washington 466 U.S. 668. Counsel was ineffective in failing to submit a merit brief to the Court and Petitioner was prejudiced in that had the Court received a merit brief he would likely have prevailed on appeal. Thus, the PCR Judge erred in refusing to find Petitioners Appellate Counsel ineffective in filing an Anders Brief. These issues were not finally adjudicated in accordance with 17-27-80 and 17-27-90 and were out of Place in a no merit brief.

Issues 7 and 8

It is well settled law that a conviction cannot rest on the extra-judicial confessions of a defendant unless they are corroborated by proof aliunde (from another source) of the Corpus delicti. State v. Abraham 759 S.E. 2d 440. The S.C. Supreme Court stated in a footnote in this case that "Given our Supreme Courts ruling in State v. Osborne 516 S.E. 2d. 201 we find our

States law is consistent with the trustworthiness approach delineated in Opper v. United States" 348 U.S. 84). We further clarify the law in this state. The S.C. Supreme Court stated, that consistent with Opper and its progeny, the corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendants' extra judicial statements and together with such statements permits a reasonable belief that a crime occurred. (We think the better rule to be that the corroborative evidence need not be sufficient independent of the statement to establish the corpus delicti. It is necessary therefore to require the government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. See also State v. Trexler 342 S.E. 2d. 878.

It is the contention of the Petitioner that he is entitled to a directed verdict, because the state has failed emphatically to prove that the Petitioner was at the scene of the crime when it happened or that he committed the criminal act absent the alleged confession. The Petitioner contends that the state relied exclusively on the statement at trial to convict him and that the state has failed to provide the required substantial independent evidence which would tend to establish the trustworthiness of the alleged confession. In fact, the state's attorney at trial summed up her failure to provide the required substantial independent evidence when she stated to the trial judge, "Your Honor, we're relying on Gary Scott's statement, that does not believe that -- means that the state believes that what he told in his statement is the absolute truth. In fact, (emphasis added), what is in this statement "does not" conform with the physical evidence in the house." ROA, P. 873 lines 17-21.

It is the contention of the Petitioner that this statement by the state's attorney is akin to the statement made by the state's attorney in State v. Martin 533 S.E. 2d. 572 wherein the state's attorney summed up his failure to meet the any substantial evidence standard when he stated to the judge "We do not know which person actually held victims head in that pan

of water and Your Honor the whole Point is we don't know if they acted in concert".

To further lend substance to the Petitioners Position that he is entitled to a directed verdict based on the states attorneys at trial admitting that she hadn't carried her burden of Proof is a a statement she made in her closing argument on ROA P. 1055 lines 6-9 where she states "So what happened? I don't really know, because the only Person alive who really knows exactly what happened is Gary Scott and he hasn't chosen to tell the truth".

This alleged confession was the thrust and focal Point of the state's case (and by the states' attorney's own admission on ROA P. 873 lines 17-21 they were relying on the statement to convict the Petitioner) and the Petitioner contends that without the alleged confession the state would not have convicted him. The error in admitting the alleged confession was not harmless in that the alleged confession was the cornerstone of the states case at trial. U.S. v. Garribay 143 F. 3d. 534; Henina v. Collins 917 F. 2d. 850; U.S. v. Webb 879 F. 2d. 1320; U.S. Perdue 8 F. 3d. 1455; U.S. v. Jones Fed. Supp. 2d. 618; State v. Osborne 516 S.E. 2d. 201.

The S.C. Supreme Court stated in State v. Manis 51 S.E. 2d. 370 at 371 that where it is taken by the Prosecution in a Criminal Case to Prove the guilt of the accused by circumstantial evidence, not only must the circumstances be Proven, but they must Point conclusively that is to a moral certainty to the guilt of the accused; they must be wholly and in every Particular Perfectly consistent with each other and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. All of the facts Proven must be consistent with each other and taken together should be of a conclusive nature and tendency Producing a reasonable and moral certainty that the accused and no one else committed the offense charged. It in not sufficient that they create a Probability though a strong one; and if, therefore, assuming all the facts to be true, which the evidence tends to establish, they may yet be accounted for upon any hypothesis

which does not include the guilt of the accused then the proof fails... It is not sufficient to establish a probability of guilt arising out of the doctrine of chances that the fact charged is likely to be true.

In another case, State v. Arnold 569 S.E.2d. 379, the S.C. Appeals Court stated that; "Except in cases where the crime is alleged to be procured or caused indirectly, our Supreme Court has clearly stated that by bringing the case, the state assumes the burden of proving that the accused was at the scene of the crime when it happened and that he committed the criminal act. Schrock 322 S.E.2d. 452 and Martin 533 S.E.2d. 572.

It is abundantly clear from the record that the Petitioner is entitled to a directed verdict because of the lack of evidence and that in the light most favorable to the state there's still no direct or substantial circumstantial evidence tending to prove the guilt of the Petitioner beyond a reasonable doubt, thus the case was improperly submitted to the jury. The evidence presented by the state in the instant case may raise a suspicion of guilt, but it does not point conclusively, nor to a moral certainty, nor beyond a reasonable doubt to Petitioners guilt. The Petitioner attests that all sorts of tests were done in an attempt to ascertain the truth about what happened on the night in question (i.e. D.N.A. testing, major case printing and all other manner of testing) and none of them point to Petitioner. Trial counsel said that. ROA P. 1030 lines 3-13.

Issues 9, 10, 11, 12

There is precedent in the South Carolina Supreme Court that prohibits police initiated interrogations. State v. Kennedy 510 S.E. 2d. 714. The Court in Kennedy stated that "The trial Courts' factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. Further, the Court stated that when reviewing a trial Courts ruling concerning voluntariness, this

court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial courts ruling is supported by any evidence. See State v. Wilson 545 S.E.2d 827.

As a first matter the Petitioner asserts that the trial court record is devoid of any evidence that would support Judge Lockemy's ruling that the Petitioner initiated anything. In fact, the trial court record refutes Judge Lockemy's ruling on ROA P. 122 lines 12-15; ROA P. 124 lines 9-21 and ROA P. 256 lines 9-17. These two investigator's admit in open Court that they initiated Communication with the Petitioner after he clearly invoked his right to Counsel during custodial interrogation. The above exerpts from the trial record clearly indicate that Judge Lockemy's ruling is without evidentiary support. Thus, the statement should have been suppressed, because the investigator's admit that they initiated Communication with the Petitioner after the clear invocation of the right to Counsel. Just like in Edwards v. Arizona 451 U.S. 485 it was the Communication with the accused after the invocation of the right to Counsel had been made during custodial interrogation that violated the rights that were invoked.

Second, it is the contention of the Petitioner that the trial judge's ruling was erroneous just like the Arizona Court in Edwards. Judge Lockemy ruled that the alleged Confession was voluntary without determining whether it was knowing and intelligent. ROA P. 359 lines 2-5. Pursuant to Edwards a waiver of rights "must" be voluntary, knowing and intelligent. (The right to Counsel that is). The Petitioner asserts that having exercised his right to Counsel on July 16, 2000 to have Counsel present during custodial interrogation, he did not validly waive that right on July 17, 2000. The Court in Edwards stated that "additional safeguards are necessary (the Court stated this is strongly indicated) when the accused asks for Counsel; and

we now hold that, when an accused has invoked his right to have Counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation (custodial), even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges or conversations with the police."

Now, the S.C. Supreme Court is also clear on this matter that police-initiated interrogations are prohibited in South Carolina. State V. Kennedy 510 S.E.2d 714 and that a [redacted] waiver [redacted] under traditional standards is presumed invalid. The S.C. Supreme Court in State V. Anderson 593 S.E.2d. 820 stated that "The sixth amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to... have the assistance of counsel for his defense. U.S. Const. Amend. VI. Once a criminal defendant invokes his sixth amendment right to counsel, a subsequent waiver of that right - even if voluntary, knowing and intelligent under traditional standards is presumed invalid if secured pursuant to police initiated interrogations and statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecutions case in chief. Michigan v. Harvey 494 U.S. 344 and Michigan v. Jackson 475 U.S. 625. Likewise the S.C. Supreme Court has held: When the sixth amendment right to counsel has attatched, if police initiate interrogation after a defendants assertion at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendants

right to Counsel for that Police initiated interrogation is invalid unless the defendant initiates the contact himself." State v. Council 515 S.E.2d 508, 515.

It is readily apparent from the record that the Petitioner did not initiate communication with law enforcement. This fact is irrebutable and has gone uncontested throughout the history of this case and should thus be suppressed. The judge abused his discretion in admitting the statement into the trial and the Petitioner was prejudiced in that the alleged confession was heavily relied upon to convict the Petitioner.

Issue # 13

The Petitioner asserts that the Uniform Post Conviction relief Act is the appropriate forum to seek relief when the order denying relief is not in accordance with 17-27-80 and 17-27-90. Such an order is not as final adjudication on the merits and when Counsel at first PCR fails to file a 59(e) when one is required then that "is" sufficient enough reason to justify the filing of a subsequent PCR application.

Issue # 14

The Petitioner Contends that once appointed (an applicant for P.C.R) should not be stripped of Counsel and made to Proceed Pro Se merely because the state intends to seek summary dismissal. Applicants have a statuatory right to PCR Counsel. The Petitioner would like to incorporate the argument of Mr. Tristan Shaffer in this argument and in support of the appeal itself. The general Procedure in PCR Cases is to appoint Counsel after the state files its return. See rule 71.1(d). The Procedure was Presumably established so that the resources are not used on cases when there is no issue of fact or law to be decided. Counsel Shaffer, an officer of the Court, argued that there are issues of fact and law to be determined yet Counsel was

stripped from the Petitioner on the strength that the state sought to summarily dismiss the application despite the meritorious nature of the issues at bar. The statuatory right to Counsel in 17-27-60 has been trampled upon in the most recent application for P.C.R.

Issue # 15

The Petitioner asserts that amendments to indictments become unconstitutional when the amendment increases the nature and seriousness of the offense and increases the punishment the accused can receive. The amendment in the Case at bar changed the offense from murder to killing by stabbing and thrusting. (Motion to quash the murder indictment is referenced on ROA P. 29 lines 13-24, but by the time the amendment took place or when it took place the judge had granted a continuance so the Petitioner does not have a specific reference for the hearing when the judge allowed the actual amendment, but on ROA P. 374 lines 1-10 there's a reference to the already amended indictment), which has an additional element to be proven which is not included in an indictment for murder, that is use of a knife or similar weapon to cause the death. The amend- in the current case violated the fifth amendment Grand Jury clause and established a crime different from the charge in the original indictment. Title 16-3-40 states with certainty that the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v. Kornahrens 350 S.E. 2d. 180. In State v. Lynch 545 S.E. 2d. 511 it states that the Court is deprived of jurisdiction when an amendment to an indictment changes an offense to one with increased punishment. For purposes of the language in Gentry (cite unknown) this indictment issue was raised prior to the jury being sworn so the Petitioner contends that the trial court was deprived of jurisdiction because of the amendment to the murder indictment.

Issue # 16

The Petitioner contends that his fourteenth amendment right to due process pursuant to and guaranteed by the U.S. Constitution were violated at trial and appeal. The Due Process violations in this case stem from several different factors depriving the Petitioner of a fair proceeding. All of the issues complained of in this petition violate due process. It violates due process for the petitioner to be incarcerated without sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Jackson v. Virginia 99 S.Ct. 2781. It violates due process for the Petitioner to have been convicted solely on an alleged confession that the state admits was not corroborated as is required by the corroboration rule to establish the trustworthiness of an alleged confession. as earlier demonstrated on ROA P. 873 lines 17-21. In Fleming v. Collins 917 F.2d. 850; U.S. v. Wolf 879 F.2d. 1320; U.S. v. Abrrilbay 143 F.3d. 534; U.S. v. Perdue 8 F.3d. 1455; U.S. v. Jones 232 F. Supp. 2d. 618; State v. Dodd 579 S.E.2d. 331 and State v. Osborne 516 S.E.2d. 201 it clearly states that an accused person cannot be convicted solely on an uncorroborated statement. Further, these cases indicate clearly that the state must provide substantial independent evidence aliunde the alleged confession to establish the trustworthiness of the statement. The Petitioner asserts that, that feat is impossible since the State has admitted on ROA P. 873 lines 17-21 that the alleged confession did not conform to the physical evidence in the house.

The South Carolina Supreme Court stated in myriad cases that for a trial judge to submit a case to the jury on circumstantial evidence the states evidence must reach the substantial circumstantial evidence standard and the circumstantial evidence relied upon must coincide with each other to exclude any other

reasonable hypothesis which the state has failed to achieve. The Repeated ways the judge at trial abused his discretion as earlier demonstrated in this Petition violated due Process. Because his rulings weren't supported by the record but contrary to testimony given by witnesses which violated due Process. The trial Court ruled that the Petitioner was the initiating Party after the Petitioner invoked his right to counsel during custodial interrogation when the investigator's admitted in open Court that they initiated Communication with Petitioner. ROA P. 122 lines 12-13; ROA P. 124 lines 9-19 and ROA P. 256 lines 14-17. Trial Court's refusal to suppress the statement and to recuse himself violated due Process. Trial Counsel established a Miranda violation and he still wouldn't suppress the statement but made a ruling contrary to testimony

On direct appeal, appellate Counsel violated Petitioners due Process rights in failing to file a merit brief when here were more than several issues of merit Properly preserved for appeal. out of the issues Preserved for direct appeal there's at least one dead bang winner. Banks v. Reynolds 54 F.3d.1508. Each and everything Complained of in this action violated due process. That includes first PCR Counsel's failure to file a 59(e) thereby denying Petitioner a complete or full bite of the apple.

Conclusion

For the foregoing reasons the Petitioner is entitled to a belated appeal (Austin review)

Respectfully Requested,

Gary Steven Scott

This 2nd day of September 2014

Gary Steven Scott
430 Oak Lawn Rd.
Pelzer, S.C. 29669

The State of South Carolina
In The South Carolina Supreme Court

Appeal from Dillon County South Carolina
Common Pleas Court
Docket Number: 2013-CP-17-054
Paul M. Burch, Circuit Court Judge

Gary Steven Scott #282106 ________ Appellant

Versus

The State of South Carolina ________ Respondent

Proof of Service for Writ of
Certiorari to the
South Carolina Supreme Court

I certify that I have a copy of the Petitioners Writ of Certiorari to the S.C. Supreme Court by depositing it in the U.S. Mail Postage Prepaid on 9/2/14 addressed to the South Carolina Supreme Court, P.O. Box 11330, Columbia, S.C. 29211. And delivering a copy via U.S. Mail postage prepaid to opposing counsel @ Office of the Attorney General @ P.O. Box 11549 Columbia, S.C. 29211-1549.

Gary Steven Scott

Gary Steven Scott
430 Oak Lawn Rd
Pelzer, S.C. 29669

This 2nd day of September 2014