

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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2013-CP-23-00765

Appellate Case No.: 2014-001951

S.C. Supreme Court

SAMUEL LAMONT WHITNER Appellant

v.

The Division of Appellate Defense Defendant

The office of the Attorney General of South Carolina, Defendant

PRO SE MOTION OF WAIVER OF REPRESENTATION, CONSOLIDATED PURSUANT TO RULE 42 (a), SC RCP, WITH PRELIMINARY INJUNCTION PURSUANT TO 65 (a) SC RCP

The Petitioner through this pro se motion would respectfully move before this Honorable court and pray of this Honorable court to grant the herein requested preliminary injunctive relief, as well as respectfully move to waive any and all court appointed representation from the South Carolina Commission on Indigent Defense, for the foregoing reasons that are provided below within this motion.

STATEMENT OF THE FACT

The Petitioner was indicted for a single count of criminal sexual conduct with a minor in the first degree. The Petitioner was called to trial for this offense on March 11, 2009 Case No.: 2009-GS-23-1072, before the Honorable Victor Pyle, Jr, in which the jury had not been sworn.

Assistant Public Defender...; Christopher D. Scalzo, represented the Petitioner. Assistant solicitor Christy Sustakovitch, represented the State. However, the solicitor had made a motion to admit a surreptitious taped recorded telephone conversation between the Petitioner and his daughter. The Honorable C. Victor Pyle Jr, denied the state's motion., the solicitor had then made an interlocutory appeal; thus appealing the trial court order of denial of state's motion for admissibility of the illegal surreptitious wiretap. The state then filed a notice of appeal to the South Carolina Court of Appeal on the 19th day of March 2009. Attorney General William M. Blitch Jr, had subsequently on March 27th 2009, filed a motion to vacate Judge Pyles suppression order and allow Petitioner to file a suppression motion with the court of Appeal pursuant to S.C. Code Ann, § 17-30-110 (A). . . ., Robert M. Dudek, whom at the time was Deputy Chief Appellate Defender for Capital Appeal;) For the South Carolina Commission on Indigent Defense, which Robert M. Dudek had filed and opposed the state's motion within a: Return to the Motion to vacate and allow a motion to be served and filed pursuant to section § 17-30-110, and argued therein that "[t]he state should not be awarded a second bite at the apple nor rewarded for its sandbagging the trial judge". The state's motion was granted by written order per the court of Appeals dated June 11, 2009, The court of Appeals found that the circuit court lacked subject matter jurisdiction and that [it] had exclusive jurisdiction to hear a motion to suppress based on a violation of the south Carolina wiretap statute and vacated Judge Pyle's original suppression order.

On July 22, 2009, a motion to suppress the intercepted recorded conversation along with a memorandum of law in support of the motion was filed with the court of Appeals by defense counsel, Scalzo on behalf of the Petitioner. The assistant solicitor filed a reply on the behalf of the state. Defense counsel filed a

response to the state reply...

On July 22, 2009, a suppression hearing was held before the Court of Appeals. The state was represented by assistant solicitor christy Sustakovitch. The Petitioner was represented by defense counsel christopher D. Scalzo. The Court of Appeals issued a written order on July 27, 2009, denying the Petitioner's motion to suppress...

The trial had then reconvened from November 2-4 2009, case No. 2009-GS-23-01072, before Judge few in which the Petitioner was found guilty and sentenced to thirty years.

A direct appeal was filed with the South Carolina Supreme Court. christopher D. scalzo Esquire, and Robert M Dudek Esquire, perfected the appeal. The South Carolina Supreme Court affirmed the Petitioner's appeal on July 11, 2012, see State v Whitner 399 S.C 547 732 SE 2d 861 (2012). The Remittitur was sent on July 27 2012.

The Petitioner then filed for post conviction Relief on February 8, 2013, an evidentiary hearing was held on the 19th day of June, 2014.

However the Petitioner was not served with disposition of the P.C.R. proceeding¹. WHEREFORE; This requested injunctive relief hereby follows.

I
GROUNDS FOR WALVER OF
REPRESENTATION, PER THE
APPELLATE DEFENSE..

When the state had initiated a interlocutory appeal before the south Carolina Court of Appeals, the petitioner was provided with representation of

1. A pro se preliminary Injunction that was consolidated pursuant to Rule 42(a) S.C.R.C.P with a motion to relieve, was filed to the Court of common Pleas on July 31, 2014; which was submitted before the P.C.R court had rendered an order of disposition of the P.C.R action case No.: 2013-CP-23-00765. Moreover the P.C.R. court had.... abandoned to issue a ruling concerning this injunction

conflict of interest, and which this representation had so derived from the Division of Appellate Defense.

However the Petitioner respectfully contends that the ~~origin~~ of the conflict that which its "imputation" had so derived, from a failure to oblige by a legal obligation to prevent the Court of Appeals from becoming a partner with illegal conduct within: THE STATE V. WHITNER. Appellate Case No.: 2009-121593 See Gelbard v Cal. 1972 92 S.Ct 2357.²

when the state had initiated an appeal before the Court of Appeals, upon submitting a motion to vacate, and allow a motion to be served and filed pursuant to section 317-30-110 see (Exhibit 1.1), in which the state argued that "[t]he recording was appropriate under a theory of vicarious consent as expressed in Pollock v Pollock 154 F3d 601 (6th cir 1998)".³

The state had contended within its motion that a circuit court lacked jurisdiction to hear a motion to suppress a recording under the the state wiretap Act, see (Exhibit 1.1).

However, Robert M Dudek, Esquire, whom at time was Deputy chief Appellate defender, had failed to prevent; thus an "imputation of conflict of interest," regarding the petitioner as well as the Court of Appeal, and the South Carolina "Commission" on Indigent Defense, upon Robert M. Dudek Esquire, actively representing conflicting interest for reasons

2 The Petitioner was entitled to a preliminary injunction against the state use or discloser of the surreptitious recorded conversation see William v Poulos D. Me 1992 801 F. Supp 867 and 18 U.S.C. § 2520

3. The call was taped without the Petitioner's knowledge or consent and it violated the Petitioner's right to privacy under the U.S.C.A 4th amendment and S.C constitution Artical 1 § 10

being (1). Robert M. Dudek Esquire, whom at the time was Deputy chief Appellate Defender, did not provide "conflict free" representation, upon not assuring that the Court of Appeal to be fully apprised with law concerning lawful "accreditation of jurisdiction" of the Court of Appeal to entertain the state's Appeal pursuant to S.C. code ann §17-30-110. Generally the state's appeal was not cognizant under S.C. code ann §14-3-330, see STATE V. WHITNER. Appellate Case No.: 2009-121593..

However, Robert M. Dudek Esquire, omitted to provide this vital factor before the South Carolina Court of Appeals, when the Appellate counsel submitted the Return to the Motion, to vacate order and allow Motion to be served and filed pursuant to section §17-30-110, when responded and opposed the state's motion and appeal see (Exhibit. 1).

Moreover, The Court of Appeal had needed to be apprised of the mandatory requirement that are proscribed per S.C. code ann §17-30-105 before the court of Appeal could have lawfully take jurisdiction of the states interlocutory appeal pursuant to S.C. code ann §14-3-330 as well as §17-30-110.

S.C. Code ann §17-30-105 which in part reads

As required by federal law, the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom must not be received in evidence or otherwise disclosed in any trial hearing, or other proceedings, unless each party not less than ten days before the hearing or proceeding and not less than thirty days prior to trial has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved;

This requirement is mandatory to be provided before the South Carolina court of Appeals pursuant to S.C. code ann §17-30-110 (A). As provided

in part of S.C. code ann §17-30-110(A)(3)

"[U]pon receiving the motion, the reviewing authority must notify the issuing judge who must transfer copies of the content of all recordings, applications, orders, and other documents relating to the issuance of the "order of authorization." see S.C. code ann §17-30-110(A)---,*

This mandatory requirement concerns the Attorney General to obtain a order and accompanying application under which the interception is to be approved, which is the factor that serves as the keystone to lawfully support the jurisdiction in order for the Court of Appeal to entertain an appeal with regards to S.C. code ann §17-30-110(A)(3).⁴

Moresoever an order authorizing or approval of the wiretap had not been granted per a judge of a competent jurisdiction see S.C code ann §17-30-70(A) and §17-30-15(8).

The initial trial transcript of record before the Honorable C Victor Pyle Jr held March 11 2009 case No.: 2009-GS-13-01072 (Exhibit A) is void of showing of evidence that provides that an exception to the wiretap statute: The Petitioner was unaware that his conversation had been intercepted. see Chandler v. U.S Army 125 F.3d 1296, 1300-01. also see Thompson v. Dulaney 838 F. Supp. 1535 (D. Utah 1993) this interception was not within the exceptions of federal

* The south carolina Supreme court... unintentionally neglected to recognize the necessity of this requirement for an application or approval see 18 USC 2516 (1) SC code ann §17-30-105. Robert M. Dudek Esquire whom at time ~~as~~ the Chief Appellate Defender failed to provide before the Court of Appeal as well as before the Supreme Court with the facts and evidence. That the Petitioner's conversation was taped without the Petitioner's knowledge or consent... see The State v. Whitner Appellate case No.: 2009-121593 also see The State v Whitner 399 SC 547 732 SE. 2d 861 (2012)

wiretapping law... As proscribed per S.C. code ann §17-30-65 (A)
which therein reads.....

when ever any wire, oral or electronic communication has been intercepted no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.

This code ann is identical to 18 U.S.C.A § 2515. However, being as the Petitioner was unaware that his conversation with his daughter had been taped without his knowledge or consent, upon the disclosing (the) contents within the initial trial proceedings held March 11, 2009, before the Honorable C Victor Pyle Jr. 2009-GS-23-01072, as well as before the South Carolina Court of Appeals see State v Whitner; Appellate Case No.: 2009-121593, its disclosure is promulgated as a violation pursuant to §17-30-65 (A)

II

DISCUSSION OF LAW

violation of Ethical standards of
Professional conduct.

A court has a "duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar, see *In re Asbestos cases* 514 F. Supp 214 925 (E.D. Va. 1981), citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2nd cir 1975). *Latham v. Matthew*. NOS. 6.08-CV-02995-JMC, 6.08-CV-03183 JMC, 2011 WL 52609 at *2 (D.S.C January 6, 2011)

The chief Appellate defender did so represented the Petitioner in both separated but related action (1) before the South Carolina Court of Appeal. see State v. Samuel Whitner: Appellate Case No.: 2009-121593. also (2). upon direct appeal, see State v Whitner 399 S.C. 547 732 SE 2d 861 (2012). which is violative as provided by 407 professional conduct Rule 1.9 (c) see (Exhibit. I). The Petitioner did not waive his right to a conflict free representation. see (Exhibit. N), also see Rule 1.9 (2) and Rule 1.7 (4), 407 Professional conduct S.C.A.C.R.

"For purposes of the Rule of professional conduct, the term "Firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law or lawyers employed in a legal services" see COMMENT [1] of Rule 1.10 407 profes cond. S.C.A.C.R.

Rule 1.10 (e) allows programs providing legal services to indigents to avoid imputed disqualification by screening lawyers from conflicting matter within the office see Rule 1.0 (1). see COMMENT [9] of Rule 1.10, 407 professional conduct S.C.A.C.R.

As proscribed of Rule 1.0 (1), "[5]creened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."

(A). ACTIVE REPRESENTATION OF CONFLICT OF INTEREST WITHIN THE PROCEEDING BEFORE THE SOUTH CAROLINA COURT OF APPEAL: Appellate Case No.: 2009-121593

The Petitioner hereby set forth [his] reasons for requesting for waiver of representation per the South Carolina Commission on indigent defense

As proscribed of law the division of the Appellate defense does not function or exist as a "particular," nor as a "discrete unit," but however, the Appellate defense operates as a constituent that which is empowered per the South Carolina Commission on indigent defense; The division of the Appellate defense is obligated by law and oath, and as well as constitutionally entrusted affectively as well as with cognition to uphold the ethical standards and avoid imputation of conflict. see 407 Professional Conduct, Rule 1.10 (e). Rule 1.13.

As stated of 407 professional conduct Rule 1.0(a) as read thereof: "[K]nowingly," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Robert M. Dudek Esquire, whom as the Deputy Chief Appellate defender was with knowledge that the wiretap is illegal, but willfully failed to apprise the court of Appeals, that there exist no adequate remedy at law within the state's appeal. see The State v. Whitner Appellate Case No.: 2009-121593. Robert M Dudek Esquire, was within knowledge that the Petitioner's conversation with his daughter was taped without the Petitioner's knowledge or consent, as well as with knowledge that an application of order of authorization pursuant to S.C. Code Ann §17-30-70 had not as well as could not be granted per a judge of a competent jurisdiction. see S.C. Code Ann, §17-30-15(8). wherefore jurisdiction do not as well as can not exist for the Court of Appeals to entertain a appeal pursuant to S.C. Code Ann §17-30-110, prior to the fact that unlawfull disclosure of contents of an illegal intercepted wiretap is a violation of the Federal wiretap statute pursuant to 18 USC 2515-2520 S.C. Code Ann §17-30-20, §17-30-105 §17-30-65.

Title III of the Omnibus Crime Control and Safe Street

Act of 1968. Title III prohibits the "[i]nterception and disclosure of wire, oral, and electronic communication except as provide by the statute.

III.

Actual knowledge of an UNLAWFUL obtained conversational wiretap, that which its OBVOLUTION is provided per the initial Trial record held March 11, 2009, before the Honorable C Victor Pyle Jr case No.: 2009-GS-23-01072..

According to the initial trial record that which was held before the Honorable C Victor Pyle Jr on March 11 2009, case No.: 2009-GS-23-1072, that which provides that it is unequivocally obvious that the expectation of privacy is frustrated. see U.S. v. Jacobsen 104 S. Ct at 1658-59, this trial transcript was at the Appellate counsel's proximal upon Robert M. Dudek Esquire, filing in opposition against the state appeal, and motion to vacate the Honorable Pyle's order of suppression. see Exhibit. A - Page 23 see Exhibit. 1.1 and Exhibit. 1. However the trial transcript of the March 11, 2009 trial proceeding are direct evidence that does prove that the intercepted private conversation between the said Petitioner and his daughter is not within the exception to the Federal wiretap law. see William v. Paulos D. Me 1992 801 F supp 867, 18 U.S.C § 2520. It was inappropriate for the state by law to apply the theory of vicarious consent as expressed in Pollock v. Pollock 154 F.3d 601 (6th cir 1998)..

As provided of section §17-30-20(4) which thereof reads..

"[I]ntentionally uses or attempts to use the contents of any wire, oral or electronic communication knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection."

Again with regards to the initial trial transcript of record held March 11, 2009 case No.: 2009-GS-23-1072* and (which) this trial provides that prior to the jury being sworn, the solicitor for the state had moved to admit the illegal surreptitious recorded conversation between the Petitioner and his daughter as evidence into trial. See Exhibit A Page 18 and however had disregarded the fact that the recording of the phone call was made by the Petitioner daughter's mother's husband in violation of the South Carolina wiretap act codified at section 37-30-10, et seq (Supp 2008) see Exhibit A Page 18-19 the Honorable Pyle had inquired of the state "[w]hat right does that person have to unknowingly record the conversation?" see Exhibit A Page 18, and prior to this inquiry His Honorable Pyle had also inquired of a requirement that would allow admissibility see Exhibit A Page 18. The state had provided that a requirement or an exception had not been met which to allow admissibility see Exhibit A Page 18.)

The solicitor Christy Sustakovitch was within knowledge and also well within reason to know that the Petitioner's private conversation with his daughter which was taped without the Petitioner's consent or knowledge is a violation of law pursuant to S.C. code ann 37-30-20 see Thompson v. Dulancy D. Utah 1993 838 F.Supp. 1535 139 ALR Fed 765.

The solicitor had confirmed that this interception violates the wiretap statute, upon affirming that the Petitioner's private phone conversation with his daughter was taped without [his] knowledge

* Exhibit A identified as the The pretrial hearing transcript which contains only page numbers not lines to cite. which was held on the 11th day of March 2009 before the Honorable C Victor Pyle Jr see Exhibit A

or consent within the states response to the Petitioner's motion to suppress that which was filed before the court of Appeals on the 15th day of July 2009 see App. p. 481

[As stated within the states return, see App. p. 488.,]
"[N]either Petitioner nor the victim knew the phone call was recorded. The state argued the call was admissible pursuant to section 17-30-30 (C)!"]

Upon the state apprising the south carolina court of Appeals of this fact within its return, did so undisputedly affirms that, without an order of the "authorization" or approval, pursuant to S.C. Code ann §17-30-105, that which is to be granted per a judge of a competent jurisdiction. see S.C. code ann §17-30-70 (A) and §17-30-15 (8). The prohibition of law pursuant to §17-30-20 was made unequivocally clear before the court Appeal; the statutory ripener was incomplete to set forth lawful jurisdiction, in order for the south carolina court of Appeal to entertain a appeal pursuant to §17-30-110. Moreover the solicitor had provided before the Court of Appeal with the states return to the Petitioner's motion to suppress, that the law is violated.

As provided within the states Return 1., (see App. p. 507 - 508.)

"[U]nder the Petitioner's theory of the wiretap statute, a completely absurd result, one affecting evidence admissibility as well as the possibility of criminal charges and civil causes of action. would happen in this case: 1) the call of a defendant apologizing to his daughter for a heinous crime would be suppressed; 2) technically, her mother and stepfather

* The solicitor for the state had made vindictive allegation that the Petitioner had confessed within the state's memorandum of law filed on the 15th day of July 2009. see App. p. 481, prior to the suppression hearing before the South Carolina Court of Appeals in which testimonies were made by the intercepting party that the petitioner had never confessed to committing any sexual abuse on the 22nd day of July 2009

would have committed a criminal act for recording the call in the first place under state law but not federal law;".

see The state's response to Petitioner's motion to suppress App. p. 488-508.).. The solicitor did not provide any evidence within the initial trial proceeding before the Honorable C Victor Jr on March 11, 2009 nor before the Court of Appeals, that the Petitioner had entered into a agreement, or had knowledge that [his] daughter's Mother's husband intercepting his private conversations with his daughter see 18 USCA § 2511 (2) (C). S.C. Code ann § 17-30-30 (C) see Griggs Ryan v. Smith CA. 1 (Me.) 1990 904 F.2d 112. also Chandler v U.S. Army 125 F.3d 1296. see Thompson v. Dulancy 838 F. Supp. 1535

IV..

ACTIVE REPRESENTATION OF ACTUAL
CONFLICT WITHIN DIRECT APPEAL
BEFORE THE SOUTH CAROLINA SUPREME
COURT. see, State v. whitner 399 S.C. 547
732 SE.2d 861 (2012)

Upon the south carolina Court of Appeal vacating the original suppression order that was rendered per the Honorable C Victor Pyle Jr, and also the Court of Appeals had ordered for a motion to suppress to be filed before south carolina Court of appeals. see App. p ~~450~~ A suppression hearing was held before the south carolina Court of Appeals on the 22nd day of July 2009. The Court of Appeals issued a written order on the 27th day of July 2009 denying the Petitioner's motion to suppress. see The state v. SAMUEL whitner Appellate case No 2009-121593

The trial had then reconvened from November 2-4, 2009 case No.: 2009-GS-23-01072 before Judge Few; in which the Petitioner was

found guilty and sentenced to thirty years

A direct appeal was filed with the South Carolina Supreme Court the Petitioner trial counsel; Christopher D Scalzo Esquire, as well as Robert M Dudek Esquire, perfected the Appeal. The South Carolina Supreme Court affirmed the Petitioner's appeal on July 11, 2012, see State v. Whitner 399 S.C. 547 732 SE 2d 861 (2012).

As stated of rule 407 Professional Conduct Rule 1.9 (c) therein

"[A] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter."

Upon Robert M Dudek Esquire representing the petitioner on direct appeal see The State v. Whitner 399 S.C. 547 732 SE.2d 861 (2012) and also represented the Petitioner within a related action see State v. Whitner Appellate case No.: 2009-121593. And however the Petitioner did not waive his right to a conflict free representation see U.S. v. William 81 F3d 1321, 1324 (4th Cir. 1996)

with respect to information relating to the representation per Robert M Dudek Esquire, when the Appellate counsel represented the Petitioner on direct appeal before the Supreme court; does concern the Appellate counsel's personal "knowledge", of a prohibited act as proscribed of S.C. Code ann §17-30-20 (3) (4). that which this prohibition and the reason ^(for) the Appellate counsel to have knowledge of its "actuality"; but willfully failed to protect the Petitioner's rights pursuant to the U.S.C.A 6, thus this such representation, provides that the Appellate counsel had indeed represented Actual conflict, being as Robert M. Dudek Esquire, was within knowledge and with reason to know that there exist no adequate remedy at law concerning an illegal wiretap when upon the Appellate counsel's representation before the Court of Appeals see The State v SAMUEL WHITNER. Appellate case No.: 2009-121593. Moreover,

Robert M. Dudek Esquire had so implemented disadvantages against the Petitioner being as (1). The Petitioner's rights were violated as well as the South Carolina Constitution Artical 1 S 10 and U.S.C.A 4th... and (2). Again. the appellate counsel was with knowledge and also had reason that law was violated pursuant S.C. Code ann §17-30-20(3) (4) §17-30-65, §17-30-70, 18 U.S.C. §2515.

However disadvantages were implemented against the Petitioner when Robert M Dudek Esquire had subsequently represented ~~The Petitioner~~ before the South Carolina Supreme Court. see The state v. Samuel whitner 399 S.C. 547 732 SE 2d 861 (2012), in which the Supreme court's intergrity was undermined see Hawkins v. Bruno Yacht sales Inc. 353 S.C. 31 42. 577 SE.2d 202 208 203.

As held by the South Carolina Supreme Court: stated within [it's] opinion op. No.: 27142 Heard October 18 2011...,

[T]he couple decided to record telephone calls between Appellant and the victim. Several days later, Mother Consented to Stepfather recording a telephone conversation between the victim and Appellant without the victim knowledge or consent. During the thirty-one-minute conversation, Appellant admitted the sexual abuse and stated that the incident was a mistake he deeply regretted

* Justice Pleicones, had upon concurring with the results reached by the majority, that which states, "[i]n which a third party" seeks to have evidence excluded as obtained in violation of the wiretap Act." The Petitioner was not made aware that his private conversation with his daughter was to be recorded by the stepfather whom by law within this case is the "third party" (i.e. The stepfather whom is referred to within this courts opinion No.: 27142).

The Petitioner respectfully admonishes this Honorable Court that this finding is contrary to the facts in light of evidence with regards to a confession.

Within the wiretap hearing that was held before the South Carolina Court of Appeals on the 22 nd day of July 2009. The Mother and stepfather, that which is referred to within this court's Opinion, No. 27142 (i.e. the party whom intercepted the Petitioner's private telephone conversation with his daughter). see State v. Samuel Whitner. Op No.: 27142 at 399 S.C. 547 732 SE.2d 861 (2012).

The Petitioner respectfully emphasize the fact that (1) The mother and stepfather whom had intercepted the Petitioner's Private phone conversation had so testified that the Petitioner did not admit to any sexual abuse upon intercepting the phone conversation between the Petitioner and his daughter see Exhibit. B). Page 14. Ln 12-25. Pg. 17. Ln. 7-12.

And however the testimonies that were offered per the Mother and stepfather attesting to the veracity of a none confession by the Petitioner, was stated within the Suppression hearing more then 8 times in the record see Exhibit. B). Page 22. Ln 7-15) Pg. 25 Ln 1-21

The transcripts of record of the Suppression hearing was at the Appellate counsel proximal prior to the South Carolina Supreme court had held oral arguement on the 18th day of October 2011.

Furthermore. also stated within the South Carolina Supreme Court's order see Op. No.: 27142.. State v. Whitner 399 S.C. 547 732 SE.2d 861 (2012) The Supreme Court ruled that...;

"[S]everal days later. Mother consented to stepfather recording a telephone conversation between the victim and Appellant without the victim knowledge or consent ["]"

Again. Robert M. Dudek Esquire was with knowledge and with reason

to know that the recorded telephone conversation that was intercepted per the Mother and stepfather was taped without, both the Petitioner; (i.e. whom is referred to as the "Appellant" within this court's order. see State v. Whitner Op. No.: 27142), and without his daughter's knowledge or consent

It was held also per the Supreme Court thus (stated within; the State v. Whitner see Op. No.: 27142. The Supreme Court ruled ().

"[A]ppellant also contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protections afforded by our state's constitution See S.C. Const. art I. § 10 ("The right of the people to be secure in their persons, houses, papers, and effect against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . ."). We disagree. Appellant's argument is dependent upon a rejection of the vicarious consent of a minor child. Appellants constitutional argument must be rejected."

Testimonial evidence were at the Appellate Counsel proximal that indeed substantiates that the taping of the Petitioner's private conversation with his daughter is illegal due to the fact that the interception derived from acts of eavesdropping that which the Mother and stepfather had offered testimonies before the South Carolina Court of Appeals that The Petitioner was unaware that the Mother and stepfather had recorded his conversation see

V.
GROUND FOR A INJUNCTIVE
RELIEF; REGARDING A APPEAL
BEFORE THE SOUTH CAROLINA
SUPREME COURT.: Appellate
Case No. 2014-001951

The Petitioner had filed for Post conviction Relief on the 8th day of February 2013 C/A 2013-CP-23-00765. an evidentiary hearing was held 19th day of June 2014.

However, the Petitioner was not served with a disposition of the PCR proceeding.

Moreover, a pro se preliminary Injunction which was with a consolidation, pursuant to Rule 42 (a) S.C.R.C.P., with a motion to relieve was filed to the court of Common Pleas on July 31, 2014, which indeed was submitted before the P.C.R court had rendered an order of the disposition of the PCR action C/A No.: 2013-CP-23-00765.

However, the PCR court had abandoned to issue a ruling concerning this injunction.

The Petitioner had complied per se with the procedural norm that are proscribed per the uniform Post conviction Act.

The Petitioner had raised issues of ineffective assistance of Appellate counsel within his PCR action C/A 2013-CP-23-00765, but was not addressed because of misconduct that was implemented per the Petitioner's court appointed P.C.R counsel.

The Petitioner move to consolidate below the preliminary injunction which was consolidated with a motion to relieve that was submitted before the court of common Pleas thus to proffer for scrutiny per this Honorable court.

The Petitioner PCR counsel did not served the Petitioner with a copy of the PCR court dispositional order, concerning the Petitioner's Post conviction action case No.: 2013-CP-23-00765. and which the Petitioner remains unserved..

State of South Carolina
County of Greenville

Samuel Lamont Whitner
Applicant

v.

The State of South Carolina
Respondent

IN THE COURT OF COMMON PLEAS

Case No 2013-CP-13-00765

Motion to relieve counsel with
consolidation pursuant to Rule
42(a) S.C.R.C.P. of a preliminary
Injunction

The Applicant hereby move before this Honorable court to relieve
his P.C.R. counsel

A. evidentiary hearing had convened on the 19th day of June
2014. However, therein the Applicant had presented before the court
merit, to present tangible evidence, which are the Applicants
phone records, and the court had ordered the record to remain
open within a limitation of thirty days, from the initial day that
which the P.C.R. hearing had convened; which to allow the Applicant
to have the opportunity to present the requested phone records
as evidence that which the Applicant had asserted that ~~the~~ [his]
phone records are essential; thus for the Applicant to meet the
burden of proof that will satisfy [his] ineffective of assistance
claim, that is setforth within the Applicant's P.C.R. Application
and supplement with attachments which was filed to this court

prior to when this hearing had convened.

Upon the P.C.R. counsel; Esq. Caroline M. Harlbeck confrontation with the Applicant, which took place within a ample amount of time prior to when this P.C.R. hearing had convened, the Applicant did informed the counsel, that the Applicant's phone records needed to be obtained, because the Applicant phone records will provide before the court "exculpatory factors," regarding the Applicant's guilt, and discrediting, to the state's claim of defense; thus contending that the Applicant's daughter's mother had acted with good faith basis when the Applicant's daughter's mother had surreptitiously taped the Applicant conversation without the Applicant's knowledge or consent.

However, prior to the court's order for the record to remain open; P.C.R. counsel had stated before the court that the Applicant's phone records were no longer accessible, and can not be obtained, this assertion that which was implicated by the P.C.R. counsel upon contending that the requested phone records could not be obtained "was refuted," by accordance to the Applicant sister whom was present at the P.C.R. hearing and attest to the fact that the phone record can be obtained.¹

¹ This court had ordered for the P.C.R. record to remain open and instructed the P.C.R. counsel to obtain the phone records and brief an arguement, which to provide the court with evidence, that will substantiates the ineffective assistance of counsel claim, with regard to the good faith basis concerning vicarious consent.

The P.C.R. counsel had forwarded a June 20 2014 correspondence to the Applicant informing the Applicant that the burden to obtain the evidence (ie the Applicant's phone records) was placed upon the Applicant's sister. (see Exhibit, 2)

I.

The P.C.R. Counsel's inadvertent representation within the P.C.R. hearing, that 19th day of June 2014. will establish a cause for a procedural default, concerning the procedural mandates regarding due process of law pursuant to the Uniform Post-Conviction Procedure Act. see Harvey v. South Carolina (1970 DCSC 310 F. supp 83). The inordinatness administered per Esq. Caroline M. Horlbeck, provides a unjustified delay within the state corrective process, which will result to frustrate the rights of the Applicant and be such a circumstance as to render that process ineffective see Allen v. Leeke (1971 DCSC) 328 F supp 292. also see Martinez v. Ryan — S.Ct — 2012 WL 912950 (U.S.I). It was held by the Martinez court; that for the Applicant "[+]o present a claim of ineffective assistance at trial in accordance with the state's rules then a prisoner likely needs an effective attorney."

Upon the Applicant's counsel placing the burden upon the applicant's family to meet legal expectation and qualification of that which the P.C.R. counsel is vested of.. and by duty being as Esq. Caroline M. Horlbeck was court appointed to represent the Applicant, and however, neglecting a lawyer's obligation, to assure that vital evidence is before the court.

The Applicant's family is "unlearned" in the law, and which will create a high risk that the Applicant's family will unknowly fail to comply with [state] procedural rules see Cf., e.g., id., at 620-621, 125 S.Ct 2582. citing Martinez v Ryan — SCT

2012 WL 912950 (U.S.11). The Applicant phone records are evidence that consist outside the trial record. see Martinez supra,- The P.C.R. counsel conduct obstruct the Applicant's ability to comply with [state's] established procedure. see Strickler v. Greene 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.E.2d 837 (1963).

II.

SUBSTANTIVE GROUND FOR THE P.C.R. COUNSEL TO BE RELIEVED..

As stated within S.C.R.C.P. 71.1 (d) (e)

(b) If after the state has filed its return the application presents question of law or fact which will require 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 insure that all available grounds for relief are included in the application and shall amend the application if necessary.

The Applicant had filed his P.C.R. application on the 8th day of February 2013, and supplement and supporting facts and attachment was filed before the court on the 19th day of February 2014, and therein Applicant's supplement the P.C.R. counsel was advised to amend all issues.² see Exhibit X Page 3). However within the P.C.R.

² see Page 3 of the supplement of issues (Exhibit X) and Rule 71.1 (d) S.C.R.C.P. Noncompliance pursuant to Rule 71.1 (d), can provide moots to the effects that is expected of rule 59 (e) S.C.R.C.P., see McCullough v. State. 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995)..

hearing on that 19th day of June 2014. The P.C.R. counsel had contended that the case was ready to proceed with the hearing. P.C.R. counsel, did so proceed, with coherence, with disregards concerning the Applicant's procedural rights pursuant to, S.C. code ann § 17-27-20. (6). The Applicant's Counsel had so failed to amend the supplemental and attachments as evidence with pursuant to S.C. code ann § 17-27-40 - 17-27-50³. Upon the Applicant's counsel not amending the issue set forth within the Applicant's Supplement; before the P.C.R. hearing had convened on that 19th day of June 2014, frustrates the right of the Applicant pursuant to U.S.C.A 14th amendment and S.C. const Artical 1 § 3.

The Applicant contends that the P.C.R. counsel's willfull misconduct, is considered prejudicial to applicant pursuant to "Rule of law." See: In re Hatley 400 S.C. 470. 735 SE.2d 488. also see S.C.A.C.R 407 Professional conduct Rule 8.4 (a)(e)(f). Such misconduct does provides possible threat of undermining of the courts integrity see Hawkins v. Bruno Yacht sales Inc 353 S.C. 31. 42. 577 S.E. 2d 202. 208 (203). also see Quinn v. Sharon Corp. 343 S.C. 74 540 SE. 2d 474 (ct. App 2002). Artical 1 § 3 of S.C. constitution

3 South Carolina Rules of civil procedure 71.1 instructs the parties to follow the rules of civil procedure. to the extent they are not inconsistent with the P.C.R. Act.

The Applicant must meet the burden to prove the allegation in the Applicant's application. see Matthews v. State 565 SE.2d 766

guaranteed that defendant could seek a remedy for the violation of rights in a collateral proceeding, see U.S. v. Morrison 449 U.S. 361 365 (1981)..

The P.C.R. counsel had relieved the Appellate counsel of his presence from within the Post conviction hearing that 19th day of June, 2014 without first consulting with the Applicant. moreover, the Applicant did not waive, nor move to waive any issue that was raised within the Applicant's application and supplement. This decision was not secured with the Applicant's consent, prior to or upon taking action within the Post conviction hearing on that 19th day of June 2014. A waiver of issue had not been made by the Applicant per se on the record that 19th day of June 2014.⁴

[MOTION FOR CONSOLIDATION OF A PRELIMINARY INJUNCTION PURSUANT
RULE 42 (a) S.C.R.C.P]

The Supreme court has repeatedly reminded all involved parties that "[c]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omission to the attention of the P.C.R. court. prior to issuance of the order see Hall v. Catoe 360 S.C. 353 365 601 SE.2d 335 341 (2005) also see S.C.A.C.R 501 judicial conduct, CANNON

⁴. The Applicant had admonished this Honorable court of this error regarding P.C.R counsel's misconduct within a July 9th 2014 correspondence to this Honorable court, with certificate of service. certifying that all parties had been served a copy of the same.

3.B(7)(e)), also see, (Exhibit K). The Applicant had forwarded a 7-9-2014 correspondence to this court while the record had remained open that which was by order of this court. see, (Exhibit K). And which that 7-9-2014 correspondence had so addressed a definite immaturity regarding applicability of law in pursuant to S.C. code ann §17-27-80, for several reasons that, (1), The misconduct per the P.C.R counsel to act unlawfully; thus "[tacitly]" before the court had waived the Applicant's issue, upon failing to subpoena the Appellate counsel to the Post conviction hearing that 19th day of June 2014; and in furtherance (2). The Applicant did not offer a waiver, thus for any Issue to be addressed.. (3). The issues that concerned ineffective assistance of Appellate counsel that was raised within the Applicant's P.C.R application, and supplements was not addressed because the Appellate counsel whom had represented the Applicant on direct appeal, before the south carolina Supreme court, was not required per the court to be present within the Post conviction proceeding thus to offer testimony. see Evitts v Lucey 469 U.S. 387. 105 S.Ct. 830. 83 L.E.2d 821 (1985)..

— (subject matter, pursuant to S.C. code §17-27-80, is unripe for this court consideration of order)...

Subject matter jurisdiction is the power to hear and determine cases of general class to which the proceeding belong. see Dema v. Tenet Physician Services - Hilton Head, Inc., 383 S.C. 115, 120, 678 SE.2d 430, 433 (2009). The jurisdiction of a court over the subject matter of a proceeding is determined by the constitution., and the laws of the state. Duckett v. Goforth 374 S.C. 446, 456, 649 SE.2d 72, 77 (Ct. App. 2007). Issues involving subject matter jurisdiction may be raised at any time see Arnal v Fraser 371 S.C. 512, 517 n. 2, 641 SE.2d 419, 421 n. 2 (2007).

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. Sloan. v Hardee 371 S.C. 495. 498 640 SE 2d 457. 459 (2007). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." State v Sweat 386 S.C. 339. 350 688 SE 2d 569. 575 (2010).

The misconduct which was administered by the P.C.R. counsel Esq Caroline M Hortbeck, provided a cause for a procedural default, which prohibits this court to address all issues raised by the Applicant and greatly increased the chance that the order will fail to make appropriate and specific finding with the respect to each issue presented see Pruitt 310 S.C. at 256, 423 SE 2d at 128: see also Marler 375 S.C. at 410 653 SE. 2d at 267 and Rule 52 (a). S.C.R.C.P. The Applicant's P.C.R counsel misconduct provides diminishing effects to the P.C.R. courts jurisdiction to lawfully set forth finding and reasons for those findings as required by. S.C. code §17-27-80 see DeLaney v. State 238 SE 2d 679. The Applicant was deprived of a fair bite of the judicial apple, wherefore an order drafted by the parties at this point will hold S.C. code ann §17-27-80, will be unripe for the P.C.R Judge consideration.

WHEREFORE The Applicant respectfully pray that this Honorable court to relieve the counsel from representation of the Applicant's case, due to the above complaints of misconduct regarding the counsel's representation, and reappoint counsel..

The Applicant hereby pray for this Honorable court with a- consolidation of a preliminary injunction with this motion to grant a injunction that which to allow the Applicant to lawfully complete a prima facie showing which the Applicant may fairly substantiate the ineffective assistance of both trial as well as

Appellate counsel. that which the Appellate Counsel presence within
the P.C.R hearing is required.....

prose Samuel Lamont Whitner

Samuel Lamont Whitner #263066
B.R.C.E WAT 143
4760 Broad River Rd
Columbia S.C. 29210

SWORN AND SUBSCRIBED TO BEFORE ME

THIS 31st day of July 2014

Susan H. Fry

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires

March 5, 2018

STATE OF SOUTH CAROLINA
County of Greenville

Samuel Lament whitner
Applicant

v

The state of South Carolina
Respondent

IN THE COURT OF COMMON PLEAS

Case No 2013-CP-23-00765

CERTIFICATE OF SERVICE

I the above stated Applicant hereby certify that have filed a motion titled: Motion to relieve counsel with consolidation pursuant to Rule 42 (a) S.C.R.C.P of a preliminary Injunction, and is depositing a copy in the U.S mail on the 31stth day of July 2014. addressed to the Clerk of Court. Paul B. Wickensimer at Greenville County Courthouse 305 East North Street Greenville S.C. 29601-2185. and certify that all parties below has been served the same

Esq Caroline M. Horlbeck
101 Whitsett St.
Greenville S.C. 29601

Karen C Ratigan
Office of Attorney General
of South Carolina
Rembert C Dennis Building
P.O. Box 11549

SWORN AND SUBSCRIBED BEFORE ME.

THIS 31ST DAY OF July 2014

Caroline M. Horlbeck
NOTARY PUBLIC FOR SOUTH CAROLINA

Samuel Whitner

My Commission Expires
March 5, 2018

Existing Justiciable Controversy

The Petitioner maintains that the existing justiciable conflict is with respect to the Omnibus crime control and safe street Act of 1968. Title III prohibits the interception and disclosure of wire, or oral and electronic communication except as provided by statute.

The implication of the U.S.C.A 4th; were brought about because the Petitioner's right that concerns expectation of privacy has been frustrated see U.S V. Jacobsen 104 S. Ct at 1658-59. However the controversy which is before this court provides that this irreparable harm will be repetitious and continue to be envading upon review, see Curtis v. State 549 SE 2d 591 (S.C. 2001). Moreover, the necessity for the herein requested injunction is prominent thus due to the herein stated contentions that are set forth within this motion does indeed proportionately decreases the need of showing irreparable harm see Rocford Mfg., Ltd Bennet 2003 296 F. Supp 2d 681.

(1). Wherefore the Petitioner respectfully pray to this Honorable court to grant a preliminary Injunction thus to determine the legalistic of surreptitious intercepted phone conversation between the Petitioner and his daughter with pursuant to federal, and state wiretap statute to prevent further use per the state. see William v Poulos D Me 1992 801 F. Supp 867 see 18 USC § 2520.

(2). Wherefore the Petitioner respectfully move before this Honorable court to waive representation from the South Carolina on indigent defense the Petitioner do hereby clearly and unequivocally has provided herein this motion of [his] right of self representation for a waiver to be valid.

(3). The Petitioner's hereby pray to this to grant a injunction that which to allow the Petitioner to lawfully complete the prima facie showing within Post Conviction action: C/A 2013-CP-23-00765, may also substantiate fairly the ineffective assistance of both; trial as well as the Appellate counsel, that which is per law that which the Appellate Counsel's presense within the P.C.R hearing is required...

Respectfully submitted.....

sworn to and subscribed before me.

This 19th day of February 2014

Leida H. Dye

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires

March 5, 2018

prose Samuel L Whitner

SAMUEL L WHITNER

BRCE WAT 143

4460 Broad River Road

Columbia S.C. 29210

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

2013-CP-23-00765

Appellate Case No.: 2014-001951

SAMUEL Lamont Whitner Appellant

v.

The Division of the Appellate Defense Defendant

The office of the Attorney General of South Carolina Defendant

CERTIFICATE OF SERVICE

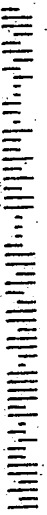
I the above Appellant hereby certify that I have submitted a prose Motion titled: MOTION OF WAIVER OF REAPRESENTATION, CONSOLIDATED PURSUANT TO RULE 42 (a) WITH PRELIMINARY INJUNCTION PURSUANT TO 65 (a) SCRPC. and hereby deposited such motion in the U.S mail addressed to: Post Office Box 11330 Columbia S.C 29211 on the ___ day of _____ 2015 and hereby certify that the below listed parties has been served the same

Karen C Ratigan
office of Attorney General
of South Caroling
Rembert C Dennis Building
P.O. Box 11549

John H. Strom
Division of Appellate Defense
1330 Lady Street Suite 401
Columbia S.C. 29201-3332
P.O. Box 11589

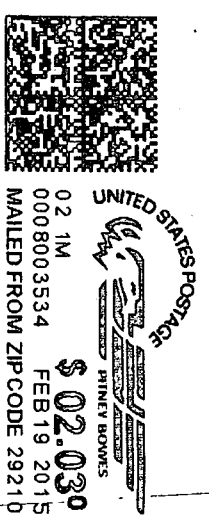
Sworn to and subscribed before me
This 19th day of February 2015

William H. Frye
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires
March 5, 2018



4460 Broad River Road
Columbia S.C. 29210

The Supreme Court of South Carolina
DANIEL E SHEARDUSE, CLERK OF COURT
Post OFFICE BOX 11330
Columbia South Carolina 29211



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