

STATE OF SOUTH CAROLINA

RECEIVED

In The Supreme Court

JUL 06 2015

CERTIORARI TO GREENVILLE COUNTY S.C. SUPREME COURT
Robin B. Stillwell, Circuit Court Judge
CASE NO. 2014-001951

Samuel Lamont Whitner,.....Appellant,

v.

State of South Carolina,.....Respondent.

**MOTION TO SUPPLEMENT THE RECORD
PURSUANT TO RULE
212(b), (c), SCACR**

The Petitioner hereby moves before this Court pursuant to Rule 212(b), (c) for leave of this Court for Petitioner to supplement the record on appeal, upon the Petitioner submitting a response to his court appointed counsel's submission with regard to the Johnson Petition.

The Petitioner asserts that the Petitioner's appeal is meritorious thus for this Court to grant relief. The Petitioner asserts as follows:

I.

S.C. Code Ann. §17-27-20

As stated therein S.C. Code Ann. §17-27-20(a):

[A]ny person who has been convicted of or sentenced for, a crime and who claims:... (See 17-27-20(a))

The Petitioner per right pursuant to S.C. Code Ann. §17-27-20 is entitled per the Uniform Post Conviction Procedure

Act §17-27-10 to have standing thus to file an application for post conviction relief, and provide claims that the Petitioner is suffering a continuing consequence as a result of an invalid conviction. See: Jackson v. State 331 S.C. 486 S.E.2d 915 (1997); Jones v. State, 322 S.C. 101, 470 S.E. 2d 110 (1996).

The Petitioner had filed for post conviction relief on the 8th day of February 2013. A pro se supplement and supporting facts and the attachments were submitted through the Petitioner's court appointed P.C.R. counsel, Mr. Robert M. Ariail Jr. Esquire, and clocked stamped on the 17th day of Feb, 2014. See: State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564; Foster, 298 S.C. at 307, 379 S.E.2d at 907. (See also: Exhibits W & T.)¹

Moreover, the Petitioner's February 17th 2014, pro se filed Supplement of Issues (i.e. amendments) (Exhibit X), encompasses merit that indeed substantiates that the Petitioner is entitled to an exclusive remedy due to the error which is proscribed of S.C. Code Ann. § 17-27-20(a)(2)(4)(6). However, section (a) of S.C. Code Ann. § 17-27-20 provides declaration

¹ Exhibit W is the January 10th 2014 correspondence addressed to Robert M. Ariail Jr. which was initially court appointed to represent the Petitioner within post conviction relief with certificate of service. Exhibit T is the February 19, 2014 correspondence addressed to the Petitioner from Robert M. Ariail Jr. Esquire informing the Petitioner that, as his counsel, the pro se Supplement of Issue was filed per the Petitioner's counsel.

regarding the "exclusiveness of right" per the institutor of a remedy under § 17-27-10. Moreover, § 17-27-20(a) provides clearly that, a person who has been convicted of, or sentenced for a crime, is vested per law under 17-27-20(a), that which afford a [prisoner] under the Post-Conviction Procedure Act. See: State v. Carpenter, 277 S.C. 309, 286 S.E.2d 384 (1982).

Being as the Petitioner was convicted and sentenced to 30 years (See: App. p. 653, l. 21.), the record on appeal reflects that the Petitioner had submitted pro se the original post conviction relief application on the 22nd day of January 2013 (App. p. 789), and was clocked stamped per the Greenville County Clerk of Court on the 8th day of February 2013. (App. pp. 784-789) Moreover, the Petitioner had so applied in compliance with § 17-27-40.

II.

ACTUAL EVIDENCE OF NONE HYBRID REPRESENTATION

Prior to the submission of the Petitioner's February 17th 2014 supplement of issues (See: Exhibit X.), that which was lawfully filed per the Petitioner's initial court appointed counsel. See: Exhibit W. The Petitioner had forwarded a correspondence to his initial court appointed counsel² on the

² Robert M. Ariail Jr. Esquire was initially appointed per the court to represent the Petitioner at P.C.R. However, the Petitioner had mentioned for Robert M. Ariail Jr. to be relieved due to conflict of interest. The Honorable Letitia H. Verdin, had granted the motion to relieve. But however, Robert M. Ariail Jr. Esquire, as the Petitioner's counsel, had filed the Petitioner's supplement of issues prior to being relieved of representation. The Petitioner was reappointed counsel, Ms. Caroline M. Horlbect Esquire.

10th day of January 2014, that which is titled: RE. SAMUEL L. WHITNER V. THE STATE OF SOUTH CAROLINA, CASE NO.: 2013-CP-23-00765. REQUEST FOR COUNSEL TO SUPPLEMENT ISSUE. (See: Exhibit W.) And attached with this correspondence was a pro se certificate of service pursuant to Rule 4 (h) S.C.R.C.P. thus certifying that the Clerk of Court of Greenville County, Paul B. Wickensimer as well as Karen C. Ratigan, Esquire with the Attorney General's office has been served the same. (See: Exhibit W.) The Petitioner's initial court appointed post conviction relief counsel, Mr. Robert M. Ariail Jr., Esquire had forwarded a February 19, 2014 response to the Petitioner's January 10th 2014 correspondence thus informing the Petitioner, that as the Petitioner's counsel, he had filed the petitioner's supplement which was clocked stamped per the Clerk of Court as February 17th 2014. (See Exhibits T & X.)

III.

ABUSE OF DISCRETION PER P.C.R. COURT

As provided per the record in regards to the State's Order of Dismissal ³ (See: App. pp. 853-861), the State contends therein upon footnote (See: App. p. 855.) that [t]his Court notes the Applicant filed a pro se document titled: "Supplement of Issues" to the above civil post conviction relief on February 17, 2014. As the Applicant was represented by counsel,

³ Standard of review of whether any evidence support a court's finding. See: State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000); State v. Jones, 364 S.C. 51, 610 S.E.2d 846 (Ct. App. 2005); State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2002). A court is bound per its preliminary factual findings. See: State v. Wilson, 345 S.C. 1, 545 S.E.2d 821 (2001).

however, this document cannot be considered by the Court. See Rule 11(a) S.C.R.C.P.; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517 (2002)(holding there is no constitutional right to hybrid representation either at trial or on appeal.) (See: App., p. 855.)

A court abuse its discretion where a judge issuing an order was controlled by an error of law or where the order is based on factual conclusion that are without evidentiary support BB and T v. Taylor, 633 S.E.2d 501, 369 S.C. 548; Sharps v. Sharps, 535 S.E.2d 913, 342 S.C. 71. Likewise, the Attorney General cannot elect to curtail a prisoner's rights with respect to S.C. Code Ann. § 17-27-20 and § 17-27-40, when a convicted prisoner's post conviction relief is of a scope sufficiently in compliance with the mandates and holding of the United States Supreme Court relating to federal review of state convictions. See: Curran v. State of Delaware, 10 Terry 587, 122 A.2d 26 cert. den. 352 U.S. 913, 77 S.Ct. 151 1 L.E.2d 120. It was held per the court within Harvey v. State of South Carolina, 310 F. Supp. 83, that "[t]here is no basis for a holding that South Carolina thus deprive a convict of constitutional right." See: Harvey v. State of South Carolina, 310 F. Supp. 83. "Exclusiveness" of the Petitioner's right is purported per § 17-27-20(b) as a vehicle for remedy. See: Baskins v. Moore, 362 F. Supp. 187 (1973 DCSC)

The Petitioner's January 10th 2014 correspondence to his initial court appointed P.C.R. counsel, Robert M. Ariail Jr.

Esquire (See: Exhibit W) was attached with Certificate of Service certifying that the State was served with a copy, and therein the January 10th 2014 correspondence is with request for the Petitioner's initial P.C.R. counsel to supplement to the Petitioner's original application. Again, the Clerk of Court of Greenville County was served a copy as well. See: Exhibit W.

Due to the facts argued above provides that upon the Petitioner's request to his initial P.C.R. counsel, Mr. Robert M. Ariail Jr. Esq. thus to supplement to the Petitioner's original P.C.R. application were so a prerequisite to the State's as well as the Court's notion⁴ prior to the Petitioner's initial P.C.R. counsel [fulfilling] the Petitioner's request upon supplementing (i.e. amending) to the Petitioner's pro se application prior to when the P.C.R. hearing had convened. See: App. pp. 796-853. (Exhibits T & W)

The State as well as the court had omitted from the record unlawfully. The requirements of due process include notice of an opportunity is to be heard in a meaningful and judicial review. See: Ogburn-Matthews v. Loblolly Partners, Ricefields Subdivision, 332 S.C. 551, 505 S.E.2d 598 (S.C. App. 1998); see also: S.C. Constitution Art. 1 § 3 and U.S.C.A. 14th Amendment. Due process prohibits estopping some litigants who never had a chance to present their evidence and arguments

⁴ Rule 407 Professional Conduct, Rule 1.0, Terminology (h) S.C.A.C.R. "Knowingly" "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

on a claim. See: Robert v. Recovery Bureau Inc., 316 S.C. 492, 450 S.E.2d 616. And however, due process indeed requires that litigants receive notice of the issue to be met on trial, hearing, or appeal. See: Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (S.C. App. 1993).

The Petitioner was indigent when upon the submission of his post conviction relief application, and the court had initially appointed Mr. Robert M. Ariail Esquire to represent the Petitioner (S.C. Code Ann. § 17-27-60. See: Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992)) pursuant to Rule 71.1(d) S.C.R.C.P.

The Petitioner's original P.C.R. application and supplements thus submitted by counsel (See: Exhibits W and T) were clocked stamped and accepted per the court. See: State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (S.C. 2013); also see: State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564; S.C. Code Ann. § 17-27-20, 17-27-40, 17-27-50.

Generally, it is set forth upon the evidence that the Petitioner's supplement was lawfully accepted per the court absent of hybrid representation (Foster 298 S.C. at 307, 379 S.E.2d at 907) and as not a mere conduit for the Petitioner's supplements as an effort to avoid the prohibitions against hybrid representation. See: Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002). Furthermore, the State did not object upon the Petitioner testifying within the P.C.R. hearing thus referring to the pro se supplement if actual hybrid representation had at all commenced. See App., p. 825, ll. 17-18.

IIII.

GROUND FOR SUPPLEMENTING THE RECORD

The Petitioner respectfully request leave of this Court so the Petitioner can supplement the record pursuant to Rule 212(b), (c) S.C.A.C.R. The Petitioner's pro se February 17th 2014 Supplement of Issues (Exhibit X) was lawfully accepted per the Court of Common Pleas (Case No. 2013-CP-23-00765) in absence of hybrid representation. The Petitioner's pro se Supplement of Issues (Exhibit X; See App. p. 855) was filed by the Petitioner's initial court appointed counsel, Mr. Robert M. Ariail Jr. Esq. (See Exhibits W, T, & X); S.C. Code Ann. § 17-27-20(a), § 17-27-40) and serve as necessity for order of proper consideration of the Petitioner's case [in] appeal (See South Carolina State Highway Dept. v. Meredith, 128 S.E.2d 179), which the Petitioner is entitled per right. § 17-27-10, Copeland et. al. v. Graig et. al., 193 S.C. 484, 8 S.E.2d 858. Allowing the Petitioner to supplement the record on Appeal (i.e. to nexus the Petitioner's pro se 2-17-14 Supplement of Issues (Exhibit X) to the Appendix; by this will enable the Petitioner to provide adequately the facts and legal presentation, thus initiated upon the Petitioner's P.C.R. application. § 17-27-20(a); U.S. v. Breeden, 96 F.3d 1439 (C.A. 4, W. Va. 1996).

The Petitioner can and will provide within a response to his court appointed appellate counsel's Johnson Petition, that there is a presentation of vital issue, which will

require a method which will cure any possibilities overlooking the evidence and correct application of legal principles. 340 U.S. at 496, 71 S.Ct. at 469.

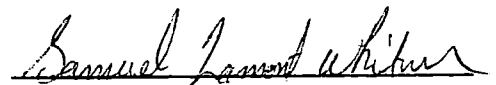
However, substantive error has occurred, thus imposing on fundamental fairness (See: Grundler, 283 F.2d at 802), because of the omission of the Petitioner's supplements; but however, was "accepted per the court lawfully (See: S.C. Code Ann. § 17-27-20, 17-27-40, and 17-27-50 (See Exhibit T)), indeed exempts the Petitioner of right that affords the Petitioner a full and fair litigation of issue in highest state court. Stone v. Powell, 428 U.S. 465 (1976); Boggs v. Bair, 892 F.2d 1193 (4th Cir. 1989) Furthermore, the unlawful omission of the Petitioner's Supplements from the Appendix, that does provide a default, will arise from out of the P.C.R. hearing, Case No. 2013-CP-23-00765, and renders a failure of the issues or claims to be raised, not at fault of Petitioner. Moreover, the record is curtailed,... due to an omission of a showing in light of the Petition's February 17, 2014 Supplements that the P.C.R. Court had not relied on on an independent and adequate state ground. See: Coleman v. Thompson, 501 U.S. 722 (1991); Harris v. Reed, 489 U.S. 255 (1989); Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994). The Petitioner's February 17, 2014 Supplement of Issues (App., p. 855) had made apparent that the "Petitioner's" P.C.R. issues which these claims rest as well as interwoven with federal law. See Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991). The Petitioner implores this Court's indulgence upon respectfully elicit-

ing the relation between Exhaustion and Procedural Bar Rules:
The Petitioner is entitled to state relief, that which the
Petitioner has applied in compliance of § 17-27-10, this
generally provides that the Petitioner cannot endure a barr
of state relief under 17-27-10 in which the Petitioner must
seek such relief before proceeding in Federal Court. See
Miller v. Harvey, 566 F.2d 879 (4th Cir. 1977 cert. denied)
439 U.S. 838 (1978); Patterson v. Leeke, 556 F.2d 1168 (4th
Cir.), cert. denied).

CONCLUSION

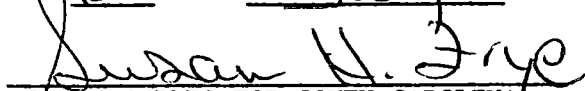
Lastly, the Petitioner hereby request to supplement the
record, which is per the Petitioner a justifiable request
for reason being: (1) The Petitioner's February 17, 2014
Supplement of Issues was lawfully filed and accepted per the
court pursuant to 17-27-40-50, absent of hybrid representat-
ion. (2) Upon the Petitioner responding to the Johnson
Petition, Petitioner's issue will be fairly before the high-
est State Court thus for the issue which to be raised per
the Petitioner will satisfy the exhaustion requirement, and
substantiate merit for relief.

Respectfully submitted,



Samuel L. Whitner #263066
B.R.C.I. Wat. 143
4460 Broad River Rd.
Columbia, S.C. 29210

SWORN TO AND SUBSCRIBED TO BEFORE ME
THIS 1st DAY OF July 2015.



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires

MY COMMISSION EXPIRES: March 5, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

CASE NO. 2014-001951

Samuel L. Whitner,.....Appellant,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, the Petitioner, hereby certify that I have filed a motion pursuant to Rule 212(b)(c), titled: **MOTION TO SUPPLEMENT THE RECORD**, within the S.C. Supreme Court and deposited a copy in the U.S. mail addressed at P.O. Box 11330, Columbia, S.C. 29211 and hereby certify that parties listed below have been served the same.

Karan C. Ratigan, Esquire
Office of the Attorney General
at Rembert Dennis Building
1000 Assembly St. Rm. 519
Columbia, S.C. 29201



Samuel L. Whitner #263066
B.R.C.I. Wat. 143
4460 Broad River Rd.
Columbia, S.C. 29210

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 15 DAY OF July 2015.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES:

My Commission Expires
March 5, 2018