Dear Clerk

Please find enclosed is a copy of the @ Pro se July 31st 2015 Johnson Petitioner The Petitioner request that the enclosed document be clock stamped and sent to me. An self addressed envolope is also enclosed with this correspondence.

Thank you everso kindly

Samuel Whitner 263066

RECEIVED

AUG 07 2015

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

Samuel Lamont Whitner,

Petitioner,

v.

State of South Carolina

Respondent.

Appellate Case No. 2014-001951

PRO SE JOHNSON PETITION FOR WRIT OF CERTIORARI

Samuel Lamont Whitner

B.R.C.I. Wat. 143 b
4460 Broad River Rd.
Columbia, S.C. 29210

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QUESTION PRESENTED

Did the circuit court err in holding that the trial counsel was not ineffective even though trial counsel failed to object when the State stopped the trial prior to the jury being sworn thus to move for an interlocutory appeal thus to preserve the record or appeal that the State lacked appealability under S.C. Code Ann. §14-3-330 because the State failed to obtain an application under which the interception was authorized or approved?

STATEMENT

The Petitioner was called to trial on March 11, 2009 before the Hon. C. Victor Pyle Jr. in which a jury had not been sworn. (App., pp. 1-26) 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 surreptitiously taped recorded telephone conversation between the Petitioner and his daughter. (App., pp. 18-22) The Honorable C. Victor Pyle, Jr. denied the State's motion. (App., p. 23) The solicitor had then made an interlocutory appeal, thus appealing the trial court's order of denial of State's motion for admissibility of the illegal surreptitious wiretap. (App., pp. 26-30) The State then filed a notice of appeal to the South Carolina Court of Appeals on the 19th day of March 2009. (App., p. 35) Attorney General William M. Blitch, Jr. had subsequently, on March 27th 2009 (App., p. 40), filed a motion to vacate Judge Pyle's suppression order and allow Petitioner to file a suppression motion with the Court of Appeals pursuant to S.C. Code Ann. § 17-30-110(A). (App., pp. 30-40) 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." (App. pp. 41-45) The State's motion was granted by written order per the Court of Appeals dated June 11, 2009, (App., pp. 56-58) 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. (App., pp. 56-58)

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. (App., pp. 59-86) The assistant solicitor filed a reply on the behalf of the State. (App., pp. 86-121) Defense counsel filed a response to the State's reply. (App., pp. 122-136)

On July 22, 2009, a suppression hearing was held before the Court of Appeals. (App., pp. 137-204) 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. (App. pp. 205-207)

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. (App., pp. 208-655)

A direct appeal was filed with the South Carolina Supreme Court. Christopher D. Scalzo, Esquire and Robert M. Dudek, Esquire perfected the appeal. (App., p. 656) The South Carolina Supreme Court affirmed the Petitioner's appeal on July 11, 2012. See State v. Whitner, 399 S.C. 547 732 S.E.2d 861 (2012). The remittitur was sent on July 27, 2012. (App. pp. 765-783)

The Petitioner then filed for post conviction relief on February 8, 2013. An evidentiary hearing was held on the 19th day of June 2014. (App. pp. 784-853)

The solicitor for the state violated the S.C. Wiretap statute as well as federal law when the solicitor had disclosed the contents of the Petioner's private conversation with his daughter upon the solicitor moving for an interlocutory appeal of the Honorable C. Victor Pyle, Jr.'s order of suppression of the audio tape of the call. (App., pp. 26-29) The Solicitor did, upon disclosing the contents of the Petitioner's private conversation implicate that Petitioner was sexually abused as a child, when however, no such statement was uttered by the Petitioner ever claiming to have been a victim of sexual abuse. (App., p. 826, ll. 9-19) Moreover, the wiretape violation implemented by the solicitor is so substantiated within trial before Honorable C. Victor Pyle Jr. that which the record clearly reflects that prior to the contents of the Petitioner's private conversation being unlawfully disclosed by solicitor within trial, the solicitor had proffered a transcript of the Petitioner's private conversation with his daughter for appeal purposes. (App., p. 28) The record had provided, as well, that a jury had been selected but had not been sworn in upon the Petitioner's private conversation with his daughter being suppressed by order of Honorable C. Victor Pyle, Jr. (App., pp. 23-32)

The Petitioner hereby sets forth evidence that the solicitor's motives toward the Petitioner were so malicious upon the solicitor attempting to somehow lead the trial court to take in account that the Petitioner was [b]asically apologizing to his daughter for the alleged abuse upon the solicitor unlawfully disclosing the contents of the Petitioner's private conversation within the initial trial. (App., pp. 24-25) [1]

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[1] The court appointed counsel, Appellate Defender John H. Strom, Esquire induced this prejudice within the Johnson Petition that was filed on the Petitioner's behalf. Appellate counsel had not stated the facts and did,

The Petitioner respectfully directs this Honorable Court's attention to the transcript of record, the Wiretap Act suppression hearing held before the South Carolina Court of Appeals (App., pp. 137 - 204), which this suppression hearing had convened on the 22nd day of July, 2009, approximately four and a half months after the initial trial proceeding before Honorable C. Victor Pyle when the Petitioner's private conversation was lawfully suppressed on the 11th day of March 2009.

Moreover, on the 22nd day of July 2009, Grady had testified within the Wiretap Act suppression hearing before the South Carolina Court of Appeals, that Petitioner had denied that he had committed any sexual abuse against his daughter. Upon when Grady and her husband had secretly recorded the Petitioner and his daughter's conversation (App., p. 161, 11. 7-20), nor did Grady or her husband ever offer testimonies that the Petitioner had uttered an apology for committing any sexual act towards his daughter, upon Grady and her husband surreptitiously taping the Petitioner's conversation with his daughter without Petitioner's knowledge or consent. (App., p. 159, 11. 21-25) Generally, Grady and her husband's testimonies regarding the Petitioner denying the sexual act towards his daughter were so uttered per Grady and her husband more than eight times before the South Carolina Court of Appeals.[3] (App., p. 137; p. 150, 11.

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with false pretense state within his filed Johnson Petition before this Court that the Petitioner's daughter, per se, had accused the Petitioner of forcing this abuse on [her]...See pg. 3 of the Johnson Petition submitted by counsel. But however, Appellate Counsel's, John H. Strom, Esquire reference to the Appendix (i.e. App., p. 145, 1. 13 - p. 147, 1. 7) provided that this statement is totally contrary to veraciousness that regard the facts that are contained in the record, for reason being, the Petitioner's eleven-year old daughter at the time was not present before the Court of Appeals thus to offer testimonies (App., p. 147, 11. 7-17), and generally, a dialogue that which consist of a phrased verbatim as Petitioner "[f]orcing her to perform oral sex on him when she was five years old" had not been uttered by the victim nor the Petitioner and not provided in the record. (App., p. 145, 1. 13 - p. 147, 1. 17)

20-25; p. 153, ll. 10-12; p. 161, ll. 7-20; p. 172, ll. 15-20)

Again, the Petitioner, in furtherance, argues with respects to the colloquy within the initial trial proceeding before the Honorable C. Victor Pyle, Jr. (App., pp. 1-35), in which the Honorable C. Victor Pyle, Jr. inquired of the solicitor of [law] which would require admissibility of the surreptitiously recorded conversation between the Petitioner and his daughter as provided per the record the colloquy between the solicitor and trial court. (App., p. 18):

THE COURT: Do you, Solicitor?

Ms. Sustakovich: Yes the State does.

THE COURT: What is the basis introducing that?

MS. SUSTAKOVICH: The statement is a 31-minute conversation between the defendant and it is extremely probative on

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3 The PCR court abused its discretion. The PCR court's order of denial was controlled by an error of law which the order is based on factual conclusions that are without evidentiary support. See 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. Standard of review of whether of any evidence support a court's finding. See: State v. Brockman, 339 S.C. 57, 528 S.E.2d 661. A court is bound by its preliminary finding. See: State v. Wilson, 545 S.E.2d 821 (2001)

Raised within the Petitioner's February 17th 2014 supplements p. 13 regards the fact that the Petitioner did not give a voluntary confession regarding the crime charged, the Petitioner testified within the PCR hearing that an apology for committing sexual abuse towards his daughter had never been uttered by the Petitioner. (App. 825, l. 14 - App. 11. 1-25), but however, erroneously the PCR Court had noted on the record that [it] did not consider the Petitioner's February 17th 2014 supplement due to hybrid representation (app., p. 855), this such determination by the PCR court hold to be as an abuse of discretion, because the Petitioner's February 17, 2014 pro se supplement of issues was submitted by Petitioner's counsel. However, on the 1st day of July 2015, the Petitioner filed two documents before this Court. Moreover, one document was a Request for Extension, and the second document being a MOTION TO SUPPLEMENT THE RECORD PURSUANT TO RULE 212(b),(c), SCACR. This Court had granted Petitioner's motion to supplement the appendix and the Petitioner's supplemental appendix that which was filed by the Petitioner was accepted per this Court on the 17th day of July 2015. These facts presented raises questionable concerns if the PCR Court's determination is cognizant per SC Code Ann 17-27-80.

the issue of guilt. Essentially, it can be construed as a confession by this defendant to his daughter.

THE COURT: What right does that person have to unknowingly record the conversation?

MS. SUSTAKOVICH: Your Honor, I have several cases that support this. Basically, the doctrine is a doctrine that courts across the country, either federal and/or state courts have been following.

THE COURT: Do you have a South Carolina federal cases?

MS. SUSTAKOVICH: We do not. South Carolina and federal law.

See App. 18-19. Due to the facts argued above concerning the colloquy between the trial court (i.e. the Hon. C. Victor Pyle, Jr.) and the solicitor (i.e. Ms. Sustakovich) provides that the record is clear that the solicitor's conduct prevailed beyond the scope of law as proscribed of per S.C. Code Ann. § 17-30-20(3)(4)[4] (App. pp. 18-19); mainly for reason being the solicitor, Ms. Sustakovich, Esquire's conduct was implemented in bad faith and the result of such conduct is discriminatory pursuant to law and violates the State's constitution Article 1, Section 3 and the U.S.C. Amendment 14.

The Solicitor had taken the position, before the trial court within the initial trial proceeding held March 11, 2009, that the secretly taped conversation of the Petitioner and his daughter should be admitted as is proscribed within Pollock v. Pollock, 154 F.3d 601. (App., p. 21) which the South Carolina Supreme Court had cited as "[T]he leading case when upon the Supreme Court had affirmed the Petitioner's conviction and sentence. (App., pp. 765-777)

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[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.

The Honorable C. Victor Pyle, Jr. forbid the secretly taped conversation of the Petitioner and his daughter thus to be admitted into trial (App., p. 23) despite of the State's attempts for admission. (App. pp. 18-23)

The trial records for the 11th day of March 2009 proceedings before the Hon: C. Victor Pyle, Jr. provides that when his Honor (Pyle) rendered an order denying the State's motion to admit the surreptitious taped conversation between the Petitioner and his daughter. (Exhibit App., p. 23) The trial court had inquired of the solicitor, "if there was anything the State would like to add before the jury is brought in." (App., p. 24). The solicitor then inquired "[i]f the Petitioner's daughter could testify to the contents of the surreptitiously taped conversation concerning "[apologies]." (App., p. 25)

The Honorable C. Victor Pyle, Jr. granted that the Petitioner's daughter could testify to anything." (App., p. 25) Wherefore, the same privilege was granted to the stepfather. (App., p. 28)

Trial records before the Honorable C. Victor Pyle, Jr. provides that the jury "HAD NOT" been sworn in when the solicitor moved for an interlocutory appeal (App., p. 28), and wherefore, the trial proceeding concluded.

Trial transcripts of the proceedings before the Honorable C. Victor Pyle, Jr. establishes that the solicitor submitted the surreptitously taped conversation between the Petitioner and his daughter as evidence for appeal purposes. (App., p. 28)

The trial records before Honorable Pyle, Jr. reflects and provide, that upon the trial court's inquiring of the State; the 'Basis' for admission of the surreptitiously taped conversation between the Petitioner and his daughter. (App., p. 19) The State then provided before the

trial court a 'lengthy argument' involving Federal Consent Exception of vicarious Consent' as the State's 'Basis' for Honorable Pyle, Jr. to 'Grant' the States 'Motion to Admit' the illegal surreptitiously taped conversation as evidence into the trial. (App., pp. 17-22)

However, these facts contained within the records before Honorable Pyle, establishes that a 'Mistrial' WAS warranted for several reasons:

1) The solicitor demonstrated acts that 'violate' controlling law;

2) Such prosecutorial misconduct will substantively invalidate a jury trial;

3) Such invalidation of a jury trial by such means as 'Prosecutorial Misconduct' could be seen to spawn from 'GOADING';

4) That trial counsel was ineffective for failing to 'Move' for a 'Mistrial' at the trial proceedings before Honorable Pyle, Jr. Therefore, this provides cumulative errors and raises the fact that any subsequent jury is barred by 'Double Jeopardy.'

PCR HEARING

An evidentiary hearing convened on the 19th day of June 2014. However, therein the Petitioner had presented before the court merit to present tangible evidence, which are the Petitioner's 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 PCR hearing had convened to allow the Petitioner to have the opportunity to present the requested phone records as evidence (App., p. 850, 11. 1-22), that which the Petitioner had asserted that [his] phone records are essential, thus for the Petitioner to meet the burden of proof that will satisfy [his] ineffective of assistance claim, that is set forth within the Petitioner's PCR

application and supplement with attachments which was filed prior to when this hearing had convened. S.C. Code Ann. § 17-27-20(a).

Upon the PCR counsel, Esq. Carolina M. Horlbeck's confrontation with the Petitioner, which took place within an ample amount of time prior to when this PCR hearing had convened, the Petitioner did inform the counsel that the Petitioner's phone records needed to be obtained, because the Petitioner's phone records will provide before the court "exculpatory factors" regarding the Petitioner's guilt, and discrediting to the State's claim of defense, thus contending that the Petitioner's daughter's mother had acted with good faith basis when the Petitioner's daughter's mother had surreptitiously taped the Petitioner's conversation without the Applicant's knowledge or consent. (App., p. 772; p. 799, ll. 14-25)

However, prior to the court's order for the record to remain open (App., p. 850, ll. 1-11 & 22), PCR counsel had stated before the court that the Petitioner's phone records were no longer accessible and cannot be obtained. (App., p. 799, l. 19 - p. 800, l. 10) This assertion that which was implicated by the PCR counsel upon contending that the requested phone records could not be obtained "was refuted" by accordance to the Petitioner's sister whom was present at the PCR hearing to attest to the fact that the phone records can be obtained.[5] (App. p. 800, l. 11 - p. 801, l. 15)

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[5] The PCR court had ordered for the PCR record to remain open and instructed the PCR counsel to obtain the phone records and brief an argument, which to provide the court with evidence that will substantiate the ineffective assistance of counsel claim, with regard to the good faith basis concerning vicarious consent. (App., p. 850, ll. 1-22)

The PCR counsel had forwarded a June 20 2014 correspondence to the Petitioner informing the Petitioner that the burden to obtain the evidence (i.e. the Petitioner's phone records) was placed upon the Petitioner's sister. (See Exhibt 2)

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

> 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 ensure that all available grounds for relief are included in the application and shall amend the application if necessary.

The Petitioner had filed his PCR application on the 8th day of February 2013, and supplement and supporting facts and attachment was filed before the court on the 17th day of February 2014, and therein Petitioner's supplement, the PCR counsel was advised to amend all issues.[6] See Exhibit x, page 3. However, within the PCR hearing on that 19th day of June 2014. The PCR counsel had contended that the case was ready to proceed with the hearing. PCR counsel, did so proceed, with coherence, with disregard concerning the Petitioner's procedural rights pursuant to S.C. Code Ann. § 17-27-20(a)(6). The Petitioner's PCR counsel had so failed to amend the supplemental and attachments as evidence pursuant to

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[6] 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 provides 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). This Court had granted leave of the Petitioner to supplement the record and accepted the Petitioner's pro se February 17th 2014 supplement of issue on the 17th day of July 2015.

S.C. Code Ann. § 17-27-40 - § 17-27-50.[7] Upon the Petitioner's PCR counsel not amending the issue set forth within the Petitioner's supplement, before the PCR hearing had convened on that 19th day of June 2014, frustrated the right of the Petitioner pursuant to U.S.C.A. 14th Amendment and S.C. Const. Artical 1 § 3.

The Petitioner contends that the PCR counsel's willful misconduct is considered prejudicial to Petitioner pursuant to "Rule of law." See: In re Hatley, 400 S.C. 470, 735 S.E.2d 488; also see S.C.A.C.R. 407 Professional conduct, Rule 8. 4 (a)(e)(f). Such misconduct does proved possible threat of undermining of the court's integrity. See Hawkings v. Bruno Yacht Sales Inc., 353 S.C. 31, 42, 577 S.E.2d 202, 208 ( ); also see: Quinn v. Sharon Corp. 343 S.C. 74 540 S.E.2d 474 (Ct. App. 2002. Article 1 § 3 of S.C. Constitution 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 PCR counsel had relieved the Appellate counsel of his presence from within the post conviction hearing that 19th day of June 2014 (App. p. 849, l. 23 - p. 850, l. 21) without first consulting with the Petitioner. Moreover, the Petitioner did not waive, nor move to waive any issue that was raised within the Petitioner's application and supplement. This decision was not secured with the Petitioner'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 Petitioner, per se, on the record that 19th day of June. (App., pp. 796-852)

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[7] 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 PCR Act.
The Petitioner must meet the burden to prove the allegation in the applicant's application. See Matthews v. State, 565 S.E.2d 766.

A PROPOSED ORDER WAS NOT FILED ON PETITIONER'S BEHALF

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 PCR Court prior to issuance of the order. See: Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2005); also see: S.C.A.C.R. 501 Judicial Conduct, Cannon 3. B (7) (e); also see: Exhibit 10. The Petitioner had forwarded a 7-9-2014 correspondence to this Court while the record had remained open that which was by order of the PCR court (See Exhibit 10), and which that the 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 PCR counsel to act unlawfully, thus "[tacitly]" before the PCR court thus waived the Petitioner'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 Petitioner 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 Petitioner's PCR application and supplements were not addressed nor raised, 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).

[8] The Petitioner had admonished this Honorable Court of this error regarding PCR counsel's misconduct within a July 9th 2014 correspondence to the PCR court, with certificate of service certifying that all parties had been served a copy of the same (Exhibit 10) prior to the PCR court dismissing the Petitioner's PCR action.

DISCUSSION

The misconduct which was administered by the PCR counsel, Esq. Caroline M. Horlbeck, provided a cause for a procedural default, which prohibited the PCR court from addressing all issues raised by the Petitioner and greatly increased the chance of the order failing to make the appropriate and specific findings with the respect to each issue presented. See: Pruitt, 310 S.C. at 256, 423 S.E.2d at 128; see also: Marler, 375 S.C. at 410, 653 S.E.2d at 267 and Rule 52 (a) S.C.R.C.P. The Petitioner's PCR counsel's misconduct provided a diminishing effect effect to the PCR court's jurisdiction to have lawfully set forth finding and reasons for those findings as required by S.C. Code Ann. § 17-27-80; See Delaney v. State, 238 S.E.2d 679. The Petitioner was deprived of a fair bite of the judicial apple. Wherefore, the order drafted by the parties hold S.C. Code Ann. § 17-27-80 is to be unripe for the PCR judge to consider. (App., pp. 853-862)

The PCR counsel's inadvertent representation within the PCR hearing, that 19th day of June 2014, has established a cause for a procedural default, concerning the procedural mandates regarding due process of law pursuant to the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10; see Harvey v. South Carolina (1970 DCSC) 310 F. Supp. 83. The inordinateness administered per Esq. Caroline M. Horlbeck provides an unjustified delay within the State's corrective process, which did result to frustrate the rights of the Petitioner and is 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.) It was held by the Martinez court, that for the Petitioner "[t]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 Petitioner's counsel placing the burden upon the Petitioner's family to meet legal expectation and qualification of that which the PCR counsel is vested of, and by duty being as Esq. Caroline M. Horlbeck was court appointed to represent the Petitioner, and however, neglecting a lawyer's obligation to assure that vital evidence is before the PCR court.

The Petitioner's family is "unlearned" in the law, and which did create a high risk that the Petitioner's family has unknowingly failed to comply with [state] procedural rules. See: cf., eg., id., at 620-621, 125 S.Ct. 2582 (citing Martinez v. Ryan S.Ct. 2012 WL 912950 (U.S.)). The Petitioner's phone records are evidence that consist outside the trial record. See: Martinez, supra. The PCR counsel's conduct obstructed 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).

Petitioner had also pursued and exhausted his PCR remedies in his PCR action as a matter of right. See S.C. Code Ann. § 17-27-90.

The Petitioner, per se, had complied with the procedural norm set forth in S.C. Code Ann. §§ 17-27-20 - 50, and due to the Petitioner's diligence, does so substantiate that the Petitioner's compliance holds the statutory ripener complete in regards to the above stated statutes under the Uniform Post Conviction Procedure Act. S.C. Code Ann. § 17-27-10; 15 ALR 4th 582. See: Harvey v. South Carolina, (1970 DCSC) 310 F. Supp. 83; Rule 201(a) S.C.A.C.R. And in furtherance, the Petitioner had timely and adequately executed his initial-review collateral proceeding

which is [t]he first [place] a prisoner can present a challenge to his conviction." Id., at 755, 111 S.Ct. 2546. Again, the Petitioner, per se, had complied with the South Carolina Post Conviction Procedure Act. See Stewart v. Warden of Lieber Corr. Inst., 701 F. Supp. 2d 785, 790 (DSC 2010).

The Petitioner moves to apprise this Honorable Court that the fruits of the Petitioner's per se diligence cannot be overlooked. To do so, would deprive the Petitioner of his right to due process pursuant to U.S.C.A. 14th Amendment and Article 1, Section 3 of the South Carolina Constitution and unlawfully strip the Petitioner of a remedy that which is just and cognizable. The record is not void of such fruits due to the Petitioner's per se diligence, upon scrutinizing the record in accordance with several prospectives, such as (1) It is undisputed that the record is void of the PCR counsel's amended application, thus to convert the issues, if possible, as a proper and substantive ineffective assistance of counsel claim before the PCR court, that which such an obligation lies upon the PCR counsel. See 71.1(d) S.C.R.C.P. (2) The record is void of a 59(e) motion, that which, any material error can only be substantiated only upon the PCR counsel filing this motion (See: 71.1(d) & 59(e) S.C.R.C.P.) and to preserve the error proscribed per S.C. Code Ann. 17-27-80.

ARGUMENT

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Boan v. State, 388 S.C. 272, 275, 695 S.E.2d 850, 851 (2010).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Boan, 388 S.C. at 275, 695 S.E.2d at 851. "First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness." Boan, 388 S.C. at 275, 695 S.E.2d at 851, citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. "Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Id. at 275-76, 695 S.E.2d at 851-52.

Upon the State initiating [its] interlocutory appeal before the South Carolina Court of appeals, (App., 26)[9] (App., p. 35). The State claims that its appeal was cognizable under 17-30-110(A); within its motion to vacate order and allow motion to be served and filed pursuant to section 17-30-110. (App., pp. 36-40) The State had argued as well, that the court (i.e. The Hon. C. Victor Pyle, Jr.) "[d]id not have

[9] With regards to the State's interlocutory appeal (App., p. 26) Attorney General William M. Blitch had filed the State's reply before the South Carolina Court of Appeals on the 14th day of May 2009. (App., p. 47) Attorney General Blitch, Esquire had certified that an "[o]rder authorizing the interception was not involved in this case." (App., p. 47-50.

jurisdiction to hear a motion under the S.C. Wiretap Act." But however, this such contention argued within the state's motion to vacate (App., p. 38) is not, and can not lawfully stand in assertion. The Petitioner in his PCR hearing had testified with non equivocation that the interception of the Petitioner's private conversation with his daughter was a violation of law and of the S.C. Wiretap Act and federal law, because interception of the Petitioner's conversation amounted to eavesdropping. (App., p. 806, l. 8 - p. 807, l. 8)

Again, with regards to the State's motion to vacate, in which the State argued that "[t]he recording was appropriate under a "[theory]" of vicarious consent as expressed in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998) or Kroh v. Kroh, 567 S.E.2d 760 (N.C. App. 2002).

(A) ANALYSIS OF THE 6TH CIRCUIT PROMULGATION EXPRESSED IN POLLOCK V. POLLOCK CONCERNING THE EXCEPTION

The Petitioner respectfully proffer particular fact that which are summarized per the 6th circuit within the Pollock court. 154 F.3d 601.

> "[I]n May of 1994, Sandra learned that a telephone conversation between herself and her daughter, Courtney had been tape recorded. Sandra contends that Courtney told her that Samuel and Laura had tape recorded the telephone call, but that Courtney would not give any further details. (J.A. at 102) Laura and Courtney contend that Courtney told Sandra that Courtney had recorded a conversation with her mother from her father's home, with Samuel and Laura's knowledge and consent and with the knowledge and consent of my husband Sam."

See Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998). Initially upon the Pollock court rendering [it] decree this court first recognized the fundamental rights with respect to the explicit consent of a conversant but also for those who do so, after receiving implied consent, as afforded of Title III of the Omnibus Crime Control and Safe Streets Act. See

Griggs - Ryan v. Smith, 904 F.2d 112.

The Petitioner had testified before the PCR court that the Honorable C. Victor Pyle, Jr.'s order of suppression of the Petitioner's conversation with his daughter had so protected the right of all parties involved concerning this case. (App., p. 809 l. 1 - p. 810, l. 3) Generally, the intercepted conversations that were intercepted as proscribed within Pollock indeed had not been intercepted surreptitiously. See Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998)

> Trial counsel was ineffective in not objecting when the State stopped the trial and moved for an interlocutory appeal prior to the jury being sworn in, which would have preserved for the record on appeal that the State lacked appealibility. Thus, the State did not meet the requirements of S.C. Code Ann. §14-3-330. See Petitioner's pro se supplement.
>
> The Fourth Amendment of the U.S. Constitution prohibit unreasonable search and seizure and requires a showing of probable cause for the issuance of any search warrant or arrest warrant. USCA 14.
>
> Moreover, this State's constitution provides added protections. S.C. Const. Art. I § 10 (The right of the people to be secure in their persons, houses, paper, and effects against unreasonable invasions of privacy shall not be violated..."

The State upon contending within it reply that the State had properly filed this appeal under the holding of State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), finding a "pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case. (App., pp. 47-51)

The Petitioner had testified before the PCR court that the State lacked appealibility as proscribed of S.C. Code Ann. §14-3-330. Likewise, Petitioner had asserted that jurisdiction to suppress the Petitioner's private conversation with his daughter that which had been intercepted without the Petitioner's knowledge of consent is lawfully vested to a judge of contempt jurisdiction. § 17-30-15(8).

S.C. Code Ann. § 17-30-15(8) states in definitions (8) of § 17-30-15:

> (8) "Judge of competent jurisdiction" means a circuit court judge designated by the chief justice of the Supreme Court of the State of South Carolina. § 17-30-15(8)

However, §17-30-15(8) regulates jurisdictional authority that satisfy fundamental 14th Amendment due process of law. Petitioner's testimonies before the PCR Court substantiated unambiguous finding that will hold contrary to the State's claim of impairment as well as [it] appealibility under S.C. Code Ann. § 14-3-330 (2)(a) (1976). (App., p. 51) See State v. McKnight, 353 S.C. 238, 577 S.E.2d 456 (2003); State v. Holiday 255 S.C. 142,177 S.E.2d 541 (1970).

EXCLUSIVE REQUIREMENT UNDER §17-30-105

It was held by the 1st circuit in the year of 2003 per the Rodriguez court, cite 319 F.3d 12 that:

> "[I]ssuing judge's initial decision to grant wiretap order is subject to review in at least two different contexts: trial judge may consider motion to suppress evidence gathered by the wiretap that issuing judge authorized and appellate court may review trial judge's suppression ruling. 18 U.S.C.A. (2002) §§ 2510-2522.

Again, the Petitioner respectfully guide this Court's attention to the prospects set forth per the Pollock court cited at 154 F.3d 601 that which the Pollock court had recognized the factor of an actual and constructive notice of consent of both the conversant and also those who do so after receiving implied consent. See Griggs-Ryan v. Smith, 904 F.2d 112. Amen, 831 F.2d at 379; Bononno, 487 F.2d at 658-659. Moreso, it was held within Simmons v. Southwest Bell Tel. Co., 452 F.2d 392, that the "[c]aller knew his calls were being monitored," and however, the Petitioner testified before the PCR court clear and unambiguous, that reasonable expectation of Petitioner's private conversation with his daughter remain private.

App., p. 807 l. 1 - p. 808 l. 22)

The jurisdiction authority under 17-30-15(8) is interwoven within almost all S.C. Code Ann. under chapter 30 Codified under §17-30-10, 17-30-15(8). Jurisdictional authority lies within §17-30-25 B (1)(c), as well as within §17-30-65 (B), §17-30-70 (A); S.C. Code ann. §17-30-15(8). Jurisdictional authority also lies within §17-30-75 (E) by which the solicitor was not authorized by granted authority per §17-30-15-(8) to disclose the contents of the Petitioner's private conversation within the initial trial before Honorable C. Victor Pyle, Jr. The authority to disclose must muster under § 17-30-80 (A).

The Petitioner had testified before the PCR court that trial counsel was ineffective upon not objecting and preserving to record before Judge Pyle, Jr. that the Petitioner was without knowledge consent that his conversation had been intercepted and the State failed to seek authorization under § 17-30-15(8), § 17-30-75 (A). However such omission frustrates right as afforded per the USCA 14th Amendment and upon the State not resulting to the requirement under §17-30-105, 18 USCA 2518 (a). Generally such interceptions that are unknowingly taken from a citizen in absence of disclosure order under §17-30-75(A) 18 USCA § 2518 (a) violates the USCA 4th Amendment[10] and this State's constitution, Article 1 § 10 and is prohibited under § 17-30-20, § 17-30-50, 18 USCA, 2515. By the facts concerning the State's absence of an issuing judge's decision under §17-30-15(8), the

[10] The Supreme Court held within State v. Whitner, See: op. No.: 27142 [A]ppellate also contends the interception of the phone conversation was an unreasonable invasion of privacy under the additional protection afforded by our State Constitution. See S.C. Const. Art. 1 § 10. But however, this Court rejected the Petitioner's constitutional issue. (App., p. 775)

State's interlocutory appeal under §14-3-330 was not cognizant. The Petioner had testified within the PCR hearing that trial counsel failed to challenge the threshold issue of appealability. State v. Thomas, 269 S.E. 2d 768.

However, a determination authorized under § 17-30-15(8), 18 USCA, 2518 (8) (a), has not been made if the Petitioner per se had known if [his] private conversation had been intercepted and if the Petitioner consented. Moreso, the State lacked appealability under §14-3-330. The Court of Appeals lacked jurisdiction to entertain State's appeal under §17-30-110A. An application of order was not involved, thus S.C. Code Ann. 17-30-65(A) forbids the Court of Appeals to take jurisdiction over an unlawful interception. 18 U.S.C.A. § 2515.

Robert M. Dudek, Esquire, whom at the time was Deputy Chief Appellate Defender, did not provide effective assistance, upon not assuring that the court of Appeals to be fully apprised with law concerning lawful "accreditation of jurisdiction" of the Court of Appeals 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. Sode Ann. §14-3-330. See State v. Whitner appellate case no.: 2009-121593.

However, Robert M. Dudek, Esquire omitted to proved 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. (App., pp. 41-45)

Moreover, the Court of Appeals had needed to be apprised of the mandatory requirement that are proscribed per S.C. Code Ann. §17-30-105 before the Court of Appeals could have lawfully taken jurisdiction of the State's

interlocutory appeal pursuant to S.C. Code Ann. §14-3-330 as well as §17-30-110. Appellate counsel failed to apprise the Court of Appeals concerning this jurisdiction defect concerning constitutional law.

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." 18 USCA §2518(a).

This requirement is mandatory to be provided before the South Carolina Court of Appeals pursuant to S.C. Code Ann. §17-30-110.[11] 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 an 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 Appeals to entertain an appeal with regards to S.C. Code Ann. §17-30-110(A)(3).

Moreover, an order authorizing or approval of the wiretap had not

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[11] The South Carolina Supreme Court unintentionally neglected to recognize the necessity of this requirement for an application or approval. See 18 USCA 2518 (1); S.C. Code Ann. §17-30-105. Robert M. Dudek, Esquire, whom at the time as Chief Appellate Defender failed to provide before the Court of Appeals 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 State v. Whitner, appellate case no.: 2009-121593; also see: State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) The Petitioner's PCR counsel had unlawfully waived the Petitioner's ineffective assistance of Appellate counsel issue that was raised in the Petitioner's PCR application. (App., p. 849 l. 23 - p. 850, l. 22)

been granted per a judge of a competent jurisdiction. See: S.C. Code Ann. §17-30-70(A) and §17-30-15(8). 18 USCA § 2518(a).

The initial trial transcript of record before the Honorable C. Victor Pyle, Jr. held March 11, 2009, case no.: 2009-GS-23-01072. (App., pp. 1-33) 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 wiretapping law... as proscribed per S.C. Code Ann. §17-30-65(A) which therein reads: (App., p. 702; p. 159 11. 21-25; p. 767)

> Whenever 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 committe, 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 USCA §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) (App., p. 818 1. 21 - p. 819, 1. 10, p. 28)

CONCLUSION

For reasons stated, Petitioner asks this Court to grant the Petitioner for a writ of certiorari which the Petitioner asserts that Petitioner's appeal is meritorious thus for this Court to grant relief.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

Samuel Lamont Whitner,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No.: 2014-001951

CERTIFICATE OF SERVICE

I certify that a true copy of the Petitioner's **PRO SE PETITION FOR WRIT OF CERTIORARI** has been filed on the 31st day of July 2015 and has been served to parties listed below.

Karen Ratigan, Esquire
Office of the Attorney General
at Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

Samuel Lamont Whitner

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

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 31 DAY OF July 2015.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 6/16/2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Robin B. Stilwell, Circuit Court Judge

Samuel Lamont Whitner,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No.: 2014-001951

ATTACHMENT

The Petitioner hereby certifies that the below attachment has been forwarded with the Petitioner's Johnson Petition:

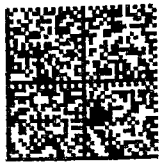
Exhibit 10: A July 9, 2014 correspondence forwarded to the Honorable Robin B. Stilwell addressed at Greenville County Courthouse 305 E. North Street, Suite 325 Greenville, S.C. 29601-2185.

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

SWORN TO AND SUBSCRIBED TO BEFORE ME
THIS 31 DAY OF July 2015.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 11/10/2018

Samuel Lamont Whitner
B.R.C.I WHT 143
4460 Broad River Road
Columbia S.C. 29210



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