

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT **RECEIVED**

OCT 20 2015

IN RE: BRIAN E. GAINES

CASE NO. 2015-000103

S.C. SUPREME COURT

THE PETITIONER, BRIAN E. GAINES, HAS BEEN GIVEN 45 DAYS IN WHICH TO FILE ANY ADDITIONAL ISSUES WITH REGARD TO THE JOHNSON PETITION FOR A WRIT OF CERTIORARI, FILED ON HIS BEHALF BY KATHRINE H. HUDGINS, OF THE SOUTH CAROLINA APPELLATE DEFENSE.

SOUTH CAROLINA SUPREME COURT RULES 50(5) AND 71.1(d) MAKE IT MANDATORY THAT POST CONVICTION ATTORNEYS MAKE SURE THAT ALL AVAILABLE GROUNDS ARE RAISED IN POST CONVICTION PROCEEDINGS. FOR AFTER FILING A PRO SE POST CONVICTION APPLICATION, AND AFTER BEING GIVEN COURT APPOINTED COUNSEL, A PRO SE LITIGANT CANNOT THEREAFTER FILE ANY FURTHER PLEADING AND ANY AMENDMENT TO HIS APPLICATION MUST BE MADE BY COUNSEL. STATE V. SANDERS, 237 S.E.2d 53 (1977), FOSTER V. STATE 379 S.E.2d 909 (1987). Thus, if post conviction counsel does not amend the pro se application, the applicant has no way-

#0 HAVE ALL SUPPORTING GROUNDS HEARD.

BECAUSE THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT BE EXHAUSTED UNTIL AN APPLICATION FOR POST CONVICTION RELIEF IS FILED, SOUTH CAROLINA LITIGANTS CLEARLY HAVE A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN PRESENTING THEIR CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. *Evitts v. Lucey*, 469 U.S. 387 (1985).

THE FAILURE OF PCR COUNSEL TO AMEND THE APPLICATION HERE, SERVES TO HAVE PREJUDICED THE PETITIONER'S RIGHT TO A "FULL BITE AT THE APPLE". AS A RESULT, WHEN AN APPLICANT IS NOT ASSISTED BY A POST CONVICTION ATTORNEY IN SETTING FORTH ALL GROUNDS TO SUPPORT HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN HIS INITIAL APPLICATION, HE SHOULD NOT BE BARRED THEREAFTER FROM SUBMITTING A SECOND APPLICATION TO INCLUDE ADDITIONAL GROUNDS FOR A COURTS REVIEW.

THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS, PROHIBITS AN IMPROPER AMENDMENT OF AN INDICTMENT, AS WELL AS MULTIPLICIOUS INDICTMENTS, -

THAT ARE VAGUE AND UNCERTAIN, CHARGING SEPARATE VIOLATIONS IN A SINGLE COUNT, A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE. TRIAL COUNSEL WAS INEFFECTIVE FOR HIS FAILURE TO MOVE TO QUASH THE INDICTMENT ON THESE GROUNDS, AND THE PCR APPOINTED ATTORNEY WAS INEFFECTIVE FOR HIS FAILURE TO AMEND THE APPLICATION TO INCLUDE THIS GROUND INTER ALIA.

MOREOVER, THE INDICTMENT ON ITS FACE CONSTITUTE A SHAM LEGAL PROCESS, WITHIN THE MEANING OF 16-17-735 OF THE SOUTH CAROLINA CODE OF LAWS (1976) AS AMENDED, WHICH PROVIDES THAT, "SHAM LEGAL PROCESS" MEANS THE ISSUANCE, DISPLAY, DELIVERY, DISTRIBUTION, RELIANCE ON AS LAWFULLY AUTHORITY, OR OTHER USE OF AN INSTRUMENT THAT IS NOT LAWFULLY ISSUED. WHICH "REQUIRE OR AUTHORIZE THE SEARCH, SEIZURE, INDICTMENT, ARREST, TRIAL, OR SENTENCING OF A PERSON OR PROPERTY."

"LAWFULLY ISSUED" MEANS ADOPTED ISSUED OR RENDERED IN ACCORDANCE WITH THE APPLICABLE STATUTES, RULES, REGULATIONS AND ORDINANCES OF THE UNITED STATES, A STATE, OR A POLITICAL SUBDIVISION OF A STATE."

HERE, the ASSISTANT SOLICITOR,
that issues the indictment, is without
lawful authority as in accordance
with the applicable statute, 14-9-210,
"INDICTMENTS FOR COUNTY COURT CASES
BY GRAND JURY OF COURT OF GENERAL SESSION"
which provides "The County Solicitor"
(not the Assistant Solicitor) shall prepare
and through the presiding Judge of the
Court of General Session, submit to the
grand jury, while in attendance upon
the Court of General Session, bills of
indictment in all cases pending in the
County Court in which the punishment
may exceed a fine of one hundred
dollars or imprisonment for thirty
days when such cases have not been
previously acted on by the grand jury.

The grand jury shall act thereon
and report its action to the presiding
judge of the Court of General Session
and said judge shall direct the clerk
of the Court of ~~General Session~~ GENERAL
Session to report the same to the pre-
siding judge of the County Court at
its next ensuing term. All cases in
which -

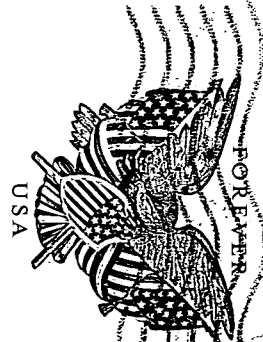
bills of indictment ARE SO FOUND SHALL STAND FOR TRIAL BY THE COUNTY COURT AS THOUGH FOUND BY THE GRAND JURY WHILE IN ATTENDANCE UPON THE COUNTY COURT."

THE PRESIDING JUDGE OF THE GRAND JURY COURT OF GENERAL SESSION, THE CLERK OF COURT FOR GENERAL SESSION AND THE PRESIDING JUDGE OF THE NEXT ENSUING TERM, ARE ALLOWED TO PASS UPON THE INDICTMENT AFTER THE GRAND JURY HAS ACTED THEREON. THIS IS CLEARLY, A CASE, OF A SHAM LEGAL PROCESS WITHIN THE MEANING OF 16-17-735, OF THE SOUTH CAROLINA CODE OF LAWS (1976) AS AMENDED, BY THE ASSISTANT SOLICITOR. A PRACTICE CONDEMNED BY S.C. SUPREME COURT, JUSTICE DON BETTIE, AND A VIOLATION OF PETITIONER'S SUBSTANTIAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. WHICH SERIOUSLY EFFECTS THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.

WHEREFORE, PETITIONER PRAYS THIS COURT GRANT THE WRIT OF CERTIORARI.
Respectfully Submitted,

Brian Gaines # 293395 F4-2124
Lee Correctional Institution
990 W. Sackety Hwy
Bishopville S.C. 29010

COLUMBIA SC 290
16 OCT 2015 PM 3 L



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

THIS ENVELOPE IS RECYCLABLE AND MADE WITH 30% POST CONSUMER CONTENT

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THE DEPARTMENT OF CORRECTIONS HAS NOT OPENED
THIS ITEM. THEREFORE, THE DEPARTMENT HAS NOT
ASSUME RESPONSIBILITY FOR ITS WRITTEN CONTENTS.
LEE CORRECTIONAL INSTITUTE
SC DEPARTMENT OF CORRECTIONS

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