

Perry Correctional Inst.
430 Oaklawn Road - Q3B-122
Pelzer, SC 29669

June 7, 2017

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JUN 12 2017

S.C. SUPREME COURT

Daniel E. Shearouse, Clerk of Court
THE SUPREME COURT OF SOUTH CAROLINA
Post Office Box 11330
Columbia, SC 29211

Re: APPELLATE CASE NO. 2016-001723

Dear Mr. Shearouse:

Please find enclosed original one copy of my pro se petition response unbounded as your office requested for filing with your office. I understand now that the matter will be submitted to the Court for its consideration.

I do thank you for all your kind assistance with this matter. If your office needs any further information, please let me hear from you.

Once again, thank you!

With kind regards,

Sincerely,


Gregory A. Ivery, #131131

GAI/jow

PS. Please return a filed copy to me,
for my records.

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JUN 12 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable R. Knox McMahon, Circuit Court Judge

GREGORY ALLEN IVERY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2016-001723

PETITIONER'S PRO SE STATEMENT IN ACCORDANCE TO
JOHNSON PETITION FOR WRIT OF CERTIORARI

GREGORY ALLEN IVERY, #131131
PERRY CORRECTIONAL INSTITUTE
430 Oaklawn Road - Q3B-122
Pelzer, SC 29669

Taylor D. Gilliam
Appellate Defender

South Carolina Commission Indigent Defense
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P.O. Box 11589
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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

Did the trial court lack subject matter jurisdiction or authority to sentence Petitioner to (10) years incarceration on the charge for distribution within proximity of a school, when in fact, NICHOLTOWN COMMUNITY CENTER, is not a school?

Did Petitioner receive ineffective assistance of trial counsel in violation of his sixth amendment right, where trial counsel failed to cross-examine an adverse state witness James Grant, who denied before the jury, that he did not purchased any crack cocaine from the Petitioner?

The Petitioner makes a Motion to Remand the matter back to the Post-Conviction Relief Court that he may fully present his issues to the court because the Court, Assistant Attorney General, nor his Counsel presented not one of his issues for review.

STATEMENT OF CASE

Petitioner on June 2012, a Greenville County Grand Jury indicted him for distribution of cocaine base (Crack Cocaine) within one-half mile of a school or park. App. 197-200. On October 11, 2012, a jury trial commenced in Greenville County Court of General Sessions before the Honorable William H. Seals, Jr. circuit court judge.

At the conclusion of the trial the jury convicted Petitioner as indicted. Following the verdict the trial judge sentenced Petitioner to concurrent terms of imprisonment of (20) years for distribution of crack cocaine and (10) years for distribution of crack cocaine within $\frac{1}{2}$ mile of a school. App. 150 11.10-14.

Petitioner filed a timely application for post conviction relief January 13, 2015. App. 152-158. The application (3) allegations: 1. ineffective assistance of counsel. 2. prosecutorial misconduct. 3. judicial misconduct. App. 154. The State filed its Return on June 2, 2015. App. 160-165. An evidentiary hearing was conducted on April 22, 2016 before the Honorable R. Knox McMahon. App.166. Mills Ariail represented Petitioner and the State represented by Patrick Schmeckpeper. App.166. Trial Counsel testified at the hearing. Petitioner not testify due to health problems which resulted in memory loss. App. 170 11. 5-18.

On July 29, 2016 Judge McMahon issued his order denying Petitioner relief. App. 188-195. Petitioner filed a notice of appeal and Counsel filed a Johnson Petition for Writ of Certiorari April 24, 2017. This Court sent Petitioner a letter on April 25, 2017, received by Petitioner May 4, 2017, stating, "that Petitioner had (45) days to file any thing or raise anything in the record." This Pro se Statement Petition follows.

ARGUMENT

The trial court lacked subject matter jurisdiction or authority to sentence Petitioner to (10) years incarceration on the charge for distribution of crack cocaine within $\frac{1}{2}$ mile of a school, when in fact, NICHOLTOWN COMMUNITY CENTER, is not a school, within SC Code §44-53-445.

Petitioner will submit that lack of subject matter jurisdiction or authority of the court may be raised at any time. State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972). Petitioner will submit that the trial court sentenced the Petitioner for distribution of crack cocaine within $\frac{1}{2}$ mile of a school to (10) years in prison, when in fact the Nicholtown Community Center is not a school within the South Carolina Statute §44-53-445 which states: "the defendant distributed, sold, purchased, manufactured or unlawfully possessed with intent to distribute cocaine base within one half mile of the grounds of a public, private, elementary, middle or secondary school, playground or a park, a public vocational or trade school or technical education center or a public or private college or university." App. 137 ll.1-11.

Petitioner will submit that the court sentenced him for a school. App. 150 ll. 10-14. Also, there was no physical evidence presented at trial that this charged was in fact within $\frac{1}{2}$ mile of a school because Nicholtown Community Center is not a school. At trial the state presented Detective Carles Cothran to testify after asked by solicitor Ms. Price, how do you know it to be within $\frac{1}{2}$ mile of a school? He answered, we have a map, we can use and we can drag a tape measure or ruler and it will give us an approximately distance and it was definitely within less than half of a mile. app. 64 ll 16-25.

There was just no physical evidence presented nor was there any evidence that this was a school. In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), this issue may be raised any time. The court was without jurisdiction to impose sentence. Funderburk, supra.

ARGUMENT

The Petitioner receive ineffective assistance of trial counsel in violation of his sixth amendment right, where trial counsel failed to cross-examine an adverse state witness James Grant, who denied before the jury, that he did not purchased any crack cocaine from Petitioner.

James Grant, the state confidential informant denied continuously that he did not purchase any drugs from the Petitioner. Ms. Price, solicitor reuested a Neil v. Biggers hearing but the state's witness was so adamant in his denial concerning this matter that Ms. Price, had to discontinue the Neil hearing. App. 17 ll. 14-17. Then once again on direct examination, James Grant, the cofidential informant was unyielding and inflexible in his denial that he did not purchase any drugs from the Petitioner. App. 84-92 ll. 1-15.

Then on cross-examination by Mr. Hamilton, he failed to pursue this very important denial for the jury. Mr. Hamilton, stated, "I just have one question. I understand that you don't know anything. I would like to ask whether or not -- you said you did not circle that." App. 92 ll. 16-24. This cross-examination was not only for the Petitioner but most important for the jury. Counsel should have pursued this matter to show the jury how the state was setting his client up with a miscarriage of justice.

Cross-examination should not be looked upon as a necessary evil or anticipated as a horrible experience. The adversary system of justice allows the accused to question the testimoney of a witness, to "Confront Witnesses Against Him" U.S. Constitution Amendment 6 as guaranteed by the South Carolina Constitution Aticle 1, §14. The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers or nonaccusers.. State v. Alesksey, 343 S.C. 20, 33, 538 S.E.2d 248 255 (SC 2000); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). State v. Saltz, 551 S.E.2d 240 (S.C. 2001).

Rule 608(c) SCRE, "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, 343 S.C. 562, 541 S.E.2d (2001). "On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914-15 (2000); State v. Brewington, 267 S.C. 97, 101, 226 S.E. 2d 249, 250 (1976).

Counsel should have taken James Grant, state's only witness, through step by step denial by his cross-examination for the jury because the Petitioner's freedom depended on it, and he also, had a right to present the testimony to the jury.

ARGUMENT

The Petitioner makes a Motion to Remand the matter back to the Post-Conviction Relief Court that he may fully present his issues to the court because the Court, Assistant Attorney General, nor his Counsel presented not one of his issues for review.

The Post-Conviction Relief Court record before this court, is absolutely silent concerning the Petitioner's (3) allegations because no one presented them on his behalf to the court. In Aice v. State, ___ S.C. ___, 409 S.E.2d 392 (1991), this court ruled that there is no right to effective representation in collateral proceedings. Thus, while the Applicant has a right to a lawyer in such an action he cannot subsequently use a Sixth Amendment claim against that lawyer as the justification for a successive application for relief.

This decision established that, absent unusual circumstances justifying a successive application, the Applicant will only get one opportunity. Therefore, it is extremely important that the PCR Applicant be able to fully present all his potential collateral claims in his first PCR action.

Since Petitioner cannot file a successive application concerning his allegations of (1) Ineffective assistance of counsel (2) Prosecutorial misconduct (3) Judgement misconduct; Petitioner is requesting this court by Motion in the interest of justice to Remand this matter as a case based upon "unique facts" as presented in Case v. State, 277 S.C. 475, 289 S.E.2d 413 (1982). App. 154.

The PCR court record doesn't present a knowing and voluntary waiver of statutory right by colloquy between Court and Petitioner. Martinez v. Ryan, ___ U.S. ___, ___ S.Ct. ___. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000); State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992); Boykin v. Alabama, 395 U.S. 238 (1969).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his pro se petition for writ of certiorari to allow full briefing on these issues, reverse the charges against him, and remand the case for a new trial.

OR

In the alternative, remand this matter back to the Post Conviction Relief Court that Petitioner may fully present his (3) post conviction relief grounds that was not presented to the court for review. 1. ineffective assistance of counsel; 2. prosecutorial misconduct; 3. judicial misconduct.

s/ Gregory A. Ivery
Gregory Allen Ivery #131131
Perry Correctional Inst.
430 Oaklawn Road - Q3B-122
Pelzer, SC 29669

Dated 10-7, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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GREGORY ALLEN IVERY,

PETITIONER, S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The Petitioner has served a true copy of his Pro se Statement in accordance to Johnson Petition for writ of certiorari filed by his counsel and has been served upon DeShawn H. Mitchell, Esq. at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201.

s/ Gregory Ivery
Gregory Allen Ivery #131131
Perry Correctional Inst.
430 Oaklawn Road - Q3B-122
Pelzer, SC 29669

SWORN and SUBSCRIBED to before me
this day 7th of June, 2017

Jamarcia Conwell
Notary Public for South Carolina.
My Commission Expires ~~My~~ **Commission Expires**
September 25, 2023

RECEIVED

JUN 07 2017

P.C.I. MAILROOM