

Explanation

The Petitioner presents to this Court an explanation pursuant to Rule 243(c) SCACR. The Petitioner asserts that the Lower Court's summarily dismissal of Petitioner's PCR application was an error. The Petitioner plead guilty to armed robbery on August 18, 2007 before the Honorable Howard P. King and was sentenced to eighteen (18) years imprisonment. The Petitioner filed a PCR application on July 14, 2008. Subsequently the Petitioner withdrew his PCR application on February 4, 2010 before the Honorable R. Lawton McIntosh.

The Petitioner was called into the South Carolina Department of Corrections, MacDougall Correctional Institution's classification office on September 25, 2018 and was informed that he would have to participate in a Community Supervision program. Neither the sentencing transcript nor sentencing sheet mentions that the Petitioner would have to participate in a Community Supervision Program. Judge King did not sentence Petitioner to a Community Supervision Program after his release. Furthermore, the Petitioner recalls plea counsel informing him that he was not eligible for parole nor any other form of supervision. Therefore, when Petitioner became ascertained that the Department of Corrections would enforce Community Supervision through the Department of Probation Parole and Pardon Services (despite being absent from the Judge's sentence, guilty plea transcript, and sentencing sheet) the Petitioner filed a PCR application with the Lexington County Clerk of Court on October 26, 2018.

The Petitioner is entitled to the Discovery Rule pursuant to S.C. Code Ann. §17-27-45(c). (If the Applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the Applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.) It is evident that the Petitioner filed the PCR application within one year of discovery that he will be forced to participate in a Community Supervision Program after his release. (Further, the PCR Judge apparently overlooked the Discovery Rule in section S.C. Code Ann. §17-27-45(c) which allows one year after the discovery of material facts not previously presented and heard that require vacation of the conviction or sentence to file a PCR application. Petitioner argued he did not discover the juror's misconduct until November 2009, and he promptly filed his second PCR application after making that discovery. Because the Petitioner's claim that he is entitled to the benefit of the Discovery Rule was not conclusively refuted by the record, the PCR Judge erred by summarily dismissing Petitioner's claim.) See McCoy v. State, 401 S.C. 363 737 S.E. 2d623.

The Petitioner's Discovery Rule claim was not conclusively refuted by the record which bars summarily dismissal. It is undisputed that the record shows that the Petitioner was not sentenced to a Community Supervision Program. The record does show that the Petitioner was sentenced to eighteen (18) years. The State, the Department of Corrections, the Department of Probation, Parole, and Pardon Services, nor any other executive branch has the authority to enforce punishment that was not pronounced by the Sentencing Judge. The U.S. Supreme Court held in Hill v. U.S. ex rel. Wampler, "choice of pains and penalties when choice is committed to discretion of Court, is part of judicial function, which must have expression in sentence which is the judgment. Also the Court held that the only sentence known to law is the sentence of judgment entered upon records of court. See Hill v. U.S. ex rel. Wampler, 298 U.S. 460 56 S.Ct 760. The U.S. Court of Appeals (2nd Cir.), held in Earley v. Murray, that the New York Department of Correctional Services' (DOCs) imposition of a five-year term of post-release supervision (PRS) to six year sentence for New York offense of attempted burglary in second degree without informing Petitioner, was contrary to clearly established federal law, even if the PRS

term was mandatory under New York law, for purposes of Petitioner's habeas Petition challenging imposition of PRS term; Supreme Court precedent had established that the only cognizable sentence is the one imposed by the Judge and that any alteration to that sentence, unless made by a Judge, has the power to constrain a person's liberty. The State Court's determination that the addition to Earley's sentence by DOCs was permissible is therefore contrary to clearly established federal law as determined by the United States Supreme Court. See Earley v. Murray, 451 F.3d71 (U.S. Court of Appeals, 2nd Cir.)

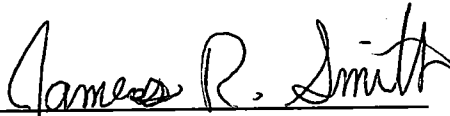
The egregious fact that the Department of Corrections and Department of Probation, Parole, and Pardon Services, which are administrative agencies under the executive branch of State Government, has the authority in South Carolina to enforce punishment that the Judge has not sentenced the Petitioner to is deeply disturbing. The due process of the United States Constitution forbids it. See Coleman v. New York State Department of Correctional Services, 19 Misc. 3d1104(A), 859 N.Y.S.2d901 (stating that the imposition of PRS by the Department of Correction is an infringement by the executive branch upon the independence of the Judiciary. It is not any less a violation of due process because the agency sought to impose PRS which was mandated by the legislature. The executive cannot usurp the role of the Judiciary to pronounce a sentence on an individual, even to correct what it believes to be an error. While the addition of PRS may seem a minor matter, the breach it makes in the separation of powers is not. Once executive functionaries are permitted to impose penal sanctions on citizens, the executive exercise of this power will only grow more frequent and drastic). The United States Court of Appeals, 2nd Cir., held in Earley v. Murray, 451F3d71 (2006), that PRS added administratively by DOCs and not imposed by a court, must be vacated. The Court found that the additional provision for post-release supervision added by DOCs is a nullity. The imposition of a sentence is a judicial act; only a judge can do it. The penalty administratively added by the Department of Corrections was quite simply never a part of the sentence. The enforcement of unlawful sentence is illegal and is forbidden by the Due Process clause of the United States Constitution. The U.S. Court of Appeals, 2nd Cir., and the lower courts have ordered the DOCs to excise PRS from the inmates' sentences.

The issue that the Petitioner brings to the Court is novel in the state of South Carolina. There are numerous cases of current and former inmates who are forced to participate in a community supervision program (CSP) although the sentencing judge did not order it at sentencing. The inmates that violate the conditions of the stringent CSP are subject to the whims of their supervising offices and are further subject to re-incarceration for failing to comply. The state of New York is still currently mired with civil suits for what this state is doing, violating Petitioner's Due Process rights.

Conclusion

The Petitioner requests that this Honorable Court allow that the Appeal will be allowed to proceed.

Respectfully Submitted,


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