



ALAN WILSON
ATTORNEY GENERAL

January 21, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Tiffany Ann Sanders
Appellate Case N: 2012-212858

RECEIVED
JAN 21 2014
S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Motion to Strike along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: Thomas Goldstein, Esquire
Dale Cobb, Esquire
Ms. Trisha Allen

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diana S. Goodstein, Circuit Court Judge
Deandra G. Benajmin, Circuit Court Judge

Appellate Case No. 2012-212858

RECEIVED

JAN 21 2014

S.C. Supreme Court

THE STATE,

Respondent,

vs.

TIFFANY ANN SANDERS,

Petitioner.

MOTION TO STRIKE

Respondent, by and through undersigned counsel, moving to strike Petitioner's Supplemental Appendix Volume III and references thereto in Petitioner's Reply to the State's Return to Petition for Writ of Certiorari, would respectfully show unto this Court:

I.

Tiffany Sanders (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment. The Dorchester County Grand Jury indicted Petitioner for murder (2010-GS-18-0707) and accessory before the fact of murder (2010-GS-18-1206). Michael O'Neal, Esquire, represented Petitioner at trial. A jury convicted Petitioner of murder and acquitted her of the accessory charge. On August 5, 2010, the Honorable Diane Goodstein sentenced Petitioner to thirty (30) years imprisonment. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief (“PCR”) on August 3, 2011, and an amended application on August 24, 2011. In the application, Petitioner alleged her counsel was ineffective because he failed to interview a witness, failed to call a different witness to the stand, and failed to cross-examine a State witness. Also, Petitioner alleged that she did not knowingly and voluntarily waive her right to appeal. The State filed a return on November 20, 2011. A hearing was held on May 24, 2012, before the Honorable Deandrea Benjamin. An order was issued on July 27, 2012, denying relief on all claims, except Petitioner’s knowing and voluntary waiver of her right to appeal. Petitioner was granted permission to proceed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Rule 243(i), SCACR; and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

Petitioner filed two documents on June 12, 2013: a petition for certiorari appealing the denial of post-conviction relief and a brief of appellant pursuant to Rule 243(i). Petitioner filed an amended Brief of Appellant on August 7, 2013. The State filed a Brief of Respondent pursuant to White v. State on December 9, 2013. Petitioner thereafter submitted a “Return to Respondent’s Return to Petition for Writ of Certiorari, a Reply Brief.

Petitioner also thereafter filed and served a motion for leave to supplement the record on appeal and motion for leave to file an Amended Petition for Certiorari. She later filed and served a Motion for Leave of Court to Correct Typographical Error.

II.

Petitioner’s co-defendant, Sean Kammerer, was not called by Petitioner at the post-conviction relief hearing despite her allegation that her trial attorney provided ineffective assistance for failing to interview and call Kammerer as a defense witness at trial. Kammerer pled guilty to murder prior to Petitioner’s trial. In its Return to the Petition for Writ of Certiorari,

the State asserted that Petitioner failed to establish deficiency or prejudice in trial counsel's treatment of Kammerer because Kammerer was not presented as a witness at the PCR hearing. The State noted that "there is no showing that Petitioner ever attempted to secure Kammerer's presence." Return to Petition for Certiorari 14. Apparently in rebuttal, Petitioner moved to offer a supplemental appendix asserting Kammerer was listed on the May 21, 2012 roster of PCR cases, was without counsel, and was unavailable to be called as a witness. In her Reply to the State's Return to Petition for Writ of Certiorari, she argued that "[a]s the roster of cases set for the May 21, 2012, term of PCR [sic] court shows, Sean Kammerer was present in the very courtroom on the very day when Petitioner's P.C.R. was scheduled. (Supplemental Appendix page 1)." Reply to State's Return to Petition for Writ of Certiorari 17-18.

On December 27, Petitioner filed a "Motion for Leave to File Supplemental Appendix" with this court. It contains a four-page roster of PCR cases heard at the Orangeburg County Courthouse during the week of May 21, 2012. See Supplemental Appendix III 1-5. This Court granted Petitioner's motion to file a supplemental appendix in the absence of the State's response to the motion. The State intended to oppose the motion but accidentally miscalendered the date. The State respectfully moves to strike the supplemental appendix and any reference to it in Petitioner's Reply to the State's Return to Petition for Writ of Certiorari.

III.

The State submits the Supplemental Appendix III and references to it in Petitioner's Rely must be stricken for three reasons.

First, Petitioner claims Sean Kammerer was present in the very courtroom on the very day when Petitioner's PCR hearing was scheduled. Reply to State's Return to Petition for Writ of Certiorari 18. But the roster Petitioner filed contradicts her assertion. According to Petitioner's

document, Kammerer's hearing was scheduled for 9:30, on May 21, 2012. (Supplemental Appendix page 1 of 5)¹. Petitioner's PCR hearing was held at 9:30, May 24, 2012.

(Supplemental Appendix page 4 of 5) The proffered schedule proves the opposite of what Appellant claims it does. Moreover, Kammerer was represented by counsel at the time. See attached order appointing counsel filed March 6, 2009. It was not until an order filed on December 3, 2012, that this appointed counsel was relieved and new counsel appointed one day later on December 4, 2012. The break in representation did not occur until December 2012. Petitioner's PCR hearing took place on May 24, 2012.

Second, Rule 243, SCACR, provides that the Appendix shall contain the entire lower court record and the final order. Petitioner never presented the roster to the lower court at her evidentiary hearing to excuse her failure to call the witness.² See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal." Therefore, that matter cannot be properly included in the Appendix, and references to the document cannot be included in Petitioner's Reply to the State's Return to Petition for Writ of Certiorari. See South Carolina State Highway Dep't v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record."); Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) ("Under our appellate court rules, we may not consider any fact that does not appear in the record."); see also Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which

¹ Petitioner has not yet numbered the Supplemental Appendix pursuant to Rule 210(c), SCACR.

² The closest Petitioner comes is when PCR counsel attempts to bring in a hearsay conversation between Petitioner's mother and Sean Kammerer. See App. 87-88. At no time is the roster mentioned.

does not appear in the Record on Appeal.”) The post-conviction relief court never used this evidence in her ruling, and it is thus irrelevant.

Third, even if the roster did tend to prove what Petitioner claims it does, it does not prove that Sean Kammerer was unavailable at the time. Rule 804(a), SCRE, defines unavailability of a witness as a situation where the declarant “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means.” Further, “[a] declarant is not unavailable as a witness if . . . absence is due to the . . . wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.” Id.

Petitioner conceded in her reply brief that counsel could have requested a continuance for Sean Kammerer but chose to move forward. Reply Brief 18. She has further conceded that “Calling Sean Kammerer as a witness would have been merely cumulative. . . .” Id. Thus, Petitioner concedes she had the opportunity to call Kammerer and made a conscious decision not to. There is no indication in the record that Petitioner made the appropriate efforts to require Kammerer’s presence as a witness and the mere fact that Kammerer had a civil post-conviction relief case pending at the time, in and of itself, did not render him unavailable as a witness. As Kammerer’s absence was due to Petitioner, the he was not unavailable under Rule 804(a), SCRE. Thus, the court roster proffered to this Court is irrelevant.

Even assuming *arguendo* that Kammerer was unavailable under Rule 804, Petitioner still had a responsibility to proffer the testimony under Rule 103(a) (2), SCRE. Rule 804 only allows for **limited** hearsay exceptions to be included in evidence, specifically prior testimony by the same witness. See Rule 804(b) (1), SCRE.

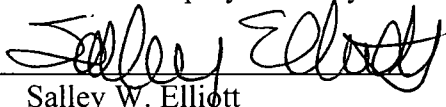
Petitioner's motion to supplement the record illustrates why South Carolina courts require the witness to be presented at the PCR hearing. State v. Glover, 318 S.C. 496, 458 S.E.2d 538 (1995) (If an applicant claims his counsel failed to call a witness, the witness must testify at the PCR hearing). If Petitioner had been sincere about Kammerer's unavailability, she would have proffered his prior testimony under Rule 804(b). Instead, she relies on vague excuses and speculation to prevent Kammerer from damaging her case. Further, the Petitioner's reason for failing to secure Kammerer as a witness is legally incorrect.³

WHEREFORE, the State respectfully asks this Court to strike Supplemental Appendix Volume III (containing the Roster of Cases from May 21, 2012 at the Orangeburg County Courthouse) from the record and any references to the Supplemental Appendix in Petitioner's Reply to State's Return to Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney-General

BY: 
Salley W. Elliott
S.C. Bar No: 1871

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 21, 2014

³ "PCR counsel discovered that [Kammerer] was present for appointment of counsel, and therefore unavailable." Reply to State's Return to Petition for Writ of Certiorari 18. Kammerer actually had a PCR evidentiary hearing on May 21, 2012, but it was continued. Kammerer eventually withdrew his PCR application.

STATE OF SOUTH CAROLINA
 COUNTY OF DORCHESTER
 Sean Eric Kammerer # 326986,
 Plaintiff(s),
 -vs-
 South Carolina State of,
 Defendant(s).

IN THE COURT OF COMMON PLEAS
 First JUDICIAL CIRCUIT
 CASE NO.: 2009CP1800203
 APPOINTMENT OF COUNSEL OR GAL
 (Select one.)

CERTIFIED COPY
 2009 MAR 6 AM 11:50
 ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case
- SVP case
- Minor Name Change
- Adoption
- Custody and/or Visitation
- Other: Post Convict Rel 500
- Juvenile
- Abuse and Neglect

It appears Sean Eric Kammerer # 326986, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained , Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other: .

Therefore, it is ordered that Barbara Strowd, hereby is appointed as (Select one.)

- counsel lead counsel (if capital PCR case) guardian ad litem
- for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered the, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
 March 4, 2009

Cheryl Graham
 Circuit Judge Clerk of Court

Plaintiff Attorney:

Sean Eric Kammerer	Barbara A. Strowd
Lee Correctional	Attorney at law
990 Wisacky Highway	306-B N. Gum Street
Bishopville, SC 29010	Summerville, SC 29483

Defendant Attorney:

Mary S Williams	
Assistant Attorney General	
P O Box 11549	
Columbia, SC 29211549	

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

4. The Dorchester County Clerk of Court shall appoint new counsel for Applicant.

AND IT IS SO ORDERED this 1st day of Nov., 2012.



CARMEN T. MULLEN
Presiding Judge
First Judicial Circuit

Beaufort, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
Sean Eric Kammerer # 326986,
Plaintiff(s),

-vs-
South Carolina State of,
Defendant(s).

FILED-RECORDED

2012 DEC -4 PM 2:14

IN THE COURT OF COMMON PLEAS
First JUDICIAL CIRCUIT
CASE NO.: 2009CP1800203
APPOINTMENT OF COUNSEL OR GAL
(Select one.)

ORDER
 AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas corpus
 SVP case
 Minor Name Change
 Juvenile
 Custody and/or Visitation
 Abuse and Neglect
 Other: Post Convict Rel 500

It appears Sean Eric Kammerer # 326986, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
 counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on:
 counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
 court appointed counsel has obtained as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
 Other: Barbara Strowd is relieved as counsel and the clerk of court is to appoint new counsel to the Applicant; See Order filed 12-3-2012

Therefore, it is ordered that **Scott McNeish** hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that , Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED
December 4, 2012


 Circuit Judge Clerk of Court

Plaintiff Attorney:

Scott McNeish	Sean Eric Kammerer # 326986,
125 Crosscreek Drive, Ste 106	Lee Correctional
Summerville, S.C. 29485	990 Wisacky Highway
	Bishopville, SC. 29010

Defendant Attorney:

Megan Elizabeth Harrigan	
PO Box 11549	
Columbia, SC 29211	

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CP20 (08/08)
SCCA/267 (03/07)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Diana S. Goodstein, Circuit Court Judge
Deandra G. Benajmin, Circuit Court Judge

Appellate Case No. 2012-212858

THE STATE,

Respondent,

vs.

TIFFANY ANN SANDERS,

Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Motion to Strike by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Thomas Goldstein & Dale Cobb, Esq.
Belk, Cobb, Infinger & Goldstein, P.A.
P.O. Box P.O. Box 71121
N. Charleston, S.C. 29415-1121

I further certify that all parties required by Rule to be served have been served.
This 21st day of January, 2014.



ANGELA BENNETT
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727