

The State of South Carolina  
In The Supreme Court

Appeal From Administrative Law Court  
Administrative Law Court Carolyn C. Matthews

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FEB 17 2015

Case No: 2013-002276

S.C. Supreme Court

Billy Lee Lisenby JR; #200273 ..... Petitioner

v.

South Carolina Department of Corrections ..... Respondent

Petition For A Writ of Certiorari

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## Certificate of Counsel

Petitioner certifies that the Petition For Rehearing was made.

## Questions Presented

1. Did the Court of Appeals err in holding that Respondents did not violate Petitioner by failing to note on the 19-29A Form that he had a mental health background and did not notify his mental health counselor?
2. Did the Court of Appeals err in holding the Respondents did not violate Petitioner's Right to be Free From Unreasonable Searches and Seizure by Fourth Amendment?
3. Did the Court of Appeals err in holding the Respondents did not violate Petitioner by not having his witnesses present on speakerphone or have them write a statement? Was his counsel substitute ineffective for not doing the same? Was he denied his right to call witnesses and no reason was documented?
4. Did the Court of Appeals err in holding the Respondents did not violate Petitioner in not viewing the video of his room being searched prior to Petitioner moving in, and not viewing the incident report that states on July 27, 2012 Sgt. Fowler found a note stating a knife was in Room #14?

## Statement OF The Case

Appellant was charged with 811: Possession of a Weapon after L.T. Lavigne alleged he found a knife in his room. On 11-5-12 he was found guilty after pleading not guilty by the D.H.U Turner. On Nov. 12<sup>th</sup>, 2012 he appealed due to actual innocence violation of due process, and ineffective assistance of counsel. His Step 1 was denied on 1-4-13 and his Step 2 was denied on 1-23-13.

Appellant appealed to the ALC on 3-11-13 and the case was assigned to Judge Matthews on 3-20-13, and she denied it on Oct. 4<sup>th</sup>, 2013

He now Appeals to the Honorable Court of Appeals.

## Argument #1

Appellant has a lengthy mental health background, in which he is being treated with meds. This was not indicated on his 19-29A form, and his mental health counselor was never notified. This is a violation of DP-22.14 section 3.3 which states:

<sup>a</sup> Note: If the inmate has a mental health issue noted on his/her MEDClass screen or is acting in such a manner that indicates a mental health concern, then a copy of the Incident Report must be forwarded to the mental health staff. This referral must be documented on the 19-29A. In these instances, a memorandum from the mental health care professional must be included as an attachment to SDC Form 19-29A, "Incident Report," attesting to the inmate's mental status and accountability for his/her actions." This was not done in this case.

## Argument #2

The Respondents violated Appellant's Right to be Free From Unreasonable Searches and seizure by Fourth Amendment. L.T. Lawrence Lavigne illegally conducted a shake down of Appellant's Room alone while he was in the holding cell. The incident Report support, this and he did not deny it at the hearing. L.T. Lavigne was alone when the allege knives were found, this is a violation of OP 22.19 of SDC Inmate Search Policy Section 8.1 which states:

"If the inmate is not present, then two (2) employees will be requested to complete the search (one to complete the search and the other to assist and to serve as a witness.) This is a major violation.

The Warden gave incorrect information on his response by stating it's the inmate's responsibility to check his room for contraband. In SMU it's the officer's responsibility. See OP 22.19 Section 8 Search Procedures For Inmates Living Area Section 8.3

"An inmate's living area will always be searched in the following instances. before inmate is moved to a special management housing unit (SMU), the SMU cell will be searched to ensure that it does not contain any unauthorized items; (4-4192)"

This is a major violation

## Argument #3 & 4 combined

Argument 3 & 4 contains similar issues so Appellant has consolidated them. Appellant asked his counsel substitute in writing and in person to call SGT. Fowler, MR. Childress, MR. Finch, and C/o Truthum as his witnesses. Prior to the conducting of the hearing counsel substitute ("CS") attempted to make reference to "allegedly" contacted the S.C. D.C. witness that were requested. However, according to S.C. D.C. policy OP 22.14 (8.2.4) the CS is required to "Interview relevant witnesses prior to the hearing, for those witnesses who will not be able to appear, obtain written statements that can be given to the Hearing Officer at the hearing." The DHU must interview any witness who is unavailable by spoken phrase during the hearing and the "answers of the witnesses must be recorded." OP 22.14 (15.5). Therefore, the alleged contact to the SCDC employee is uncorroborated hearsay testimony as neither witness was interviewed by the D.H.U. or his testimony recorded. He was denied his right to call his witnesses or have them write statements on his present. Note: MR. Childress, and C/o Truthum were approx. 25 from the D.H.U. hearing, they could've come in and testified. This violated OP 22.14 section 15.3 which states "If witnesses are denied by the Hearing Officer, the Hearing Officer must write his/her reasons for this denial on SCDC Form 1969, 'Disciplinary Report and Hearing Record,' in the space provided. If an employee has been called as a witness and has information that is relevant to the case, then he/she is obligated to provide said information."

Appellant moved in cell #14 in August 2012. On July 27, 2012 SGT. Fowler found a note stating a knife was in room #14. SGT. Fowler and C/o Bo Bo then conducted a shake-down of room #14 that was video recorded. [The incident report is part of the enclosed Record on Appeal.] They never checked the window and never had maintenance remove the metal cage from the window. The inmate that was housed in this room Christopher West has a long history of knife and weapon possession. If they had a tip a knife was in the room why didn't they take the metal cage off in July during the shake-down. Also note a person has access to room #14's window from the outside as well. Appellant asked the DHU to view the video of the July 27, 2012 shake-down but he refused. They put me in a room that they knew a knife was possibly in, and did not conduct a proper search before moving me in. SGT. Fowler would've testified to this.

Appellant was not permitted to adequately discredit the allegations against him where he was not allowed to reasonable confront and cross examine the witnesses. He requested witnesses to be present that would provide exculpatory evidence. To the best of Appellant's knowledge, the record does not reflect that anyone observed or witnessed his counsel substitute contact SGT. Fowler, MR. Childress, MR. Finch, or C/o Truthum. Therefore, the testimony of counsel substitute ("CS") unsubstantiated "hearsay evidence" and is not reliable in accord with due process set forth by Wolff v. McDonnell. The DHU was required to conduct the questioning of the employee witnesses via telephone (conference call) in the presence of the record and myself; the record is void of any substantial reason for the DHU's deviation from policy and procedure. OP 22.14 (15.3) (8.1), (8.2), (8.4), and (8.2) (6).

Lastly the D.H.U was required to state his reasons for not allowing the witnesses to be present during the hearing the SCDC 19-69 Form he did not do this. This further Offends DF-2214.

### Cases Requiring assistance.

Staff assistance must be provided "in good faith and in the best interests of the inmate". Courts have held that sometimes staff members are appointed as assistants pursuant to prison rules but then do little or nothing to help the prisoner, this denies due process.

Eng v. Loughlin 838 F.2d at 893

Grandison v. Cuyler 774 F.2d 593, 604 (3d Cir 1985)

Giano v. Sullivan, 709 F.Supp 1209, 1215 S.D.N.Y 1989)

Pino v. Dalsheim 605 F.Supp. 1305, 1315 (S.D.N.Y. 1985)

Ballo v. Idaho State Bd. of Correction, 595 F.Supp 1538, 1532 (D Idaho 1984)

Hendricks v. State of New York Dep't of Corr. Services, 165 A.D.2d 923, 560 N.Y.S.2d 534, 535 (N.Y. App. Div. 1990)

Nix v. Evatt, 850 F.Supp at 453



Conclusion

For the reasons stated, petitioner asks this Court to grant the petition for a Writ of Certiorari.

Dated: Feb 9<sup>th</sup> 2015

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LIBER CALL

SCDC

South Carolina Supreme Court

P.O. Box 11300

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