

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Xavier L. PERRY,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2014-000653 FEB 20 2015

S.C. SUPREME COURT

PETITIONER'S MOTION FOR

RELIEF OF APPELLATE COUNSEL

COMES NOW the above-named Petitioner, Xavier L. PERRY, who moving prose, submits this 'motion for Relief of Counsel'.

The Petitioner has appealed the PCR Court's decision by way of Petition for Writ of Certiorari. Petitioner was initially appointed appellate counsel, Carmen V. Ganjehsavi who filed the Petition. Subsequently, Appellate Defender, Laura R. Baer was appointed as Petitioner's appellate counsel.

Petitioner wrote to his newly appointed counsel, Laura Baer, requesting that she amend the Petition for Writ of Certiorari and to Review an additional case that the Petitioner wanted to use as an authority. Ms. Baer refused to amend Petition and Review the additional case. (see Attachment ONE; Correspondence from Laura Baer dated January 20th, 2015.

The Petition for Writ of Certiorari itself is what this Court will review. Therefore, its contents are of obvious importance and a lapse in how arguments are presented; failure to reference the pertinent portions of record; and the failure to set forth argument in general could all lead to the appealing party breaching the interests of justice by inadvertently impeding their own relief from constitutional violations.

Petitioner understands that appellate counsel has no constitutional duty to raise every non-frivolous issue requested by defendant. Although, Petitioner is aware that if this Honorable Court denies the Petition for Writ of Certiorari, then Petitioner must seek relief in the Federal Court. Petitioner is also aware that before a Federal Court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in the state court; in other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a Federal court in habeas petition. (see *O'Sullivan v. Boerckel*, 119 S.Ct. 1728).

Thus, Ms. Baer's refusal to amend Petition for Writ of Certiorari; review additional cases; and generally litigate Petitioner's case in an objective manner impedes the appellate process; barring both the Petitioner from 'one full bite of the apple' and this Court from a fair opportunity to review and act on any and all claims of Petitioner.

WHEREFORE, Petitioner humbly pray that this Honorable Court grant this motion; Relieving Petitioner of counsel and allowing him to proceed pro se.

Respectfully Submitted By:

s. / Xavier L. Perry

XAVIER L. PERRY

L.C.I. / Richland - C#123

990 Wisacky Hwy.

Bishopville, S.C. 29010

Executed at Bishopville, South Carolina
on this 17th day of February, 2015.

Attachment One



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 20, 2015

Mr. Xavier L. Perry, #346891
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010


Re: Your case

Dear Mr. Perry:

Thank you for your letters received by this office on December 16, 2014, January 12, 2015, and January 20, 2015 requesting amendments to the Petition for Certiorari and review of an additional case. To clarify as to the posture of your case, Ms. Ganjehsani filed the Petition for Certiorari on November 10, 2014. The State has not yet filed its Return, and obtained a first extension to January 29, 2015. They may file additional extensions. Once the Return is filed, the Supreme Court will either deny certiorari (ending your case) or grant certiorari.

If certiorari is granted, I will file a full brief with the Court on the issue raised in the petition and research the issue fully, including a review of the case law cited in your letters. However, I find no need to amend the Petition filed. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983) (holding appellate counsel does not have a constitutional duty to raise every non-frivolous issue requested by defendant).

If you have any other questions, please do not hesitate to contact our office.

Sincerely,

Laura R. Baer
Appellate Defender

LRB

CERTIFICATE OF SERVICE

It is hereby certified that the undersigned caused a copy of the foregoing 'Motions For Relief of Counsel' to be served upon the Supreme Court of South Carolina, this 17th day of February, 2015, via U.S. Postal Services, addressed as follows:

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

cc: South Carolina Attorney General's Office
c/o Suzanne White
P.O. Box 11549
Columbia, S.C. 29211

S.1 Xavier L. Perry
Xavier L. Perry
L.C.I. / Rich - C#123
990 Wiscacky Hwy.
Bishopville, S.C. 29010

February 17th, 2015
Bishopville, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Xavier L. PERRY,

Appellate Case No. 2014-000653

Petitioner,

PETITIONER'S REPLY TO RESPONDENT'S

v.

'RETURN TO PETITION FOR WRIT OF

State of South Carolina,

CERTIORARI

Respondent.

COMES NOW the above-named Petitioner, Xavier L. PERRY, who moving pro se, submits this 'REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI' pursuant Rule 243(h), SCACR.

The Respondent's 'Return to Petition for Writ of Certiorari' was served upon Carmen V. Ganjehsani, Esquire on January 29th, 2015. Carmen V. Ganjehsani is no longer appellate counsel for Petitioner. Laura R. Baer has been appointed as appellate counsel for Petitioner.

Petitioner has submitted a 'Motion for Relief of Counsel' in conjunction with this Reply. Thus, with leave from this Court, the Petitioner moves pro se.

Petitioner received a copy of Respondent's 'Return to Petition for Writ of Certiorari' on February 5th, 2015. In accordance to 243(h), SCACR, the Petitioner's 'Reply' to Respondent's 'Return' would be due by February 15th, 2015. February 15th, 2015 fell on a Sunday and the following day of

February 16th, 2015 was a holiday. The Petitioner has submitted this Reply on February 17th, 2015 via the U.S. Postal Service. With the days of February 7th, 8th, 14th, 15th, and 16th being weekend days and a holiday; the Petitioner is in compliance with Rule 243(h) and the time it allots for this filing.

PROCEDURAL HISTORY

The Petitioner adopts the procedural history stated within the Petition For Writ of Certiorari.

ARGUMENT IN REPLY TO RESPONDENT'S RETURN

In the Respondent's 'Return To Petition For Writ of Certiorari', the Respondent's sole argument is that "Petitioner failed to meet his burden of proof establishing that an actual conflict of interest existed when Counsel represented both Petitioner and his co-defendant at a joint plea."

However, the testimonies given at the PCR Evidentiary Hearing and the Record on its face; which includes the Record that has developed up to this juncture, leaves the Respondent's argument without merit. The foundation of the argument that the Respondent presents is built on error. Thus, their faulty foundation collapses under the weight of the Record and the Respondent's argument fails utterly. The following arguments are in support of the foregoing.

ARGUMENT ONE

Plea counsel owed a duty to Petitioner's co-defendant (MR. ANDERSON) to assert to the Solicitor that MR. ANDERSON was less culpable in his

limited involvement with the robberies. Mr. Anderson had taken the position that he was the driver in relation to the robberies and had not known before hand that the Petitioner was going to commit the robberies. Plea counsel had asserted the same to Solicitor to mitigate Anderson's culpability and thus magnifying the culpability of the Petitioner. This is reflected through the record of the Guilty Plea Transcript at pg. 28; lines 12-22. The Petitioner testified to this at the PCR hearing. (see PCR hearing transcript at pg. 14; lines 7-11; see 'Exhibit A', Investigative Report; see also Edgemon v. State, 455 S.E.2d 500. (Supreme Court of South Carolina held that an actual conflict of interest existed where counsel convinced solicitor that Petitioner's co-defendants were less culpable.)).

ARGUMENT TWO

The Respondent asserts in their 'Returns' that a conflict of interest was precluded by the fact that Petitioner did not deny any of the crimes or offer any defense at the plea hearing. However, see 'Affidavit of Xavier Perry' which reflects the fact that Petitioner felt that he had no choice but to plead guilty. 'Exhibit A' reflects that Petitioner did not involve himself in the charged offenses until after his contact with plea counsel (Mr. Cheek) and Mr. Cheek's advice as to the fact that Mr. Anderson would testify against him if he went to trial.

Respondent's also assert the fact that counsel testified that there was no conflict and at the time of his representation of both Petitioner and Mr. Anderson because neither one denied involvement or pointed the finger at the other party. However, the Petitioner asserts here that he ~~had~~ ^{XP} felt that a denial of involvement would be futile because Mr. Anderson would testify that he was involved in effort to help himself.

Petitioner also asserts here that it was by Mr. Cheek's direction and advice that he or Mr. Anderson did not attest to their different positions in their involvement or 'point the finger at one another', as stated by Respondents and plea counsel. The record reflects this fact at pg 34 ; lines 20-21 and pg. 29 ; lines 3-7 of the PCR Hearing Transcript.

ARGUMENT THREE

The Respondent asserts that a conflict of interest was precluded in plea counsel's simultaneous representation of Petitioner and Mr. Anderson because of the fact that at the plea hearing both defendants advised the court that they were satisfied with their counsel's representation and did not address the court in reference to counsel's joint representation.

However, the facts of the Petitioner's case do not allow the Petitioner's colloquy with the Court to negate the fact that an actual conflict existed in plea counsel's joint representation of Petitioner and Mr. Anderson. In fact, the Petitioner's circumstances mirror the circumstances of the defendants in the cited authorities whom were all granted relief by either this Court or another Superior Court. (see Lomax v. State, 665 S.E.2d 164; Thomas v. State, 551 S.E.2d 254; and Sanjer v. Brough, 358 F.2d 70.

ARGUMENT FOUR

Though prejudice is presumed where Petitioner has demonstrated that his counsel actively represented conflicting interests in an actual conflict. Petitioner asserts the fact that he was prejudiced by the testimony that his co-defendant gave at the plea hearing. Mr. Anderson's testimony

enraged some of the victims who were present at the plea and in consequence they decided to address the court. In their address the victims requested that Mr. Anderson and Petitioner, be sentenced consecutively with maximum penalties.

Subsequently, the Petitioner was given consecutive and 'max' sentencing as a result of the victims' request for such; which was provoked by Mr. Anderson's testimony. Prior to Mr. Anderson's testimony, the state had recommended concurrent sentencing and had assured Petitioner's counsel that the victims showed no interest in addressing the court if Petitioner and Anderson were to plead guilty.

Petitioner suffered the consequences of the victim's requests for max and consecutive sentencing which was induced by Mr. Anderson's testimony. Had Mr. Anderson and Petitioner not been jointly represented, and thus brought by Mr. Cheek to plead guilty simultaneously, there is a strong probability that the outcome of the plea would have been different for Petitioner because the court would have likely adhered to the state's recommendations of concurrent sentencing and the victims would not have addressed the court as solicitor assured. Plea counsel himself attested to the foregoing facts at PCR hearing. (see PCR hearing transcript at pgs. 31; lines 22 - pg. 32; lines 1-3. Also at pg. 32; lines 19-25.)

CONCLUSION

As set forth herein, the Petitioner has enumerated the portions of the Record that satisfied the Petitioner's burden of proof at the PCR Evidentiary Hearing. On their face, the circumstantial facts of this case validate Petitioner's claim. However, the Petitioner has referenced the testimony at the PCR hearing and the pertinent documentations that have probative value and are contrary to the Respondent's assertions set forth within the Respondent's 'Returns To Petition For writ of Certiorari'.

In light of the Petitioner's showing herein, the Respondent's argument that "the Petitioner did not meet his burden of proof at the PCR hearing" is a fallacy and fails.

Thus, Petitioner humbly prays that this Honorable Court Reverse the PCR Court's decision and Remand for a New Trial.

Respectfully Submitted by.

S.1 Xavier H. Perry

Xavier H. Perry

K.C.I. / Richland C#123

990 Wisacky Hwy.

Bishopville, S.C. 29010

February 16th, 2015

Bishopville, S.C.

AFFIDAVIT OF XAVIER L. PERRY

I, Xavier L. Perry, affirms upon penalties of perjury per. 28 U.S.C. § 1746 that the following statements are factual and true to the best of my knowledge; and that I have not been threatened into, coerced into, or promised anything to give the following statements. Thus, I state the following:

In March of 2011 I was charged with several counts of armed robbery. James A. Cheek, Esquire represented both my co-defendant, Chadwick Anderson and myself. During the pretrial stages of our case, Mr. Cheek informed me that he had been to speak with Mr. Anderson. I was unaware at this time that Mr. Cheek was representing both Mr. Anderson and I. I only thought that Mr. Cheek had been to speak with Mr. Anderson because he had been charged in related offenses.

Mr. Cheek advised me that he had learned from his speaking with Mr. Anderson that he would testify against me if I chose to go to trial on my armed robbery charges. Mr. Cheek advised me that if I were to go to trial, Mr. Anderson would surely testify against me. Therefore, I felt that I had no choice but to plead guilty to all the offenses, including ones that I had not committed because I feared the prospect of proceeding to trial and trying to defend myself against Mr. Anderson who was going to testify against me in effort to get out of the trouble he was in. I felt going to trial would be futile under such circumstances and the advice of Mr. Cheek.

Therefore, subsequently, I plead guilty to all charges, including

offenses I did not commit. I didn't refute any of the charges because of the previous stated facts and prior to the guilty plea hearing, Mr. Cheek directed me and Mr. Anderson not to 'point the finger at one another'. Thus, I followed the advice and directions of my counsel.

I affirm that the foregoing is factual and true.

S.1 Xavier L. Peerr
Xavier L. Peerr
H.C.I. / Rich-C#123
990 Wiscacky Hwy
Bishopville, S.C. 29010

Executed at Bishopville, South Carolina
on this 16th day of February, 2015.

CERTIFICATE OF SERVICE

It Is Hereby Certified that the undersigned caused a copy of the foregoing 'Reply To Respondent's Return To Petition For Writ of Certiorari' to be served upon the Supreme Court of South Carolina, this 17th day of February, 2015, via U.S. Postal Service, addressed as follows:

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

RECEIVED
FEB 20 2015
S.C. SUPREME COURT

cc: South Carolina Attorney General's Office
c/o Suzanne White
P.O. Box 11549
Columbia, S.C. 29211

s. / Xavier Z. Pugh
Xavier L. PERRY

February 17th, 2015
Bishopville, South Carolina

Xavier L. Perry #341891

H.C.I. / Richard - C# 123

990 Nisackly Hwy.

Bishopville, S.C. 29010

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

RECEIVED

FEB 18 2015

LEE C MAIL ROOM

