

Frederick Harris, #267210
Perry C.I. / #4B-120
430 Oaklawn Road
Pelzer, SC 29669

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MAY 11 2012

S.C. SUPREME COURT

May 7, 2012

S.C. Supreme Court
Daniel E. Shearouse
Clerk of Court
Post Office Box 11330
Columbia, SC 29211

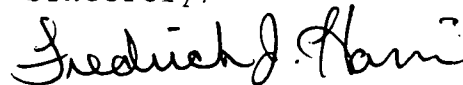
Re: Filing Pro Se Response to Johnson Petition

Dear Honorable Shearouse,

Please find enclosed one (1) copy of my pro se response to the Johnson petition filed by appellate counsel, Mr. Pachak.

Please clock-stamp and file along with his petition for the Court's review and consideration. Thanking you in advance.

Sincerely,



Frederick J. Harris

Enclosure: 2

cc: file

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MAY 11 2012

STATE OF SOUTH CAROLINA

In The Supreme Court

S.O. SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. Edward Welmaker, Circuit Court Judge

Frederick J. Harris, Petitioner,

v.

State of South Carolina, Respondent.

PRO SE RESPONSE TO JOHNSON
PETITION FOR WRIT OF CERTIORARI

OTHER COUNSEL OF RECORD:

Robert M. Pachak
SCCID - Appellate Defense
Post Office Box 11589
Columbia, SC 29211
(803) 734-1343

Frederick J. Harris, #267210
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STATEMENT OF ISSUES

Did Petitioner's trial counsel err in failing to challenge and/or object to unsigned Return, incident to search warrant; thereby failing to move also for suppression of evidence obtained therefrom?

Did PCR Court err in failing to find that Petitioner's trial counsel rendered ineffective assistance by failing to challenge and/or object to unsigned Return, incident to search warrant; thereby failing to move also to suppress evidence obtained from execution of the search?

Did PCR Court err in conducting evidentiary hearing for second PCR without first attempting reconstruction hearing to recover and/or compensate for missing record of Petitioner's first PCR?

STATEMENT OF THE CASE

Petitioner was convicted of first degree burglary, two counts armed robbery, and conspiracy during a jury trial held before the Honorable John W. Kittredge on December 2-3, 2002 in Greenville County. Thereafter, Judge Kittredge sentenced Petitioner to twenty-seven (27) years. Petitioner was represented by Andrew R. Mackenzie.

Counsel for Petitioner timely filed notice to appeal the convictions; the appeal was subsequently dismissed by the SC Court of Appeals, March 30, 2004, pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Harris, Op.No. 2004-UP-224.

Petitioner filed an application for post-conviction relief (PCR), September 10, 2004. An evidentiary hearing was held, April 8, 2005, before the Honorable Larry R. Patterson. Petitioner was represented by Caroline Horlbeck. Judge Patterson denied and dismissed the application by order dated, May 17, 2005. There was no appeal.

Petitioner thereafter filed the current PCR application, August 17, 2010. An evidentiary hearing was held, May 12, 2011, before the Honorable G. Edward Wellmaker. Petitioner was present and represented by Bradd W. Bunce. Respondent was represented by Karen C. Ratigan, Assistant Attorney General. There was no testimony taken. Respondent consented to a belated appeal of the denial of Petitioner's first PCR action.

On June 13, 2011, Judge Wellmaker issued an order of dismissal but granted Petitioner a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Robert M. Pachak, of the South Carolina Commission on Indigent Defense (SCCID)-Appellate Defense, was appointed to represent Petitioner.

Thereafter, Mr. Pachak filed a Johnson petition for writ of certiorari [fn.1], wherein he raised one (1) arguable issue. Moreover, Petitioner filed a motion, pro se, requesting to supplement the record because, according to appellate counsel,

[fn.1] Johnson v. State, 364 S.E.2d 201 (1988)

Mr. Pachak, the transcript from Petitioner's first PCR was not available. Yet, in his Motion to be Relieved as Counsel, Mr. Pachak claimed he had reviewed the allegedly missing transcript. Along with the Motion to Supplement, Petitioner also filed Motion for Extension of Time to file any pro se documents, both of which, were denied by Chief Justice, Jean H. Toal. The SC Supreme Court's order denying Petitioner's motions were filed April 18, 2012. Petitioner received notification of the denial order April 23, 2012.

Therefore, notwithstanding appellate counsel's Johnson petition, Petitioner hereby presents this pro se, petition, infra wherein he raises the following issues:

ARGUMENT I

TRIAL COUNSEL WAS INEFFECTIVE IN THAT HE FAILED TO CHALLENGE AND/OR OBJECT TO IMPROPERLY VALIDATED RETURN, INCIDENT TO SEARCH WARRANT; COUNSEL FURTHER FAILED TO MOVE FOR SUPPRESSION OF EVIDENCE OBTAINED THEREFROM.

Trial counsel "failed to render reasonably effective assistance under prevailing professional norms," which thereby prejudiced Petitioner and the outcome of his trial. Strickland v. Washington, 104 S.Ct. 2052 (1984)

Prior to trial, Petitioner requested that counsel challenge the search warrant used and move to have evidence obtained therefrom, suppressed (Tr. p. 12, lns. 20-24), because the search warrant return was improperly executed without seal & oath, pursuant to statute and precedent, and therefore, [it was] defective. See, State v. Freeman, 459 S.E.2d 867, "Each defendant against whom seized evidence is offered has standing to object to the validity of the search where the search warrant is defective under 17-13-140." See also, SC Code of Law, § 17-13-140, which reads in pertinent part;

"Any warrant issued hereunder shall be executed and **return made** only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the **return is to be made...**" (emphasis added)

Of the instant case, the judicial officer failed to have his signature notarized upon the return to guarantee the veracity and integrity of the search return inventory; the judge acts as the procedural overseer and protector of one's Fourth Amendment Right. By having the judge's time-stamped, sworn signature, there would be verification that the search -- and return for property seized -- did in fact occur within the ten days of issuance as required by law.

Without the notarization, it cannot be truly ascertained when the search and return was executed. It is all too easy these days for law enforcement to "pencil whip" documents which hold

them accountable to proper procedure, thus, the primary reason, inter alia, Petitioner required counsel to move for suppression of the evidence, and by not doing so, the evidence was available against him, where it might not have been otherwise, had counsel challenged the search warrant return and/or moved to have the evidence suppressed. There is a reasonable probability the outcome of Petitioner's trial would have been different, therefore, satisfying the requisite prejudice of Strickland, supra. See also, U.S. Constitution, Amendment(s) IV & VI and S.C. Constitution, Article I, §§ 10 & 14.

ARGUMENT II

PCR COURT ERRED IN FAILING TO FIND THAT PETITIONER'S TRIAL COUNSEL RENDERED REASONABLY DEFICIENT PERFORMANCE THEREBY FAILING TO CHALLENGE SEARCH WARRANT RETURN AND FURTHER FAILED TO MOVE TO SUPPRESS EVIDENCE OBTAINED THEREFROM.

As noted above, Petitioner presented evidence demonstrating counsel's deficient performance. However, in spite of that evidence, the PCR Court ruled that counsel's performance met the standard of reasonableness by merely asserting that counsel was credible and that Petitioner was not credible.

Though it may be within the discretion of a PCR judge to deny Petitioner post-conviction relief based simply upon the existence of any evidence which may allegedly support his ruling, it should be considered an abuse of discretion when he fails to weigh that evidence against evidence offered by Petitioner and/or supported by the record. By comparing the evidentiary weight, he thereby, subjects all evidence to the "preponderance of the evidence" standard as required by South Carolina Rules of Civil Procedure, Rule 71.1.

However, the PCR judge commits error by simply ignoring the evidence offered by Petitioner upon the grounds that he supposedly lacks credibility, when the evidence offered is not a matter of Petitioner's credibility, but instead, a matter of historical and procedural fact, such as the trial judge failing to properly validate an inventory return of the search warrant,

which is clearly shown within Petitioner's record.

The PCR judge erred in two ways; first, he failed to recognize and acknowledge trial counsel's deficiency performance and the resulting prejudice and unfair trial. And second, he failed to recognize and acknowledge that the State failed to fulfill its ministerial requirement of returning the warrant to the issuing judge within ten day period as prescribed by law. This fact precipitates the assertion that the []signed, unsworn copy of the return was never properly executed or completed and was, therefore, legally defective, violating Petitioner's right to due process of law. See, State v. McKnight, 352 S.E.2d 471; U.S. Constitution, Amendment XIV, § 1 and S.C. Constitution Article I, §§ 3 & 10.

ARGUMENT III

PCR COURT COMMITTED ERROR^{II} BY CONDUCTING EVIDENTIARY HEARING OF SECOND PCR WITHOUT FIRST ATTEMPTING RECONSTRUCTION HEARING TO RECOVER AND/OR COMPENSATE FOR MISSING RECORD OF PETITIONER'S FIRST PCR.

First and foremost, Petitioner respectfully points out that in its Order of Dismissal and Grant of Belated Appeal, the PCR Court made the assertion that "[t]his Court has had the opportunity to review the record..." (See, Order of Dismissal Granting Belated Appeal, p. 3, ¶ 1) The Court's assertion simply cannot be true. Because, according to appellate counsel, Mr. Pachak, the transcript which constitutes "the record" was allegedly unavailable. Petitioner was never made aware this fact until he read Mr. Pachak's Johnson petition for writ of certiorari. Wherein, at one point, appellate counsel states that the "transcript was unavailable" (See, Johnson petition for writ of certiorari, p. 4, n.1). Then, within his own petition to be relieved, he too, declared that he had "reviewed the transcript" (See, Johnson petition for writ of certiorari, p. 7, pt. 2).

Second, this apparent contradiction is precisely the reason Petitioner filed the pro se motion requesting to supplement the

record. The plain and simple fact of the matter is this; both statements -- appellate counsel's and the Court's -- cannot be true. Either there is a transcript of the first PCR or there is not. If there is, the PCR Court, as well as appellate counsel, commits "fraud upon the court" through "sham legal process" by conspiring to purposely conceal the record of a legal proceeding from Petitioner's first PCR, for some reason or another. This cannot be allowed or tolerated.

Third, if the record is truly unavailable, and/or missing, then the PCR Court further committed error in proceeding with the evidentiary hearing of second PCR without first attempting to reconstruct the record of the first PCR. The apparent falsehood presented herein is reprehensible and certainly indicates violation of Petitioner's right to due process and equal protection of law. In a very recent case, State v. Travis Anthony Ladson (cite unavailable), conviction and sentence were reversed because of the complete absence of a transcript. However, of the instant case, the State made assurance that the record could be easily reconstructed. Yet, no reconstruction hearing was ever held and Petitioner's Motion to Supplement the Record was denied by this Court. U.S. Const., Amend. XIV, § 1 and S.C. Const., Art. I, § 3.

CONCLUSION

Based upon the foregoing arguments, showing of fact, and conclusion of law presented herein, the petition for writ of certiorari should be granted and/or the entire case remanded back to the lower court for further proceedings.

Respectfully submitted,

Date: 5/06/2012
Greenville County

Frederick J. Harris
Frederick Harris, #267210
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Pelzer, SC 29669

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STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
G. Edward Welmaker, Circuit Court Judge

Frederick J. Harris, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I hereby certify, that on this day, I did file/serve the foregoing document(s); Pro Se Response to Johnson Petition for Writ of Certiorari, upon the the individuals listed below by placing copy of the same into the U.S. Mail, postage prepaid, for delivery to their last known address as follows:

S.C. Supreme Court
Daniel E. Shearouse
Clerk of Court
Post Office Box 11330
Columbia, SC 29211

Date: 3/07/2012
Greenville County

Frederick J. Harris
Frederick Harris, #267210
Perry C.I. / Q4B-120
430 Oaklawn Road
Pelzer, SC 29669

SWORN AND SUBSCRIBED TO before me, this

7th day of May, 2012

Ann M. Mutantley

Notary Public for South Carolina

My Commission Expires: December 7, 2016

County of GREENVILLE

01-156752

SEARCH WARRANT

Date 11-09-01

Officer M/O T. J. Convioline
ES6 X568

=====

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

AFFIDAVIT

Personally appeared before me, one MASTER DEPUTY T.J. CONSIDINE #568 ESO who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

LONG GUNS, MONEY, DVD PLAYER

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

100 CRESTWOOD FOREST DRIVE APARTMENT 202

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

AFFIANT HAS WRITTEN STATEMENTS FROM SUSPECTS INVOLVED IN A HOME INVASION THAT THE PROPERTY SOUGHT IS CONTAINED IN THIS APARTMENT

Sworn to and Subscribed before me this 9 day of Nov., 2001. [Signature] (L.S.) Signature of Judge

M/O T.J. Consider #568 ESO Affiant Address 4 MCGEE STREET Greenville SC

COUNTY OF GREENVILLE

SEARCH WARRANT

Section 17-13-160
March 15, 1978

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF GREENVILLE COUNTY

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

100 CRESTWOOD FOREST DRIVE APARTMENT NUMBER 202

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

THE PROPERTY IS A VINYL SIDED MULTI FAMILY APARTMENT
HOMES LOCATED AT 100 CRESTWOOD FOREST DR. AND APARTMENT
202 IS DESIGNATED AS SUCH BY THE NUMBERS 202 IN BUILDING
NUMBER 2

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

JUDGE KEATON AND OCCUPANTS OF LISTED ADDRESS

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Pr C
Greenville, S.C.
Nov. 9, 1978

[Signature] (L.S.)
Signature of Judge

RETURN

I received the attached Search Warrant NOVEMBER 09, 2001, and have executed it as follows:

On NOVEMBER 09, 2001 at 0435 AM o'clock A M, I searched:

(the person) described in the warrant and (the premises)

I left a copy of the warrant with Billy Cox (OCCUPANTS)

Name of person searched or "at the place of search" with.

Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

- T.J.C.
- 1) REM WINCHESTER 1200 SERIAL # 144066 PISTOL GRIP BLACK
 - 2) BLACK DUFFLE BAG WHICH #1 FOUND IN
 - 3) STEVENS ARMS SAVAGE Co. MODEL 940A 20 GAUGE NO SN VISIBLE
 - 4) ONE LIVE 20 GAUGE DOVE SHOT FOUND IN #3
 - 5) BLACK PLASTIC BAG WHICH # 3+4 FOUND IN
 - 6) ONE PLASTIC BAG OF MARIJUANA

This inventory was made in the presence of Billy Cox OCCUPANT, SGT ROGERWAY
AND DEPUTY WEINER

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____
day of _____, 19_____

(L.S.)
Signature of Judge

M/D T.J. Conscience #366 ETC
(Signature of Officer Executing Warrant)