

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JAN -9 2017

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No.: 2016-000823

James LivingstonPetitioner

v.

State of South Carolina.....Respondent

MOTION TO HOLD APPEAL IN ABEYANCE AND
MOTION TO REMAND FOR RECONSTRUCTION
OF POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's post-conviction relief hearing originally before the Honorable Edgar W. Dickson held on August 16, 2013. While this motion is pending, Petitioner asks this Court to hold the timelines for filing his appendix and petition for certiorari in abeyance.

In support of his motion, Petitioner would present the following:

The undersigned represents Petitioner in his appeal before this Court. The transcript from Petitioner's Post-Conviction Relief hearing could not be produced or ascertained by the Court Reporter during the normal course of the appeal process. (See letter from Harriet Bennett dated

August 12, 2016, filed with this court August 22, 2016)

There is a transcript which was not ordered by Petitioner's attorney but ordered by Petitioner or someone on his behalf. Since the transcript was not ordered in the normal course of this appeal and since it is not now known whether the entire transcript was requested, Petitioner requests that a reconstruction hearing be held to determine if the transcript previously produced is an accurate and full transcription of the Post Conviction Relief hearing. Petitioner further requests that the court at the reconstruction hearing be supplied with the audio discs of the hearing in order to make a determination of whether it is a full and accurate transcription of the hearing.

In order to allow for meaningful appellate review, the record must be reconstructed to determine the completeness and accuracy of the privately ordered transcript..

Procedural History

The Petitioner was indicted in Lexington County for Trafficking in Cocaine (2008-GS-32-2647) and two counts of Distribution of Cocaine Base 3rd or Subsequent Offense (2006-GS-32-0170 and 172) On April 13, 2009, the Petitioner pled guilty before the Honorable J. C. Nicholson to both counts of Distribution of Cocaine Base 3rd og Subsequent Offense and to the lesser offense of Distribution of Cocaine 3rd or Subsequent Offense. Petitioner was represented by Joshua Kendrick He was sentenced to three concurrent terms of eighteen years each. Petitioner was also sentenced by the Honorable Knox McMahon on May 29, 2009 on a probationary violation revoked his probation to run concurrently to the other charges. Petitioner appeared without counsel at the probation violation.

Petitioner filed an application for Post-Conviction Relief in October, 2009. The State's Return was filed in March, 2010. Petitioner filed an amended application for PCR in May, 2011. An evidentiary hearing was held before the Honorable Edgar W. Dickson on August 16, 2013. Petitioner was represented by Robert W. Mills. Respondent was represented by Mary Williams of the Office of the Attorney General. Following the evidentiary hearing, an Order of Dismissal was filed on May 19, 2015. Petitioner filed a Motion for Rehearing or to Alter/Amend the Order of Dismissal, a Motion for Relief from Judgment and a Motion for a New Trial on or about June 12, 2015. The State's Returns to these motions were filed on or about February 3, 2016. An order denying the motions was signed on or about March 9, 2016. Petitioner's counsel received written notice of entry of the final order on March 23, 2016. A notice of appeal was filed on or about April 20, 2016. The undersigned first requested the transcript from the August 16, 2013 hearing on June 8 2016..

A remand and subsequent reconstruction attempt would ensure that this Court can be provided the most complete and accurate record can be obtained prior to undertaking appellate review of the issues raised in this case.

Argument

When a transcript has been lost or destroyed, the Court may remand to have the record reconstructed so as to allow for meaningful appellate review. Whitehead v. State. 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott. 251 S.C. 329, 162 S.E.2d 276 (1968); Koon v. State. 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); Dolive v. J.E.E. Developers. Inc.. 308 S.C. 380,

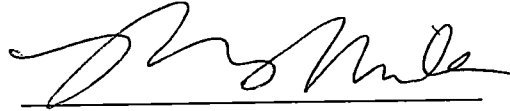
383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson. 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

Petitioner respectfully requests an order for the remand of this matter and subsequent reconstruction of the entirety of Petitioner's PCR hearing in order to perfect the certiorari appeal in this case..In the present case, there is a transcript which was not ordered by Petitioner's attorney but ordered by Petitioner or someone on his behalf. Since the transcript was not ordered in the normal course of this appeal and since it is not now known whether the entire transcript was requested, Petitioner requests that a reconstruction hearing be held to determine if the transcript previously produced is an accurate and full transcription of the Post Conviction Relief hearing or if it is incomplete. Furthermore, a reconstruction hearing is necessary to determine if the exhibits referenced in the privately obtained transcript are fully available.

While this motion is pending, Petitioner asks this Court to hold the timelines for filing his petition for certiorari and appendix in abeyance. Undersigned counsel has spoken to Johanna Valenzuela with the South Carolina Office of the Attorney General who consents to holding the filing of the petition for certiorari and appendix in abeyance during the pendency of this motion.

WHEREFORE, in order to allow for meaningful appellate review, Petitioner respectfully requests that this Court hold Petitioner's appeal in abeyance and remand his case to the Lexington County Court of Common Pleas for reconstruction of the PCR hearing and to determine if the privately retained transcript is an accurate and complete transcript while reviewing the audio files and the exhibits.. Petitioner also requests that this Court hold the timelines for filing the appendix and petition for certiorari in abeyance during the pendency of this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert W. Mills", written over a horizontal line.

Robert W. Mills
1728 Main Street
Columbia, SC29201
(803)252-9648
Attorney for Petitioner

Columbia, SC
January 9, 2017

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PROOF OF SERVICE

I certify that I have served the MOTION TO HOLD APPEAL IN ABEYANCE AND MOTION TO REMAND FOR RECONSTRUCTION OF POST-CONVICTION RELIEF HEARING on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on January 9, 2017 addressed to the attorney of record, Johanna Valenzuela, Office of the Attorney General, P.O. Bo 11549, Columbia, South Carolina 29211-1549.

January 9, 2017



Robert W. Mills
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