STAEE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Ocenee County

Honorable Jecelyn J. Newman, Circuit Court Judge

JAMES R. FRADY, APPELLANT,

V.

STATE OF SOUTH CAROILNA, RESPONDANTS.

APPELLATE CASE NO. 2018-001817

APPENDIX

James R. Frady
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina 29669

James Randolph Frady #317328
Perry Correctional Institution
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Pelzer, South Carolina 29669

Re: Appellate Case No. 2018-001817

Attn:

Enclosed please find a copy of a pro-se Memorandum to Support Johnson Petition filed July 29th, 2019, to filed in this action i.e., Appellate Case number 2019-001817.

Respectfully submiited

James R. Frady #317328

CC:

South Carolina Supreme Court

South Carolina Attorney General Office

South Carolina Appellate Defense Office

STATE OF SOUTH CAROLINA

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PRO-SE MEMORANDUM TO SUPPORT JOHNSON PETITION FOR WRIT OF CERTIORARI

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29211

Attorney of Appellant

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STATEMENT OF THE CASE

Appellant was indicted by an Oconee County grand jury in December 2004 for arson in the second degree, burglary in the first degree, grand larceny, two counts of murder, and possession of a weapon during the commission of a violent crime. App. 974-985. He proceeded to trial before the Honorable Perry M. Buckner and a jury on August 29, 2006. Donald Allen and C. Elizabeth Waldrep represented Appellant, and Mindy Hervey and David Wagner served as the assistant solicitors.

After a three day trial, the jury found Appellant guilty as indicted. App. 666 ll. 5-25. Judge Buckner sentenced him top a life sentence on each of the murder charges, twenty-five years on the arson charge, five years on the grand larceny charge five years on the possession of a weapon charge, and thirty years on the burglary charge, all concurrent. App. 671 l. 17-App. 672 l. 19.

Appellant's conviction were affirmed. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. filed November 12, 2008). The remittitur was sent on December 3, 2008. App. 685. A timely application was then filed on or about April 13, 2009. App. 868. The state made its Return on or about October 19, 2009. App. 701. Appellant thereafter amended his application. App. 699. As a result, the state filed a Amended Return. App. 708.

An evidentiary hearing was convened on October 3, 2011 before the Honorable J. Cordell Maddox, Jr. App. 716. Rodney Richey represented Appellant, and Kaelon May appeared on behalf of the state. Multiple witnesses testified, but the first forty-four minutes of the hearing were not preserved. App. 717-718.

An Order of Dismissal was filed on January 19, 2012.App. 729.

A motion to Remand for Record Reconstruction was filed on July 12, 2012 by Appellate Defender Breen Stevens. App. 752-754. On August 10, 2012, this court issued an Order granting the motion and remanding the case for reconstruction of the missing portion of the record. App. 832-833.

Judge Maddox wrote the Court a letter on February 28, 2013 indicting that the record could not be reconstructed adequately. App. 834-835. On December 9, 2015, this Court affirmed in part, vacated in part, and remanded Appellant's matter. App. 837-839. Because meaningful appellate review was impossible for six grounds, the case was remand.

An evidentiary hearing was then held before the Honorable Jocelyn Newman on June 26, 2017. App. 840. Robert Mills Ariail, Jr. represented appellant, and Linsy McCallister appeared on behalf of the state. Appellant and trial counsel testified at the hearing. An Order of Dismissal was issued on September 5, 2018. App. 955.

This pro-se petition follows:

ISSUES PRESENTED

ISSUE I.

Appellant object to Johnson brief and petition to be relieved of counsel.

ISSUE II.

Did the P.C.R. Court erred in denying appellant's claim when when trial counsel failure to object to the Court instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon.

ISSUE III.

Did the P.C.R. Court erred in not finding trial counsel ineffective by not objecting to the State introduction of unfair prejudice character evidence in violation of Rule 404(a)(1), SCRE.

ISSUE IV.

THe P.C.R. Court error when trial counsel failed to object to the broken chain of custody and tainted evidence, when the evidence obtain was a product of an illegal search, under the 4th and 14th Amendment, State and Federal Constitution.

ISSUE I

Appellantobject to Johnson's brief and petition to be relieve of counsel.

This matter comes before the Court as an Objection to Johnson petition filed by Appellate defender Taylor D. Gilliam, esq., of the South Carolina Commission on Indigent Defense. Appellant assert that the appellate defender should be held ineffective, more importantly, counsel petition to be relieve as counsel should be denied.

On July 29, 2019, Toyler D. Gilliam (Gilliam), esq., filed a no merit appeal pursuant to Johnson v. State, 294 S.C. 310,364 S.E.2d 201(1988), claiming the appeal is without legal merit sufficient to warrant a new trial while subsequently motioning this Court to be relieved of counsel.

Appellant object's to Gilliam's petition to be relieved as appellate counsel on the grounds that is meriterious and substantive issues avialable and unbriefed that was propery preserved for appellate review during trial.

Appellate asserts he has a right to the effective assistance of appellate counsel on his collateral appeal as a matter of right. Gilliam's should not be relieve as counsel and this Court should ereder Gilliam to brief the substantive issues appellant raised in his Pro-se Johnson petition.

The Johnson's petition before this Court, Gilliam raised:

"Whether the P.C.R. Court erred in denying relief, where trial counsel filed a pre-trial motion to change venue in a double murder case in a small community, where the matter had recieved significant press coverage such that the case had a fair amount of notoriety, and where trial counsel withdrew the

motion?"

Appellant first contends that, Gilliam,esq., was ineffective for raising a meritless issue and it has no-substantive basis for a federal constitutional claim. Appellate counsel, Gilliam, esq., failed to challenge any of the substantive circuit court's rulings; such as:

a. "DId the P.C.R. Court erred in denying appellant's claim when trial counsel failure to object to the Court instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon."

b. "Did the P.C.R. Court erred in not finding trial counsel ineffective by not objecting to the State introduction of unfair prejudice character evidence in violation of Rule 404(a)(1), SCRE."

c. "The P.C.R. Court error when trial counsel failed to object to the broken chain of custody and tainted evidence, when the evidence obtain was a product of an illegal search, under the 4th and 14th Amendment, State and Federal Constitution."

Failure of appellate counsel to brief these substantive issues, would prevent consideration of the appellant's federal constitutional question, moreover, the Johnson's petition lacks any exhaustion to issues raised in the circuit court that was properly preserve. State v. Hoffman, 312 S.C. 386,440 S.E.2d 869(1994). See also Simmons v. State, 419 S.E.2d 275(1992); Gilliam's, esq., representation fall below the objective stander of reasonableness when it would allow the State to overcome the collateral hurdle of the appellant's last attempt to go free and and unpunished at the appellate Court level.

Appellant respectfully request this Court to deny Gilliam's petition to be relieved of counsel and order appointed counsel to redraft appellant's brief to contain the underlying substantive issues. Douglas v. California, 373 U.S. 353,356,83 S.Ct 814(1963); Lucy v. Evitts, 469 U.S. 396,105 S.Ct. 830(1985); Anders v. California, 386 U.S. 738,, 87 S.Ct. 1396(1967).

ISSUE II.

"Did the P.C.R. Court erred in denying appellant's claim when trial counsel failure to object to the Court instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon."

The last statement in the trial court charge to the jury as follows:

"Inferred malice may arise when 19 the deed is done with with a deadly weapon. A deadly weapon is 20 any article, instrument, or substance which is likely to 21 cause death or great bodily harm. Whether an instrument 22 has been used as a deadly weapon depends on the facts and 23 circumstances of each case.
24 Ladies and gentlemen of the jury. I have now charges 25 you on the law in order to help you and guide you...."
Trial Record page 653 11. 18-25.

There was testimony that appellant, in this case had "a disagreement between one of the--or both victims." Trial Record page 628 11. 21-24. Moreover, the trial Court did not specifcally instruct the jury it could reject an inference of implied malice. There was evidence presented that would reduce, mitigate, excuse or justify a homicide--caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. See Trial Record page 633-634. Exhibit A.

Objecting to the Court's jury instruction which stated that malice could be inferred from the use of a deadly weapon disregarding the principle established in Arnold v. Evatt, 113 F.3d 1352, 1356(4th Cir.1997)., thus shifting the burden of

proof from the state to the Appellant. Arnold's case predated the South Carolina Supreme Court case of Belcher v. State, 685 S.E.2d 802(2009) by more than twelve (12) years and represents the established federal-law standard in the Fourth Circuit.By disregarding this clearly established federal standard, the Appellan's trial counsel was ineffective for failing to request the permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the Appellant has committed murder,or manslaughter. Futhermore, trial counsel was ineffective for not requesting that the jury could reject aan inference of implied malice. State v. Burdette 2019 WL 4337783 State v. Stanko, 402 S.C. 252,260,741 S.E.2d 708,712(2013), a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. (citing State v. Belcher, 385 S.C. 597,600,685 S.E.2d 803-04(2009)). State v. Northcutt, 372 S.C. 207,215,641 S.E.2d 873,877(2007); State v. Scott, 414 S.C. 482, 779 S.E.2d 529(2015).

ISSUE III.

"Did the P.C.R. Court erred in not finding trail counsel ineffective by not objecting to the State introduction of unfair prejudice character evidence in violation of Rule 404(a)(1), SCRE.

There was no physical evidence, no identification evidence nor any testimonial evidence---to link the Appellant to the crime scene or the victim's murder. As in State v. Turner,--S S.C.--,109 S.E.2d 119(1921) "His conduct after the homicide cannot convict him of an offense that the state failed to prove." "While the...case raised a suspicion...it did not warrant a verdict of guilty." State v. Epps,--S.C.--,395 S.E.2d 769,786 (1946).

THe P.C.R. Court found trial counsel did cross-examine Kevin Comer and "trial counsel did indeed cross-examine Comer as to his criminal record and the alleged conversation about LSD." See Order page 11.

However, trial counsel did not attempt to prevent the inclusion of the LSD under a pre-trial motion for In Camera or motion for a Jackson v. Denno. In Rule 404(b),SCRE states: "Evidence of other crimes, wrongs, or act is not admissible to prove the character of a person in order to show action in conformity therein"). There was a reasonable probability that the trial Court would have exclude it under Rule 403,SCRE, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

State v. Nelson, 331 S.C. 1,501 S.E.2d 716(S.C.1998); State State v. Stokes, 279 S.C. 191,304 S.E.2d 814(1983) and State v. Lyle, 125 S.C. 406,118 S.E.2d 803(1923). See e.g., Old Chief v. United States, 519 U.S. 172,117 S.Ct. 644(1977).

Trial counsel failed to object to Comer's testimony as it was highly ambiguous, in which the state relied heavily upon such purjuryed testimony in its closing argument.

"Because that's what he tells Kevin 22 Comer. Yeah, its one thing to sit there and say, you 23 know what, my father, he's just frustrating me. I'm just going to kill him. It's another to go, how much LSD do you reckon it takes for it to do it before it becomes traceable. I mean, that's a whole other level of 2 conversation." Trial Record page 609 ll. 20-25, page 610 l.. 1-2. "Who's talking to 5 Kevin Comer about how to kill them in an untraceable way 6? Who's get that much meanness in their heart? Trial Record page 615.

In this context the state used this evidence "of a person's character or trait of character is not admissible for the purpose of proving action in conformity there with on a particular occasion.

Appellant did not testify in his own defense. Comer's testimony was not as the state proclaimed. See attached Exhibit B. The Record reflects:

Comer 7 A: We had just been talking just different stuff. The 8 usage of LSD got brought up. And several of us was 9 talking about...it's nontraceable, this, that, 10 and the other. * * * he talked about him and his dad's relationship. 15 And

he talked about if his dad was out of the way, he'd 16 have the house and this, that and the other...."

Comer 20: "How he wanted his dad out of the way. 15 His brother Barry not to a great extent * * *"he always talked [about] Costa Rico...in Florida." Trial Record 423 and attached exhibit. Trial counsel question Comer's "about LSD, too, you claim...? Comer answered 4"Yes, sir, We had been in a conversation talking 5 about drugs. And when it come up that LSD was 6 nontraceable in most toxicology reports, he TWINKLED. And 7 he asked me several question s about it." Trial Record page 429 ll. 3-7.

Although the State lobbied feverishly to connect Appellant to the crime(s), it insisted upon introducting Comer's to testify that LSD was and "untracable drug" and Comer's surely didnot testify that Appellant "threaten to "kill them" but never explain when this so call conversation to place and who were the several other people. See exhibit B. It was irrelevant and it was unjust prejudical testimony that shift the burden to the Appellant. Testimony which was not substantiated by any forensic evidence, or any other evidence that LSD was untraceable as proclaimed; nor did such testimony had any nexis with the criminal charges the Appellant had to face at trial, violating Rule 404, SCRE. This did not even remotely suggest murder. However, the State plugged the large hole in its case with this very distraction, that required the State to prove Appellant's presence at the scene of the crime. See e.g., Rosebore v. State, 454 S.E.2d 312,313(1995); State v. Porter, 109 S.E.2d 716,729(1959), g in the constitutional protection of reasonable doubt.

ISSUE IV.

"The P.C.R. Court error when trial counsel failed to object to the broken chain of custody and tainted evidence, when the evidence obtain was a product of an illegal search, under the 4th and 14th Amendment, State and Federal Constitution."

Accordingly in appellant's Order of Dismissal, dated September 5, 2018, the circuit court concluded that trial counsel failure to object to admission of evidence on the alleged van introduce at trial. The Order stated: "Trial counsel testified he felt the van was no way to keep it out completely. However, he testified he was able to cross-examine the officers and argue to the jury the van was unreliable evidence because of the chain-of-custody and that, if anything, the van supported Appellant's third party guilt defense because the finger-prints and palm print found in the van were not Appellant's." Order page 16-17.

In State v. Brown, 698 S.E.2d 811,815(S.C.Ct.APP.2010), under the search incident to arrest exception, if the arrest is supported by probable cause, police officers may search an arrestee's person and the area within his or her immedediate control for weapons and destructible evidence within first obtaining a search warrant. State v. Ferrell, 266 S.E.2d 869 871(1980). However, this doctrine does not allow law enforcement officers to conduct a warrantless search of an arrestee's automoblile after the arrestee has been handcuffed or other wise prevented from regaining access to the car, unless it is reasonable to believe (1) the arrestee might access the vehicle at

the time of the search, or (2) that the vehicle contains evidence of the offense of the arrest. Arizona v. Grant,--U.S.--,129 S.Ct 1710,1723-24(2009)(limiting New York v. Belton, 453 U.S. 454,(1981) and Thornton v. U.S. 541 U.S. 616(2004)).

The concurrence asserts that search and seizure cases analyzed under the Fourth Amendment have made distinctions between vehicles parked in public and private places. However, there has never been a clear statement by the United States Court that a warrant is required before a vehicle is search in a private place. In fact, the Fourth Circuit has stated there should not be a bright-line rule that the automobile exception may never apply when a vehicle is stationed on private or residential property. United States v. Brooks, 345 F.3d 231,237(4th Cir. 2003).

Appellant contends that the P.C.R. Court erred when in its order it stated: "Since officer Hunnicutt and its owner had located the van, he released it back to the owner that night, and no forensic processing or evidence collection was done [that night] of September 22, 2004. Officer Hunnicutt testified that they were unaware of [may] being in-connection to a murder. The next day they return and seizure the van. See Order.

Clearly, the P.C.R. Court failed to note that the intervening act reqiured the police to obtain a search warrant, therefore, the search and seizure of the van was unreasonable accordingly to the Fourth Amendment. United States v. Sprinkle, 106 F.3d 613,619 (4th Cir.1997).

CONCLUSION

Based on these forgoing, Appellant respectfully requests that this Court to request appellate counsel Gilliam's to redraft appellant's issues set froth herein.

Taylor D. Gilliam, Esq.
Attorney for Appellant

James R Frady
James R. Frady
Appellant

This 16th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Ceriorari to Oconee County

Honorable Jocelyn J. Newman, Circuit Court Judge

JAMES R. FRADY, APPELLANT,

V.

STATE OF SOUTH CAROLINA, RESPONDENTS.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true copy of his pro-
s
se Memorandum To support of Appellate's counsel brief has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, Sc 29201; Tayor D. Gilliam, Esquire, at Division of Appellate Defens, Post Office Box 11589, Columbia, SC 29211; and The South Carolina Supreme Court, Post Office Box 11330, Columbia, SC 29211, this 16th day of August, 2019.

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2019.
Nancy C Merchant
My Commission Expires: 1-23-2023

James R Frady
James R. Frady
Appellant

Taylor D. Gilliam,
Attorney for Appellant.