STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari - PCR - Common Pleas - Other
APPEAL FROM HORRY COUNTY
Common Pleas Court
Honorable H. Steven DeBerry, IV

Appellate Case No. 2023-000747
Trial Court Case No. 2020-CP-26-4711

Marquis McDonald ..... , Petitioner,

v.

The State of South Carolina ..... , Respondent.

REPLY TO RETURN
TO PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. BAR NO. 6188

Attorney for Petitioner

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Statement of Issues Presented

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Question II: Did the Post Conviction Relief judge err in failing to trial counsel ineffective when he failed to object to the jury charge that the jury may infer malice from the use of a deadly weapon?

Argument

Question I

Did the Post Conviction Relief judge err in failing to find trial counsel was ineffective for not securing the services of a crime scene expert when the Post Conviction judge found the testimony of Dr. Brent Turvey would have been helpful but was not an unreasonable decision as the testimony was merely duplicative evidence of what trial counsel believed the evidence would show?

The State in its brief relies upon several federal cases. To the extent that the federal cases review a state conviction after a federal habeas, the standard of review is much more differential than the review this court must conduct. As the United States Supreme Court has said, "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, Mirzayance's ineffective-assistance claim fails." *Knowles v. Mirzayance*, 556 U.S. 111, 129 (2009). This Court does not review the facts of this post-conviction relief hearing under a "doubly deferential" standard of review. The federal courts review an appeal of a state habeas case is whether the federal law was fairly interpreted. They do not, in most cases, second guess the application of state law. The review by the federal courts is limited to deciding if the lower court ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
> 28 U.S.C. § 2254

Thus, federal decisions are of little use to the state, except when they interpret a state

court post conviction relief case on direct appeal.

The state first argues that the testimony of Dr. Brent Turvey was merely cumulative. As they state, "Several other jurisdictions have held counsel is not ineffective for failing to present cumulative evidence." Br. of Resp. at 8. Granted the testimony was cumulative to the closing argument of defense counsel. It was also cumulative to the testimony of Mr. McDonald. Under the theory of the state, if an alibi witness did not testify, it would not be prejudicial as it would be merely cumulative to either the defendant trial testimony or his statement to the police. This is precisely what the State has argued when it said, "Counsel reasonably thought an expert was not needed, because testimony would have been repetitive to that already produced, especially with respect to the testimony of Petitioner." Br. of Resp. at 9. Such is not the law. *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). Nor should it be. The State never stated as to what other evidence the testimony was cumulative. Being cumulative to a theory the trial lawyer has is not sufficient reason to claim the evidence was cumulative.

The Post Conviction Relief judge also found the testimony of the expert to be "duplicative." App. at 828. In his Rule 59 motion, counsel for Mr. McDonald brought to the court's attention that Dr. Turvey was presenting facts not presented in the trial. In the closing argument of trial counsel some, but not all, of Dr. Turvey's theories were presented. App. at 811. The Post Conviction Relief judge summarily dismissed the Motion without an explanation as to how the testimony of Dr. Turvey was duplicative to the closing argument of trial counsel or other testimony at the trial. Thus, the Post Conviction Relief judge's order in concluding that the testimony of Dr. Turvey was cumulative, was without facts to support his conclusion. Thus, he abused his discretion.

The three cases the state presented in support of the contention that defense counsel need not call an expert that is cumulative to other evidence, do not support the position of the State under the facts of this case. In *Miller v. State,* 295 Ga. 769, 771, 764 S.E.2d 135, 138 (2014) the court noted these facts, "They [investigators] collected a number of samples they believed to be blood but none of the samples were a match for the victim's blood." The defendant had contended that his trial counsel was ineffective because he did not call a DNA expert. The court held trial counsel was not ineffective as the absence of the victim's blood was testified to by the state's witnesses. The DNA expert would clearly be cumulative to what the state had proven and would not have proven the defendant was innocent. Here, the testimony of Dr. Turvey is completely contrary to the theory of the state. His testimony was not cumulative to what the state's witnesses had testified.

In *Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) the court said as to the failure of defense counsel to subpoena a witness concerning his wife's infidelity, "The victim's infidelity and the subject matter of the quarrel which preceded the shooting were both essentially undisputed at trial. The testimony of the two additional witnesses would not have made significant inroads into the State's case or contributed substantially to petitioner's diminished capacity defense." In this case the testimony of Dr. Turvey completely contradicted the closing argument of the state and the testimony of the key witness for the state.

Finally, in *Ford v. Hall,* 546 F.3d 1326, 1335 (11th Cir. 2008) the court said, "The fact is, the opportunity to present such evidence was given and there can be no constitutional violation when a defendant and his counsel decide that they have exercised that right to the fullest extent desirable. Demonstrating in the habeas proceeding that there were other witnesses who could

have testified at trial does not, by itself, prove that counsel was ineffective for not presenting them at trial." In the present case, Mr. McDonald never testified he agreed with any decision of trial counsel not to call an expert witness. As no expert was ever retained by either side, obviously Dr. Turvey's testimony would not have been cumulative to other witnesses. Mr. McDonald was deprived of this right to effective assistance of counsel when trial counsel failed to contact a crime scene expert to testify about the impact of the physical evidence in this case.

The State has further argued that, "Calling an expert would risk the admission of unfavorable testimony, coupled with the low benefit of duplicative evidence and an inability to disprove Petitioner's involvement relating to hand of one hand of all." Br. of Resp. at 9. The State has not pointed to any testimony of Dr. Turvey that would be unfavorable to Mr. McDonald. As to the hand of one argument, except for Mr. McDonald and Mr. McLain being at the scene, the record is devoid of any evidence of a pre-planned robbery of the victim. Mr. McDonald testified no plan existed to rob the victim.

The state has further argued, "Expert testimony is not reasonably probable to change the outcome because the State presented sufficient evidence and because the jury was not required to establish Petitioner's role as the shooter to secure a conviction." Br. of Resp. at 9. There are two problems with this theory. First, the State argued that Mr. McDonald was in fact the shooter. The solicitor argued, "But we know the Defendant pulled the trigger because all the action happened on the driver's side where Amanda McTaggart saw them." App. at 643, ll 2-4. The State never argued Mr. McDonald was guilty under the hand of one is the hand of all, except for

one sentence. App. at 642, ll 23-24.[1]

Secondly, what both the State in its brief and the Post Conviction Relief judge failed to recognize, is that the testimony of Dr. Turvey helped undermine any theory of the hand of one is the hand of all. The testimony of Dr. Turvey established that Mr. McDonald fled from the car shortly after Mr. McLain pulled out the gun. This action would have been inconsistent with a planned robbery. The jury, after hearing the testimony of Dr. Turvey, easily could have concluded the robbery was not planned. The testimony of Dr. Turvey supported the trial testimony of Mr. McDonald. The expert helped give credence to Mr. McDonald's testimony that no robbery was planned. To convict under the hand of one, the jury should have the advantage of hearing a full presentation of the facts.

This Court has long held the failure to investigate a case is a ground to grant relief in a post conviction relief action. This Court has said, "We believe it was unreasonable for trial counsel not to further investigate Respondents background and present even the minimal mitigating evidence that was obtained." *Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008). Thus, trial counsel in this case rendered ineffective assistance of counsel to Mr. McDonald in failing to call a crime scene expert to testify.

Failure to use shell casing evidence

The fact that the same firearm was used on another murder that Mr. McDonald could not have committed is strong evidence that Mr. McDonald did not bring the firearm to the drug deal.

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[1] The state said Stephon McLain was guilty under the hand of one is the hand of all. App. at 643, ll 1-2. The public records for Horry County show the murder charge against Mr. McLain in case № 2013A2610700006 was ultimately dismissed. This Court may take judicial notice of this fact. Rule 201(b) and (f) of the South Carolina Rules of Evidence.

This refutes the theory of the State that Mr. McDonald brought the weapon to the drug deal and planned a robbery. As noted in the opening brief, trial counsel thought the evidence would be helpful. App. at 42, ll 13-16.

Question II

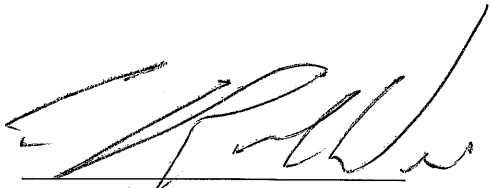
Did the Post Conviction Relief judge err in failing to trial counsel ineffective when he failed to object to the jury charge that the jury may infer malice from the use of a deadly weapon?

To the extent the State contends that Mr. McDonald could be guilty under the hand of one is the hand of all, as noted in the opening brief, if Mr. McCullum has been aware of *State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009) he should have imposed an objection to the use of implied malice under the hand of one is the hand of all. Such an inference is questionable at best in the case of a hand of one is the hand of all. And even if applicable, it would only apply if the State affirmatively proved Mr. McDonald was aware that Mr. McLain was armed. No proof of this fact exists in this case. While such an implied inference had been permitted, at the time of the trial, as to the person who actually used the weapon, it would be improper to infer malice as to one who did not use the weapon without proof of knowledge of the weapon.

Mr. McDonald agrees that Mr. McCollum had no reason to anticipate the decision in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)' The purpose of the question was simply to show to the Post Conviction Relief judge that years after the Burdette decision, Mr. McDonald's trial lawyer was still not staying current on the law that a reasonably competent defense lawyer should know about.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the petition, reverse the order of the lower court and remand the case for a new trial.



February 5, 2024

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 6188

Attorney for
Marquis McDonald