

The Supreme Court of South Carolina

Marquis McDonald, Petitioner

v.

State of South Carolina, Respondent

Appellate Case № 2023-000747

RECEIVED

Oct 16 2024

S.C. SUPREME COURT

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Petition for Rehearing

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Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Marquis McDonald hereby Petitions this Court to reconsider the denial of the Petition for Writ of Certiorari based upon the following grounds:

1. The Court appears not to have consider, in part because counsel was not specific enough in the Petition for Writ of Certiorari, that the testimony of Dr. Brent Turvey would not only have proven that Marquis McDonald was not the shooter, but the testimony would have provided the jury additional information to establish that Mr. McDonald in his trial testimony was truthful when he testified there was no plan to rob the victim. In the typical hand of one is the hand of all case, who is the shooter is not relevant. The defense used by trial counsel was there was no planned robbery. The testimony of Dr. Turvey would have significantly helped establish this defense.

2. This Court further appears to have failed to consider that the testimony that the weapon used in this case was used in another shooting which Mr. McDonald could not have committed, also helps prove the validity of the testimony of Mr. McDonald that the shooping was

not planned. This testimony would have also supported the defense theory that Mr. McDonald was not the shooter and there was no planned robbery.

3. The Court failed to consider that the Post Conviction Relief judge found the testimony of Dr. Turvey to be credible. The Post Conviction Relief judge stated, “Though this court finds that the expert would have been helpful, it was not unreasonable for Counsel to fail to call [an] expert to present duplicative evidence aligning with what he reasonably thought the evidence clearly established.” App. at 828. A finding by the Post Conviction Relief judge that the testimony of the expert to have been helpful is a finding that the expert testimony was credible. Obviously a helpful witness is also a credible witness. This Court should have reviewed the Petition for Writ of Certiorari with this issue of credibility decided in favor of Mr. McDonald. This is not a case of an applicant presenting testimony the Post Conviction Relief judge found not to be credible. This court is bound by the credibility findings of the lower court judge.

4. The Court failed to consider that the credible testimony of Dr. Turvey made what at trial appeared to be a strong case of a robbery gone wrong to a case where a crime scene reconstruction expert made the testimony of Mr. McDonald credible. The failure to call the expert witness could have impacted the outcome. The testimony of Dr. Turvey could have made the jury “hesitate to act.” App. at 657. The testimony of Dr. Turvey easily could have made the jury believe, as the trial judge charge, “[A] real possibility that he’s not guilty.” App. at 657. Considering the testimony of Dr. Turvey, the evidence in this case was not overwhelming. As this Court has said, “However, for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and Harris—the evidence must

include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability ... the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). As this Court on review is required to find Dr. Turvey’s testimony credible, this standard of overwhelming evidence has not been met in this case. “We defer to a PCR court’s findings of fact and will uphold them if there is evidence in the record to support them.” *Id.* at 180, 810 S.E.2d at 839. Deferring to the credibility finding of the Post Conviction Relief judge, the record establishes error in failing to retain an expert and prejudice as the evidence was not overwhelming. The Post Conviction Relief hearing judge made an error of law when he concluded Mr. McDonald was not prejudiced in stating, “This Court finds that the eyewitness testimony and the ability of the jury to infer their findings from all the evidence presented at trial.” App. at 828. The Post Conviction Relief hearing judge failed to consider that the credible testimony of Mr. Turvey refuted the testimony of the eyewitness and the inferences the jury drew.

## CONCLUSION

For the foregoing reasons, this Court should reconsider this matter, grant the Petition for Writ of Certiorari, reverse the conviction of Marquis McDonald in keeping with the principles established by this Court in *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) and *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d. 590 (2007) and as required by *Strickland v. Washington*, 466 U.S. 668 (1984).

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