STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Dorchester County

Honorable Paul M. Burch, Circuit Court Judge

DAMON RILEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000771

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR court erred in finding counsel was effective when he failed to request a circumstantial evidence charge pursuant to *State v. Logan* in a case dependent upon circumstantial evidence and the credibility of a single witness?

STATEMENT

During the December term of 2013, a Dorchester County Grand Jury indicted petitioner for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. App. 370 - 381. The case against petitioner relied heavily on the credibility of the alleged victims, Kimberlee Felder and her husband Carsheme Dinkins. App. 106, ll. 13 - 17. Petitioner and Felder were cousins and Felder clamed to know petitioner well. App. 105, l. 22 – 106, l. 16. Felder's story relied upon petitioner randomly finding Felder and Dinkins while they were driving in the early morning hours (between 3:30 and 3:40 am of June 5, 2016) in a borrowed vehicle (a red Mercedes owned by Felder's friend) and then firing multiple rounds into the vehicle while leaning out of a window with Felder looking directly at petitioner over her left shoulder during the shooting. App. 106, l. 18 – 107, l. 20; 116, l. 19 – 117, l. 21. Felder, who was driving at the time of the shooting, was shot in the face, with the bullet traveling from the left to the right side of her face. App. 131, ll. 10 – 17.

After the shooting, Felder moved to the rear of the vehicle and Dinkins drove slowly, on a blown-out tire, past the nearest hospital to another hospital several miles away. App. 118, l. 20 – 119, l. 13. During this drive, Dinkins passed at least one police officer and neither Dinkins nor Felder contacted 911. App. 118, ll. 8 – 9; 215, l. 21 – 216, l. 19. The state elected not to call Dinkins to the stand during petitioner's trial. Felder claimed there had been a "fight" between petitioner and Dinkins prior to the shooting. App. 106, ll. 13 – 17.

During the police investigation of the scene of the shooting, multiple shell casings were found scattered over a wide area. App. 188, l. 15 – 189, l. 22. The investigation ultimately revealed that three firearms were used. App. 290, l. 23 – 291, l. 5. Petitioner was arrested several days later, and a 9 mm handgun was found in the vehicle petitioner had occupied just before the

arrest. App. 205, l. 15 – 206, l. 10. Some of the shell casings from the crime scene matched this 9 mm handgun. App. 287, ll. 17 – 20.

Petitioner's original trial on these charges ended in a mistrial when the jury failed to reach a verdict. During the original trial, petitioner was represented by Ash Chisholm. App. 420, ll. 12 - 17. Petitioner was retried before the Honorable Maite Murphy and a jury, from August 19 – 21, 2019. App. 1. During this second trial, petitioner was represented by Chad Shelton and Michael Barrett. App. 17. The State was represented by Mike Spears and George Smythe. App. 17. After six hours of deliberation, Petitioner was convicted as indicted and he was sentenced to serve consecutive terms of imprisonment of thirty years for the attempted murder of Felder, thirty years for the attempted murder of Dinkins (consecutive), and to a concurrent five-year term for the weapons charge.[1] App. 370 – 381.

On direct appeal, the Court of Appeals affirmed the conviction in an unpublished opinion, rejecting petitioner's assertion that the trial court improperly admitted a video of him holding a gun from a social media website under Rule 404(b), SCRE. State v. Riley, No. 2019-001810 (S.C. Ct. App. Apr. 6, 2022). Petitioner filed for post-conviction relief. App. 382 – 399. Michael Lifsey was appointed to represent petitioner and filed an amended application on his behalf. App. 400 – 401. An evidentiary hearing was held before the Honorable Paul M. Burch on February 8, 2024. App. 414. Mr. Lifsey appeared on behalf of petitioner and Bryan T. Hall represented the state. App. 414. The PCR court denied relief by written order of dismissal dated April 21, 2024. App. 450 – 460.

This petition for certiorari follows.

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[1] Jury deliberations began at 3:30 pm with the verdict being rendered at 9:30 pm. App. 356, ll. 12 – 19; 359, ll. 6 – 14.

ARGUMENT

The PCR court erred in finding counsel was effective when he failed to request a circumstantial evidence charge pursuant to *State v. Logan* in a case dependent upon circumstantial evidence and the credibility of a single witness.[2]

A. How circumstantial evidence impacted trial.

The state's case was built upon the direct evidence presented by Felder that she knew petitioner well and she observed him leaning out of a passing vehicle and shooting at her and her husband in the vehicle they were driving. App. 106, l. 18 – 107, l. 20; 116, l. 19 – 117, l. 21. However, Felder's story had significant credibility issues, including questionable behavior just following the shooting that included not calling 911, driving by police, driving past a hospital (despite the vehicle having a blown-out tire) to get to a further hospital. App. 118, l. 1 – 119, l. 13; 215, l. 21 – 216, l. 19. Felder's story also required the jury to believe petitioner randomly found Felder and Dinkins while they were driving in the early morning hours (between 3:30 and 3:40 am of June 5, 2016) in a borrowed vehicle (a red Mercedes owned by Felder's friend) and then fired multiple rounds into the vehicle while leaning out of a window with Felder looking directly at petitioner over her left shoulder during the shooting. App. 106, l. 18 – 107, l. 20; 116, l. 19 – 117, l. 21. The angle of Felder's injury (from the left to the right side of her face) did not support her claims of looking straight at petitioner while he fired from the passing vehicle.

To bolster Felder's story, the state relied upon circumstantial evidence. The state used circumstantial evidence to connect petitioner to a 9 mm handgun that matched shell casings from the scene of the shooting. App. 283, ll. 9 – 14; 284, ll. 1 – 15. During petitioner's arrest, several

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[2] 405 S.C. 83, 747 S.E.2d 444 (2013).

days after the shooting, a 9 mm handgun was found in the backseat of a vehicle in the area petitioner had been sitting. App. 205, l. 15 – 206, l. 10. There were no fingerprints or DNA found on this handgun. App. 190, ll. 12 – 17. The state also introduced a video of petitioner waiving a 9 mm handgun from a moving vehicle, asserting during closing:

> Damon Riley was found with that handgun a number of days later, five days later. And that handgun matched the casings at the scene. That handgun was with him in a car with a bunch of people, but his phone is covered up in that video and other photos of him with a conveniently dark extended magazine gun.

App. 321, l. 22 – 322, l. 2.

This handgun, and the matched 9 mm casings, were circumstantial evidence supporting Kimberlee Felder's testimony that petitioner leaned out of the rear window of a passing car and shot into the vehicle Felder was driving in which her husband, Carsheme Dinkins, was a passenger. App. 106, l. 18 – 107, l. 20; 116, l. 19 – 117, l. 21.

There was also circumstantial evidence that other guns had been fired during the shooting. Police recovered thirteen 9 mm casings along with 12 .40 caliber casings. App. 289, l. 24 – 290, l. 8. The bullets (as opposed to the shell casings) recovered by police were determined to be .40 caliber and fired by two different .40 caliber weapons:

> Q. There were two projectiles that you were able to examine, correct?
>
> A. There were two bullets, fired bullets, that I could tell were bullets that I examined. And I received two other pieces of evidence that could have been projectiles or parts of a projectile that I examined as well. Those were the two pieces of led.
>
> Q. So the two bullets that you were able to identify as bullets and compare, I guess ---
>
> A. Yes, sir.

> Q. --- those were 40 caliber or 10-mm?
>
> A. That's correct.
>
> Q. And a 9-mm, that handgun could not have fired -- the handgun that you examined could not have fired those bullets?
>
> A. That's correct. Those bullets would have been too large for the firearm that was submitted. And also one of the bullets, State's Exhibit -- was my Item 10, the rifling characteristics would have been wrong for a Glock.

App. 288, ll. 2 – 22.

The .40 caliber casings were fired from two distinct handguns:

> Q. Your testimony was comparing those 40-caliber cartridge casings, there's three handguns, correct, three guns?
>
> A. That's correct, based on the differences of the characteristics. Again, looking under the microscope you can tell differences, firing pin differences, different types of firing pins. *There were three guns that fired that 40 cartridge cases.*

App. 290, l. 23 – 291, l. 5. The bullet fragments recovered at the hospital from Felder's injuries could not be matched to a specific caliber or weapon. App. 289, ll. 15 – 23.

The nature of the guns involved in the shooting, the use of three separate weapons, was circumstantial evidence that contradicted Felder's testimony that she could positively identify the lone shooter as petitioner leaning out of the window of a passing vehicle. It was also circumstantial evidence that supported firing from the Felder vehicle, as trial counsel argued during closing statements to the jury:

> So Carsheme, why was he fighting with Damon? Why? Some questions that we don't have answers. Why was he fighting with Damon. That's what Kim said. They were fighting. So why were they fighting? Who else was he fighting with? Where is he? Where is he? Where is he? The State can't find him. Where is he? He's a victim, and he is not coming to testify. Where is he? Why is he not

> here? It doesn't make sense that he's not here. He gave a statement to the police, so why is he not here? Why didn't he testify?[3]
>
> Why did he pass Summerville Medical? *Was he throwing things out the window? Was he getting rid of his gun, his shell casings?* Was he dropping somebody off? Was he hiding out? Why did he pass Summerville Medical?

App. 340, ll. 11 – 25 (emphasis added).

The circumstantial nature of some of the critical pieces of evidence was apparent. Circumstantial evidence connected petitioner to the 9 mm handgun and circumstantial evidence existed that multiple guns were fired during the shooting, raising questions regarding the credibility of Felder's story related to petitioner shooting into the vehicle without warning or provocation. Despite the importance and impact of the circumstantial evidence, trial counsel did not request the appropriate circumstantial evidence charge under State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

While counsel was correct that Felder's testimony was direct evidence, the state bolstered that evidence with circumstantial evidence. Trial counsel's claim during PCR that he did not see the case as a circumstantial evidence case ignored critical supporting evidence presented during trial. App. 438, ll. 18 - 21.

B. How the issue was raised at PCR.

In the amended petition, petitioner's counsel asserted trial counsel was ineffective in failing to request a circumstantial evidence charge pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d

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[3] Carsheme Dinkins was listed as the victim of one of the attempted murder indictments for which petitioner was convicted, but he did not appear or testify during petitioner's trial. App. 374 – 375. The lack of gunshot residue testing on Dinkins (or Felder) was an area of focus of trial counsel's cross-examinations. App. 138, l. 19 – 139, l. 8; 153, ll. 10 – 12.

444 (2013). App. 400. At the PCR hearing, trial counsel admitted he did not request the Logan charge, explaining he did not view the case as involving circumstantial evidence:

> Q: All right. He also alleges that you failed to request a Logan charge for circumstantial evidence. Was this a circumstantial evidence case?
>
> A: I didn't see it as a circumstantial evidence case.

App. 438, ll. 18 - 21.

C. How the PCR court ruled.

The PCR court ruled that counsel was not ineffective since the case was not based upon circumstantial evidence due to the testimony of Felder that petitioner was the person who shot into the vehicle. App. 459. The PCR court also ruled that there was no prejudice to petitioner since the trial judge gave a circumstantial evidence charge that was a correct statement of law under State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997):

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight, or to the value given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.
>
> You should weigh all of the evidence in this case. After weighing all the evidence, if you're not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

App. 344, 7 – 18; 459.

D. The PCR court erred in finding trial counsel's performance was not ineffective in failing to request a *Logan* charge when counsel's defense focused on the circumstantial nature of

the evidence against petitioner and questioning the credibility of Felder as the sole witness directly connecting petitioner with the shooting.

Based upon the ruling of the PCR court, trial counsel can never be deemed ineffective in failing to request a Logan charge if the traditional circumstantial evidence charge is used during trial. This finding was an error of law. "When requested, the Logan charge must be given in cases based in whole or part on circumstantial evidence." State v. Herndon, 430 S.C. 367, 371, 845 S.E.2d 499, 501 (2020). This has been the law of South Carolina since Logan was published in 2013. *See* State v. Jenkins, 408 S.C. 560, 572, 759 S.E.2d 759, 765 (Ct. App. 2014) (noting the law required the "application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published"). Trial counsel offered no strategic reasons for his failure to request the preferred charge that was settled law at the time of trial. In fact, trial counsel implied that he was under the mistaken belief that the case did not involve circumstantial evidence. App. 438, ll. 18 - 21. If, as the PCR court has found, the Grippon charge negates a finding of ineffective assistance of counsel, then State v. Logan and the cases directing the use of the revised charge, including State v. Herndon, have little if any meaningful value.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "strategic choices made by counsel" are reasonable "only to the extent that reasonable professional judgment supports" the strategic decision.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting* Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Here, trial counsel failed to request the appropriate charge, was ineffective and offered no strategic basis for the decision.

E. Prejudice.

Contrary to trial counsel's claim and the PCR court's ruling, the case against petitioner was heavily reliant upon circumstantial evidence. While Felder did provide direct testimony that petitioner was involved in the shooting, her credibility was cast in doubt due to the behavior of both her and her husband, Dinkins, surrounding the shooting. As noted, to convict petitioner, the jury was required to accept Felder's story that petitioner randomly found Felder and Dinkins while they were driving in the early morning hours in a borrowed vehicle (a red Mercedes owned by Felder's friend). App. 106, l. 18 – 107, l. 20; 116, l. 19 – 117, l. 21. Felder, who was driving at the time of the shooting, was shot in the face, with the bullet traveling from the left to the right side of her face, despite her claim to have been staring at petitioner during the shooting. App. 131, ll. 10 – 17.

Only circumstantial evidence connected petitioner to the 9 mm handgun that the state's ballistics expert connected to the shooting: petitioner was arrested several days after the shooting and a 9 mm handgun was found in the vehicle petitioner had occupied just before his arrest. App. 205, l. 15 – 206, l. 10. During the police investigation of the scene of the shooting, multiple shell casings were found scattered over a wide area. App. 188, l. 15 – 189, l. 22. The investigation ultimately revealed that three firearms were used, including the 9 mm found during petitioner's arrest. App. 290, l. 23 – 291, l. 5. The state failed to conduct gun shot residue testing on Dinkins (or Felder) and simply accepted their version of events. App. 138, l. 19 – 139, l. 8; 153, ll. 10 – 12. While Dinkins was listed as the victim of one of the attempted murder indictments for which petitioner was convicted, he did not appear or testify during petitioner's trial. App. 374 – 375.

Petitioner's original trial on these charges resulted in the jury being deadlocked and failing to reach a verdict. App. 420, ll. 12 - 17. On re-trial, jury deliberations began at 3:30 pm with the verdict being rendered at 9:30 pm. App. 356, ll. 12 – 19; 359, ll. 6 – 14. The PCR court erred in finding a lack of prejudice excused trial counsel's failure to request the appropriate circumstantial evidence charge under State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

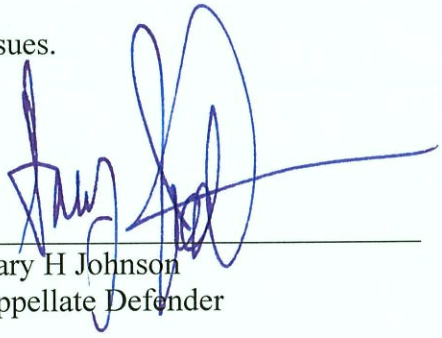
In light of the significant error of trial counsel in failing to request a Logan charge, this Court should "find the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018). Considering the original mistrial and the lengthy jury deliberation before conviction, there is "a reasonable probability" that "but for counsel's errors, the result of the trial would have been different.'" Smalls, 422 S.C. at 195, 810 S.E.2d at 847.

CONCLUSION

To establish ineffective assistance of counsel, the petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

Here, trial counsel was ineffective in dealing with the circumstantial nature of the evidence presented during trial and requesting a charge on circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Prejudice is demonstrated by the original mistrial due to a deadlocked jury and the substantial period of deliberation by the jury that convicted petitioner.

Based upon the foregoing arguments, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



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This 3rd day of December, 2024.