

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Perry M. Buckner, Circuit Court Judge

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MAY 15 2014

S.C. Supreme Court

JOSE ANGEL HERRERA,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001119

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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ATTORNEY FOR RESPONDENT

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ARGUMENT IN REPLY

Reply to Issue 2

Petitioner does not understand the State's argument that Issue 2 is not preserved for appeal. The State asserts that the issue was not raised to and ruled on by the PCR Court. State's Return at 7 – 8. Petitioner's issue on appeal is: "Whether trial counsel was ineffective in failing to obtain an involuntary manslaughter charge and preserve the request for a charge for appellate review?" Pet. Certiorari at 2. In the PCR court's Order of Dismissal, it lists Petitioner's allegations and among them is: "Counsel failed to argue Applicant's first and second version of events as a basis for requesting involuntary manslaughter and preserving the issue for review." App. 440. The PCR court's Order further states that at the hearing, petitioner elected to proceed only on certain issues and listed those issues. App. 440. The fourth issue listed is: "Failure to request an involuntary manslaughter charge." App. 440. In the "Summary of the Testimony" section of the PCR court's Order, it states: "The Applicant testified that his attorney should have requested an involuntary manslaughter charge." App. 441. It also states that trial counsel "testified she requested an involuntary manslaughter charge and the Court denied her request." App. 442-43.

Under the "Ineffective Assistance of Counsel" heading in the Order, the PCR court made its factual findings and legal conclusions. Regarding the involuntary manslaughter charge issue, the PCR court ruled:

This Court finds the Applicant failed to meet his burden of proving trial counsel should have requested an involuntary manslaughter jury instruction. This Court finds and the record reflects counsel requested an involuntary manslaughter charge (T.341:6-7, 341:23-342:1) and her request was denied by the Court. (T. 349:16-18). The Court's denial of counsel's request was reviewed on appeal and affirmed. State v. Herrera, Op. No. 2011-UP-354 (filed June 30, 2011). This

Court finds the Applicant's allegation is without merit and counsel's performance was not deficient.

App. 444-45. The State even quotes from the above ruling in its Return, yet still has represented to this Court that the issue was "not ruled on by the lower court." State's Return at 8. This ruling, although erroneous for the reasons stated in the petition, seems perfectly clear. This issue is preserved and the Court should ignore the State's argument regarding procedural bar.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant certiorari with the ultimate relief of a new trial for petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Alexander", written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 15th day of May, 2014

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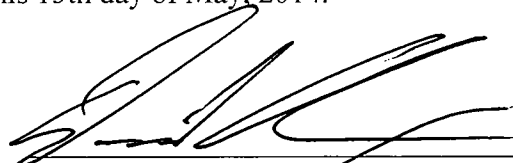
STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001119

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to return to petition for writ of certiorari in this case have been served on Ashleigh R Wilson, Esquire, this 15th day of May, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 15th day
of May, 2014.

Rhonda Demese Joseph (S.)

Notary Public for South Carolina

My Commission Expires: October 17, 2021