

Marlon Rivera

430 Oaklawn Rd.

Pelzer, S.C. 29669

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

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AUG 20 2014

S.C. SUPREME COURT

Re: Marlon Rivera v. State of South Carolina, 2011-CP-23-1209
Appellate Case No: 2013-002652

Dear Mr. Shearouse,

Enclosed please find the Petition for Writ of Certiorari.
Also enclosed as part of the Petition is a Certificate of Service.

Sincerely,
Marlon Rivera

Marlon Rivera, 311864
PCI Q4B Room 105
430 Oaklawn Rd.
Pelzer, S.C. 29669

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AUG 14 2014

P.C.I. MAILROOM

As of this day August 14, 2014

Tamaia Conwell

My Commission Expires
September 25, 2023

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Greenville County
Court of Common Pleas
Robin B. Stillwell, Circuit Court Judge

Case No: 2011-CP-23-001209

Appellate No: 2013-002652

Marlon Rivera, 311864 Petitioner,

v.

State of South Carolina Respondent.

PETITIONER FOR A WRIT OF CERTIORARI

pro se. petitioner, Marlon Rivera
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, S.C. 29669

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AUG 20 2014

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Robin B. Stilwell, Circuit Court Judge

Case No: 211-CP-23-1209
Appellate No: 2013-002652

CERTIFICATE OF SERVICE

Marlon Rivera, 311864 Petitioner,
V.
State of South Carolina Respondent.

I certify that I have served a copy of Petition for Writ of Certiorari
by placing a copy of same in the United States Mail, first class
postage prepaid, addressed as follows:

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

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ISSUES PRESENTED

1. Did appellate counsel's failure to petition this court for a remand of Appellate's remaining issues back to the Court of Appeals for a ruling on the merits constitute ineffective assistance of counsel?
2. Did trial counsel's failure to sequester the witnesses, to quash the indictment before the jury was sworn in not after constitute ineffective assistance of counsel?
3. Did PCR judge failure to decide was the appellate counsel deficiencies or trial counsel?
4. Did Solicitor was subjected to Prosecutor Misconduct at trial?

STATEMENT OF THE CASE

Petitioner Marlon Rivera was indicted by the Greenville County grand jury at the October 2004 term, for the murder. Susannah C. Ross, Esquire, represented Rivera at trial.

Judge C. Victor Pyle Jr., presided at the petitioner's trial on October 13, 2005. The petitioner was convicted of murder.

Rivera appealed and was represented by appointed appellate counsel Robert Dudek, Esquire. Appellate Counsel briefed four issues: (1) improper admission of his statement to the police, (2) improper admission of hearsay testimony, (3) refusing to allow unsequestered witnesses to testify, and (4) failing to charge accident and involuntary manslaughter.

The Court of Appeals reversed and remanded on based on the failure of the court to instruct the jury on involuntary manslaughter. (State v. Rivera, Op. No. 2008-UP-187 (ct. App. 03/18/08).

The Court of Appeals held that "in light of our disposition of the issue pertaining to the judge's refusal to charge the jury on involuntary manslaughter, the remaining issues on appeal are not dispositive and need not be addressed. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

"As a result, the remaining issues were not ruled on by the court.

The state appealed the Court of Appeals decision. This Court granted certiorari, reversing the Court of Appeals. State v. Rivera, 389 S.C. 299, 699 S.E.2d 157 (2010). In its review of the case, this Court addressed only the jury charge issue. Agreeing with the trial courts conclusion that there is no evidence in the record indicating that Respondent was acting in self-defense, this Court held that the Rivera was not entitled to a charge on involuntary manslaughter. State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) (finding that, in the absence of self-defense, pointing and presenting a firearm precludes an involuntary manslaughter charge). Rivera conviction was reinstated without having the merits of his four other appellate issues addressed by any court. Rivera filed an application for post conviction relief on February 17, 2011. The Respondent filed its return June 28, 2011. J. Falker Wilkes was appointed to represent Rivera in the PCR action. Karen C. Ratigan, represented the state. An evidentiary hearing was held on August 27, 2013, the Honorable Robin B. Stilwell presiding. An Order of Dismissal was entered on November 7, 2013. Rivera timely appealed. Due to a conflict, the Office of Indigent Defense was relieved and J. Falker Wilkes appointed as counsel to represent Rivera in the filing of his Petition for Writ of Certiorari.

ARGUMENT

- I. Petitioner Received Ineffective Assistance of Counsel when His Appellate Attorney Failed to Preserve and Pursue Review of Additional Issue on Appeal.
- II. Petitioner Received Ineffective Assistance of Counsel when His Trial Attorney Failed to Quash the Indictment before the Jury was Sworn in, not after and to Sequester the Petitioner's Witnesses and Failed to Object to Prosecutor closing Argument.
- III. The PCA Courts erred in Ruling was the Appellate Counsel Deficiencies or Trial Counsel
- IV. The Solicitor was subjected to Prosecutor Misconduct at trial for improper closing argument.

The test for ineffective assistance of counsel is whether counsel performance was deficient and, if so, whether deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A criminal defendant is entitled to effective assistance of counsel through the appellate process. State v. Thrift, 397 S.E.2d 523 (S.C. 1990); Jones v. Barnes, 463 U.S. 745 (1983). As entitled to effective assistance of counsel through trial process. Sixth (6) Amendment of the U.S. Const.; and Article 1, sec. 14, of the S.C. Constitution.

Appellate Counsel failure to preserve by not motion those issues into the jurisdiction of the Supreme Court and ask them to remand the case back to the Court of Appeals to make findings and address issues one through four that the court did not address. In assessing a claim of ineffective assistance of counsel of Appellate, courts apply the Strickland Test to determine if Appellate Counsel was deficient for failing to raise an issue and whether the Petitioner was prejudiced from the failure to raise the issues. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 736 (2000); Southerland v. State, 337 S.C. 610, 324 S.E.2d 833 (1999). Additionally, in Ezall v. State, 345 S.C. 312, 548 S.E.2d 832 (2001). "The South Carolina Supreme Court found, that the appropriate remedy for ineffective assistance of Appellate Counsel is a New Trial! The Petitioner's Appeal resulted in the South Carolina Court of Appeals, ruling to "Reverse and Remand, his conviction" see State v. Rivera, Unpublished Opinion No. 2008-UP-187; Heard March 6, 2008 filed March 18, 2008. On Appeal the Petitioner was represented by Mr. Robert M. Dudels, Deputy Chief Attorney for Capital Appeals, of the South Carolina Commission on Indigent Defense. The State filed for Writ of Certiorari to the South Carolina Supreme Court, "Reversed", the Court of Appeals ruling. State v. Rivera, Opinion No. 26877, Heard April 8, 2010 filed September 7, 2010.

Petitioner's petition for Rehearing was denied on October 7, 2010, by the South Carolina Supreme Court. Appellate Counsel is not required to raise every non-frivolous claim, Smith v. Robbins, Supra, but instead may select among them in order to maximize the likelihood of a favorable outcome. Petitioner's appeal, became "final" the date his petition for rehearing to the South Carolina Supreme Court, was denied on October 7, 2010.

However, Petitioner Appellate Counsel was ineffective when he failed to spot a prejudicial issue, that denied Petitioner due process of law. Both the Solicitor, in the Closing Argument and the Trial Judge, in the charge to Malice and a Deadly Weapon an implication of Malice arises.

The instruction is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. A jury charge is no place for purposeful ambiguity. see State v. Hopkins, 13 S.C. 487, 13 S.E. 359 (1892).

Quoting from the South Carolina Supreme Court's new precedent ruling in State v. Belcher, Opinion No. 26729, Heard May 14, 2009-Oct. 12, 2009! Generally a party must make a contemporaneous objection to improper arguments or the objection is waived. However, our Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice. Toyota of Florence v. Lynch, 314 S.C. 368, 373, 523 S.E.2d 187, 189 (1994).

An Petitioner must prove both an abuse of discretion and resulting prejudice to warrant reversal. State v. Sierra, 337 S.C. 368, 373, 442 S.E.2d 187, 189 (Ct. App. 1999). In the case State v. Belcher, Supra, the South Carolina Supreme Court ruling is effective in this case, and for all cases which are pending on direct review or not yet final where the issue is presented and preserved. Petitioner's case was pending on direct appeal, and did not become final until one (1) year after the ruling in State v. Belcher, Supra Appellate Counsel had an obligation to know or should have known that Petitioner's case applied under Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that's new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases... pending on direct review or not yet final). See Volume II, trial transcript p. 543, lines 23-25, p. 544 line 1, "(for the Solicitor's improper closing argument)" and Volume II, trial transcript p. 546, lines 17-25, p. 547, lines 1-8, ("for the erroneous jury charge, by the Court").

(1) On October 10, 2005, after the jury had been sworn in trial counsel made a Motion to Quash the Indictment. The motion was made in reference to the 90 days requirement under Rule 3 (c) South Carolina Rule of Criminal Procedure; and defects in the body of the indictment. Trial Counsel Motion to Quash the Indictment after the Jury had been sworn in. Clearly violated the statutory requirements of South Carolina Code Ann. 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face there of shall be taken by demurren or on motion to quash such indictment before the jury shall be sworn and not afterwards"). The South Carolina Supreme Court, had ruled months prior to Petitioner's trial, in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Trial counsel's untimely Motion to Quash the indictment, was both deficient and prejudicial toward the Petitioner. Whereas the indictment issue preserved for appeal, and denied him a due process violation that could have vacated his sentence and conviction on direct appeal. (see Volume 1, trial transcript p. 22, Line 10-19; and p. 23, Line 7-25).

(2) Trial Counsel's Motion to sequester the witnesses; gave the state an undue advantage against the Petitioner. Although, Mr. Carlos Freeman, was qualified by the court as the defense Interpreter throughout the entire trial. Mr. Freeman's name appeared as a witness for the defense and his testimony was very vital and essential.

In regards to showing the jury numerous inconsistencies in the state evidence and witness statements. Also would have exposed the fact, that the state withheld evidence in violation of Rule 5, South Carolina Rules of Criminal Procedure. The Motion to Sequester the witnesses was ill conceived; not very well thought out; or consented to by the Petitioner. Neither was it a strategic or tactical trial court strategy, because it undermined Petitioner's defense. see Currier v. United States, 160 F. Supp. 2d 159, 166 (D. Mass. 2010). Trial Counsel Motion to Sequester the Witness, caused the Petitioner to suffer ineffective assistance of counsel because the motion deprived him an Eye-Witness who was at the scene, on July 18, 2004. The testimony of Ms. Yamileth Corrales, was not allowed because she entered the courtroom unaware of the Motion to Sequester the Witnesses. Trial Counsel (did not inform her of the motion), did not even know who she was, or had interview her as a defense witness. (Please see Volume II, trial transcript p. 414, Line 17-21; and p. 413 Line 1-8). The failure to interview or investigate a very vital defense witness before the day of trial, constitute counsel's performance as being constitutionally deficient and was very prejudicial. see Belton v. Cockrell, 294 F.3d 730, 734 (5th cir. 2002); Ainsworth v. Woodford, 268 F.3d 868 (9th cir. 2001); Rios v. Rocha, 299 F.3d 796 (9th cir. 2002); However, the Motion to Sequester the Witnesses, gave the state an undue advantage against him, as trial counsel was ill prepared and failed to properly investigate.

Petitioner asserts that he suffered Ineffective Assistance of Counsel, when trial counsel failed to "object to the Prosecution's closing argument's to the jury. As well as trial judge's erroneous jury charge. Trial counsel may be found deficient for failing to object to trial court error. This includes, by the prosecution the making of improper arguments, Matthew v. State, 2001 WL 1887491 (S.C. Sup. Ct., decided June 17, 2002), and erroneous jury instructions, Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992), (Counsel deficient for failing to object to improper charge on malice, which improperly shifted burden of proof from the State to defendant). see Sandstrom v. Montana, 442 U.S. 510, 524 (1979), (holding that burden shifting presumptions or conclusive presumptions deprive a defendant of the "due process of law" and are therefore unconstitutional); Mullanse v. Wilber, 421 U.S. 684, 703-04 (1975), (holding that the "due process clause" forbids a State from placing the burden on the accused to prove his actions reduced the crime from Murder to Manslaughter"). A Solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) In reviewing a solicitor's closing argument, the court determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process, State v. Caldwell, 300 S.C. 484, 504, 388 S.E.2d 816, 822 (1990)

Petitioner was subjected to Prosecutor Misconduct at trial, that violated his Due Process Rights under the Fourteenth (14th) Amendment of the United States Constitution; and Article 1, sec. 3, of the South Carolina Constitution. When the prosecutor's closing Argument "that Malice can be implied by the use of a deadly weapon," violated the United States Supreme Court's ruling "which states that Due Process Clause of the Fourteenth (14th) Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. Sandstrom v. Montana, 442 U.S. 510, 524 (1979), (holding that "burden shifting presumptions or conclusive presumptions deprive a defendant of the due process of law" and are therefore unconstitutional); also Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "Murder to Manslaughter"). The South Carolina Supreme Court... addressed the Due Process Clause and unconstitutional charge on malice. Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (Improper charge on malice, which improperly shifted burden of proof from the state to defendant). The Prosecutor is guilty of misconduct, by vouching for the credibility of a witness, as was done in the Petitioner's case. see Volume II, trial transcript p. 530 lines 23-25, p. 531 lines 1-4. The United States prohibited the prosecutor from vouching for witness, as was done in petitioner case. United States v. Young, 105 S.Ct. 1038 (1985); also State v. Shuler, 545 S.E.2d 805 (2001); and State v. Kelly, 540 S.E.2d 851 (2001)

PCR Court heard testimony from Appellate Counsel and Trial Counsel and should had decide that one was deficiencies. The record reflect that trial counsel was more deficient, which was ineffective assistance of counsel, and they admitted on record at the PCR that they was deficient. Petitioner entitled to a reversal of his conviction accordingly.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

Marlon Rivera

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430 Oaklawn Rd.

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