THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

Appellate Case No.: 2013-001970

Lower Court Case No.: 2010-GS-32-01876

---

RECEIVED
OCT 24 2014
S.C. Supreme Court

State of South Carolina, Respondent,

vs.

Lexi Dial, III, Petitioner.

---

# REPLY BRIEF OF PETITIONER

---

H. Wayne Floyd, Esquire
Wayne Floyd Law Office, P.A.
1611 Augusta Road
P.O. Box 3972
West Columbia, S.C. 29171
(803) 739-1824
Attorney for Petitioner

Other Counsel of Record:

Christina Catoe Bigelow
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

## TABLE OF CONTENTS

TABLE OF CONTENTS....................1

TABLE OF AUTHORITIES....................2

STATEMENT OF THE CASE....................3

STATEMENT OF THE FACTS....................3

ARGUMENT....................

I. THE COURT ERRED WHEN IT RULED THAT OFFICER DUKES HAD AUTHORITY TO ARREST PETITIONER IN RICHLAND COUNTY....................3

II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF A MISTRIAL WHEN THE VICTIM'S MOTHER APPROACHED THE WITNESS STAND CARRYING AN URN CONTAINING THE VICTIM'S ASHES....................6

III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S EXCLUSSION FROM EVIDENCE OF THE CONFLICTING DEATH CERTIFICATE OF DR. ROSS....................6

CONCLUSION....................7

# TABLE OF AUTHORITIES

**CASES**

McKnight v. State 378 S.C. 33, 661 SE 2d 354 (2008)

State v. Boswell 391 S.C. 592, 707 SE 2d 265 (2011)

State v. Northcutt 372 S.C. 207,643 SE 2d 873 (2007)

**Statue**

S.C. Code §17-13-10

## STATEMENT OF CASE

Petitioner was indicted by the Lexington County Grand Jury in July 2010 for homicide by child abuse. This matter was tried before the Honorable R. Knox McMahon and a jury from April 11th to April 15, 2011. Petitioner was found guilty as indicted. Post-Trial motions were denied on April 19, 2011 and Petitioner was sentenced to life without parole.

Timely notice of appeal was filed. The Court of appeals affirmed all rulings of the Trial Court July 10, 2013.

Petitioner filed a Petition for Rehearing with Memorandum of Law on July 24, 2013. Petition for Rehearing was denied on August 22, 2013 and a Petition for Writ of Certiorari was filed September 18, 2013.

An Order granting Certiorari on questions I, III and IV was entered on August 6, 2014.

## STATEMENT OF THE FACTS

On January 19, 2010 Petitioner was taking care of his five month old son when he suffered a serious head injury. When CPR failed to revive the child 911 was called and emergency medical services and Law Enforcement Officers of the Lexington County Sheriff's Department responded to the scene.

EMS transported the child to Lexington Medical Center and Petitioner was taken to the hospital by Lexington County Sheriff's Department personnel. The child was then transported to Richland Memorial Hospital and likewise the Lexington County Sheriff's Department transported Petitioner there.

The child died the following day and Petitioner was arrested very shortly thereafter by Henry Dukes a Lexington County Officer at the hospital in Richland County. He was immediately transported to the Lexington County Sheriff's Department where he was interrogated until an inculpatory statement was obtained.

Petitioner contended at the scene and at the beginning of the interrogation that he was carrying his child when he tripped and the child's head hit the coffee table. Several experts opined that the child's injury was the result of "shaken baby syndrome".

### I. THE COURT ERRED WHEN IT RULED THAT OFFICER DUKES HAD AUTHORITY TO ARREST PETITIONER IN RICHLAND COUNTY.

Although Respondent advances numerous arguments in an attempt to evade the impact of the wrongful arrest of Petitioner, none of these arguments change the undisputed fact that Petitioner was arrested by a Lexington County Deputy in Richland County.

Lexington County Deputy Russell, who had control and custody of Petitioner at Richland Memorial Hospital admitted he did not have jurisdiction or authority to arrest Petitioner (R.p. 105, l. 19 to R. p. 106, l. 5). Arguably, petitioner had already been de facto arrested since Russell admitted petitioner was not free to leave the hospital.

It is clear on its face that the Memorandum of Understanding (MOU) (App. Pp. 18-21) did not apply to Petitioner. The MOU states its intent "is to investigate and apprehend local, state and federal fugitives, thereby improving public safety and reducing violent crime". (App, p. 18)

Petitioner was not a fugitive, he was in the control of Deputy Russell and it certainly doesn't change his status by placing his name in NCIC. That action was simply an effort of the Lexington County Sheriff's Department to hopefully impart authority to Deputy Dukes to arrest Petitioner in Richland County. The NIC entry however did nothing to alter the fact that Petitioner was not and never was a fugitive.

Furthermore the MOU requires the participating agency to refer cases for investigation by the DFTF (District Fugitive Task Force)....to be adopted by the DFTF at the discretion of the District Chief Deputy. (App, p. 18). This was not done. The Lexington County Sheriff's Department tried to hijack the MOU for its purely local purposes.

Respondent argues that this issue was not preserved however this is not a new issue but an additional argument on the same issue, that the MOU did not give Deputy Dukes authority to arrest Petitioner in Richland County. Furthermore this argument was presented to the Court of Appeals (App. p. 7)

There is also the question of whether the MOU is valid. There are no statues authorizing a county to enter into multijurisdictional agreement with the Federal Government as was argued by Petitioner at trial. (R.p 687, ll. 3-5)

Respondent also argues that the arrest was lawful as a "citizen's arrest". This statute authorizes a citizen upon view of a felony committed or certain information that a felony had been committed to arrest the felon and take him to Judge or Magistrate to be dealt with according to the law. S.C. Code §17-13-10. First of all this was not a citizen's arrest but an arrest by a Law Enforcement Officer. The statute does not authorize a Law Enforcement Officer to arrest outside his jurisdiction.

If the statute granted the blanket authority to arrest argued by Respondent then an Officer could simply ignore his jurisdictional limitations and go to another county and say he as arresting someone as a citizen because his fellow Officer's told him a felony had been committed.

Furthermore the statutory requirement that the citizen arrestor take the prisoner to a Judge or Magistrate was not complied with.

Petitioner finds it interesting that Respondent argues that the statute was complied with because they took Petitioner to Lexington County Sheriff's Department Complex, of which the bond court is a part, as if taking him to a building complex that housed a Magistrate met the requirements of the statute. Not only is this argument specious, it emphasizes the likelihood that if they had taken him to a Magistrate as required by the statute they never would have had the opportunity to browbeat this 18 year old scared kid who was suffering the grief of the death of his son into an alleged confession.

Petitioner's father told the arresting officers that Petitioner had an attorney, Bill Rast, (Rp. 19 to p. 20, l. 11)

Mr. Rast then went over to the jail to see Petitioner but they wouldn't let him see Petitioner because he was not booked in yet. (R.p. 142, l. 24 to p. 144, l. 22)

Had they taken Petitioner to the Magistrate rather than the interrogation room he would have had the benefit of legal representation and Deputy Russell would not have been able to interrogate him.

Since the arrest was not lawful Petitioner's alleged confession should have been suppressed. _State v Boswell_ 391 S.C. 592, 707 S.E. 2d 265 (2011)

Respondent's argument that the approval of the arrest and the admission of the inculpatory statement was harmless error because of overwhelming evidence of guilt overlooks the ample evidence that the incident was accidental, including the Petitioner's testimony at trial (R. p.856, l. 22 to R. p. 859, l. 5), the testimony of the initial treating physician, Dr. Shuler, that the injury could have been caused by the child being dropped on a coffee table (R. pp. 298-299), the original certificate of pathologist Dr. Ross that said head hit object (R. p. 1005) and the absence of any evidence of prior abuse to the child (R. p 797, ll. 13-16; R. p. 595, ll. 2-7)

## II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF A MISTRIAL WHEN THE VICTIM'S MOTHER APPROACHED THE WITNESS STAND CARRYING AN URN CONTAINING THE VICTIM'S ASHES.

The only reason for witness Richard to parade the ashes of the deceased child in front of the jury was to inflame the passions of the jury. She made it to the witness stand holding the ashes after parading in front of the jury. (R. p. 498, ll. 7-12; R. p. 499 ll. 16-25; R. p. 504 l. 22 to R. p. 505, l. 5)

Reversal is proper when matters tending to inflame the passions of the jury are injected into the jury's consideration rather than a decision based solely on the record evidence and it's reasonable inferences. *State v. Northcutt* 372 SC 207, 641 SE 2d 873 (2007)

## III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S EXCLUSSION FROM EVIDENCE OF THE CONFLICTING DEATH CERTIFICATE OF DR. ROSS

The original death certificate of Dr. Ross clearly supported Petitioner's testimony that the injury to his child was accidental. It said "head hit object". (R. p. 1005). This was consistent with Petitioner's statement to the police on scene that he was carrying his child when he tripped and fell and the child's head struck the coffee table. (R. p. 643, ll. 11-17). This also supported Dr. Shuler's testimony that the injuries he observed could have been caused by the child being dropped on a coffee table (R. pp 298-299)

It was error for the court to deny Petitioner's request to place this document in evidence. This was a powerful piece of documentary evidence that the jury should have been able to consider in the jury room.

In the course of deliberation testimony and lawyers arguments may fade from the juror's thoughts but the hard documents cannot be ignored and would be there to constantly remind the juror of this powerful piece of exculpatory evidence for the Petitioner. This is the same type of "hard" evidence our court has ruled should not be denied to the jury. *McKnight v State*, 378 SC 33, 661 SE 2d 354 (2008)

## CONCLUSION

It is clear the arrest was unlawful. Sgt. Dukes, a Lexington County Deputy, did not have authority to arrest Petitioner in Richland County under any theory of law.

The MOU did not apply as Petitioner was not a fugitive and it's requirements were not followed.

This was not a citizen's arrest as contemplated by the statute and that statute was not complied with. Accordingly the alleged inculpatory statement of the Petitioner should have been suppressed.

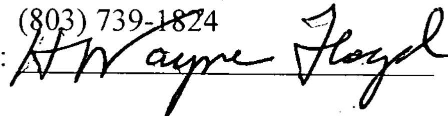
The parading of the ashes of the victim before the jury interjected passion and necessitated an mistrial.

The exclusion from evidence of the original Death Certificate deprived the Petitioner of powerful supporting documentary evidence.

For all these reasons the conviction of Petitioner should be reversed and this matter remanded for a new trial.

Respectfully submitted,

Wayne Floyd Law Office, P.A.
1611 Augusta Road
P.O. Box 3972
West Columbia, S.C. 29171
(803) 739-1824

By: 

West Columbia, South Carolina

October 23, 2014.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

Appellate Case No.: 2013-001970

Lower Court Case No.: 2010-GS-32-01876

---

State of South Carolina, Respondent,

vs.

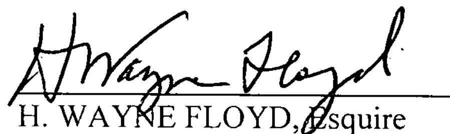
Lexi Dial, III, Petitioner.

---

**CERTIFICATE OF SERVICE**

---

The undersigned attorney hereby certifies that the **Reply Brief of Petitioner** in the above-referenced case has been served upon **Christina Catoe Bigelow**, Post Office Box 11549, Columbia, SC 29211, this 24 day of October, 2014.



H. WAYNE FLOYD, Esquire

Wayne Floyd Law Office, P.A.
1611 Augusta Road
P.O. Box 3972
West Columbia, S.C. 29171
(803) 739-1824

ATTORNEY FOR PETITIONER

**Wayne Floyd Law Office, P.A.**
1611 Augusta Road
P.O. Box 3972
West Columbia, S.C. 29171-3972

(803) 739-1824 Email: wayne@waynefloydlaw.com Fax (803)739-1888

October 24, 2014

RECEIVED
OCT 24 2014
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

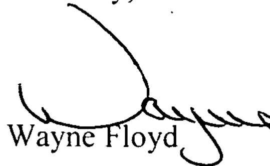
RE: Name: State v. Lexie Dial, III
Appellate Case No.: 2011-190693

Dear Mr. Shearouse:

Enclosed is the unbound original and fourteen (14) copies of the Reply Brief of Petitioner along with our certificate of service in the referenced matter.

Please contact me if you have any questions concerning this matter.

Sincerely,



Wayne Floyd

WF/mmw
enclosure

cc: Christina Catoe Bigelow, Assistant Attorney General