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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2014-000925
Circuit Court Case No. 2012-CP-23-07837

Gerald Brown, #174505,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **TRIAL COUNSEL WAS INEFFECTIVE AT PETITIONER BROWN'S TRIAL.**

   a. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT MEANINGFUL PRETRIAL INVESTIGATION AND PREPARATION.**

   b. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO LOCATE AND CALL AN EXULPATORY WITNESS AT BROWN'S TRIAL.**

   c. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DISCOVER AND POINT OUT SERIOUS INCONSISTENCIES IN THE VICTIM'S TESTIMONY.**

   d. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INTRODUCE CRITICAL EVIDENCE AT BROWN'S TRIAL.**

II. **APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A VALID AND PRESERVED ARGUMENT IN BROWN'S DIRECT APPEAL.**

REPLY ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE AT PETITIONER BROWN'S TRIAL.

The Sixth Amendment right to effective assistance of counsel is an overwhelmingly important right in the American judicial system. Without effective counsel, the protections we are so proud of in the criminal justice system are essentially meaningless, as is the pride.

In examining what the State means by repeatedly stating "[t]his argument is without merit", it helps to analyze exactly what the State argues in this case. The trial counsel candidly testified he spent a mere few hours with the Petitioner prior to the beginning of trial. Trial counsel has admitted to failing to raise critical defense arguments and failing to make those arguments in an effective manner. Appellate counsel failed to raise an argument that would have been successful in the appellate court based on subsequent precedent.

This Court should protect the accused's right to effective assistance of counsel. This means counsel that operates in the highest tradition of our justice system. It does not mean simply showing up and winging it at a trial that ends in a sentence of life without parole.

a. Trial counsel was ineffective for failing to conduct meaningful pretrial investigation and preparation.

Trial counsel showed up on a Wednesday and informed Brown they would be going to trial in his case the following Monday. (App. p.629, ll.11-14) He then met with Brown a few times over the next several days and trial began. (App. p.629, ll.14-16)

The State claims in its Return that Brown was hostile to his attorney and insisted on getting different representation. This hostility was entirely reasonable. It is utterly unfair to insist a defendant trust an attorney who has left him with two business days and two weekend days to prepare for a trial involving a sentence of life without parole.

The State relies on *Smith v. State* and related cases in support of its argument that the brevity of a trial attorney's preparation is not, by itself, ineffective assistance of counsel. *Smith v. State,* 404 S.C. 493 (Ct.App. 2012). Petitioner has already distinguished this case in his petition.

In his initial petition to this Court, Petitioner went through each of the cases relied on by the State and explained why they not only help the State, but support Petitioner's case and warrant relief in this case. Brown has demonstrated, and the record in this case corroborates, a difference would have been made by sufficient preparation time prior to trial. The failure to spend that time preparing cannot be endorsed by this Court.

b. Trial counsel was ineffective for failing to locate and call an exculpatory witness at Brown's trial.

Brown has asserted his defense centered on being in the wrong place at the wrong time. The State argues he did not tell trial counsel about a critical defense witness until the weekend before trial. There was no prior opportunity to tell his defense attorney about this information because trial counsel did not begin preparing for trial until just a few days before trial.

The PCR judge's finding are not supported by the record. Any finding that the witness would have come forward if he had helpful information is pure speculation. More importantly, it is incorrect to hold trial counsel was not deficient because "Petitioner was a hostile client who withheld information from him prior to trial." This argument by the State defies logic.

The State's reliance on the Fifth Circuit's opinion in *United States v. Pellerito* is misplaced, as that case involves an entirely different set of circumstances. *United States v. Pellerito,* 878 F.2d 1535 (5th Cir. 1989). *Pellerito* involved a guilty plea and unsupported allegations of his counsel's behavior. *Id.* at 1543. Unlike *Pellerito,* Petitioner's case involves a record that clearly demonstrates a breakdown of the attorney-client relationship. More importantly, trial counsel truthfully admitted in his testimony he only spent a few days preparing for trial.

c. Trial counsel was ineffective for failing to discover and point out serious inconsistencies in the victim's testimony.

Petitioner stands on his initial argument for this ground, but would like to point out that the argument Petitioner did not give his counsel information in a timely manner is meritless when there were only a few days spent preparing for trial.

d. Trial counsel was ineffective for failing to introduce critical evidence at Brown's trial.

The State's argument counsel had a valid strategic reason for not introducing this evidence is puzzling, in light of the fact trial counsel testified to just the opposite. To be clear, Petitioner repeats verbatim the argument he made in his initial petition.

When questioned about why he did not put this shirt into evidence, trial counsel could not remember a specific reason for failing to do this and testified "maybe [he] should have" put the bloody white t-shirt into evidence. (App. p.664, l.24 – p.665, l.3) Trial counsel stated the law enforcement witnesses were inconsistent, and possibly lying, about the clothes Brown was wearing and where they were found. (App. p.665, ll.11-20)

When questioned in more detail about the bloody shirt, trial counsel candidly admitted his argument to the jury would have been more effective had he introduced the shirt into evidence. (App. p.675, ll.16-23) Counsel's argument that there was no blood on the blue police shirt would have been far more powerful if he had been able to show the significant amount of blood that was on the shirt Brown was wearing. The lack of blood on the police shirt, compared with the amount of blood on the white t-shirt would have made a far more compelling point in favor of the defense theory that Brown was not the man who had committed the robbery. (See App. p.389, ll.2-25)

Trial counsel himself stated this was not a strategic decision and would have made for a more powerful defense. Not only was this not a strategic decision, but the "overwhelming guilt" was overwhelming in light of the lack of defense preparation and should be disregarded.

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A VALID AND PRESERVED ARGUMENT IN BROWN'S DIRECT APPEAL.

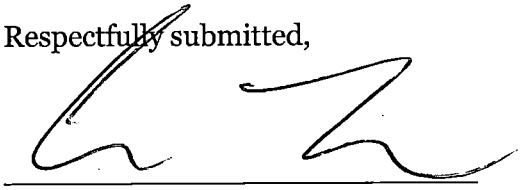
The State argues that appellate counsel's failure to raisie the accomplice liability charge is meritless. South Carolina appellate courts have overturned a conviction on that very ground. This appellate argument would have been successful and should have been raised. See *Wilds v. State,* 407 S.C. 432 (Ct.App. 2014); *Barber v. State,* 393 S.C. 232, 236 (2011).

CONCLUSION

The State essentially argues there is no problem spending several hours over the course of a few days preparing for a life without parole case. It then proceeds to argue that Petitioner is responsible for not providing enough information or cooperation with trial counsel, despite the limited opportunity to do so.

Petitioner respectfully prays this Court will disagree with the State and protect the important rights protected by the Sixth Amendment's right to effective counsel.

Respectfully submitted,



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May 28, 2015

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

The undersigned certifies a copy of the attached PETITION FOR WRIT OF CERTIORARI AND APPENDIX was hand delivered on opposing counsel at the following address, this 29th day of May, 2015, by United States Mail:

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Respectfully submitted,

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May 29, 2015
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May 28, 2015

Via hand delivery
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: Gerald Brown, 174505 v. State of South Carolina
Case No. 2012-CP-23-07837
Appellate Case No. 2014-000925

Dear Mr. Shearouse:

I hope you are well. Please find attached for filing an original *Reply to Return to Petition for Writ of Certiorari* and six copies.

If you need any additional information, please contact me at your convenience.

Sincerely,

Joshua Snow Kendrick

cc: Karen Ratigan, Esquire