

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Keith Kelly, Circuit Court Judge

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FEB 01 2016

SC SUPREME COURT

RISHAWN LAMAR REEDER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002708

REPLY TO THE RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Issue 1: Trial Counsel Made a Mistake of Law, Not Strategy

It is undisputed that petitioner received a self-defense charge. It is undisputed that trial counsel did not object to the jury charge prohibited by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). In response to what would seem to be a clear case of ineffective assistance of counsel, the State argues that a credibility finding by the PCR judge renders trial counsel's mistake of law irrelevant.

The State argues that the evidence supporting the PCR judge's conclusion is trial counsel's "credible" testimony that he believes an inferred malice instruction is not inconsistent with a self-defense charge. The State also asks this Court to accept a purported strategy for not objecting to the inference of malice charge—that it would be inconsistent with a strategy of showing "that Petitioner was an innocent rider." Ret. Cert. at 13.

While trial counsel may earnestly believe that the inference of malice charge and self-defense are not inconsistent, this is a mistake of law. Belcher holds that instructing the jury that malice may be inferred from use of a deadly weapon is error "where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Id. at 600, 685 S.E.2d at 803-04. The mitigating evidence in Belcher was self-defense. Id. at 601, 685 S.E.2d at 804. The credibility finding by the PCR court is of no import because trial counsel did not understand Belcher.

Furthermore, because trial counsel did not understand Belcher, he could not have made an educated strategic decision not to object to the inference of malice charge. Counsel cannot make a strategic decision without first conducting a full investigation and this principle applies with even more force to understanding the current status of the law. See Wiggins v. Smith, 539 U.S. 510 (2003). No set of circumstances exists where the inference of malice charge would be

beneficial to petitioner regardless of the defense strategy. No defendant gains an advantage by relieving the State of its burden to prove malice. The PCR court essentially adopted trial counsel's mistake of law. This Court should grant certiorari and reverse.

Issue 2: Strategic Decisions Must be Based on a Full Investigation

The State argues trial counsel had a strategic reason for failing to introduce the videos proving petitioner could not be in two places at the same time, but ignores that this supposed strategy was not based on assumptions, not an investigation. At the PCR hearing, trial counsel speculated that the nearly simultaneous time stamps could have been easily explained. However, nothing in trial counsel's testimony indicates that he made even a rudimentary investigation into the time stamps. A full investigation would have entailed contacting the person responsible for maintaining the surveillance videos and determining whether the time stamps were inaccurate **before** dismissing this vital evidence as unhelpful.

Indeed, the State's lack of evidence at the PCR hearing on this point proves the error made by trial counsel. While the burden of proof is on petitioner, he met that burden by showing videos that would place him at two locations at the same time. The State offered no evidence that the time stamps were inaccurate—evidence that trial counsel claimed could have been easily obtained. The only evidence before the PCR court was that the videos had nearly simultaneous time stamps. Instead of relying on this evidence, the PCR court used mere speculation to support its order. This was error. This Court should grant certiorari and reverse.

Issue 3: Petitioner Demonstrated Prejudice Because Kelly Was a Neutral Witness in a Circumstantial Evidence Case

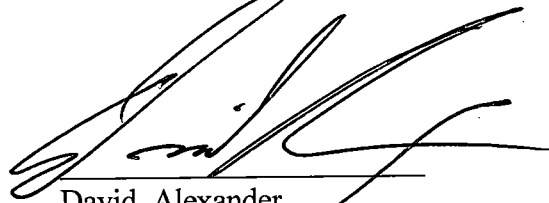
The State has offered only a mere conclusion that trial counsel was not ineffective for failing to investigate Glenn Kelly's testimony. Confusingly, the State asserts that petitioner cannot establish that trial counsel was "inadequately prepared" without presenting "evidence of what counsel could have discovered." Ret. Cert. at 16. This rule bars courts from granting PCR when a petitioner alleges the existence of a favorable witness, but the witness does not testify at the PCR hearing. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.")

In this case, there is no speculation because Glenn Kelly testified. Kelly testified that the car involved in the shooting was a Mustang. The State's case against petitioner depended on linking Cathcart's Nissan Maxima to the shooting. Kelly was a neutral witness. He had no ties to the defendants or the alleged victims. The PCR court made no finding that Kelly was not credible. No overwhelming evidence of guilt exists and the State's argument rests on the jury crediting Miller's testimony about the Maxima. Kelly's testimony undercuts the State's entire theory of the case. Petitioner amply demonstrated prejudice through Kelly's testimony and this Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

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 1st day of February, 2016

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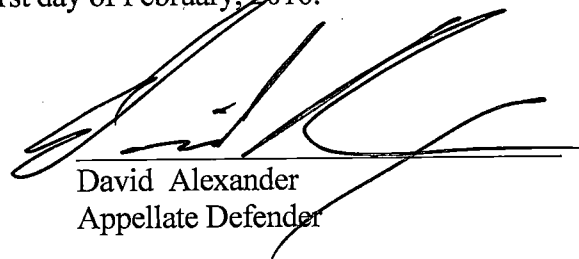
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CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to petition for writ of certiorari in this case have been served on Alicia Olive, Esquire, this 1st day of February, 2016.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 1st day
of February, 2016.

Maet Munder (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023