

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SEP 16 2016

CERTIORARI TO RICHLAND COUNTY S.C. SUPREME COURT

The Honorable Maité D. Murphy, Circuit Court Judge

Opinion No. 2016-UP-239 (S.C. Ct. App. Filed 6/1/2016)

1997-CP-40-02059

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

KURTINO WEATHERSBEE,

PETITIONER.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

DAVID E. BELDING
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ATTORNEY FOR PETITIONER

September 16, 2016

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the *Petition for Rehearing* was made and finally ruled on by the Court of Appeals on August 18, 2016.

QUESTION PRESENTED

Whether the Court of Appeals erred by affirming the Circuit Court ruling that Petitioner was not entitled to a new trial based on after-discovered evidence.

STATEMENT OF THE CASE

Petitioner was convicted of Armed Robbery, Kidnapping and Burglary in the First Degree after a jury trial held before the Honorable James R. Barber, III, in Richland County on April 19, 2005. Eighteen (18) year sentences were imposed on each charge, to run concurrently. Petitioner appealed and the S.C. Court of Appeals affirmed the convictions on January 10, 2008. State v. Weathersbee, 2008-UP-017. Petitioner filed an application for post-conviction relief on February 26, 2008. Following an evidentiary hearing, the Honorable L. Casey Manning issued an order on June 23, 2009, denying relief and dismissing Petitioner's PCR case. Petitioner appealed and this Court denied his *Petition for Writ of Certiorari* on May 26, 2011.

Petitioner then filed an application for post-conviction relief on August 15, 2011, alleging newly-discovered evidence showing that the State's chief witness (the Victim) testified falsely as to the source of the money she alleged was stolen by Petitioner. The State moved to dismiss this PCR application as untimely and successive. Prior to the evidentiary hearing, Petitioner informed the Circuit Court that he wished to withdraw the PCR application and move in the Court of General Sessions for a new trial under Rule 29(b), *SCRCrimP*.

Petitioner filed a *Notice of Motion and Motion for New Trial Based on After-Discovered Evidence* on September 24, 2013. A hearing on the motion was held by the Honorable Maité D. Murphy on September 29, 2014, resulting in a handwritten order denying the motion. Petitioner appealed and the S.C. Court of Appeals affirmed the Circuit Court order on June 1, 2016. *State v. Weathersbee*, 2016-UP-239. Petitioner filed a *Petition for Rehearing* on June 8, 2016, which was denied by Order dated August 18, 2016.

ARGUMENT

In the Circuit Court hearing and on appeal, Petitioner showed that his motion for a new trial was supported by written documentation that was not available at trial. (*Appendix* pg. 026-027). Petitioner demonstrated that the State's chief witness testified at trial that the money stolen from her was "from unemployment" when police records provided in pre-trial discovery had included a statement that the money was from a "tax refund". The chief witness's proposed trial testimony was not provided to Petitioner's trial counsel; therefore, the change in testimony (from tax refund to unemployment benefits) was a surprise at trial. The State does not have to prove, as an element of Armed Robbery, how the stolen money came into the possession of the victim; however, if the State intends to elicit the source from the victim at trial, the proposed testimony must be provided to a defendant's attorney in order for the Sixth Amendment Right to Counsel to be genuine and meaningful. Here, the State elicited the source of the stolen funds on direct examination with obvious intent to show the jury that the victim was needy. (*Appendix* pg. 013-014). This is improper because it would tend to affect the passions of the jury, *i.e.*, that a poor woman had her

unemployment funds stolen. Since there was no requirement to prove the source of the funds, the purpose of this line of questioning could only be intended to inflame the passions of the jurors.

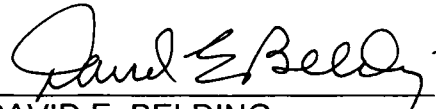
Petitioner demonstrated compliance with Rule 29(b), *SCRCrimP*, in that the motion for new trial was made within one (1) year of actual discovery of the evidence of the chief witness's actual unemployment benefits, which were different than the amount the State asserted had been stolen in the armed robbery. (*Appendix* pg. 007).

Petitioner has demonstrated that the Circuit Court failed to properly review his motion under the five (5) factor test outlined in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998). This failure to consider each required factor constitutes an abuse of discretion by the Circuit Court in reviewing Appellant's motion.

CONCLUSION

A Writ of Certiorari should issue to allow full briefing on these issues.

Respectfully submitted,



DAVID E. BELDING
ATTORNEY FOR PETITIONER

Columbia, S.C.

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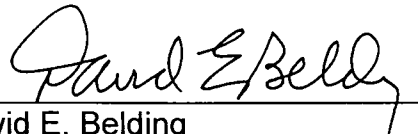
I certify that I have served the *Petition for Writ of Certiorari* and a copy of the *Appendix* in this case on the Hon. Alan McCrory Wilson, Attorney General, and Jennifer Ellis Roberts, Esquire, counsel for Respondent, and on the Hon. Daniel E. Johnson, Fifth Circuit Solicitor, by First Class United States mail on September 16, 2016. I further certify that a true copy of said *Petition* was served by mail on September 16, 2016, on the Petitioner.

The addresses for service are:

The Hon. Alan M. Wilson, Attorney General
Jennifer Ellis Roberts, Esquire
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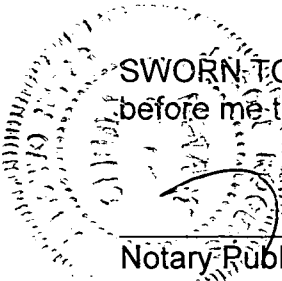
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David E. Belding
ATTORNEY FOR PETITIONER

SWORN TO AND SUBSCRIBED
before me this 16th day of September, 2016.





Notary Public for South Carolina (L.S.)
My Commission Expires: _____

My Commission Expires September 13, 2020