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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Dorchester County

Frank R. Addy, Circuit Court Judge

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000284

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ARGUMENT IN REPLY

1.

The state's contention that Petitioner's mugshot was admitted into evidence with a condition in place and that the condition could have been to remove any identifying marks that would have inferred Petitioner had a criminal record confuses the record where the record clearly indicates that it was Petitioner's "fingerprint card" that was admitted with a condition and that this condition was to redact the booking offense. Further, the record refutes the state's claims that there was no mention during the trial of when Petitioner's mugshot was taken and that the jury could have inferred the photograph was from Petitioner's booking for the murder charge before them when the jury was distinctly informed that the mugshot was taken more than four months before the murder. The introduction of Petitioner's mugshot was reversible error and trial counsel was ineffective for failing to object.

There are numerous factual and legal inaccuracies in the state's return that merit a response from Petitioner. In its return, the state contended that State's Exhibit No. 41, which is Petitioner's mugshot, was admitted into evidence with a condition in place and that this "condition could very well have been to remove any identifying marks that would infer a prior criminal record." Ret. 5. However, the state's assertion is refuted by the record.

The record clearly reflects that the trial court admitted State's Exhibit **No. 40**, which was the copy of Petitioner's "fingerprint card," with a condition in place, **not** State's Exhibit **No. 41** as the state asserted. App. 325, l. 17 – 326, l. 10. It was later revealed that the "condition" was based on an agreement by the parties to redact the fingerprint card because the card "listed his [Petitioner's] charge that he was booked in on as distribution of Schedule 1, 2, or 3 controlled substance." Based

on this condition, the fingerprint card was later substituted for a copy with the listed charge redacted. App. 370, l. 6 – 371, l. 4.

While trial counsel requested the booking offense be redacted from the fingerprint card, **she did not request any redactions be made to State's Exhibit No. 41** before it was admitted into evidence. Consequently, Petitioner's mugshot was admitted with language that indisputably suggested he had a prior criminal record. See State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004) ("The introduction of a 'mug-shot' of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication."). Most notably, "Charleston County Sheriff's Office Detention Center," was listed at the top of the mugshot in large, bold writing. Additionally, the body of the mugshot included, "Booking Date: 05/11/07" and Petitioner's basic background information, including his race, height, and gender. See App. 524.

The state also claimed in its return that "[t]here was also no mention during the trial of when the booking photograph took place." Ret. 5-6. This is also incorrect. Not only does the mugshot list the booking date as "05/11/07," which was approximately four months before the murder in this case, but state witness Javon Wright, who identified himself as an employee of the Charleston County Detention Center before the jury, also testified that State's Exhibit No. 41 is "a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07**." App. 323, 1. 5 – 325, l. 6 (emphasis added). Accordingly, despite the state's assertion, there was mention of *exactly* when the mugshot was taken, and significantly, as stated above, it was months before Petitioner's arrest in this case.

Moreover, this evidence clearly refutes the state's claim that the "jury could easily have inferred the picture and fingerprints were from Petitioner's booking for the murder charge before

them." Ret. 6. The murder in this case took place on September 17, 2007, approximately four months after the listed booking date on Petitioner's mugshot. Consequently, it is impossible that the jury could have inferred the mugshot was from Petitioner's arrest for the murder offense for which he was being tried.

In addition to "Charleston County Sheriff's Office Detention Center," the booking date, and Petitioner's background information, State's Exhibit No. 41 also contains both a front and side profile picture of Petitioner, which is normally associated with a mugshot. Therefore, it is undeniable that Petitioner's mugshot admitted as State's Exhibit No. 41 suggested he had a criminal record.

Furthermore, while the state contended in its return that Petitioner's mugshot "was not introduced in such a way as to draw attention to its origin or implication," it failed to make any argument in support of this assertion. Rather, the state simply maintained that the "booking photograph and the fact that the fingerprints were taken at a county detention center were not mentioned during the State's closing argument" and the "photographs [sic] origin and implication were entirely avoided by the State after its introduction." However, when Petitioner's mugshot was admitted into evidence, as mentioned above, Javon Wright testified the exhibit was "a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07**." Wright also testified that he took the picture of Petitioner when he booked Petitioner into the Charleston County Detention Center. The mugshot itself even states "Charleston County Sheriff's Office Detention Center." Therefore, it is obvious that the mugshot was admitted in a manner that drew significant attention to its origin and implication.

In support of its argument that the prosecution had shown a demonstrable need to introduce Petitioner's mugshot, the state incorrectly asserted in its return that admitting the mugshot was

necessary to tie the fingerprint card to Petitioner. Ret. 5. Introduction of Petitioner's mugshot was not necessary to establish that the fingerprint card entered as State's Exhibit No. 40 belonged to Petitioner. Petitioner never contested that this fingerprint card belonged to him nor did he dispute that his fingerprints were found on the outside of the decedent's vehicle. Before Javon Wright testified and Petitioner's mugshot was admitted into evidence, Investigator John Garrison told the jury that latent prints were located on the outside passenger side of the decedent's vehicle and that the prints "came back to the defendant." Petitioner did not object to this testimony or dispute that his fingerprints were on the outside of the car. App. 287, ll. 15-17.

The state could have easily established the validity of the fingerprint card without introducing Petitioner's mugshot or suggesting to the jury that he had a prior criminal record. For example, Wright could have simply testified that he collected Petitioner's fingerprints on May 11, 2007 and that the prints were stored by the sheriff's office without any mention of Petitioner's prior arrest or why the prints were collected.

Therefore, trial counsel was ineffective for failing to object to State's Exhibit No. 41 as the introduction of Petitioner's mugshot was in clear violation of this Court's holding in Traylor.

If trial counsel would have objected to the admission of Petitioner's mugshot and the trial court admitted the exhibit over objection, it would have been reversible error on appeal since the state did not have a demonstrable need to introduce the photograph, the photograph suggested Petitioner had a criminal record, and the photograph was introduced in a way that drew attention to its origin and implication. See Traylor, 360 S.C. at 84, 600 S.E.2d at 528. Moreover, since the three factors outlined by this Court in Traylor were not met in this case, it is highly probable the trial court would have sustained an objection from trial counsel if an objection had been made.

Contrary to the state's argument in its return, if the mugshot had not been admitted, the outcome of Petitioner's trial would have been different. The state's case against Petitioner was based almost exclusively on circumstantial evidence. Specifically, the state presented evidence that Petitioner's fingerprints were found on the outside of the decedent's car, his DNA was found on a telephone headset found in the parking lot where the decedent was shot, and he allegedly fled to New York. The only direct evidence against Petitioner was a statement given by his codefendant, Veronica. However, Veronica disavowed most, if not all, of this statement during her testimony at trial. Consequently, the state's evidence against Petitioner was very weak. It is highly likely that the improper admission of his mugshot tipped the scales in favor of a conviction and led the jury to convict Petitioner on an improper basis, namely because they knew he had a criminal record and had committed prior bad acts. The danger in admitting such prejudicial evidence is that even if the jury found the state had failed to prove Petitioner's guilt beyond a reasonable doubt, it likely concluded he was a criminal and should be incarcerated.

Respectfully, this Court should hold trial counsel was ineffective, reverse the ruling of the PCR court, and remand for a new trial.

2.

The state oddly cites to the standard of review that is used by federal courts to determine if a writ of habeas corpus should be granted which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This is an incorrect standard of review in post-conviction relief cases in South Carolina. Further, the state ignores the fact that the trial judge instructed the jury that its task was the "seek the truth" in *both* her opening remarks and her charge on the law. The court's repeated use of the "seek the truth" language erroneously shifted the state's heavy burden to Petitioner and likely caused the jury to apply the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt.

The state's return ignores the fact that the trial judge instructed the jury that its task was to "seek the truth" in *both* her opening remarks and her charge on the law at the conclusion of the trial. In fact, the court's last words to the jury before it began to deliberate was: "The word 'verdict' . . . comes from the Latin phrase 'verdicto,' which means to speak the truth, to speak the truth. And that is now your task, to speak the truth." App. 494, ll. 6-9. The state makes no mention of this erroneous and burden shifting language in the court's charge on the law and instead focuses on the trial judge's opening instruction.

The state contended in its return that because the trial judge's opening instructions were not a charge on the law, her erroneous use of "seek the truth" was not objectionable. However, the trial judge never instructed the jury during her opening that her remarks were not a charge on the law as most judges do. Because the judge failed to inform the jury that her opening remarks were not an instruction on the law, the jury could only have assumed her opening instructions were the law.

The trial court's repeated use of the "seek the truth" language in its opening remarks to the jury and its instruction on the law at the conclusion of the trial erroneously shifted the state's heavy

burden of proof to Petitioner. Throughout the trial, the jurors were concentrating on evaluating the quality of the evidence in a "search for the truth" rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt. Because of the repeated use of this erroneous language throughout Petitioner's trial, even in the state's closing argument, there is a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. During its deliberations, the jury was likely focusing on discovering "the truth" as opposed to determining whether the state had met its hefty burden of proving Petitioner's guilt beyond a reasonable doubt.

Moreover, at the conclusion of its argument, the state oddly cited to an incorrect standard of review. Specifically, the state argued, "Respondent asserts the PCR Court's rejection of this claim of ineffective assistance of counsel, is not contrary to, or an unreasonable application of, clearly established **state** law, nor did the adjudication result in an unreasonable determination of the facts." Ret. 11 (emphasis added). This language appears in 28 U.S.C.A. § 2254(d), which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and is the standard used by federal courts to determine if a writ of habeas corpus should be granted. Specifically, the statute reads,

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claims – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established **Federal** law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

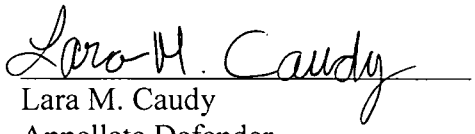
(emphasis added). This standard is not proper in post-conviction relief cases in South Carolina and was incorrectly and oddly cited by the state.

Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function that occurred during both the court's opening remarks and the charge on the law at the conclusion of the trial, this Court should hold trial counsel rendered ineffective assistance of counsel by failing to object and that Petitioner was prejudiced by counsel's deficient performance since the incorrect instruction improperly shifted the burden of proof and tainted the jury's deliberations. Respectfully, due to counsel's deficient performance and the resulting prejudice to Petitioner, this Court should reverse the ruling of the PCR court and grant Petitioner a new trial.

CONCLUSION

For these additional reasons, Petitioner respectfully requests this Court grant the petition for writ of certiorari.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that a true copy of the Reply to Return to Petition for Writ of Certiorari in the above referenced case has been served upon Ruston W. Neely, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 2920, this 16th day of September, 2016.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

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

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.