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SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

ORIGINAL

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 4, 2018

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED

MAY 04 2018

S.C. SUPREME COURT

Re: Rashaun Jarmine Sobers v. State
Appellate Case # 2017-002002

Dear Mr. Sobers:

Enclosed are copies of an Affidavit being submitted to the Court as attachments to copies of the Petition for Appointment of Outside Counsel filed in the above titled case on yesterday's date. If any inquiries arise regarding this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/sl

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
RASHAUN SOBERS,)
)
PETITIONER,)
v.)
)
THE STATE,)
)
RESPONDENT.)
_____)

IN THE COURT of COMMON PLEAS

AFFIDAVIT

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MAY 04 2018

S.C. SUPREME COURT

PERSONALLY appeared before me, Robert M. Dudek, who being duly sworn, deposes and says:

1. He is the Chief Appellate Defender for the Office of Appellate Defense, Commission on Indigent Defense.
2. He has been an Appellate Defender for more than twenty-seven years, handling criminal appeals before the South Carolina Supreme Court and the South Carolina Court of Appeals during that time period.
3. Undersigned counsel represented Petitioner Sobers in his direct appeal to the South Carolina Court of Appeals.
4. Counsel filed an Initial Brief of Appellant and Designation of Matter with the South Carolina Court of Appeals on petitioner's behalf on December 20, 2011.
5. Counsel filed the final brief of appellant on petitioner's behalf on July 19, 2012.
6. Undersigned counsel raised the following two issues for Petitioner Sobers on direct appeal because he thought they gave petitioner the best opportunity to win a new trial:
 - a. The court erred by excluding the testimony of Travoiris Gentry, Ricky Smith, Quitha Gentry, Joshua Fuller, and Phoenix Fielder about gangs and gang signs being made at the scene of the shooting since this was relevant to appellant's self-defense case because appellant's fear, his apprehension, and his state of mind at the time he fired the gun was affected by the fact of gang involvement.

b. The court erred by refusing to allow former veteran Greenville County Narcotics Officer Rocky Watts to testify as an expert witness, where he was qualified by experience and education, and his testimony that gangs typically now videotape their gang activity and that he was familiar with the north side gang, and the south side gangs, after his investigation since this evidence was relevant and probative in this case.

7. Undersigned counsel argued petitioner's case before the South Carolina Court of Appeals on June 4, 2014. The Court of Appeals panel was now-Chief Judge Lockemy, now-Justice Few, and Judge Geathers.

8. The Court of Appeals affirmed petitioner's convictions in a published opinion, State v. Sobers, 404 S.C. 263, 744 S.E.2d 588 (2013). The Court affirmed the trial judge's ruling excluding evidence of gangs and gang activity at the time of the shooting. In affirming, the Court wrote:

"We note that although the trial court left open the possibility Sobers could offer gang evidence if he could establish the requisite relevancy, Sobers never testified the mob that surrounded his car was part of a gang. According to Sobers, the mob action caused him to fear for his life and fire his gun, but he never testified he was more fearful because the mob was part of a gang. Thus, Sobers never introduced evidence that would make gang activity relevant." The Court also held that there was not any reason to decide whether former veteran Greenville County Narcotics Officer Rocky Watts should have been allowed to testify as an expert witness in gangs since it reasoned the defense had not established the relevance of gangs or gang activity.

State v. Sobers, 404 S.C. 263, 268, 744 S.E.2d 588, 590-591 (2013).

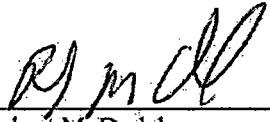
9. Undersigned counsel obviously raised the issues he thought gave petitioner the best chance of obtaining a new trial from the Court of Appeals. Counsel obviously does not intentionally fail to raise any issue he perceives to be a winning issue. Thus, if petitioner identifies a winning issue to this Court that counsel did not raise, undersigned counsel did not have any strategic reason for failing to raise that winning issue on appeal.

10. Specifically, as to an allegation of ineffective assistance of appellate counsel for not raising the denial of the motion to dismiss based on phone camera evidence, Tr. pp. 45-55, counsel did not think the appellate court would reverse the trial judge's ruling that the defense had not shown bad faith (or really even argued it other than returning the phone to the owner while the case was pending). The trial judge reasoned that the prosecution turned over to the defense the relevant portion of the video, and that any assertion of exculpatory evidence that might have been available if the phone was not returned to its owner was speculative. The judge also noted that the video was not going to be of good quality to start with given that a phone did the filming. The judge reasoned the defense had the essence of the video, and everything was speculative. The defense also did not dispute that the person who made the video was present to testify. Given the ultimate penalty of dismissal of a murder case, while the judge's denial of the motion seemed reasonable, for the reasons above, counsel did not believe the appellate court would find an abuse of discretion on this dismissal issue. Again, if this Court disagrees, counsel would assert that petitioner is entitled to relief.

11. As to the "burden shifting" closing argument of then Solicitor Gowdy, at Tr. pp. 550-551, after counsel refreshed his memory, this would have been an improper argument had the defense *not* put up witnesses in its defense. However, petitioner testified in his own defense, and the defense put up a host of defense witnesses. Under the circumstances, counsel does not think it would be improper to point out what was allegedly material and missing since it was not a comment on the defendant's right to remain silent or his right to put the state to its burden of proof without offering witnesses. Further, the arguments of counsel are not evidence, and there was not an instruction to draw an adverse inference from the failure to call witnesses "under the control of a party." Finally, the standard for reversal of even a very bad closing argument is high: Did the solicitor's argument so infect the trial with unfairness as to make the resulting conviction a denial of due process. Counsel does not think this was a good issue given the

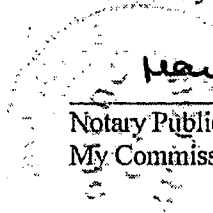
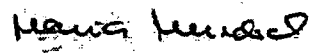
closing argument in this case, the circumstances under which it was made, and the standard for reversal. Again, if this Court disagrees with counsel's reasoning on not raising this issue, counsel certainly does not want his former client denied relief.

The above paragraphs are true and correct to the best of my knowledge.



Robert M. Dudek
Chief Appellate Defender

SWORN TO before me
this 21st day of June, 2017.


 (L.S.)

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