

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-000193

Joseph Richard Graddick, Petitioner,

v.

State of South Carolina, Respondent.

Reply to State's Return to Petition for Writ of *Certiorari*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Petitioner Joseph Graddick

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ARGUMENTS

Question I

Appellate counsel rendered ineffective assistance of counsel by failing to appeal the trial judge instructing the jurors on S.C. Code § 16-3-657, when such instruction did not comply with *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), and the credibility of the witnesses was the central issue for the jurors to determine.

The State argues, “At the time of [Mr. Graddick’s] trial, this particular jury instruction had been deemed an appropriate charge.” State’s Return to Petition for Writ of *Certiorari* (“State’s Return”), at 9. The State’s Return focuses on Mr. Graddick’s trial occurring five years before this Court’s decision in *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480, 483 (2016). The State, however, never acknowledges that *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006) recognized this instruction to be objectionable when the trial judge unduly emphasizes the instruction, which is what happened in Mr. Graddick’s case. See Petition for Writ of *Certiorari*, at 12-16. This is not a question of being “clairvoyant” as suggested by the State’s Return, at 11, but rather being familiar with *Rayfield*. Mr. Graddick’s trial counsel was keenly aware of the objectionable nature of this instruction when he made the objection. Appellate counsel rendered prejudicial, deficient performance by not raising this issue on appeal.

Question II

In the alternative to Question I, trial counsel rendered ineffective assistance of counsel when he failed to renew the objection to the trial judge instructing the jurors on S.C. Code § 16-3-657, when such instruction did not comply with *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006), and the credibility of the witnesses was the central issue for the jurors to determine.

If this Court concludes trial counsel did not preserve this issue for appellate review, then this Court should grant relief based on ineffective assistance of trial counsel for not preserving the issue for review.

Question III

Trial counsel rendered ineffective assistance of counsel when he failed to object to the trial judge instructing the jurors “to seek the truth regardless of its source” and “to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case” when these instructions violated *Cage v. Louisiana*, 498 U.S. 39 (1990), *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and other longstanding precedent in this state, resulting in prejudice because the credibility of the witnesses was the central issue for the jurors to determine.

The State’s Return, at p. 16, acknowledges some, but not all of this Court’s precedent dating back to *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998).¹ The State’s Return did not acknowledge that *Cage v. Louisiana*, 498 U.S. 39 (1990) prohibits jury instructions that reduce the prosecution’s burden of proof. In Mr. Graddick’s case, the trial judge not only instructed the jurors “to seek the truth regardless of its source” and “to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case,” but also instructed the jurors to ignore the lack of corroboration of the allegations. Viewing the jury instructions as a whole, Mr. Graddick’s jurors were not aware of their proper role. See *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008) (“the challenged instruction must be examined in the context of the trial court’s entire charge to the jury and not in isolation”) and *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) (“It is error to give instructions which may confuse or mislead the jury. The test is what a reasonable juror would understand the charge to mean.” (citations omitted)).

¹ The State’s Return, at 16 (fn. 3), points out this Court decided *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018) seven years after Mr. Graddick’s trial. This Court decided *Needs* twenty years before *Beaty*. Thus, for two decades, the bench and bar has been on notice that these jury instructions are improperly burden shifting.

Question IV

Trial counsel rendered ineffective assistance of counsel by failing to object to testimony about Joseph Graddick's pre-trial incarceration when such testimony constituted improper character evidence and prejudiced Mr. Graddick by reducing his credibility in the eyes of the jurors in a case where credibility of the witnesses was the central issue for the jurors to determine.

The State's Return, at 17-19, seeks to minimize the improper testimony about Mr. Graddick's incarceration as "passing comment" or "fleeting references." The record, however, demonstrates the prosecution questioned Ms. Dunham and Detective Forsythe in a manner that called attention to the incarceration. A. 123-29, 218-19. This Court's guidance is needed in order to discourage prosecutors from improperly highlighting an accused's incarceration.

The State also argues, "When [Mr. Graddick] took the stand in his own defense, he testified he had been arrested in Georgia and extradited back to South Carolina, information which can only logically indicate that [he] was detained pre-trial on these charges." The State misses the point. An arrest is required in every criminal case, but most people accused of a crime are routinely released on bond. This testimony implied no more than Mr. Graddick was arrested and returned to South Carolina. Without more information, the jurors would not have had any reason to think Mr. Graddick was not released on bond. The Solicitor's questioning painted the complete, prejudicial picture of Mr. Graddick's incarceration.

Question V

Appellate counsel rendered prejudicial, ineffective assistance of counsel by failing to brief on appeal testimony by Officer George Van Tine about statements made by Ms. Dunham that were impermissible hearsay and violated the Confrontation Clause.

The State's Return, at 19, argues, "When appellate counsel reviewed an issue and made a professionally reasonable decision not to raise an issue on appeal, appellate counsel has not performed in a constitutionally ineffective manner." By filing an *Anders* brief,² appellate counsel, in effect, did not raise *any* issue on appeal. Even if the confrontation clause objection was not preserved for appeal, the hearsay objection was viable under the same analysis that this Court employed in *State v. King*, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017); *see also German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996) and *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). The prosecution used this inadmissible evidence to imply Ms. Dunham was helping Mr. Graddick flee from justice, but the jurors never heard from Ms. Dunham about these supposed statements.

Question VI

Trial counsel rendered prejudicial, ineffective assistance of counsel by failing to call Leroy Graddick to corroborate Joseph Graddick's testimony that he knew the complaining witness prior to the incident giving rise to the underlying charges.

The State's Return, at 21-22, if taken to its logical conclusion, absolves trial counsel of conducting a meaningful interview with the client and interviewing collateral witnesses. *See* South Carolina Commission on Indigent Defense Performance Standards for Public Defenders and Assigned Counsel (Non-Capital), July 1, 2013, Guidelines 2.2

² *Anders v. California*, 386 U.S. 738 (1967).

and 4.1.³ Trial counsel was aware Mr. Graddick knew Ms. Joyner prior to the incident leading to the criminal charges. Citing *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), the State acknowledges trial counsel has a duty to conduct a reasonable investigation. A reasonable investigation includes thoroughly interviewing the client to discover witnesses that can corroborate the defense. In this case, a reasonable investigation would have led trial counsel to discovering Leroy Graddick and calling him as a witness.

Question VII

Appellate counsel rendered prejudicial, ineffective assistance of counsel by failing to brief the trial judge limiting trial counsel's closing argument.

The State's Return, at 22, argues Mr. Graddick "appears to be advocating for a standard that appellate counsel should be deemed *per se* ineffective whenever he or she elects to file an *Anders* brief based on his or her professional judgement of the issue's merit if the issue is preserved for appellate review." Mr. Graddick does not ask this Court to create a new rule regarding ineffective assistance of appellate counsel, but rather to apply the already existing precedent. Mr. Graddick testified and trial counsel argued the complaining witness had a motive to take Mr. Graddick's freedom. Appellate counsel believed trial counsel's argument was not objectionable because it was "on the line of whether that actually was getting to punishment or if it was a matter the jury could consider." A. 504-05. Appellate counsel, however, did not link the closing argument to Mr. Graddick's testimony that Ms. Joyner wanted to take his freedom. If properly briefed,

³ [https://sccid.sc.gov/docs/SCCID%20%20Performance%20Standards%20\(Non-Capital\)%20for%20Public%20Defenders%20and%20Assigned%20Counsel%20as%20adopted%20by%20SCCID%206-7-2013%20with%20revised%20Preamble%208-22-2013.pdf](https://sccid.sc.gov/docs/SCCID%20%20Performance%20Standards%20(Non-Capital)%20for%20Public%20Defenders%20and%20Assigned%20Counsel%20as%20adopted%20by%20SCCID%206-7-2013%20with%20revised%20Preamble%208-22-2013.pdf) (last viewed Nov. 7, 2018). Publications of "criminal defense and public defender organizations" are evidence of the prevailing professional norms. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

then this issue has merit. Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

Question VIII

Joseph Graddick is entitled to a new trial based on the Cumulative Error Doctrine.

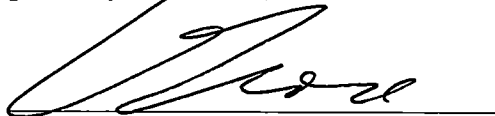
The State's argument against applying a cumulative error analysis is rooted in its position that there are not multiple errors. Once this Court reviews the other issues raised in Mr. Graddick's petition, it will be appropriate to consider the cumulative error doctrine. For example, the jury instruction contained multiple errors that reduced the State's burden of proof and detracted from Mr. Graddick's defense. Despite the incorrect instructions, the jurors struggled over whether to convict Mr. Graddick, as evidenced by their request to be re-instructed on the law. There is a reasonable probability that a properly instructed jurors would have acquitted Mr. Graddick.

CONCLUSION

For the reasons set forth in Mr. Graddick's petition for a writ of *certiorari* and this return, this Court should grant the writ, consider the issues, and order a new trial.

Respectfully Submitted,

By



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

Attorney for Petitioner Joseph Graddick

November 8, 2018.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM Charleston COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000193

Joseph Richard Graddick, Petitioner,

v.

State of South Carolina, Respondent.

Certificate of Service

I certify that I have served a copy of Mr. Graddick's Reply to the State's Petition for Writ of *Certiorari* and Appendix on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

November 8, 2018



E. Charles Grose, Jr.
The Grose Law Firm, LLC.
404 Main Street
Greenwood, SC 29646
(864) 538-4466

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: chasgrose@gmail.com
Web: GroseLawFirm.com

November 8, 2018

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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

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S.C. SUPREME COURT

Re: *Joseph Richard Graddick v. State of South Carolina*
Appellate Case No. 2018-000193

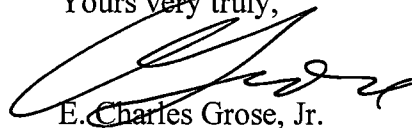
Dear Mr. Shearouse:

Enclosed please find the original and six copies of Ms. Graddick's Reply to the State's Return to Petition for Writ of *Certiorari*, along with a certificate of service.

Thank you for your attention to this matter. If you have any questions or require additional information, please do not hesitate to contact me.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Megan Harrigan Jameson, Esquire

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cet
29646



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The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211