

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County
Honorable J. Mark Hayes, Circuit Court Judge

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S.C. SUPREME COURT

JOVAN MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001004

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel's deficient performance in failing to object to the charging of a lesser-included offense for which there was no evidence at trial prejudiced petitioner?

STATEMENT

On September 27, 2013, a Greenwood County grand jury indicted petitioner for grand larceny. App. 339. On October 1, 2013, appellant was tried before the Honorable Donald B. Hocker and a jury. App. 1. Shannon S. Odom and Cam Morrow represented the State. App. 1. Carson Henderson represented petitioner. App. 1. The jury convicted petitioner of the lesser included offense of larceny in the amount of \$1,000.00 to \$5,000.00. App. 212. Judge Hocker sentenced petitioner to five years' imprisonment suspended upon the service of eighteen months and two years' probation. App. 238. Judge Hocker also ordered restitution in the amount of \$1,000.00. App. 238. Petitioner's conviction was affirmed on appeal. State v. Jovan Mitchell, Op. No. 2015-UP-543 (S.C. Ct. App. Nov. 25, 2015).

On December 12, 2016, petitioner filed a PCR application. App. 241. On February 26, 2018, the Honorable J. Mark Hayes held a hearing. App. 256. Ashley McMahan represented petitioner and Justin Hunter represented the State. App. 256. On April 25, 2018, Judge Hayes denied the application. App. 321. This petition follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

Trial counsel's deficient performance in failing to object to the charging of a lesser-included offense for which there was no evidence at trial prejudiced petitioner.

The PCR court correctly found trial counsel performed deficiently in failing to object to the giving of a lesser-included offense, but erred in finding no prejudice. App. 335-36. Appellant was originally charged with grand larceny in an amount exceeding \$10,000 for the theft of metal from an old mill site. App. 339. App. 36. The owner of the property testified that petitioner took a metal called "Niresist" which was "a real valuable metal." App. 49. The owner testified the value of the metal was over \$22,000. App. 50.

However, the owner did not give the police this value on the day of the incident. App. 63. On cross-examination, trial counsel confronted the owner with tickets from a scrap yard showing an amount under \$1,000. App. 69-73. The trial judge charged the jury on three offenses of larceny: (1) over \$5,000; (2) between \$1,000 and \$5,000; and (3) less than \$1,000. App. 206. The jury convicted petitioner of the intermediate amount. App. 212.

After the verdict, trial counsel moved for a judgment of acquittal because the only amounts before the jury were the owner's testimony that the metal was worth more than \$5,000 and the tickets showing the metal was worth less than \$1000, but no evidence in between the two amounts. App. 215-219. The trial judge said there had been a discussion in chambers regarding the jury charge, but that petitioner failed to object on the record to charging "the three levels of larceny" or the verdict form and denied the motion. App. 216-17.

At the PCR hearing, trial counsel admitted he "dropped the ball and didn't object to it." App. 295-96. The PCR judge found trial counsel deficient for failing to object to the charge. App. 335-36. However, the PCR judge found no prejudice because the valuation of the metal

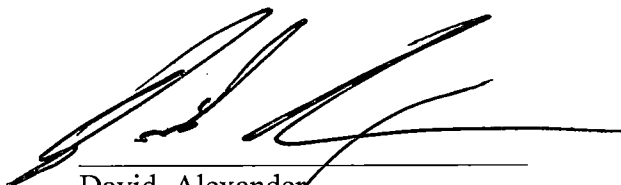
was a question for the jury. App. 335-36. The court reasoned that because it was a question of fact whether the metal was worth between the amount claimed by the owner and the amount presented by the defense, the trial judge correctly instructed the jury on the lesser included offense of between \$1000 to \$5000.

The PCR court erred in its reasoning. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). A lesser included offense instruction should be refused if there is no evidence to support it. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991).

This was a criminal trial, not a civil trial. Therefore, the jury was not being asked to determine damages, but only whether there was evidence beyond a reasonable doubt to convict. The analogy that the jury was the factfinder and entitled to consider amounts in between the owner's value and the amount of the scrapyard tickets simply does not apply. Here, there was only evidence that the metal was worth more than \$20,000 and there was only evidence that the metal was worth less than \$1000. No evidence existed to place the value in between these amounts. Therefore, with no evidence, the trial court clearly erred in giving the charge. Had trial counsel preserved his objection, petitioner's conviction would have been reversed on appeal. See McHam v. State, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (holding failure to preserve issue for appeal constituted deficient performance). This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing petitioner's conviction and remanding for a new trial.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenwood County
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JOVAN MITCHELL,

PETITIONER

V.

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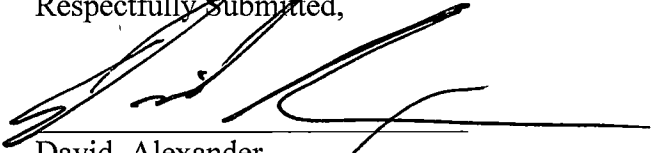
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jovan Alexander Mitchell states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before the Honorable J. Mark Hayes, which was held on February 27, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jovan Alexander Mitchell.

Respectfully Submitted,

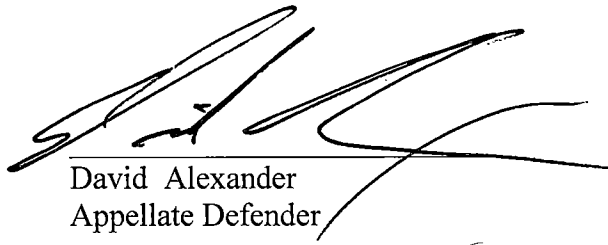


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 22nd day of January, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

A handwritten signature in black ink, appearing to read 'D. Alexander', is written over a horizontal line. The signature is fluid and cursive.

David Alexander
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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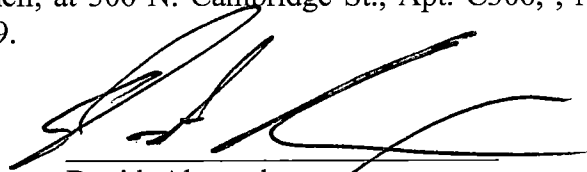
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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Janell Gregory, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Jovan Alexander Mitchell, at 306 N. Cambridge St., Apt. C306, , Ninety Six, SC 29666, this 22nd day of January, 2019.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 22nd day of January, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.