STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-001475

RYAN P. DELESTON, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

BENJAMIN LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

1. Did the PCR judge properly find trial counsel was not ineffective for failing to object to a proper jury instruction given by the trial court?

2. Did the PCR judge properly find trial counsel was not ineffective for failing to argue the State opened the door to counsel cross-examining Bryan Rivers about a previous crime where this testimony would have been merely cumulative and was admissible under a third-party guilt theory?

STATEMENT OF THE CASE

In October of 2012, the Charleston County Grand Jury indicted1 Petitioner, Ryan P. Deleston, for murder, attempted armed robbery, possession of a hand gun with an obliterated serial number and possession of a weapon during the commission of a violent crime. On October 7, 2013, Petitioner proceeded to jury trial before the Honorable Kristi L. Harrignton. D. Ashley Pennington and John T. Kozelski represented Petitioner at trial. Scarlett A. Wilson and Bruce Durant prosecuted the case. The jury returned verdicts of guilty and Judge Harrington sentenced Petitioner to life in prison for murder, twenty (20) years concurrent for attempted armed robbery and five (5) years concurrent for the unlawful weapon. The judge did not impose a sentence for the possession of a weapon during the commission of a violent crime because of the life sentence imposed for the murder^. A timely notice of intent to appeal was filed and the direct appeal perfected.

The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Deleston. 2-16 UP-)55 (Ct. App. filed February 10, 2016). A petition for rehearing was filed and then denied on April 21, 2016. On May 23, 2016, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The return was filed on June 29, 2016. On December 1, 2016, the South Carolina Supreme Court granted the petition for writ of certiorari. Following briefing and argument, the South Carolina Supreme Court dismissed the petition for writ of certiorari ad improvidently granted.

On September 5, 2017, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on December 12, 2017, and an amended return on May 23, 2018. On May 24, 2018, an evidentiary hearing was held before the Honorable Roger M. Young Senior. Christopher L. Murphy represented Petitioner at the PCR hearing. Deputy Attorney General

Donald J. Zelenka and Assistant Attorney General Kelly Oppenheimer represented the State. In a written order filed July 25, 2018, Judge Young denied relief and dismissed the application. A timely notice of intent to appeal was served on August 7, 2018. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

ISSUE 1

The PCR judge properly found trial counsel was not ineffective for failing to object to a proper jury instruction given by the trial court.

Petitioner contends counsel ineffective for failing to object to a jury instruction given by the trial court concerning express malice. The jury instruction given by the court was as follows:

> Expressed malice is shown when a person speaks words or which -- words which express hatred or ill-will of another person **or when the person prepared beforehand to do the act which was later accomplished.** For example, **lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be expressed malice.**

Petitioner alleged during the PCR that the jury instruction given by the trial court on express malice impermissibly commented on the facts of the case and that counsel should have objected. Counsel was asked during the evidentiary hearing why he did not object and stated: "I think the record speaks for itself. I did not object, and I would have been listening and paying attention to anything that came my way on that front." App. P. 1277, lines 9-11.)

The PCR court properly found that trial counsel could not be found ineffective for failing to object to a charge was and is currently good law in South Carolina. The PCR court noted in its order of dismissal that Petitioner presented no case that would support the claim that counsel should have objected to a charge that was proper. ROA p. 1317-1318. Petitioner contends that the PCR courts reliance on State v. Kelsey, 331 S.C. 50, 78, 502 S.E.2d 63 77 (1988) and State v. Hardin, 114 S.C. 280, 103 S.E. 557, 558 (1920) was misguided as those cases did not directly challenge the "lying in wait" portion of the express malice charge. The PCR court did not rely on these cases entirely in support of its decision and even noted that they were simply examples of

the Court "implicitly" approving of a similar instruction. ROA p. 1317. The PCR court even went so far as to address State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) by noting that this Court "expressly did not address the implied malice by use of a deadly weapon instruction as a violation of the state constitution "charge on the facts," but limited its holding to a common law determination based upon its original jurisprudence." ROA p. 1318. Petitioner has failed to show how the PCR court citing to cases in its order of dismissal that include a similar jury instruction at all shows that counsel was deficient for failing to object.

In conclusion, the original order of dismissal summarizes the State's argument as best is possible:

> Here, the Applicant, in a collateral setting seeks for the first time for this court to declare the instruction defining express malice is a charge on the facts and that counsel was deficient in 2013 in failing to challenge it. Counsel cannot be deficient in failing to object to an instruction which has been used and no opinion of a court has concluded it was a violation of the State Constitution. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law"). See United States v. McNamara, 74 F.3d 514, 516-17 (4th Cir. 1996) (holding trial counsel cannot be found deficient under Strickland where counsel failed to anticipate a subsequent change in the law) (collecting cases); see also Honeycutt v. Mahoney, 698 F.3d 213, 217 (4th Cir. 1983) (finding trial counsel was not deficient for not objecting to a malice charge

that was correct under state law at the time it was given, despite persuasive authority from other jurisdictions calling the validity of the charge into question).

Petitioner has failed to show how counsel could be deficient for failing to object to a charge that was and is good law in South Carolina. Therefore, the PCR court properly found counsel not to be ineffective and dismissed this allegation.

ISSUE 2

The PCR judge properly found trial counsel was not ineffective for failing to argue the State opened the door to counsel cross-examining Bryan Rivers about a previous crime where this testimony would have been merely cumulative and was not admissible under a third-party guilt theory.

Petitioner contends counsel was ineffective for "failing to argue that, by introducing Petitioner's statement to police that he heard Bryan Rivers shot a drug dealer named "Chopper" with the same gun used to shoot Marty Lion, the State opened the door to allowing the defense to question Rivers about the "Chopper" shooting." Petitioner contends counsel was deficient for failing to get Bryan Rivers to admit to the "Chopper" shooting and thoroughly challenging his credibility concerning lies to police officers about that shooting.

First, it is necessary that this Court determine if Petitioner's allegation is precluded as being previously ruled upon on Direct Appeal. Respondent acknowledges that throughout most of Petitioner's Petition for Writ of Certiorari the argument is that counsel was ineffective for failing to argue that the State opened the door to Bryan Rivers being cross-examined about the "Chopper" shooting, however, Petitioner also argues in closing that counsel "should have been allowed to cross-examine both Rivers and Brown." Respondent would ask this Court to deny this

allegation in the Petition if the argument rests on an issue previously ruled upon on Direct Appeal, however, Respondent will address the issue in the alternative as well.

The issue as raised on direct appeal was as follows:

> Whether the court erred by refusing to allow Appellant to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Appellant from fully developing and presenting his defense at trial, namely that Bryan Rivers was the shooter who killed the decedent, Marley Lion, and that Appellant was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Appellant's due process right to present a defense?

Second, Respondent asks this Court to consider how Petitioner has framed their issue presented. Petitioner argues that counsel was deficient for failing to argue a point to the trial court, but presents no evidence or argument that the trial court would have granted counsel's motion had this additional argument been made. To the contrary, the record reflects that Judge Harrington not only granted the State's motion to exclude at the conclusion of the motion hearing, but denied counsel's renewed objections when made contemporaneously. OOD p. 37-39. The morning after that motion hearing, trial counsel requested a subsequent ruling on the "Chopper" evidence under a due process argument. Judge Harrington stated that Petitioner's due process argument was addressed in the previous rulings. OOD p. 40. Trial counsel renewed his objection concerning further cross-examining Bryan Rivers at the conclusion of his cross-examination, the motion was denied by the trial court. ROA p. 528, ln. 22-25; ROA p. 529, ln. 2-4. Again, Petitioner simply argues that the State did in fact open the door and that the jury should have been able to hear Rivers be cross-examined about the "Chopper" shooting, however, there is little discussion as to whether or not the argument would have been successful. Respondent

contends, in looking at the trial court's other rulings, it is improbable the motion would have been granted with a different argument.

Petitioner argues that counsel should have argued that the State opened the door to Rivers being cross-examined about the "Chopper" shooting due to the introduction of Petitioner's statement because the jury should have heard Rivers admit to using the same gun in the "Chopper" shooting as well as impeaching testimony concerning his lies to police about the incident. Respondent submits that the information counsel could have gotten from cross-examining Rivers on these topics would have been merely cumulative to other evidence in the trial and is ultimately harmless. Both Petitioner and counsel at the PCR hearing contend that an admission by Rivers that the same gun was used in the "Chopper" shooting and this robbery would carry greater weight than the statement made by Petitioner. PWC p. 11. Respondent argues that Rivers admitting that it was the same gun would simply be duplicative of Petitioner's statement and would not add anything of substance to the trial. Petitioner also speculates as to the testimony that Rivers would have given had trial counsel questioned him as to this subject, there is no indication that he would indeed have freely admitted that the gun was the same one used in the "Chopper" shooting.

The inability of trial counsel to cross-examine Rivers concerning the guns being the same in the "Chopper" shooting and the Lion case did not prevent the jury from hearing other testimony about Rivers possessing the murder weapon prior to the Lion incident. The fact that Rivers possessed the murder weapon in an armed robbery immediately prior to the Lion incident was an uncontested fact in the trial. OOD p. 51. The robbery of the couple just hours before the incident was testified to by Julius Brown, Bryan Rivers, George Brown, and the victim. OOD p. 51. Evidence was also introduced at trial that Rivers was waving a gun at a video shoot the day

before the robberies. OOD p. 51. Also, Rivers admitted that he and Petitioner had a discussion where they attempted to pass the gun between one another. This discussion was testified to by Rivers and Julius Brown, it was also discussed in Petitioner's own statement. OOD p. 51. The jury was ultimately able to hear extensive testimony and evidence that Rivers was in possession of the gun directly prior to the Lion incident. The jury not, speculatively, hearing Rivers admit that this was the same gun used in the "Chopper" shooting is significantly less probative than the testimony concerning Rivers possessing the gun immediately prior to the incident.

The information Petitioner claims the jury was not able to hear because counsel was not able to cross-examine the witness was actually brought out by the solicitor in her closing argument to the jury. In closing, the solicitor states: "The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named "Chopper" with the murder weapon. Okay. So Bryan Rivers is now alleged to have shot someone with a murder weapon." Inadvertently or not, the solicitor brings to the jury's attention that Rivers used the same gun in the "Chopper" shooting as was used in this incident. Respondent recognizes the closing argument is not evidence, however, it does bring the jury's attention to making that connection. Ultimately, the alleged potential testimony of Rivers concerning the gun would have been cumulative to Petitioner's statement and harmless considering the other evidence of Rivers possessing the gun prior to the incident as well as the solicitor's closing argument.

Petitioner also contends that counsel's failure to cross-examine the witness precluded the jury from hearing that Rivers initially lied to police about his involvement in the "Chopper" shooting and were not able to properly assess his credibility. Respondent submits that counsel was able to thoroughly impeach Rivers on cross-examination and the jury was more than able to assess his credibility as a witness. Counsel was able to bring to light a significant number of

Rivers' past charges to impeach him, specifically including a charge for providing false information to a police officer. ROA p. 507, ln 7-9; p. 506-507. Counsel was also able get Rivers to admit that he initially made false statements to Detective Osborne and ultimately that he lied to him about his involvement in the case. ROA p. 510-512; p. 512, ln. 16. Counsel was also able to point out that Rivers had pending charges and that the solicitors were in charge of him possibly getting a deal, potentially further impeaching his credibility to the jury. ROA p. 524, ln. 12-19. Counsel was able to impeach Rivers' through his criminal history, lying to law enforcement, and a potential deal for his testimony. Respondent submits Petitioner was not prejudiced by not having the opportunity to elicit one further lie from the witness, as the jury had plenty to consider in regards to the witness' testimony being impeached. Further, in reference to Petitioner's argument that it would have been helpful to have Rivers testify about the guns being the same, it is inconsistent to say that this witness' testimony about one thing was crucial to the outcome of the case while simultaneously arguing that he should have been impeached more thoroughly. If Rivers' testimony about the guns being the same was crucial, counsel should not have impeached him further. If Rivers being impeached further was crucial, counsel eliciting testimony about the guns being the same would not have mattered to a jury that did not believe his testimony. Respondent submits counsel was not deficient in his inability to cross-examine Rivers concerning the "Chopper" shooting and that Petitioner has failed to show prejudice if in fact counsel did provide deficient representation.

Petitioner's contention that counsel was deficient for failing to cross-examine Rivers concerning the "Chopper" shooting because it improperly limited his ability to fully present his third party guilt defense is without merit, as the evidence was not admissible for that purpose. Petitioner asserts that the testimony concerning the "Chopper" shooting would have been helpful

to his case, however, the evidence would not have been inconsistent with his guilt for the Lion incident and would have actually attributed to his culpability.

Petitioner's claim rests on the idea that he would not have been criminally responsible if it were shown that Rivers had the gun at both the "Chopper" shooting and the Lion incident. This view is flawed in that it was undisputed at trial that Rivers was involved in the attempted robbery of Lion and the jury could have convicted Petitioner even if he did not pull the trigger under the "hand of one hand of all" theory. Third party guilt is not an issue when the Petitioner is shown to be an active participant in a planned robbery that ends with the victim being shot, he could have been convicted even if he showed that he did not have the gun at the time. The potential testimony about the "Chopper" shooting might also have shown that Petitioner would have been as guilty as Rivers under the same "hand of one hand of all" theory.

The inadmissibility of evidence relating to the "Chopper" shooting for the purpose of supporting third party guilt further illustrates the improbability that counsel's argument would have been successful. The trial court, as well as the PCR court, properly relied on State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) in determining the admissibility of evidence of third party guilt. OOD p. 49. The Court of Appeals also cited to Gregory in the direct appeal:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

The evidence presented throughout the trial and the testimony enumerated do not support a series of facts inconsistent with Petitioner's guilt. As the PCR court noted; evidence of Rivers' involvement in the "Chopper" shooting along with evidence he robbed a couple at gunpoint hours before the incident does not point to Rivers being the person who shot Lions. OOD p. 50. Petitioner also admitted in his statement to being involved in the intended robbery, Rives' prior possession of the gun is not inconsistent with Petitioner's guilt, and there were no other "train of facts or circumstances" that would clearly point to another person as being guilty. OOD p. 50. The trial court properly found the evidence pertaining to the "Chopper" shooting to be inadmissible and that it would only cast "a mere suspicion upon a third party" and " the introduction of this evidence would amount to solely conjectural inference as to commission of a crime by a third party." OOD p. 50-51. Petitioner was able to have a "meaningful opportunity to present a complete defense" per Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) within the "reasonable evidentiary restrictions." Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003). Thus, counsel was not deficient for failing to again argue the admissibility of the evidence and Petitioner has failed to show any resulting prejudice.

Finally, Petitioner has failed to show how trial counsel fell below an objective standard of reasonableness, per Strickland, by failing to argue that the State opened the door to evidence concerning the "Chopper" shooting but properly preserving the issue for appellate review. Furthermore, Petitioner has failed to prove how he was prejudiced by counsel not eliciting the speculative testimony about the "Chopper" shooting on cross-examination. The PCR court properly found that counsel was not deficient and that Petitioner failed to prove any resulting prejudice from the alleged deficiency.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

BENJAMIN HUNTER LIMBAUGH
S.C. Bar No. 103334
Assistant Attorney General

By:______________________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

______________, 2019

ALAN WILSON
ATTORNEY GENERAL

September 27, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Ryan Deleston v. State of South Carolina**
Appellate Case No.: 2018-001475

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Benjamin Limbaugh

Benjamin H. Limbaugh
Assistant Attorney General
S.C. Bar # 103334

BHL/jj
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

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RYAN DELESTON, PETITIONER,

v.

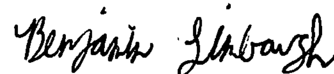
STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 27th day of September, 2019.



Benjamin H. Limbaugh, AAG
Attorney for Respondent

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Benjamin H. Limbaugh, AAG
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211