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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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FRED FREEMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001221

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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The post-conviction relief court erred by finding trial counsel was not ineffective when counsel failed to object to the jury instruction on reasonable doubt where the instruction improperly shifted the burden of proof to Petitioner and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had properly objected to this burden shifting language. ....5

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## **ISSUE PRESENTED**

Did the post-conviction relief court err by finding trial counsel was not ineffective when counsel failed to object to the jury instruction on reasonable doubt where the instruction improperly shifted the burden of proof to Petitioner and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to this burden shifting language?

## STATEMENT OF THE CASE

The state alleged that Petitioner burglarized Jeremiah Kulas's home in Goose Creek on the evening of October 3, 2015. Kulas and his wife arrived home shortly after 8:00 that evening. After Kulas unlocked and opened the front door, he saw "a large black man, roughly 12 to 15 feet in front of [him], galloping sideways, barking like a dog, saying I got a gun." The man began backing up toward Kulas's office where the back door of the home was located. While doing so, the man stumbled over the threshold between the tile and the hardwood floor located in the office. Kulas ran toward the man, grabbed him, and they both fell through the open back door onto the concrete slab outside. The man began to run toward the six foot privacy fence. Kulas, who saw a gun in the man's hand, picked up a lawn chair from the back porch and struck the man with the chair as he was trying to climb over the fence. This caused the man to drop a bag he was holding. The man then proceeded over the fence. Kulas grabbed him as he was going over and they both landed on the ground on the other side of the fence. Kulas began beating the man, trying to wrestle the gun out of his hands. Eventually, Kulas's neighbor came outside after hearing the commotion and took the gun from the man.

The neighbor and Kulas's wife called 911 while Kulas continued to restrain the man. The man was later identified as Petitioner. The gun allegedly removed from Petitioner's hand belonged to Kulas. App. 53, l. 24 – 64, l. 19. Another firearm belonging to Kulas was found in the bag Petitioner allegedly dropped. App. 151, ll. 12-23. Additional items, including Kulas's wallet and his wife's jewelry, were allegedly found on Petitioner's person. App. 135, ll. 10-25; App. 151, ll. 3-11.

A Berkeley County grand jury indicted Petitioner on December 15, 2015 for first degree burglary and possession of a weapon during the commission of a violent crime. App. 413-416.

His case was called to trial on August 28, 2017 before the Honorable Maite Murphy, and a jury. App. 1. Assistant Solicitors Bryan Alfaro and Benjamin Dennis represented the state. John Church and Keisha White represented Petitioner. App. 1. On August 29, 2017, the jury found Petitioner guilty as indicted. App. 252, ll. 6-13. He was sentenced to forty-five years for first degree burglary and five years for the weapons offence. App. 256, ll. 10-19.

The Court of Appeals dismissed Petitioner's appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Freeman, 2019-UP-200 (S.C. Ct. App. filed June 5, 2019).

On October 15, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 258-276. The state filed a return to this application on July 20, 2020. App. 277-282. An evidentiary hearing was convened on April 16, 2021 before the Honorable Diane S. Goodstein. App. 284. Due to the Covid-19 pandemic, the hearing was held virtually through the WebEx platform. App. 284. Assistant Attorney General Samantha Weidauer represented the state. App. 285. Christopher J. Murphy represented Petitioner. App. 285.

On the morning of the hearing, Petitioner's counsel emailed the PCR judge and the assistant attorney general the amended allegations Petitioner intended to raise during the evidentiary hearing. App. 283. At the beginning of the hearing, Petitioner moved to relieve counsel. After holding an *in camera* hearing, the PCR judge denied the motion. The main concern Petitioner had concerning counsel was that counsel had not filed an amended application nor provided Petitioner with a copy of the amended allegations. App. 297, l. 21 – 336, l. 21.

One of the amended allegations of ineffective assistance of counsel raised by Petitioner's PCR counsel was that trial counsel was ineffective for failing to object to the jury instruction

concerning reasonable doubt on the basis that the instruction was burden shifting. App. 283.

The trial judge charged the jury as follows:

If based upon the consideration of the evidence you are firmly convinced the defendant is guilty of the crime as charged, you must find the defendant guilty. If, on the other hand, there is a *real possibility* that the defendant is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

App. 230, ll. 10-16 (emphasis added). Trial counsel did not object to this charge.

At the beginning of the evidentiary hearing, PCR counsel argued the reasonable doubt charge was “improper burden shifting.” Counsel argued that “use of the word real” put a “heavier burden on the defendant to prove his innocence.” He argued the charge should have stated “any” possibility instead of a “real” possibility. App. 341, l. 13 – 341, l. 10.

John Church, Petitioner’s trial counsel, testified that he did not find the charge objectionable. To his knowledge, the instruction was part of “the standard jury charges.” He had not heard anything about the charge being improper. Consequently, he did not object to the charge. App. 390, l. 1-23.

By order filed June 22, 2023, the PCR court denied Petitioner relief. App. 401-412. The court found Petitioner failed to prove trial counsel was ineffective for failing to object to the jury instruction on reasonable doubt. App. 405-406. The court emphasized that Petitioner “had not submitted anything to show the language was objectionable.” Thus, it concluded Petitioner failed to prove counsel was deficient. Moreover, the court determined Petitioner had “not shown a reasonable probability the outcome would be different had counsel objected to this language.” App. 406.

This petition for writ of certiorari follows.

## ARGUMENT

The post-conviction relief court erred by finding trial counsel was not ineffective when counsel failed to object to the jury instruction on reasonable doubt where the instruction improperly shifted the burden of proof to Petitioner and where Petitioner was prejudiced because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to this burden shifting language.

The PCR court erred by finding Petitioner's trial counsel was not ineffective when counsel failed to object to the jury instruction on reasonable doubt since the instruction improperly shifted the burden of proof to Petitioner. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly objected to this burden shifting language.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

A charge asking the jury in considering circumstantial evidence to “seek some reasonable explanation other than the guilt of the defendant” was disapproved by this Court in 1991. State v. Manning, 305 S.C. 413, 416-17, 409 S.E.2d 372, 374 (1991). “Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they run the risk of unconstitutionally shifting the burden of proof to a defendant.” State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)). This Court has repeatedly indicated that trial courts should avoid instructing jurors to “seek some other rational or logical explanation other than the guilt of the accused” when charging jurors on either reasonable doubt or circumstantial evidence. “Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.” State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998).

The charge here was akin to the charges in Aleksey, Needs, and Manning, in that the jury was not simply instructed to return a not guilty verdict if the state failed to prove guilt beyond a reasonable doubt, but instead was instructed that if it was not convinced there was a real possibility of innocence, it should convict. The only party available to shoulder the burden of convincing the jury the possibility of innocence was real was Petitioner. The trial court’s charge that the jury should give the defendant the benefit of the doubt only if convinced there was a real possibility he was innocent is inconsistent with the presumption of innocence. Therefore, trial counsel was deficient for failing to object to the charge.

Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the outcome of Petitioner’s trial would have been different if counsel had

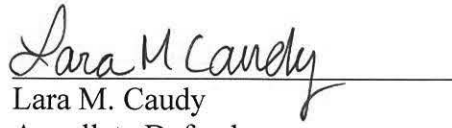
properly objected to the charge. There was no forensic evidence implicating Petitioner in the crime. It is likely the jury would have acquitted Petitioner but for the burden shifting instruction.

Respectfully, this Court should grant certiorari and hold the PCR court erred by denying Petitioner relief.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing. Petitioner ultimately requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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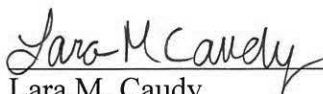
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Counsel for Fred Freeman states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on April 16, 2021 before the Honorable Diane Schafer Goodstein, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Fred Freeman.

Respectfully Submitted,

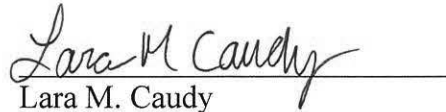
  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2024.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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 cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

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This 3rd day of June, 2024.