RECEIVED
Aug 01 2025
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Brian M. Gibbons, Circuit Court Judge

ARTRELL HICKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000393

PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Senior 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

INDEX

ISSUES PRESENTED

1.

Did trial counsel provide ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to properly cross-examine Randy Wilson about the possible eighteen year sentence reduction he was seeking for his armed robbery conviction in exchange for Wilson's testimony against Petitioner as such evidence was critical to show bias and Wilson's motivation to lie, and where Petitioner was prejudiced because there was no physical evidence of his guilt and Wilson's credibility was essential to the state's case?

2.

Did trial counsel provide ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the admission of a text message received by Candice Bryant the night before her testimony, which stated "What are you at the courthouse snitching," pursuant to Rule 403, SCRE, since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, given that the message suggested to the jury that Petitioner, or someone on his behalf, attempted to engage in witness intimidation even though the state presented no evidence linking Petitioner to the message?

3.

Did trial counsel provide ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial court's opening remarks instructing the jury to "render a true and just verdict" and its erroneous jury instructions at the conclusion of the trial directing the jury to return a "fair and impartial" verdict, since these comments and instructions diluted the state's burden of proof and shifted the burden of proof to Petitioner?

STATEMENT OF THE CASE

Around noon on June 25, 2009, three men robbed the Security Federal Bank in Graniteville, South Carolina. App. 41, l. 9 – 42, l. 12; App. 50, l. 10 – 51, l. 11; App. 56, ll. 9-20. One man, later identified as David Kearse, stood near the door. App. 51, ll. 12-14; App. 89, ll. 2-5. The other two men approached the two bank tellers and the branch manager demanding money. App. 42, l. 3 – 43, l. 15; App. 51, l. 6 – 52, l. 17; App. 57, l. 10 – 58, l. 14. The two tellers gave the men money from their top drawers, which were all smaller bills. App. 58, ll. 15-22. In total, the men stole $4,902. App. 123, ll. 3-5.

The men wore dark clothing, gloves, and covered their faces. App. 52, l. 24 – 53, l. 19. They were in the bank for no more than two minutes. App. 43, ll. 16-19. The bank employees activated the alarm, and the police arrived shortly thereafter. App. 43, l. 23 – 44, l. 12. Although security cameras captured the robbery, the identities of the robbers could not be determined because of their facial coverings. App. 45, ll. 9-12; App. 53, l. 20 – App. 54, l. 6. Additionally, none of the bank employees could identify the robbers. App. 42, ll. 19-20; App. 49, ll. 12-23.

Within a few hours, the police apprehended Kearse, who was hiding under a storage shed behind a residence only blocks from the bank. App. 70, ll. 5-14; App. 96, ll. 10-23; App. 97, ll. 12-13. The police also found $290 in five dollar bills and a silver gun under the shed. App. 71, ll. 1-2; App. 123, ll. 6-10. Kearse gave an oral confession, admitting to robbing the bank, and claimed Petitioner and his brother, Javier Hickson, were his accomplices. App. 115, l. 22 – 116, l. 2. In his statement to police, Kearse claimed the three divided the money among them at a water tower. Officers transported Kearse to the water tower in hopes of discovering evidence to corroborate his story, but found none. App. 116, l. 14 – 117, l. 11

On June 30, 2009, based upon Kearse's statement alone, Petitioner and his brother were arrested and charged with armed robbery. App. 121, l. 25 – 122, l. 2.

On July 1, 2009, the police arrested Randy Wilson for his involvement in a separate bank robbery. App. 201, ll. 3-6. Wilson, Phillip Paul, and Jelani Edwards robbed the First Citizens Bank in Jackson, South Carolina, on that date. App. 201, ll. 3-8. Edwards was shot and killed as the three fled. App. 201, ll. 9-10. Wilson admitted his involvement in the First Citizens robbery during an interview with the FBI and told the FBI that he had information about the robbery of the Security Federal in Graniteville. App. 201, l. 20 – App. 202, l. 1. When local law enforcement interrogated Wilson, he implicated Petitioner and his brother in the Security Federal robbery. App. 202, l. 20 – 203, l. 3.

Wilson pled guilty to armed robbery on December 14, 2009, and was sentenced on March 8, 2010. App. 202, l. 17 – 203, l. 6. At the time of Petitioner's trial, Wilson's motion for reconsideration of his sentence was pending. App. 203, ll. 4-12.

An Aiken County grand jury indicted Petitioner in December 2009 for armed robbery and in April 2010 for possession of a firearm during the commission of a violent crime. App. 926-929. Petitioner's case was called to trial on September 20, 2010, before the Honorable Doyet A. Early, III, and a jury. App. 1. Petitioner was tried jointly with his brother and codefendant, Javier Hickson. Then Solicitor J. Strom Thurmond, Jr. and Assistant Solicitor Susanna Ringler represented the state. Kelley Brown represented Petitioner and Michael Routzong represented Javier Hickson. App. 1. On September 22, 2010, the jury found Petitioner guilty as indicted. App. 321, l. 9 – 322, l. 1. He was sentenced to twenty-eight years for armed robbery and five years concurrent for the weapons offense. App. 326, ll. 17-24.

Petitioner filed a timely notice of appeal. The appeal was perfected by Jerry M. Screen. The Court of Appeals affirmed Petitioner's convictions and sentence in an unpublished opinion. State v. Hickson, 2012-UP-667 (S.C. Ct. App. filed December 19, 2012). App. 404-405.

On May 21, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 406-430. The state filed a return to this application on July 3, 2013. App. 431-436. An evidentiary hearing was held on September 11, 2015 before the Honorable Edgar W. Dickson. Assistant Attorney General Daniel Gourley represented the state, and Aimee Zmroczek represented Petitioner. App. 437. By order filed January 9, 2017, Judge Dickson denied Petitioner relief. App. 440-448.

On January 19, 2017, Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. App. 449-451. The state filed a return to the motion to consider on February 6, 2017. App. 452-453. By order filed March 17, 2017, Judge Dickson denied the motion. App. 454.

Petitioner's counsel failed to file a notice of appeal from the order denying him post-conviction relief. On June 19, 2019, Petitioner filed a second PCR application seeking a belated appeal from the denial of his first application. App. 455-461. On March 16, 2020, Petitioner filed a third PCR application again seeking a belated appeal. App. 462-470. The state filed a return and a motion merge the two PCR actions on August 13, 2021. App. 471-488. An evidentiary hearing was convened on September 7, 2021, before the Honorable Courtney Clyburn Pope. App. 489. Senior Assistant Deputy Attorney General Megan Harrigan Jameson represented the state. Nancy Fennell represented Petitioner. App. 489.

By order filed September 10, 2021, Judge Clyburn Pope granted Petitioner a belated appeal from the denial of his first application for post-conviction relief pursuant to Austin v.

State, 305 S.C. 453, 409 S.E.2d 395 (1991). In the same order, the judge also granted the state's motion to merge the two PCR actions. App. 502-510.

Petitioner timely filed a notice of appeal with this Court. However, a transcript of the evidentiary hearing held on September 11, 2015, during Petitioner's first PCR action could not be transcribed because more than five years had passed from the date of the hearing and the date the transcript was first requested from the court reporter. See Rule 607(i), SCACR (requiring court reporters to retain the tapes of a proceeding for five years).

On February 23, 2022, Petitioner filed a Motion for a New Trial or, In the Alternative, an Order to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing with this Court. App. 511-551. The state filed a return to this motion on March 4, 2022. App. 552-559. By order dated April 5, 2022, this Court remanded the matter to reconstruct the record of the September 11, 2015 evidentiary hearing. App. 560-561.

A reconstruction hearing was held on April 28, 2022, before Judge Dickson. App. 562. Senior Assistant Deputy Attorney General Megan Harrigan Jameson represented Respondent. Undersigned counsel represented Petitioner. App. 562. By order dated June 29, 2022, Judge Dickson found the record of the September 11, 2015, evidentiary hearing could not be reconstructed to allow for meaningful appellate review. App. 642-652.

On July 15, 2022, Petitioner filed a motion to vacate the order of dismissal and remand for a new post-conviction relief hearing with this Court. App. 653-851. On August 23, 2022, this Court issued an order vacating the order of dismissal filed January 9, 2017, and remanded the case to the circuit court for a new hearing on Petitioner's original PCR application. App. 852-853.

Petitioner filed an amended PCR application on January 22, 2024, raising the claims argued in this petition. App. 855-857. An evidentiary hearing was held on July 16, 2024, before the Honorable Brian M. Gibbons. App. 858. Assistant Attorney General Zachary Jones represented the state. Undersigned counsel represented Petitioner. App. 859. By order filed February 24, 2025, the PCR court denied Petitioner relief.

This petition for writ of certiorari follows.

ARGUMENT

1.

Trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to properly cross-examine Randy Wilson about the possible eighteen year sentence reduction he was seeking for his armed robbery conviction in exchange for Wilson's testimony against Petitioner as such evidence was critical to show bias and Wilson's motivation to lie, and where Petitioner was prejudiced because there was no physical evidence of his guilt and Wilson's credibility was essential to the state's case.

Relevant Facts

Randy Wilson admitted that he was arrested on July 1, 2009, for robbing the First Citizens Bank in Jackson, South Carolina, along with Phillip Paul and Jelani Edwards. App. 201, ll. 3-8. Wilson testified that he pled guilty to armed robbery on December 14, 2009, as a result of this arrest, and was sentenced on March 8, 2010. App. 202, l. 17 – 203, l. 6. Wilson told the jury that after he was sentenced, his attorney filed a motion on his behalf to reconsider his sentence. At the time of Petitioner's trial, Wilson's motion for reconsideration was still pending. App. 203, ll. 4-12. While Wilson never disclosed his sentence to the jury, he had been sentenced to twenty-eight years imprisonment.

During trial counsel's cross-examination of Wilson, the following exchange occurred:

Q: As it stands right now you're going to be in the South Carolina Department of Corrections for a good long time, aren't you?

A: Yes, ma'am.

Q: And you know that that motion to have your sentence reconsidered hasn't been heard yet, has it?

A: No, ma'am.

Q: And you're hoping that whatever help you give to the state will help you on that motion to reconsider, don't you?

A: I wasn't promised anything.

Q: I didn't ask if you were promised anything. I am asking are you hoping that the help that you give the State will help you on your motion to have your sentence reduced?

A: I'm hoping that the State will reduce my time - - I am not saying for this, but I am hoping that they do.

Q: You're hoping that the State will reduce your time, right?

A: Yes.

App. 211, l. 21 – 212, l. 15.

Trial counsel never elicited testimony that Wilson had been sentenced to twenty-eight years, that the mandatory minimum sentence for armed robbery is ten years, and that Wilson was seeking a possible eighteen year sentence reduction in exchange for his testimony against Petitioner. During her testimony at the evidentiary hearing, trial counsel admitted that questioning Wilson about the specific reduction of his sentence that he was seeking "certainly would have been a stronger cross-examination." App. 884, ll. 3-16. Additionally, counsel "was aware it [questioning about the specific sentence] could be done" at the time, but simply did not do it. App. 884, l. 17 – 885, l. 2. Counsel further agreed that eliciting testimony from Wilson that he could potentially receive an eighteen year sentence reduction would have shown the extent of his bias and motivation to lie during his testimony against Petitioner. App. 885, l. 3 – 888, l. 17.

The PCR court found Petitioner's argument that trial counsel was ineffective for failing to properly cross-examine Randy Wilson about the sentence he received after pleading guilty to armed robbery and the specific reduction in sentence he was seeking in exchange for his

testimony against Petitioner was "meritless." App. 928. The court found these "details were not necessary to render trial counsel's cross-examination effective" since counsel did elicit testimony from Wilson that he was "going to be in the South Carolina Department of Corrections for a good long time" and that "he was hoping the state would reduce his sentence if his testimony [against Petitioner] helped the state." App. 928. The PCR court further found Petitioner failed to prove prejudice since it was unlikely "that eliciting additional minor details about Wilson's sentence would have changed the result of the trial." App. 929.

Discussion

Trial counsel was ineffective for failing to properly cross-examine Randy Wilson about the sentence he received after pleading guilty to armed robbery months earlier and the possible eighteen year sentence reduction he was seeking in exchange for his testimony against Petitioner. This evidence was critical to show the extent of Wilson's bias and his motivation to lie. Petitioner was prejudiced by counsel's deficient performance because there was no physical evidence of his guilt and Wilson's credibility was essential to the state's case.

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).

"Evidence of a witness's bias can be compelling impeachment evidence, and for that reason considerable latitude is allowed to defense counsel in criminal cases in the cross-examination of an adverse witness for the purpose of testing bias." Smalls v. State, 422 S.C. 174, 182, 810 S.E.2d 836, 840 (2018) (quoting State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991)) (internal quotation marks omitted). "Our courts have followed the general rule that anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony, so that on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness." Id. at 182-83, 810 S.E.2d at 840 (quoting State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) and 98 C.J.S. Witnesses §§ 460, 560a) (internal quotation marks omitted).

In Smalls v. State, this Court held Smalls' counsel was ineffective for failing to elicit from Eugene Green, the state's star witness, that Green's carjacking charge was dismissed on the morning of Smalls' trial. 422 S.C. at 183, 810 S.E.2d 836, at 841. The Court emphasized that if counsel had cross-examined Green on the carjacking charge, "she would have demonstrated that the State dismissed a charge that carried up to twenty years in prison on the morning of trial in an apparent effort to secure Green's favorable testimony." Id. at 184, 810 S.E.2d at 841. Such evidence the Court concluded would have shown Green's manifest bias "because Green actually received the benefit he hoped the solicitor would provide in exchange for his cooperation." Id. at

183, 810 S.E.2d at 841. Finally, this Court concluded Smalls was prejudiced by counsel's deficient performance because the evidence was not overwhelming, and if counsel had cross-examined Green on the carjacking charge, "his credibility before the jury would have been severely damaged." Id. at 194-95, 810 S.E.2d at 846-47.

In State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), this Court held the trial court erred by limiting the defendant's cross-examination of a testifying codefendant, Donald Steele. On cross-examination, Steele admitted that the state charged him with the same crimes as Mizzell: first degree burglary and grand larceny. Id. at 330, 563 S.E.2d at 317. However, the trial court refused to allow defense counsel to elicit testimony from Steel on the possible punishment he could receive if he were convicted of the charged crimes. Id. This Court held the exclusion violated Mizzell's rights under the Confrontation Clause because the testimony was critical evidence of potential bias. Id. at 331-33, 563 S.E.2d at 318. The Court stated, "The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." Id. at 333, 563 S.E.2d at 318.

In this case, trial counsel was deficient for failing to cross-examine Wilson on the sentence he received after pleading guilty to armed robbery (twenty-eight years) and the potential eighteen year sentence reduction he could receive in exchange for testifying against Petitioner.[1] As this Court suggested in Mizzell, the lack of a negotiated sentence reduction created a situation where Wilson was "more likely to engage in biased testimony in order to obtain a future recommendation for leniency" from the solicitor. See Mizzell, 349 S.C. at 333, 563 S.E.2d at 318. Wilson reasonably would have felt the quality of his cooperation with the

[1] See S.C. Code Ann. § 16-11-330 (stating the mandatory minimum sentence for armed robbery is ten years).

state against Petitioner would determine the degree of benefit he would later receive. Eliciting this testimony would have demonstrated the extent of Wilson's bias and motivation to lie.

The PCR court found the "details were not necessary to render trial counsel's cross-examination effective" since counsel did elicit testimony from Wilson that he was "going to be in the South Carolina Department of Corrections for a good long time." See App. 928. However, as this Court asserted in Mizzell, a "long sentence may have different meanings to different jurors." See 349 S.C. at 334, 563 S.E.2d at 319. Wilson's admission that he hoped "the State will reduce [his] time" is significantly different from an admission that he could receive a reduction of eighteen years. See Mizzell, 349 S.C. at 334-35, 563 S.E.2d at 319.

Petitioner was prejudiced by counsel's deficient performance. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls, 422 S.C .at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Id. (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998)). "For the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." Id. at 191, 810 S.E.2d at 845. Here, the evidence against Petitioner was far from overwhelming and, more importantly, there was no conclusive evidence of his guilt, such as a confession, DNA evidence, or other physical evidence. The entirety of the state's case depended upon the jury

believing the self-interested, self-preservation motivated Wilson, who trial counsel failed to properly cross-examine, and codefendant Kearse.

Because trial counsel rendered ineffective assistance that prejudiced Petitioner, respectfully, this Court should reverse his conviction and remand for a new trial.

2.

Trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the admission of a text message allegedly received by Candice Bryant the night before her testimony, which stated "What are you at the courthouse snitching," pursuant to Rule 403, SCRE, since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, given that the message suggested to the jury that Petitioner, or someone on his behalf, attempted to engage in witness intimidation even though the state presented no evidence linking Petitioner to the message.

Relevant Facts

At the beginning of Candice Bryant's testimony, the following exchange took place between Bryant and the assistant solicitor:

Q: And did you receive a text message last night?

A: Yes, ma'am.

Q: What did the text message say?

Mrs. Brown: Your Honor, objection, relevance.

The Court: You received a text message? That's the answer?

The Witness: Yes.

The Court: I assume the next question is going to be what did it say; is that correct?

Ms. Ringler: Yes, Your Honor.

The Court: And is it relevant to this case?

Ms. Ringler: Yes, Your Honor. I think it will explain the witness's demeanor here today for the jury.

The Court: I'll allow it. If it's not relevant, I'll strike it. I don't know what it's going to be.

Q: What did the text message say?

A: *What are you at the courthouse snitching?*

The Court: What?

The Witness: *What are you at the courthouse snitching?*

Q: When did you receive that text message?

A: Yesterday about four.

App. 191, l. 15 – 192, l. 12 (emphasis added).

Trial counsel never renewed her relevance objection nor requested the trial judge rule on the objection. Moreover, counsel did not object to testimony about the content of the text message based on Rule 403, SCRE, or argue any probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

During Petitioner's PCR hearing, trial counsel testified that she should have requested to proffer Bryant's testimony about the text message outside the presence of the jury. Counsel admitted she did not renew her relevance objection once Bryant testified as to what the message allegedly said nor did she request the trial judge rule on the objection. Finally, counsel also admitted that she did not, but should have objected to the content of the text message pursuant to Rule 403, SCRE. She agreed the message suggested that Petitioner, or someone on his behalf, attempted to engage in witness intimidation before Bryant testified, which was prejudicial to Petitioner. Counsel maintained that she did not have a strategic reason for failing to object based on Rule 403. App. 877, l. 17 – 880, l. 10.

The PCR court found trial counsel was not ineffective for not objecting to Bryant's testimony about the text message she allegedly received the night before she testified during Petitioner's trial pursuant to Rule 403, SCRE. The court found the evidence was not unfairly

prejudicial. Rather, the court determined the message was "strong evidence that either [Petitioner] or someone acting on his behalf was attempting to suppress evidence of his guilt." The court suggested the text message was evidence of Petitioner's consciousness of guilt, which is "highly probative". Accordingly, the court concluded Petitioner failed to prove either deficiency or prejudice. App. 929-930.

Discussion

Trial counsel was ineffective for failing to object to the admission of the text message Candice Bryant allegedly received the night before her testimony, which stated "What are you at the courthouse snitching," pursuant to Rule 403, SCRE, since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, given that the message suggested to the jury that Petitioner, or someone on his behalf, attempted to engage in witness intimidation even though the state presented no evidence linking Petitioner to the message. Petitioner was prejudiced by counsel's deficient performance because the evidence improperly suggested Petitioner was guilty or sought to suppress evidence of his guilt. Moreover, the evidence made Petitioner look like a bad person before the jury.

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).

As a general rule, all relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE. Unfair prejudice pursuant to Rule 403 "is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence." State v. Phillips, 430 S.C. 319, 328, 844 S.E.2d 651, 656 (2020) (citing State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014)).

In State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009), which was cited by the PCR court in its order of dismissal, this Court held "that witness intimidation evidence, *if linked to the defendant*, may be admitted to show a consciousness of guilt. *Establishing the defendant as the source of the intimidation* provides the necessary reliability for admissibility." (emphasis added).

In this case, the state presented absolutely no evidence that Petitioner sent the intimidating text message to Candice Bryant or had someone send the message on his behalf. Because the intimidating evidence (the text message) was not linked to Petitioner, it was not probative, not admissible, and trial counsel was deficient for failing to object. This evidence was unfairly prejudicial under Rule 403 because it suggested to the jury that Petitioner was responsible for the witness intimidation and was attempting to suppress evidence of his guilt even though the state presented no evidence to support this conclusion.

Petitioner was prejudiced by counsel's failure to object for the same reasons evidence of the message was unfairly prejudicial: it suggested to the jury that Petitioner was responsible for the witness intimidation and was attempting to suppress evidence of his guilt despite no evidence

linking Petitioner to the message and the evidence made Petitioner look like a bad person. Moreover, there is a reasonable probability the outcome of Petitioner's trial would have been different if trial counsel had properly requested to proffer Bryant's testimony outside the presence of the jury and correctly objected pursuant to Rule 403, SCRE. If counsel had done so, the trial judge would have excluded the evidence. In a case where the state presented no physical evidence of Petitioner's guilt, there is a reasonable probability that trial counsel's failure to object to this inadmissible, highly prejudicial evidence affected the outcome of Petitioner's trial.

Respectfully, this Court should hold trial counsel was ineffective, reverse Petitioner's conviction, and remand for a new trial.

3.

Trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial court's opening remarks instructing the jury to "render a true and just verdict" and its erroneous jury instructions at the conclusion of the trial directing the jury to return a "fair and impartial" verdict, since these comments and instructions diluted the state's burden of proof and shifted the burden of proof to Petitioner in a case where there was no physical or forensic evidence.

Relevant Facts

During his opening remarks to the jury, the trial judge stated: "Once you determine what the true facts are, then you take those true facts as you find them to be, apply it to the law as I give it to you, and you'll be in a position to render *a true and just verdict*." App. 31, ll. 19-22 (emphasis added). Trial counsel did not object to these comments.

Later, at the conclusion of Petitioner's trial, the judge instructed the jury:

> You've heard some argument and testimony about the punishment - - concerning the punishment or penalties a person can serve for the crime alleged. In determining the guilt or innocence of the defendants you cannot consider any possible penalty or sentence of a particular crime. The punishment for the crime is a matter for me to determine and should never be considered by you in any way whatsoever in arriving at *a fair and impartial verdict* in this case.

App. 310, ll. 13-21 (emphasis added). Trial counsel also did not object to this charge.

During the PCR hearing, trial counsel admitted she did not object to the judge's opening remarks stating the jury should "render a true and just verdict" or the instruction to the jury at the end of the trial to return a "fair and impartial verdict." Counsel testified that she was not aware of State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) or State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), and did not find the language objectionable. However, if she would have

been aware of the holdings of Needs and Aleksey, she "probably would have" objected. App. 875, l. 6 – 876, l. 11.

Citing to State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), the PCR court found the trial judge's references to "true facts" and a "true and just verdict" during its opening remarks were not objectionable because the "challenged comments . . . did not appear in the reasonable doubt or circumstantial evidence charges." App. 927. The court further found the judge's instruction referring to a "fair and impartial verdict" was not improper. The court determined the challenged language did "not rise to the level of the improper charge in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), where the jury was instructed to reach a verdict that represented "truth and justice for all parties that are involved in this case." App. 928. The court emphasized that this Court in Daniels "specifically pointed to the 'all parties involved' phrase as potentially leading jurors to weigh the interests of victims in arriving at their verdict." However, this language does not appear in the trial judge's instructions in this case. App. 928.

Finally, the court found that even if the "isolated phrases were somehow improper, the trial court's jury instructions as a whole were free from error, and there was no reasonable probability that the jury applied the challenged instructions in an unconstitutional way." Consequently, the court concluded Petitioner failed to prove prejudice. App. 928.

Discussion

In State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), the trial judge charged the jury: "You and I are acting for the community" and "This Court is of the confirmed opinion that whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Writing for the Court, then Justice Pleicones determined trial counsel had failed to preserve an objection to this charge at trial. Id. at 256, 737 S.E.2d at 475. Nevertheless,

the Court instructed the trial judge "to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties." Id. According to the Court, "such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the state's burden to prove the defendant's guilt beyond a reasonable doubt." Id. Additionally, the Court noted that "to a lay person, the 'all parties involved' in a criminal case may well extend beyond the defendant and the state, and include the victim." Id. "These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial." Id.

In a concurring opinion, then Chief Justice Toal found the objection preserved. Id. Further, the concurrence agreed "that the jury should not have been instructed that their verdict would represent truth and justice for the parties." Id. at 258, 737 S.E.2d at 477. Although the "trial court included several improper statements as part of his jury instruction," the concurrence was persuaded that the errors were harmless because the trial court "prefaced those remarks with full and adequate instructions on reasonable doubt." Id. at 260, 737 S.E.2d at 477. Although the concurrence deemed the errors harmless, the justices made their concerns known:

> It is troubling that the trial court concluded his jury instruction with statements that could have distracted the jury from their core functions: to examine evidence and make factual determinations, weigh credibility, and perhaps most importantly, decide whether the state has proven its case beyond a reasonable doubt. The injection of extraneous language only serves to distract the jury from performing their critical role.

Id. at 260, 737 S.E.2d at 477.

The Court's very serious warning to trial judges regarding language used in jury instructions continued:

> The trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are

> proved from the evidence placed before them. The very term "jury" connotes a deliberative body of persons. A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. Judges and juries are not, as this trial judge put it, "in it together." While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.
>
> Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.
>
> It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the state's constitutional duty to prove guilt beyond a reasonable doubt.

Id. at 263-264, 737 S.E.2d 479-480 (internal citations omitted).

For years, the South Carolina Supreme Court has warned trial judges against using ambiguous and burden shifting language in jury instructions. In State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), upon which the Court in Daniels relied, made clear that "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.'" Id. (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998).

Trial counsel's failure to object to the judge's instruction to the jury to arrive "at a fair and impartial verdict" in the case, which was akin to the instruction in Daniels that whatever verdict rendered would represent truth and justice for all parties involved in the case, was deficient performance resulting in prejudice. But see Teamer v. State, 416 S.C. 171, 183, 786

S.E.2d 109, 114-15 (2016) (holding trial counsel was not ineffective for failing to object to a similar instruction when no case law existed rendering the instruction improper per se because "reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law"). In Teamer, the judge charged the jurors: "'Your sole objective of course is to simply reach the truth in the matter, and by doing that you will have fulfilled your obligations as jurors, and that is to simply give both the state and [Teamer] a fair and impartial trial.'" Id. at 182, 786 S.E.2d at 114-15. Although likening this charge to the one held improper in Daniels, this Court, nevertheless, held trial counsel was not ineffective in failing to object to the instruction. Id. at 183, 786 S.E.2d at 115.

In the instant case, the judge's instruction diluted the state's burden of proof and shifted the burden to Petitioner. Trial counsel erred in failing to object, and despite the fact that Daniels, had not been decided at the time of Petitioner's trial, Aleksey had been decided and was the foundation for Daniels. The question is not whether a specific charge had been deemed improper at the time of Petitioner's trial. The question is whether the legal concepts supporting the objection were developed and whether counsel's performance fell below an objective standard of reasonableness. Given this Court's prior decision warning judges to avoid burden shifting jury instructions, trial counsel's performance was deficient.

The remaining portions of the jury charge could not save this egregious error in light of the evidence presented – two cooperating codefendants, who had every motive to lie in order to obtain a better plea deal. The state presented no physical evidence. The entirety of the state's case depended upon the jury believing the testifying, self-interested, self-preservation motivated codefendants. One of those codefendants had been caught "red handed" and immediately began

shifting the blame to others. Thus, the judge's instructions to the jury diluting and shifting the burden of proof prejudiced Petitioner.

CONCLUSION

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

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of August, 2025.