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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2025-000393

Artrell Hickson,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE 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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Petitioner failed to prove Counsel was ineffective for not cross-examining Randy Wilson more thoroughly as to his armed robbery sentence, where Counsel successfully elicited from Wilson that he was facing "a good long time" in prison and was hoping for a sentence reduction by helping the State, Counsel argued to the jury that Wilson's hope for resentencing gave him a motive to lie, and there is no reasonable likelihood that eliciting additional details from Wilson about his sentence would have changed the result of Petitioner's trial.

2. The PCR court correctly found that Petitioner failed to prove Counsel was ineffective for failing to raise a Rule 403, SCRE, objection to Candice Bryant's testimony that, the night before she was called as a witness, she received a text message stating "What are you at the courthouse snitching," where the testimony had legitimate probative value as evidence of Petitioner's consciousness of guilt and was not unfairly prejudicial because the content and timing of the message linked it to Petitioner as the source.

3. The PCR court correctly found Petitioner failed to prove Counsel was ineffective for failing to object to the trial court's references to a "true and just verdict" and a "fair and impartial verdict," where those phrases were not improper under the controlling case law at the time of Petitioner's trial, and where the trial court's instructions as a whole were free from error.

STATEMENT OF THE CASE

Petitioner was true bill indicted at the December 2009 term of the Aiken County Grand Jury for Armed Robbery (2009-GS-02-2294) and at the April 2010 term of the Aiken County Grand Jury for Possession of a Firearm During the Commission of a Violent Crime (2010-GS-02-0670). Kelley P. Brown, Esquire ("Counsel"), represented Petitioner. Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. The following testimony was presented at Petitioner's trial:

Around noon on June 25, 2009, Gabrielle Hastings was working as a teller at the Graniteville branch of Security Federal Bank when she looked up and saw three gunmen wearing dark clothes, gloves, and bandanas over their faces enter the bank. (App. pp. 42-43; p. 53; pp. 56-57; pp. 90-91; p. 95; p. 112). After entering the bank, the first gunman approached the counter of Amanda Wood, another teller at the bank, knocked her envelopes onto the floor, pointed a gun at her, and demanded money. (App. pp. 51-52). Wood gave the gunman, who was approximately 5'4" tall and was wearing a backpack, money from her cash drawer. (App. p. 52; p. 91). Meanwhile, the second gunman, who was also around 5'4" tall, approached the office of Tonya Key, the branch manager of the bank, and ordered her to open the vault. (App. p. 43; p. 52). Terrified, Key was too afraid to move and did not respond. (App. p. 43). The second gunman then left the offices and demanded money from Wood. (App. p. 52). Wood told him she already gave the money to the first gunman, so he moved to the next counter and took stacks of $1 bills, $5 bills, and $20 bills from Hastings at gunpoint. (App. p. 52; pp. 57-58). Throughout the robbery, the third gunman remained at the door and acted as a lookout for the others. (App. p. 51; p. 58; pp. 90-91).

Approximately two minutes after the robbery began, the three gunmen fled from the bank

and ran towards a nearby wooded area.[1] (App. p. 43; p. 61). The bank employees then locked the door and triggered an alarm. (App. pp. 43-44; p. 57). Shortly thereafter, law enforcement officers responded to the bank, secured the scene, and obtained a description of the suspects from the terrified employees inside the bank. (App. pp. 60-61; pp. 111-113). The bank employees informed the officers that the robbers were three black males wearing dark clothing, masks, and gloves. (App. pp. 111-112). Additionally, the bank employees described the suspects as approximately 5'4" tall. (App. p. 111). Subsequently, several bloodhound tracking teams were called to the scene and attempted to track the gunmen in the direction they fled after the robbery. (App. p. 64).

Officer Demetrick Drumming of the Aiken Public Safety Department and Lieutenant Clay Adams of the Aiken County Sheriff's Office followed the bloodhounds to a nearby church. (App. p. 67; p. 69; p. 96; p. 98). Next to the church, the officers discovered David Kearse hiding underneath a storage shed. (App. p. 70; pp. 96-97). The officers removed Kearse from underneath the shed and took him into custody. (App. p. 70; pp. 96-97). After arresting Kearse, the officers looked underneath the shed where Kearse had been hiding and discovered a semi-automatic pistol and a large wad of $5 bills hidden behind a cinder block.[2] (App. p. 71; p. 97; pp. 100-102; p. 108).

Meanwhile, Investigator Greg Savell of the Aiken County Sheriff's Office responded to the bank and obtained a copy of the surveillance footage of the robbery.[3] (App. p. 100; p. 113). Investigator Savell noted one of the robbers had pronounced bushy eyebrows and appeared to fully

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[1] During the robbery, the gunmen stole a total of $4,902 from the bank. (App. p. 123). The majority of the money was never recovered. (App. p. 123).

[2] In total, Kearse was in possession of $290 comprised entirely of $5 bills at the time of his arrest. (App. p. 123). Notably, Kearse was also dressed in black. (App. p. 70).

[3] The surveillance footage of the robbery was played for the jury. (App. pp. 54-55).

fill the space of the hood covering his head. (App. pp. 118-119).[4]

Savell then travelled to the location of Kearse's arrest and transported him to the Aiken County Detention Center. (App. pp. 133-114). After arriving at the detention center, Investigator Savell informed Kearse of his rights and interviewed him about the robbery. (App. pp. 114-115). Kearse admitted to committing the robbery and implicated Petitioner Artrell Jabar Hickson and Petitioner's brother, Javier Hickson ("Javier"), as his accomplices in the crime.[5] (App. pp. 115-116).

Subsequently, on June 30, 2009, Petitioner and Javier were arrested in connection to the robbery of the Graniteville branch of Security Federal Bank. (App. p. 122). At the time of their arrests, Petitioner was 5'4" tall and Javier was 5'6" tall. (App. p. 121).

Sabrina Oakman, who was living with Kearse at the time of the robbery, testified about the events of June 25, 2009. (App. pp. 140-141). Oakman stated Kearse got up on the morning of the robbery, left the home, and then returned around 10:30 a.m. (App. p. 142). After returning home, Oakman testified Kearse asked her for a ride, and she drove him to Petitioner and Javier's home. (App. pp. 142-143). Oakman stated she and Kearse picked up Javier and Petitioner, who was wearing a black backpack, before driving to Kearse's grandmother's house, where Kearse retrieved something from his grandmother's backyard. (App. pp. 144-146). Oakman indicated

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[4] The solicitor then introduced a photograph of Petitioner taken on the day of Petitioner's arrest five days after the robbery, and the photograph was admitted into evidence over objection. (App. p. 122). During closing arguments, the solicitor noted Petitioner's eyebrows, nose, and amount of hair matched the same features of the robber visible in the surveillance footage. (App. pp. 267-268).

[5] Kearse refused to provide a written statement because he was scared. (App. p. 117). However, he directed the officers to the location where he parted ways with Petitioner and Javier after the robbery. (App. p. 117).

the four then drove to a Wal-Mart where Javier's girlfriend and sister worked. (App. pp. 146-147). At the Wal-Mart, Oakman testified Javier went inside, returned a short time later, and followed them to Graniteville in another vehicle. (App. pp. 147-149). Oakman noted Kearse was in possession of a cell phone at the time even though he did not own one. (App. p. 148). After leaving the Wal-Mart, Oakman testified she dropped Petitioner and Kearse off at Kalmia Apartments prior to 12:00 p.m. and then left.[6] (App. p. 150). Shortly after noon, Oakman stated she heard a phone ringing in her vehicle, found Javier's phone, and answered the call. (App. pp. 151-152). Oakman testified Kearse, who sounded mad and was breathing heavily, was the caller, and he asked her to pick him up at a church before the call ended.[7] (App. pp. 152-154). Oakman indicated she then returned to Kalmia Apartments and encountered Petitioner and Javier's sister, Monique Hickson ("Monique"), Javier's girlfriend, Crystal Harris, and "Devon."[8] (App. pp. 154-156; p. 189). At the apartment complex, Oakman testified she got into an argument with Harris and was accused of failing to fulfill her responsibilities as the getaway driver. (App. pp. 155-156). Oakman stated she then left the apartments in an effort to find Kearse but was unable to do so. (App. p. 156).

Consistent with Oakman's testimony, Stanley Galloway, a guest at Kalmia Apartments, confirmed he saw Kearse, Petitioner, and Javier at the apartment complex before lunchtime on

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[6] Notably, Kalmia Apartments was located only a few blocks away from the Graniteville branch of Security Federal Bank. (App. p. 114).

[7] Kearse called Javier's phone using Petitioner's cell phone. (App. pp. 151-153). The caller I.D. on Javier's phone identified the caller as "My Bro." (App. p. 152).

[8] Significantly, Harris and Monique were supposed to be working at the Wal-Mart at that time. (App. pp. 175-176). However, the two unexpectedly left work at 12:55 p.m. that day, and their absences were unexcused. (App. pp. 175-177).

June 25, 2009. (App. pp. 179-180). Likewise, Beatrix Wright acknowledged she told investigators she saw Petitioner, Javier, and Kearse at the apartment complex on the morning of the robbery. (App. pp. 187-188). Additionally, Candice Bryant, Wright's cousin, testified she saw Kearse, Petitioner, and Javier outside of Wright's apartment prior to the robbery.[9] (App. p. 185; pp. 192-193).

On cross-examination, defense counsel questioned Bryant about a portion of her statement to law enforcement officers, and Bryant's statement was marked for identification purposes. (App. pp. 194-195). Thereafter, the solicitor asked Bryant to read her entire statement to the jury, which the trial court permitted over Counsel's objection. (App. p. 197). Bryant then read the following statement:

> On the day of the robbery at Security Federal Graniteville Artrell Hickson, Javier Hickson, and David Kearse came to my cousin's Beatrix Wright's apartment. They were in a white Ford Focus. A dark skinned girl was driving. She worked – she – it was thought that she worked at Walmart on the south side. They were talking to Beatrix's boyfriend Stanley. After a while, they left. Stanley remained. Me and Beatrix took Stanley home to New Ellenton. We came back and saw the police who told us the bank had been robbed. Sabrina Oakman drove her black Tahoe and asked if Stanley knew where David was. We told her we had taken him to New Ellenton. Big Phil and Devon were at Kalmia Apartments saying, Them boys done robbed the bank I think. I saw a white Ford Focus. Phil and Devon were at the entrance to Kalmia Apartments. Sabrina kept calling Artrell's cellphone because David had it because Big Phil said David had the phone. Sabrina kept saying, David is in a storage in the woods. Sabrina was crying and said she was here to find him and pick him up. Sabrina and Artrell – Sabrina, Artrell, and Javier along with Devon. Beatrix told me that Artrell, Javier, and David were trying to get Stanley to rob the bank with them. Beatrix said Stanley told me this. Artrell dated a girl at Walmart on the south side. The girl was thought to be in the white Ford Focus.

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[9] At the outset of her testimony, Bryant noted she received a text message on the preceding night stating: "What are you at the courthouse snitching?" (App. p. 192).

(App. pp. 198-199). Wright identified "Big Phil" as Phillip Paul and "Devon" as Devon Jones. (App. p. 199).

Following Wright's testimony, Randy Wilson testified about his knowledge of the robbery of the Graniteville branch of the Security Federal Bank. (App. pp. 201-202). At the outset of his testimony, Wilson noted he robbed a different bank on July 1, 2009, with Paul and Jelani Edwards, and was arrested.[10] (App. p. 201). After he was arrested, Wilson confirmed he implicated Petitioner and Javier in the robbery on June 25, 2009. (App. pp. 202-203). Wilson stated he met with Paul, Edwards, Petitioner, and Javier on June 24, 2009, to discuss the robbery that was to occur the next day. (App. pp. 203-204). During the meeting, Wilson testified they determined which bank was going to be robbed and who was going to commit the crime. (App. pp. 204-205). Wilson stated they decided Petitioner, Javier, and Kearse were going to commit the crime, and Paul was going to supply the firearms.[11] (App. pp. 204-205). Wilson indicated Kearse's girlfriend was supposed to drop the robbers off before the crime and "Von" was going to drive them away afterwards. (App. p. 207). Subsequently, on the day of the robbery, Wilson stated he was at home with Paul and Edwards when Edwards' phone rang. (App. p. 207). Wilson testified Edwards answered the call, and he overheard Petitioner state they were "hemmed up" in Graniteville. (App. p. 208). Wilson stated Edwards and Paul then left in Edwards' vehicle.[12] (App. p. 208).

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[10] At the time of trial, Wilson was serving a sentence for armed robbery. (App. p. 203). Wilson testified he hoped to have his sentence reduced after testifying during Petitioner and Javier's trial. (App. p. 212).

[11] Wilson testified Petitioner asked Paul to let him use an AK-47 during the robbery, but Paul declined to give it to Petitioner. (App. pp. 205-206).

[12] Around 3:30 p.m. on the day of the robbery, Investigator James Criscillis of the Aiken County Sheriff's Office observed Edwards and Paul travelling in Edwards' vehicle near the bank. (App. p. 214; pp. 216-217).

Subsequently, David Kearse testified about his involvement in the robbery of the Graniteville branch of Security Federal Bank. (App. p. 219). Kearse stated they began planning to rob the bank a week before the crime occurred, and the initial discussion regarding the robbery involved Petitioner, Edwards, and Kearse. (App. p. 222). Later that week, Kearse testified he met with Petitioner, Javier, and Paul to further discuss the robbery. (App. pp. 223-224). During the second meeting, Kearse testified they planned when they were going to commit the crime and what they were going to wear. (App. p. 224). Following that meeting, Kearse, Javier, and Petitioner initially agreed to commit the robbery on June 24, 2009. (App. p. 225). However, on the day of the planned robbery, Kearse stated they drove by the bank and decided to wait. (App. p. 226). Then, on the next day, Kearse testified he asked Oakman to drive him to Petitioner and Javier's house and they picked up Petitioner and Javier. (App. pp. 228-229). Kearse stated they then went to his grandmother's house and picked up some gloves before driving to Wal-Mart. (App. pp. 229-230). At the Wal-Mart, Kearse indicated Javier borrowed his girlfriend's car, and they then all drove to Kalmia Apartments in Graniteville. (App. pp. 230-231). At the apartment complex, Kearse stated they changed into black clothes and retrieved their guns from Petitioner's backpack. (App. pp. 233). They then met with Jones, who was supposed to be the getaway driver, and rode with Jones to the bank. (App. p. 232; p. 234). Kearse stated they went into the bank, committed the robbery, and came back outside. (App. pp. 234-235). Once outside, Kearse testified Jones was nowhere to be found, so they fled to a nearby wooded area. (App. pp. 235-236). Kearse stated they then split up and he called Oakman on Petitioner's phone. (App. pp. 237-238). Kearse testified he was later arrested while hiding under a shed and implicated Petitioner and Javier in the crime. (App. p. 238). Kearse then identified Petitioner and Javier in the surveillance photographs of the robbery. (App. p. 239).

At the conclusion of the trial, Petitioner was found guilty as indicted. Judge Early sentenced Petitioner to twenty-eight years' imprisonment for Armed Robbery and five years' imprisonment for Possession of a Firearm During the Commission of a Violent Crime, with both sentences to run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Jerry M. Screen, Esquire. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. *State v. Hickson*, Op. No. 2012-UP-667 (S.C. Ct. App. filed December 19, 2012). The Remittitur was issued on February 11, 2013.

Petitioner filed an application for PCR on May 21, 2013. A hearing was held on September 11, 2015, at the Aiken County Courthouse before the Honorable Edgar W. Dickson. On January 9, 2017, Judge Dickson issued an Order of Dismissal denying the application. Petitioner did not file a notice of appeal.

On June 19, 2019, Petitioner filed a second PCR application seeking belated appellate review under *Austin v. State*[13] of Judge Dickson's 2017 Order of Dismissal. Petitioner filed a third PCR application, also seeking *Austin* relief, on March 16, 2020. An evidentiary hearing on both applications was held on September 7, 2021, before the Honorable Courtney Clyburn Pope. On September 10, 2021, Judge Clyburn Pope issued an order merging Petitioner's second and third PCR applications and granting *Austin* review of the denial of Petitioner's first PCR application.

Petitioner filed a timely notice of appeal from Judge Clyburn Pope's order. During the pendency of that appeal, it was determined that the transcript of the September 11, 2015, evidentiary hearing before Judge Dickson was not available. On April 5, 2022, the South Carolina

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[13] 305 S.C. 453, 409 S.E.2d 395 (1991).

Supreme Court issued an order remanding the matter for a reconstruction of the record of the September 11, 2015, hearing.

A reconstruction hearing was held on April 28, 2022, before Judge Dickson. By order dated June 29, 2022, Judge Dickson found that the record could not be reconstructed to allow for meaningful appellate review. Subsequently, on August 23, 2022, the Supreme Court issued an order vacating the 2017 Order of Dismissal and remanding the matter to the circuit court for a new evidentiary hearing on Petitioner's original PCR application.

The new evidentiary hearing was held on July 16, 2024, before the Honorable Brian M. Gibbons at the Aiken County courthouse. Following the hearing, Judge Gibbons issued an order on February 24, 2025, denying relief and dismissing the PCR application. Petitioner appealed and filed a Petition for a Writ of Certiorari. This return follows.

STANDARD OF REVIEW

The PCR court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support those findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

1. **The PCR court correctly found Petitioner failed to prove Counsel was ineffective for not cross-examining Randy Wilson more thoroughly as to his armed robbery sentence, where Counsel successfully elicited from Wilson that he was facing "a good long time" in prison and was hoping for a sentence reduction by helping the State, Counsel argued to the jury that Wilson's hope for resentencing gave him a motive to lie, and there is no reasonable likelihood that eliciting additional details from Wilson about his sentence would have changed the result of Petitioner's trial.**

Petitioner argues the PCR court erred in finding Counsel was not shown to be ineffective for failing to more thoroughly cross-examine Randy Wilson as to his motivations for testifying. Specifically, Petitioner contends Counsel was deficient for failing to elicit that Wilson had been sentenced to 28 years' imprisonment for armed robbery and that the minimum sentence he could receive on resentencing was 10 years. Petitioner acknowledges that Counsel *did* elicit from Wilson that he had been sentenced to "a good long time" in prison and that he was testifying in hopes of a sentence reduction; however, Petitioner argues Counsel's cross-examination would have been more effective if she had elicited specific numbers because she could have argued that Wilson was facing a potential sentence reduction of 18 years, instead of just a "good long time."

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); *Butler*, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. *Id.* at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. *Id.* Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, any deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117–18, 386 S.E.2d at 625.

The PCR court found Petitioner's argument on this issue meritless. The PCR court noted that Counsel cross-examined Wilson about his reasons for testifying and elicited from him that he was facing a substantial amount of prison time and was hoping for a reduction in his sentence if he testified in Petitioner's trial. The PCR court found that additional details about the precise sentence Wilson had received and the precise reduction he was hoping to receive were not necessary to render Counsel's cross-examination effective; the admissions Wilson made were sufficient to expose his self-serving motivation for testifying, and Counsel used her cross-examination of Wilson to attack his credibility in her closing argument to the jury. The PCR court also found that Petitioner had failed to prove a reasonable probability that eliciting additional minor details about Wilson's sentence would have changed the result of Petitioner's trial.

The PCR court's findings on this issue are clearly well-supported by the evidence and should be affirmed. While Counsel did not specifically cross-examine Wilson about the exact amount of prison time he was facing, she *did* cross-examine Wilson about his motivations for

testifying, and she successfully elicited 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 helped the State. (App. pp. 211-212). Counsel went on to argue in closing that Wilson had a motive to fabricate his testimony in order to get a sentence reduction. (App. pp. 301-302). It cannot be said that Counsel's mere failure to adduce the precise range of Wilson's potential sentence reduction substantially weakened the effect of her argument that Wilson had a motive to lie.

Moreover, even if eliciting these additional details would have caused the jury to find Wilson completely untrustworthy, the evidence supports the PCR court's finding that Petitioner had not shown a reasonable probability that the outcome of his trial would have been different. Petitioner claims that "[t]he entirety of the state's case depended upon the jury believing the self-interested, self-preservation motivated Wilson . . . and codefendant Kearse." (Pet. pp. 12-13). This claim is absurd. In addition to the testimony of Kearse—whom Petitioner admits was "caught 'red-handed'" and was unquestionably one of the three robbers (Pet. p. 23), Wilson's testimony implicating Petitioner in the crime was corroborated by, *inter alia*: Oakman's testimony that Kearse directed her to pick Petitioner up and drop him off with Kearse a few blocks from the bank just before the robbery occurred, and that Kearse called her from Petitioner's cell phone shortly after the robbery; the testimony of Galloway, Wright, and Bryant that Kearse was with Petitioner and Javier at the apartments near the bank shortly before the robbery; the bank employees' testimony that one of the robbers was 5'4" tall, which was Petitioner's height; the fact that one of the robbers was wearing a backpack, as both Kearse and Oakman testified Petitioner was; and the surveillance footage, from which the jury could observe the robber's distinctive height and eyebrows and compare them with Petitioner's features. Each of these items of evidence

independently tended to prove Petitioner's participation in the robbery, as well as to corroborate Wilson's testimony. Given this wealth of evidence, a more thorough effort by Counsel to expose Wilson's potential bias would not have made the slightest difference in the outcome of the trial.

Therefore, the PCR court did not err in concluding Petitioner failed to prove Counsel was ineffective on this ground. This Court, accordingly, should deny the petition for a writ of certiorari as to this issue.

2. The PCR court correctly found that Petitioner failed to prove Counsel was ineffective for failing to raise a Rule 403, SCRE, objection to Candice Bryant's testimony that, the night before she was called as a witness, she received a text message stating "What are you at the courthouse snitching," where the testimony had legitimate probative value as evidence of Petitioner's consciousness of guilt and was not unfairly prejudicial because the content and timing of the message linked it to Petitioner as the source.

At one point in Petitioner's trial, Candace Bryant testified that, on the night before she was called to testify, she received a text message stating "What are you at the courthouse snitching." (App. p. 192). Counsel objected to this portion of Bryant's testimony on the ground that it was irrelevant, but the trial court overruled the objection. Petitioner claims Counsel was ineffective for objecting on the basis of relevance, rather than on the basis of Rule 403, SCRE, arguing that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Specifically, Petitioner contends there was no evidence linking the suspicious text message to Petitioner, so admitting the testimony unfairly led the jury to believe it was sent by Petitioner or by someone on his behalf.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice 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).

"[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt." *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009).

Citing *Edwards*, the PCR court found that the message "What are you at the courthouse snitching" had legitimate probative value insofar as it suggested Petitioner, or someone on his behalf, was attempting to intimidate Bryant and keep her from testifying against Petitioner. The PCR court rejected Petitioner's argument that this inference was somehow "unfairly prejudicial," reasoning that consciousness of guilt is a legitimate focus of the State's proof. Therefore, the PCR court found a Rule 403, SCRE, objection would have been futile, and Counsel could not have been ineffective for failing to make one.

Petitioner now claims there was "absolutely no evidence" linking the intimidating text message to Petitioner. (Pet. p. 17). The PCR court, however, explained that the link was obvious from the content and timing of the message itself: "The fact that a witness was warned to stop "snitching" at the courthouse, on the night before that witness was called to testify at Applicant's trial, is indeed strong evidence that either Applicant or someone acting on his behalf was attempting to suppress evidence of his guilt." (App. pp. 929-930). On the night Bryant received that text message, she was, in fact, getting ready to come to the courthouse and "snitch" on Petitioner. The link between the threatening message and Petitioner is obvious.[14]

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[14] *Edwards* itself supports the PCR court's reasoning. The *Edwards* Court, in its discussion of how witness intimidation must be "linked" to the defendant to establish its reliability, approvingly quoted the following passage from *United States v. Hayden*, 85 F.3d 153 (4th Cir. 1996):

> There was no handwriting analysis, nor were there any fingerprints, and the letter was not signed—it was sent anonymously. *The letter's content, however, pointed to [Hayden] as its author.* The letter referred to the recipient as owing the writer money for drugs unpaid for. The recipient of the letter testified that . . . Hayden was the only person to whom he had ever owed drug money and about whom he

The PCR court correctly ruled that the text message was witness intimidation evidence with legitimately probative value. Moreover, there was evidence to support the PCR court's finding that the message's content and timing established the requisite link to Petitioner. Accordingly, the PCR court did not err in holding Counsel was not ineffective for failing to raise a Rule 403, SCRE, objection. Therefore, this Court should deny the petition for a writ of certiorari.

3. The PCR court correctly found Petitioner failed to prove Counsel was ineffective for failing to object to the trial court's references to a "true and just verdict" and a "fair and impartial verdict," where those phrases were not improper under the controlling case law at the time of Petitioner's trial, and where the trial court's instructions as a whole were free from error.

Finally, Petitioner argues the PCR court erred in finding Counsel was not ineffective for failing to object to the trial court's use of the phrases "true and just verdict" and "fair and impartial verdict" in its opening remarks and jury instructions. Petitioner argues these phrases were objectionable under *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and *State v. Daniels*, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012).

The PCR court's finding was correct: Counsel was not ineffective for failing to object to the trial judge's jury instructions because the instructions were not objectionable. *Aleksey* held that such language is *not* improper if it "did not appear in either the reasonable doubt or circumstantial evidence charges." *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. Since the challenged comments in this case did not appear in the reasonable doubt or circumstantial evidence charges, they were not objectionable.

> was planning to testify. Thus, the recipient established the identity of the writer of the letter to a fairly reliable degree.

Edwards, 383 S.C. at 72–73, 678 S.E.2d at 408 (quoting *Hayden*, 85 F.3d 153, 159) (emphasis added).

Petitioner also argues Counsel was ineffective for failing to object to the trial judge's instructions to the jury referring to a "fair and impartial verdict." (App. p.310, line 20). Again, the PCR court correctly found the challenged language was not improper. The use of the phrase "fair and impartial" does not rise to the level of the improper charge in *State v. Daniels* where the jury was instructed to reach a verdict that represented "truth and justice for all parties that are involved in this case." *Daniels*, 401 S.C. at 255, 737 S.E.2d at 475. *Daniels* specifically pointed to the "all parties involved" phrase as potentially leading jurors to weigh the interests of victims in arriving at their verdict, which would be improper. That phrase does not appear in the trial court's instructions in this case. In addition, *Daniels* was not decided until *after* Petitioner's trial had concluded. Counsel cannot be deemed deficient for failing to make an objection based on a Supreme Court opinion that did not exist at the time.

The PCR court also correctly found that, even if these 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. *See id.* at 258, 737 S.E.2d at 477. The PCR court did not err. Therefore, this Court should deny the petition for a writ of certiorari as to this issue.

CONCLUSION

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

Respectfully submitted,

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