

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2014-001125

Ted E. Abney, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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QUESTION PRESENTED

Did the Court of Appeals properly conclude Petitioner failed to establish that counsel's failure to request a jury charge on strong arm robbery as a lesser included offense of armed robbery constituted ineffective assistance of counsel?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Newberry County Clerk of Court. He was indicted at the January 2005 term of the Newberry County Grand Jury for Armed Robbery and the Possession of a Firearm or Knife During the Commission of a Violent Crime (2005-GS-36-0043). He was represented by Charles V. Verner, Esquire. On May 18, 2005, Petitioner proceeded to a jury trial. The Honorable Paul M. Burch directed a verdict in favor of Petitioner on the charge of Possession of a Firearm or Knife During the Commission of a Violent Crime. On the charge of Armed Robbery, however, Petitioner was found guilty as indicted. Judge Burch sentenced him to confinement for a period of twenty-six years.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Abney, Op. No. 2008-UP-184 (S.C. Ct. App. filed March 17, 2008). The Remittitur was issued on April 2, 2008.

Petitioner filed an application for post-conviction relief on March 12, 2009. Respondent filed its Return on or about June 5, 2009. An evidentiary hearing into the matter was convened on March 9, 2010, at the Newberry County Courthouse. Petitioner was present at the hearing and represented by Gwendlyne Y. Smalls, Esquire. The Honorable D. Garrison Hill dismissed Petitioner's application with prejudice by written Order filed on May 26, 2010. Petitioner subsequently filed a petition for writ of certiorari and Respondent filed a return. By Order filed August 20, 2012, this Court granted the petition. Petitioner filed his brief on December 19, 2012. Respondent filed its brief on March 15, 2013. Oral Argument at the Court of Appeals was held on November 13, 2013. In a 2-1 decision, the Court of Appeals affirmed the lower court's

order dismissing Petitioner's application. On July 18, 2014, Petitioner filed his Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Petitioner was convicted of armed robbery for stealing Traci Roosen's (victim) purse on October 30, 2004, in the parking lot of a Citgo Station in the town of Prosperity. The victim testified she exited the store and walked to her vehicle. App. 49. As she opened the front door, she noticed a white van parked next to her vehicle and was then approached by Petitioner. The victim testified that when she opened the door Petitioner approached her from behind and "leaned over me where I could not go anywhere." App. 50. Petitioner told the victim, "don't move, don't say nothing or I will kill you." App. 50; 55. The victim also testified that Petitioner continuously pushed an object into her ribs as he threatened her:

[T]he whole time I was standing there he took his right hand and kept pushing it in my ribs to let me know...[B]y the second time that he told me I was so afraid that he was going to shoot me that I was afraid to hit the panic button or do anything except just stand there...

App. 50.

Shocked by Petitioner's initial threat, the victim said "what." App. 50. Petitioner then became angrier, pushed harder on the victim, and again threatened her stating, "shut the f--- up or I will kill you here." App. 50; 55-56. Petitioner took the victim's purse from her and drove off in the white van. App. 50-51. The victim testified although she never saw a weapon in Petitioner's hand and he never stated he had a gun, she was confident that the object he pushed into her ribs was a gun. App. 54-55. Petitioner later turned himself into the police and voluntarily gave a verbal and written statement. App. 99; 101-104. Petitioner admitted he took the pocketbook, but insisted he did not have a weapon. App. 103; 199. No weapon was ever recovered by law enforcement in this case. App. 122-123.

After the State rested its case at trial, defense counsel moved for a directed verdict on the charge of armed robbery. App. 126-132. Although the trial judge denied that motion, he

directed a verdict of not guilty as to the charge of possession a weapon during the commission of a violent crime. App. 132.

In his instructions to the jury, the trial judge charged the jury the offense of armed robbery and the elements of the offense under S.C. Code § 16-11-330(A). App. 153. No request for a charge on strong arm robbery was made on the record. After approximately an hour and twenty-eight minutes of deliberation, the jury found Petitioner guilty of armed robbery. App. 159.

At the evidentiary hearing, Petitioner testified he could not recall counsel ever discussing the lesser-included offense of strong arm robbery with him or the possibility of having the judge instruct the jury on a lesser charge. App. 192-194. When asked whether counsel ever told him “that there is another crime that fits when there is not a weapon involved,” Petitioner responded: “it was all armed robbery, it was armed robbery or nothing.” App. 198. He stated he thinks counsel should have advised him of the law concerning strong arm robbery, and he believes the result at trial would have been different if counsel had done so. App. 196. He also testified he could not recall whether counsel tried to obtain a plea offer to the lesser-included offense of strong arm robbery. App. 205.

Counsel testified he met with Petitioner to discuss his case at least six times, and probably more than that. App. 208. Petitioner maintained from the first meeting that he took the purse but did not have a weapon. Counsel stated that Petitioner was willing to plead guilty to common law robbery “[i]n the beginning and even during trial” App. 213. Although they “tried hard” to obtain a plea offer for common law robbery, the State refused. App. 209. Counsel stated that Petitioner knew the State was refusing to reduce the charge. App. 219.

Counsel testified the initial defense strategy was that Petitioner “was guilty of the charge but that it was a common law, that it was an unarmed purse snatching and that the State had over charged him.” App. 209-210. In response to Petitioner’s testimony that counsel never explained to him that he could be found guilty of the lesser-included offense of strong-arm robbery, counsel stated “[t]here is no way I did not,” and said he likely discussed the possibility of a lesser-included charge each of the six or more times that he met with Petitioner. App. 217-219. He stated he also explained to Petitioner that § 16-11-330(A) had been amended to include a representation of a weapon. App. 217-218.

Counsel testified the initial strategy changed after the State presented its case and the evidence showed that the victim “clearly had the opportunity to see a weapon” but did not. App. 213. He discussed with Petitioner the possibility of not requesting a charge on strong arm robbery “just go for an outright acquittal.” App. 224. They both agreed not to make a request for a charge on the lesser-included offense as they both believed they were winning the case. App. 214. Specifically, counsel testified the following conversation with Petitioner took place “[a]fter the State’s case which we felt was particularly weak” regarding the decision of whether to request a strong arm robbery charge:

I told [Petitioner], “You know, it’s an all or nothing, it’s basically a roll of the dice, you’re going to win big or going to lose big time because the judge had said he’s not going to give the State a lesser included offense and do you want to go for all or nothing or do you want me to put it in there,” and he said, “All or nothing,” and I said, “I agree with you, I think we’re winning.”

App. 222-223 (emphasis added).

Furthermore, counsel specifically explained to Petitioner the potential consequences of proceeding with this strategy:

[H]e was certainly told armed robbery was ten to thirty, non paroleable [sic], and strong armed robbery was fifteen, so when I explained it to him the second time I told him ... "Common law is up to fifteen, armed robbery is ten to thirty, if you don't charge you're going for broke," **and he said ... "Let's go for it and not charge it."** I agreed, I thought we were winning, too, and I said, "I agree with you."

App. 224 (emphasis added).

Counsel testified he later found out after the trial that the jury had indicated "[w]e really didn't know whether he had a weapon but we're not letting a man like that go home, either." App. 221. Counsel stated, in hindsight, he should have requested a charge on strong arm robbery and he believes the trial judge would have granted such a request. App. 214; 216. However, the decision not to make such a request "was clearly a tactical decision" based on the belief he shared with Petitioner at the time of the trial that they were winning the case. App. 214-215.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

THE COURT OF APPEALS PROEPRLY CONCLUDED PERITIONER FAILED TO ESTABLISH COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A CHARGE ON THE LESSER-INCLUDED OFFENSE OF STRONG ARM ROBBERY.

Probative evidence in the record supports the PCR court's finding that counsel was not ineffective. Counsel was not deficient for failing to request a charge on the lesser-included offense of strong arm robbery as the evidence presented at trial did not warrant such a charge. The State presented uncontradicted evidence that Petitioner physically represented he was armed while repeatedly threatening to kill the victim if she failed to comply with his demands, thus rendering the victim's belief that Petitioner was armed reasonable under the circumstances. Even if Petitioner was entitled to a charge on strong arm robbery, counsel's decision not to request such a charge was valid trial strategy. Indeed, Petitioner agreed with the decision to go "all or nothing" and not request the charge with full knowledge of the potential consequences of such a decision. In any event, Petitioner suffered no prejudice as there is no evidence indicating the jury, if given the option, would have found him guilty of strong arm robbery as opposed to the greater offense of armed robbery.

In denying relief, the PCR court made the following pertinent findings:

This Court finds that the [Petitioner's] testimony that trial counsel never discussed strong-arm robbery with him is not credible, while also finding trial counsel's testimony credible.¹ The [Petitioner], in consultation with his counsel, made the strategic choice not to request the jury be charged with the lesser-included offense of strong-arm robbery. The choice was made based on sound and experienced professional judgment, and was valid under the circumstances....

App. 238. Respondent submits that there is probative evidence in the record to support these findings.

¹ See Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court").

“The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.C.2d 391, 394 (2001). “A judge is only required to charge a jury on a lesser included offense if evidence exists that suggests the lesser, rather than the greater, crime was committed.” Sellers v. State, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (2005). “Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense.” State v. Patterson, 337 S.C. 215, 233; 522 S.E.2d 845, 854 (Ct. App. 1999).

Petitioner was indicted for armed robbery in violation of S.C. Code § 16-11-330(A) (Supp. 1996), which provides:

A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, he was armed while using **a representation of a deadly weapon** or any object which a person present during the commission of the robbery **reasonably believed to be a deadly weapon**, is guilty of a felony

(Emphasis added).² On the other hand, common law or strong arm robbery is defined as “the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.” State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) (citation omitted). “Thus, it is the use or alleged use of a deadly weapon that distinguishes armed robbery from robbery” Id. at 5, 675 S.E.2d at 437 (citation omitted).

² As our Supreme court has explained:

Under § 16-11-330(a), the State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by actions or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.

State v. Muldrow, 348 S.C. 264, 267-68, 559 S.E.2d 847, 849 (2002).

In State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), our Supreme Court discussed the legislative intent underlying the addition of the second prong via amendment in 1996:

Before the second prong was added, evidence the object used in a robbery was in actuality not a deadly weapon created a jury issue and entitled the defendant to a charge on the lesser included offense of strong arm robbery. The legislature's amendment to § 16-11-330(A) simply ensures that the use of a[n] object which is in fact not a deadly weapon will support a conviction for armed robbery. Under this prong, the State must still show evidence corroboration the allegation of being armed *i.e.*, the use of a physical representation of a deadly weapon, to establish armed robbery.

Id. at 269, 559 S.E.2d at 850 (citations omitted); see also Mitchell, 382 S.C. at 4, 675 S.E.2d at 437 (“Armed robbery occurs when a person commits robbery while either armed with a deadly weapon or *alleging to be armed by the representation of a deadly weapon*”) (emphasis added); State v. Jones, 342 S.C. 248, 252-53, 536 S.E.2d 396, 398 (Ct. App. 2000) (“a defendant may now be convicted of armed robbery under S.C. Code Ann § 16-11-330(A) (Supp. 1999) if the jury concludes that the robber alleged that he was armed under the requisite circumstances without having to conclude that he was, in fact, so armed”). The Court in Muldrow further held that “[a] plain reading of the statute indicates words alone are not sufficient under the second prong [of § 16-11-330(A)] to support a conviction for armed robbery.” Id. at 269, 559 S.E.2d at 849-50.

In the case at hand, Petitioner was not entitled to an instruction on the lesser-included offense of strong arm robbery as the evidence presented at trial did not tend to show he committed that offense rather than armed robbery. The record shows the victim had just opened the door to her car and was about to get in when Petitioner positioned himself behind her so that she could not go anywhere. App. 50. Petitioner then threatened to kill her if she did not comply with his demands while simultaneously pushing an object into her ribs. App. 49-50; 55. When the victim hesitated, Petitioner pushed the object harder into her ribs and told her to “shut the f---

up or I will kill you here” before taking her purse. Ap. 50; 55-56. Although the victim never saw a weapon, she testified she was confident Petitioner pushed a gun into her ribs and she was afraid he was going to shoot her. App. 50; 54-55. The victim’s belief that Petitioner was armed was reasonable under the circumstances as Petitioner’s conduct was clearly calculated to make her think he possessed a deadly weapon which he was prepared to use. Therefore, the State presented sufficient evidence to establish the representation of a deadly weapon element of § 16-11-330(a).

Furthermore, no evidence was presented at trial which undermined or contradicted the State’s evidence concerning Petitioner’s representation of a weapon. See Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005) (defendant convicted of trafficking methamphetamines was not entitled to charge on lesser-included offense such as possession with intent to distribute where State’s evidence indicated he possessed enough to warrant trafficking charge and defendant failed to present evidence that he possessed less than minimum). Although no weapon was ever recovered and Petitioner gave a statement to police in which he insisted he did not use a weapon in furtherance of the crime, this evidence only tends to show that Petitioner did not actually possess a deadly weapon for purposes of the first prong of § 16-11-330(A); it has no relevance as to the issue of whether Petitioner alleged he was armed through the representation of a weapon for purposes of the second prong of § 16-11-330(A).³ Thus, Petitioner was not entitled to a charge on strong arm robbery as the State’s uncontradicted evidence indicating Petitioner physically represented he was armed while verbally threatening to kill the victim established that

³ See Walker v. Ozmint, CIVA 0:08CV00241-TLW, 2009 WL 750407 (D.S.C. Mar. 18, 2009) (concluding testimony of defendant convicted of armed robbery that he was not armed during incident did not necessarily entitle him to a charge on strong arm robbery).

he was guilty of armed robbery under § 16-11-330(A) and not a lesser offense. Accordingly, counsel was not deficient for failing to request such a charge.

Even assuming Petitioner was entitled to a charge on strong arm robbery, counsel was not ineffective as the decision not to request such a charge was a reasonable trial strategy, the purpose of which was to entice the jury to acquit Petitioner entirely as opposed to finding him guilty of a lesser offense. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (“Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel”); Whetshell v. State, 276 S.C. 295, 299, 277 S.E.2d 891, 893 (1981) (where counsel “made an informed judgment as to whether the motion to suppress should be made and the guilty plea entered...his informed advice should not be subject now to retrospective examination”). Counsel testified although their initial strategy was to show Petitioner was guilty of the lesser-included offense of strong arm robbery, App. 209-210, the subsequent decision not to request a charge on that offense was a strategic move Petitioner agreed with based on their shared belief the State had presented a weak case and they were winning. App. 214-216; 222. This strategy was reasonable under the circumstances of this case as Petitioner had already admitted to stealing the purse but there was no direct evidence that a deadly weapon was actually used.⁴

Consistent with this strategy, in his closing argument counsel reminded the jury that the issue before them was whether an *armed* robbery, and not a mere robbery, had occurred, and that

⁴ Counsel’s testimony that, in hindsight, he should have requested a charge on strong arm robbery does not render his performance ineffective as the decision not to make such a request was reasonable at the time of trial. See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time”) Judge v. State, 321 S.C. 554, 561, 471 S.E.2d 146, 150 (1996) (“counsel’s advice to reject a plea agreement does not fall below the reasonably effective assistance standard simply because, in hindsight, the advice was wrong or the attorney’s trial tactics backfired”).

they had to either find that Petitioner was armed and thus guilty or acquit him. See App. 143 (“It is not whether she was robbed or not, it is if it was *armed* robbery”) (emphasis added); App. 144 (“The state has put this before you as armed robbery.... It is armed robbery *or nothing*.”) (emphasis added). He further explained: “By finding him not guilty does not mean that this didn’t happen. It means the State failed to prove...the most essential part of their [case].” App. 137. He argued that the only evidence of a deadly weapon in this case was the victim’s testimony that Petitioner merely pushed into her, App. 142-143, and that the State did not meet its burden of proving beyond a reasonable doubt the crucial element of the offense; that Petitioner was armed with a deadly weapon. App. 145. Thus, he concluded by asking the jury to find Petitioner not guilty.

Furthermore, it is clear from the record that counsel discussed this strategic decision with Petitioner, Petitioner understood the nature and consequences of the proceeding with this strategy, and agreed with counsel that they should in fact proceed with it. See Moore v. State, 399 S.C. 641, 732 S.E.2d 871, 873 (2012) (“Attorneys have a duty to consult with their clients regarding ‘important decisions,’ including questions of overarching ‘defense strategy’”) (citation omitted). The record shows counsel repeatedly explained to Petitioner, and Petitioner understood, that strong arm robbery was a lesser-included offense, and that they had the option of requesting a jury charge on strong arm robbery, and that § 16-11-330(A) had been amended to include the representation of a weapon. App. 213-219; 224. Significantly, when asked whether he wanted to request a charge on strong arm robbery or “roll ... the dice” and “go for all or nothing,” Petitioner repeatedly indicated he did not want to request such a charge and wanted to go “[a]ll or nothing,” further stating “[l]et’s go for it and not charge it.” App. 223-224. Petitioner cannot now claim his conversation was obtained in violation of his constitutional rights simply

because he knowingly made an “all or nothing” bet and, figuratively speaking, came out with nothing.⁵

Even if Petitioner was entitled to a jury charge on the lesser-included offense of strong arm robbery, he was not prejudiced by the decision not to request such a charge. For the reasons already stated, the State presented sufficient evidence to establish that Petitioner represented to the victim that he possessed a deadly weapon and was thus guilty of armed robbery. The record is devoid of evidence establishing a reasonable probability that the jury, if charged on strong arm robbery, would have found Petitioner guilty of that offense as opposed to the greater offense of armed robbery. Although counsel testified members of the jury indicated after trial that they were unsure as to whether Petitioner actually possessed a weapon, this evidence only tends to show that the jury did not believe Petitioner was guilty of armed robbery under the first prong of §16-11-330(A). It provides no indication the jury was unsure as to whether Petitioner represented that he possessed a deadly weapon under the second prong of that statute; therefore, it does not tend to show that the jury likely would have found Petitioner guilty of the lesser-included offense had it been charged.

⁵ The instant case is analogous to situations in which a defendant, having knowledge of the maximum sentence he faces for a charge, pleads guilty without negotiations or promises as to the possible range of sentence he will receive and then receives a higher sentence than he thought or hoped he would receive. In such situations, the defendant is not entitled to relief because he hoped to receive a lighter sentence. See *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (defendant’s plea not rendered involuntary simply because he “*hoped* to get a reduced sentence and *expected* to get one” as “[w]ishful thinking regarding sentencing does not equate a misapprehension concerning the possible range of sentences”) (emphasis in original); *Harres v. Leeke*, 282 S.C. 131, 318 S.E.2d 360 (1984) (defendants’ pleas not rendered involuntary simply because “they *thought* Judge Timmerman would suspend any sentence imposed and place them on probation,” but instead sentenced them to prison terms) (emphasis in original); *Griffin v. State*, 361 S.C. 173, 604 S.E.2d 394 (2004) (counsel was not deficient for expressing belief to defendant that he would likely receive twenty-two year sentence from plea court but ultimately received thirty years where record showed defendant was aware there were no promises or negotiations and knew the maximum sentences he could receive). Here, Petitioner agreed with counsel’s strategy to not request a charge on the lesser-included offense of strong arm robbery with the hope that he would be acquitted of the greater offense of armed robbery. However, the record shows Petitioner voluntarily did so with full knowledge of the potential consequences he faced if found guilty of armed robbery, and received no assurances or promises from counsel as to how the strategy would play out. He is not now entitled to relief simply because the jury did not return the verdict he wished for.

Furthermore, the jury was repeatedly reminded that it could not find Petitioner guilty of armed robbery unless the State met its burden of proving Petitioner represented to the victim that he possessed a weapon. In his closing argument, the Solicitor stated: “The State has to prove that Mr. Abney robbed Ms. Roosen and during the commission of that robbery he recommended [sic] to her that he had a weapon by his actions or words. And that she reasonably believed that he had a weapon.” App. 134. Defense counsel argued to the jury that the State failed to establish that Petitioner was armed for purposes of the statute, and repeatedly reminded them that they had to find Petitioner guilty of armed robbery or nothing at all. App. 137; 141-145. The trial court instructed the jury on the elements of the offense of armed robbery pursuant to § 16-11-330(A). App. 145; 153. The court also stated that the State was “required by law to prove every essential element of the offense charged ... beyond a reasonable doubt before you can convict the defendant and find him guilty.” App. 148-149. Furthermore, the court instructed the jury that “it is your duty to accept and apply the law as I state it to you.” App. 149. As stated by our Supreme Court, “[a] jury is presumed to follow instructions.” Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 n.1 (1999). Accordingly, the jury’s return of a guilty verdict indicates the jury believed the State proved the representation element of §16-11-330(A), and thus tends to show that the jury would not have found Petitioner guilty of strong arm robbery even it is had been charged.

The majority of the Court of Appeals held Petitioner failed to show counsel’s representation fell below an objectively reasonable standard. In an issue of first impression, the Court of Appeals found counsel’s decision not to request a jury instruction was a valid strategic decision based on the facts of this case and the testimony as presented at the evidentiary hearing. As stated above, Counsel testified that he thought they were winning the case as the

State had failed to prove that Petitioner was armed during the incident and Victim could not identify a weapon. As such, Counsel, after conferring with Petitioner, employed an “all or nothing” strategy in hopes of obtaining an acquittal. The Court of Appeals correctly held counsel articulated this valid trial strategy and that there was sufficient evidence that supported the PCR court’s findings.

In so far as Petitioner asserts the cases that the Court of Appeals cited in coming to its correct conclusion are distinguishable from the present case, these cases are cited for the simple proposition that refusing to ask for a charge on a lesser included offense can be considered a reasonable trial strategy. The court then concluded that, based on the facts of this case, counsel’s decision not to ask for the lesser included offense of strong armed robbery was a valid strategy. As there is evidence to support both the PCR court’s order denying Petitioner’s application and the Court of Appeals Opinion affirming the PCR court’s order, this Court should deny certiorari and affirm the Court of Appeals opinion.

CONCLUSION

For the reasons stated above, this Court should deny certiorari affirm the Court of Appeals Opinion. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Columbia, South Carolina
August 8, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County

The Honorable D. Garrison Hill, Circuit Court Judge

TED E. ABNEY, 169743

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

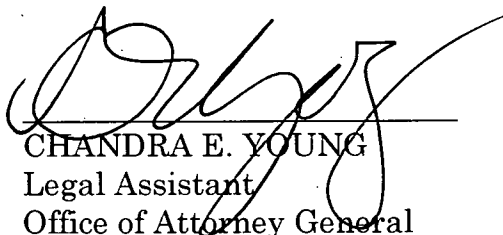
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari to the Court of Appeals on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine Hudgins
SC Commission of Indigent Defense
1330 Lady Street; Suite 401
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 8th day of June 2014.



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