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STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

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S.C. Supreme Court

Appellate Case No. 2013-001284

Nathaniel Charles Teamer,.....Respondent-~~Petitioner~~

v.

State of South Carolina,.....Petitioner-~~Respondent~~

# BRIEF OF PETITIONER

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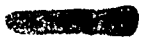

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1. Did the PCR court err in granting Respondent's application based upon Counsel's failure to move for a dismissal of Respondent's felony DUI charge where no evidence of probative value supports the PCR court's finding that Respondent satisfied his burden of showing Counsel's performance prejudiced him?

2. Did the PCR court err in granting Respondent's application where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for not impeaching a witness regarding a twelve year old conviction that the NCIC report did not report as a conviction?

3. Did the PCR court err in finding Counsel provided ineffective assistance for failing to move for a directed verdict in favor of Respondent on the burglary charge where no evidence of probative value supports the PCR court's finding that Respondent satisfied his burden of proving prejudice?

4. Did the PCR court err in granting Respondent's application where Respondent failed to prove that Counsel's failure to object to portions of the trial court's jury instructions constituted deficient performance where the jury instructions, taken as a whole under the prevailing law at the time, would not have constituted reversible error?

## STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Respondent was indicted at the May 2006 term of the Spartanburg County Grand Jury for burglary – 1st degree (07-GS-42-1719), felony driving under the influence – great bodily injury (06-GS-42-1732), and failure to stop when signaled by officer with great bodily injury (06-GS-42-1733, count 1)[1]. E. Joshua Schultz, Esquire, represented him. On September 12, 2007, Respondent underwent trial, pursuant to which he was found guilty as indicted. The Honorable J. Derham Cole sentenced him to confinement for thirty years for burglary – 1st degree, fifteen years for felony driving under the influence – great bodily injury, and ten years for failure to stop when signaled by officer with great bodily injury. All sentences were set to run concurrent.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Teamer, Op. No. 2010-UP-117 (S.C. Ct. App. filed February 11, 2010). The Remittitur was sent on July 13, 2010.

The Respondent filed his application for post-conviction relief August 2, 2010 (2010-CP-42-4049), and amendment to the application on October 8, 2012. An evidentiary hearing was held on October 29, 2012, at the Spartanburg County Courthouse. The Respondent was present and represented by Counsel, Tricia Blanchette, Esquire, and Jeremy Thompson, Esquire. The State of South Carolina was represented by Suzanne H. White, Assistant Attorney General. The Honorable Brooks P. Goldsmith

[1] The charge of attempting to leave the scene of an accident with great bodily injury (06-GS-42-1733, count 2) was nol prossed.

granted the application by written Order on February 8, 2013. Petitioner filed a 59(e) Motion and a hearing was held on the Motion on April 18, 2013. Judge Goldsmith denied the Motion by written Order on May 6, 2013. Petitioner filed a timely notice of appeal and Petition for Writ of Certiorari. Respondent filed a cross appeal and Petition for Writ of Certiorari. This Court denied Respondent's Petition for Writ of Certiorari, while granting Petitioner's. This Brief of Petitioner follows.

## STANDARD OF REVIEW

In a post-conviction relief (PCR) proceeding, an Applicant bears the burden of proving the allegations in his 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 Petitioner 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 reviewing Court may reverse the PCR judge's factual findings where the record lacks "any evidence of probative value" to sustain them. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)) ("[A] PCR judge's findings should not be upheld if there is no probative evidence to support them"). Further, where the PCR court's decision is premised on an error of law, this Court must reverse. Ard v. Catoe, 372 S.C. at 331, 642 S.E.2d at 596 ("this Court will reverse the PCR court's decision when it is controlled by an error of law.").

## ARGUMENT

**I. The PCR court erred in granting Respondent's Application for Counsel's failure to move for a dismissal of Respondent's felony DUI charge where no evidence of probative value supports the PCR court's finding that Respondent satisfied his burden of showing Counsel's performance prejudiced him.**

Petitioner respectfully submits that the PCR court incorrectly found that Counsel was ineffective for failing to move for dismissal of the Felony DUI charge, when Respondent failed to meet his required burden of proof of establishing the officer's failure to comply with S.C. Code Ann. § 56–5–2953 by failing to videotape Respondent's DUI arrest and failing to submit an affidavit would have "required dismissal of the charges." (App. p. 1396). First, the plain text of the statute in effect at the time Respondent underwent trial read in pertinent part:

> Failure by the arresting officer to produce the videotapes required by this section **is not alone a ground for dismissal** of [a DUI charge] if the arresting officer submits a sworn affidavit [explaining that the equipment was inoperable and what efforts were made to repair it] . . . or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because . . . exigent circumstances existed. **Further, in circumstances including, but not limited to,** road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, **the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal.** However, as soon as videotaping is **practicable** in these circumstances, videotaping must begin and conform with the provisions of this section. **Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape** based upon the totality of the circumstances;

PUBLIC SAFETY, 2003 South Carolina Laws Act 61 (H.B. 3231) codified at S.C. Code Ann. § 56–5–2953(B) (2003) (amended by 2008 Act No. 201, § 11) (emphasis added). As Counsel testified at the PCR hearing, he received one videotape of Respondent driving that night from Officer St. Louis, but there was not a video provided by Officer Evett. (App. p.

727). As indicated in the trial testimony and confirmed at the PCR hearing, Officer Evett testified that he had failed to cut his camera on because of the newness of camera and his failure to turn the camera back on. (App. p. 357; p. 728, lines 8-11). Further, as indicated by trial counsel, the question of whether an exception relieved the officer of the need to videotape the arrest should be resolved by reviewing all of the circumstances. (App. p. 776-7). See id. (providing "Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape *based upon the totality of the circumstances.*") (emphasis added). Moreover, the language in the provision relieving officers from the task of video recording "in circumstances including, but not limited to," clearly evinces the legislature's intent to create an inclusive rather than an exclusive list of exceptions. Id. Additionally, the provision unequivocally states that "the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal." Id. Petitioner submits the PCR court erred in finding that Counsel's failure to move for dismissal of the DUI charge constituted ineffective assistance under these circumstances because the record provides no support for the court's finding that the trial court would have dismissed the charge on these facts.

In this case, the arrest occurred as the result of the officer's investigation of an accident. (App. p. 256-8; p. 261-8; p. 336-339). On the night in question, Office St. Louis testified that he began following a Chevy Caprice out of the Li'l Cricket parking lot because it had no lights on and failed to use a turn signal. Subsequently, the Officer saw Respondent throw a beer can out of the window, which is the time that Officer St. Louis initiated his blue lights to perform a traffic stop. (App. p. 314). Officer St. Louis testified that as he continued to follow Respondent, Respondent swerved a bit and ran a stop sign.

(App. p. 314, lines 16-18). However, St. Louis indicated that because of the City of Spartanburg's chase policy, he could no longer pursue Respondent once he turned onto Crescent Avenue. (App. p. 314, lines 23-25). St. Louis then initiated a BOLO for the car with license place 849 UPU (App. p.315). Officer Evett then testified that he received a BOLO regarding a dark colored older style Chevrolet and a specific tag number and as he patrolled that general area, he saw a car matching that description and began to follow the car. (App. p. 331). Evett testified that the Chevrolet did not have its headlights on and as he caught up to the car, the car turned the lights on and turned to another road. (App. p. 332). Officer Evett testified that before he could initiate a traffic stop, the car turned off the lights and began traveling away at a high rate of speed, but Evett continued to follow the car. (App. p. 333). As Evett cut on his blue lights and siren, the car again sped away. Evett cut his emergency equipment off and continued to follow the car. (App. p. 334). Officer Evett testified that as he attempted to follow the car, difficult because the car had cut off the headlights, he saw headlights coming his way and then saw a shower of sparks. (App. p. 336). Evett testified that he sped to the first vehicle where a man was in obvious pain, but breathing, so Evett sped to the other vehicle, which ended up being the vehicle he was following earlier. (App. p. 337). Evett testified that the driver (Respondent) moved to the passenger side and climbed out of the window at which time Evett secured Respondent and placed handcuffs on him and placed him in the squad car. (App. p. 338). The statute does not indicate that an affidavit is required in such circumstances see S.C. Code Ann. § 56–5–2953(B) (2003).

> In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the

> failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal.

S.C. Code Ann. § 56–5–2953(B) (2003).

Rather, the statute gives the trial court broad discretion in deciding whether to dismiss a charge where no video and no affidavit are provided. See id. Moreover, consistent with this interpretation is the Supreme Court's paraphrasing of the statute's provisions in Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011):

> Subsection (B) of section 56–5–2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements. Noncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Although Roberts—on which the PCR court relied in part in making its decision—was not decided until several years after Respondent's case, Petitioner submits that it provides additional support for the conclusion that the plain language of the provision clearly restricts the affidavit requirements to a particular set of exceptions, not including the exception involving traffic accidents. See id. (including "sworn affidavit" language in exceptions (1) and (2) but not (3) or (4)). Because the statute did not and does not require an affidavit in every single exception, (especially, as here, in circumstances involving a traffic accident), the lack of video recording of Respondent's DUI arrest would not have been grounds for dismissal even without the affidavit.

Petitioner further submits that to the extent that this Court finds the PCR court

correctly determined that Counsel was deficient for failing to move for dismissal, no evidence in the record supports the PCR court's finding that the trial court would have granted the motion to dismiss. The court merely summarily found that there was a reasonable probability that the trial court would have dismissed the felony DUI charge. Accordingly, no evidence in the record supports the PCR court's finding that Respondent satisfied the prejudice prong of Strickland.

**II. The PCR court erred in granting Respondent's application where no evidence of probative value supports the PCR court's finding that Counsel was ineffective for not impeaching a witness regarding a twelve year old conviction that the NCIC report did not report as a conviction.**

At the PCR hearing, Counsel testified he reviewed the NCIC report for Erica Gray, a State witness at trial, and that the report included an arrest for a false information charge from 1994, but that the report did not indicate a disposition on the latter charge. (App. p. 719; p. 771-2). Because no disposition was indicated for the false information charge, Counsel did not think he could use it to impeach Gray. (App. p. 719). Counsel cross-examined Gray about her criminal record, but she only testified about the drug charge from approximately 1997. (App. p. 143-4). At the PCR hearing, Respondent introduced the case history for Gray's conviction for the false information conviction. (App. p. 620-1). The case history reflects that Gray was found guilty on January 12, 1995, at a bench trial for falsely reporting that a shooting and burglary took place at her home. (App. p. 821-2).

In order to satisfy his burden of proving that Counsel was ineffective, Respondent would have had to prove that Counsel's election not to impeach Gray regarding the charge amounted to a failure to provide "reasonably effective assistance under prevailing professional norms," and that such failure prejudiced him. Brown, 340 S.C. at 593, 533 S.E.2d at 309 (citing Strickland v. Washington, 466 U.S. 668 (1984)). Additionally, in

order to prove that Counsel's performance prejudiced him, Respondent must have shown that "but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. at 593, 533 S.E.2d at 309-10 (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)) (citations omitted). Petitioner submits that no evidence of probative value in the record supports the PCR court's finding that Respondent satisfied this burden.

Rule 609(b) provides that evidence of a **conviction** normally admissible under Rule 609(a)(1) or (2), "**is not admissible if a period of more than ten years has elapsed** since" the witness was convicted "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b), SCRE (emphasis added).

Further, the rule pertains to evidence of a *conviction*; as testified to by Counsel, the NCIC report revealed only a charge without information as to the disposition of that charge. (App. p. 719). Charges that never ripened into a conviction or that resulted in a pardon or other finding of innocence cannot be admitted under this rule. See Rule 609, SCRE (a)-(c). See also S.C. Code Ann. § 24-21-990 (1976) ("A pardon shall fully restore all civil rights lost as a result of a conviction, which shall include the right to . . . testify without having the fact of his conviction introduced for impeachment purposes").

Accordingly, Counsel's choice not to impeach Gray did not fall below an objective standard of reasonableness where Counsel reasonably assumed, based on the law, that the trial court would not have admitted the evidence.

Additionally, Petitioner submits that even if this Court finds the PCR court correctly found that Counsel was deficient, no evidence supports the PCR court's finding that the trial court would have allowed counsel to impeach Gray, or that there was a reasonable probability that evidence of the conviction would have caused the jury to render a not guilty verdict for Respondent. The South Carolina Supreme Court has held:

> [I]n determining whether the erroneous exclusion of evidence of a witness' bias constitutes harmless error[,] [the appellate court should consider the following factors]: the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case.

State v. Holmes, 320 S.C. 259, 264-65, 464 S.E.2d 334, 337 (1995) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)) (referring to these as the "Van Arsdall factors"). Petitioner submits that here, though Erica Gray was an important witness for the State, who identified Respondent's voice and handwriting, her testimony was cumulative to that of three other witnesses who also testified about the night of the burglary and identified the Respondent as the person who entered the home and held them at gunpoint. Mary Gray, testified that Respondent—known to them as "Little Charlie"—knocked on the door, entered the home, and held a gun to her. (App. p. 156-7). Mary Gray testified that she could identify Respondent because he had been in her home earlier that evening and she had known him his whole life. (App. p. 157-8). Donald Martin testified that Respondent identified himself as "Murda," so Donald opened the door, and then Respondent entered the home with a big shotgun. (App. p. 175-6). Finally, Javanica, Erica Gray's daughter, testified that she was asleep when she felt someone grab her hair and then saw a man holding a gun on her. (App. p. 202). Javanica identified Respondent as the person who was

holding them at gun point and testified that she could identify him that night because of his voice. (App. p. 202-3).

Audio recordings of Respondent's phone calls from the jail were introduced by the State. (App. p. 124). Following the publication of one of the audio recordings, Erica Gray identified Respondent's voice as the person speaking. (App. p. 125). However, on cross-examination Respondent's girlfriend also identified his voice on the phone call as well as acknowledged that Respondent told her on the phone call that "he did that shit to Duke and Pooh-Pooh," using the nicknames of Donald Martin and Erica Gray. (App. p. 394). Applying the Van Arsdall factors, the exclusion of the impeachment evidence in this case would have been harmless, thus Respondent failed to satisfy the prejudice prong of the Strickland analysis.

First, while Erica Gray's testimony helped identify Respondent's handwriting and voice, the testimony of three other witnesses also identified the assailant's voice as belonging to Respondent. Second, all of the additional testimony above corroborates Erica Gray's testimony, making it more reliable and less essential. Their testimony does not stem from her testimony but is based on their own knowledge and experience of the events. Third, Counsel impeached Erica Gray about her other conviction during cross-examination. (App. p. 143-4). Counsel also cross-examined Gray about the various inconsistencies between her testimony at trial and both of her prior statements to police. (App. p. 126-44). As Gray's credibility was impeached even without the use of the prior false information charge, any error in Counsel's failure to impeach on that particular charge did not warrant reversal. See Duncan v. State, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984) (finding a failure by the solicitor to disclose impeachment evidence was not a material Brady

violation and did not require reversal where the witness had nonetheless been impeached through prior convictions). Due to the testimony corroborating Erica Gray, the State would have had a strong case even without her testimony.

Accordingly, Petitioner submits that under the Van Arsdall factors, any error that would have resulted from exclusion of impeachment evidence under these circumstances would have constituted harmless error. Because the essential premise of a harmless error determination is that the trial would have turned out the same way notwithstanding the lack of the error, no evidence supports the PCR court's finding that Respondent proved he was prejudiced by Counsel's failure to impeach Erica Gray about her conviction. See State v. McLeod, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) ("Error is harmless where it could not reasonably have affected the result of the trial").

## III. The PCR court erred in finding Counsel provided ineffective assistance for failing to move for a directed verdict in favor of Respondent on the burglary charge where no evidence of probative value supports the PCR court's finding that Respondent satisfied his burden of proving prejudice.

Petitioner submits that the PCR court's finding on this issue is controlled by an error of law. First, the PCR court incorrectly stated the standard for a directed verdict. The court stated that "a directed verdict motion was appropriate because evidence indicated there was consent to enter the residence[.]" (App. p. 1402). The PCR court misstated the standard for such motions, and its error resulted in its concomitant misapplication of the second prong of Strickland. First, Rule 19, SCRCrimP, provides:

> the court shall direct a verdict in the defendant's favor on any offense charged . . . if there is a failure of competent evidence tending to prove the charge in the indictment[,] [and] [i]n ruling on the motion, the trial judge *shall consider only the existence or non-existence* of the evidence and *not its weight*.

(emphasis added). Further, the trial court must grant a motion for directed verdict of acquittal only where the State fails to produce *any* evidence of the crime charged. State v. Singley, 392 S.C. 270, 709 S.E.2d 603 (2001) (emphasis added). Moreover,

> [i]t is well-established that, in ruling on a motion for directed verdict, the trial court must view the evidence *in the light most favorable to the State.* The case should be submitted to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced.

State v. Prince, 316 S.C. 57, 64, 447 S.E.2d 177, 181-82 (1993). Petitioner submits that the PCR court incorrectly applied the directed verdict standard because, in this case, the State introduced ample evidence tending to prove that Respondent did not have consent to enter the home. In defining lack of consent, the South Carolina Code of Laws provides:

> [a person] [e]nters a building without consent [if he]:
> (a) . . . enter[s] a building without the consent of the person in lawful possession; or
> (b) . . . enter[s] a building by using *deception*, *artifice*, *trick*, or *misrepresentation to gain consent* to enter from the person in lawful possession.

S.C. Code Ann. § 16–11–310 (1986) (internal quotation marks omitted) (emphasis added). Here, the State presented testimony indicating that Respondent used his relationship with the Grays to gain entry into the home, concealing his true intent, which was to commit a felony once inside. (App. p. 175-6; 185-6). While Martin testified that he opened the door, he also testified that when he did so, Respondent forcefully entered the home while armed with a shotgun. (App. p. 176; 185-86). Even if Respondent presented some evidence that he had consent to enter the home, such evidence did not entitle Respondent to a directed verdict because the State introduced evidence to the contrary. See State v. Pipkin, 359 S.C. 322, 329, 597 S.E.2d 831, 834 (Ct. App. 2004) (finding that the trial judge properly denied

the defendant's directed verdict motion and submitted the case to the jury when there was conflicting evidence presented on the issue of consent during trial).

Counsel reasonably recognized that the trial court, in construing the evidence in the light most favorable to the State, would likely find the consent issue presented a question of fact for the jury, and he chose not to move for a directed verdict on that ground. The congruent case of State v. Dixon abundantly supports the reasonableness of Counsel's decision to refrain from moving for a directed verdict on the burglary charge. 337 S.C. 455, 523 S.E.2d 784 (Ct. App. 1999). In Dixon, Defendant argued that she was entitled to a directed verdict on the burglary charge because the Victim allowed her into his home. 337 S.C. at 458-59, 523 S.E.2d at 786. Defendant had asked Victim for money numerous times in the past, and as a result, she knew that Victim would assume she had come to ask for money again, and he would allow her inside. Id. However, on this occasion, Defendant intended to enter his home in order to assist her co-conspirators (and did so assist them) in ransacking Victim's house. Id. Defendant argued that the Victim's consenting to her entry entitled her to a directed verdict on the burglary charge. Id. The trial court disagreed, refusing to direct the verdict, and the court of appeals affirmed, finding that sufficient evidence existed for a jury to determine that Defendant gained entry trough "deceit, trickery, artifice, or misrepresentation[.]" Id. [2]

[2] The court in Dixon also noted: "The American Heritage Dictionary defines deception as 'the use of deceit, the fact or state of being deceived.' Artifice is defined as 'subtle but base deception.' Trick or trickery is defined as '[a] device or action designed to achieve an end by deceptive or fraudulent means' or 'deception by stratagem.' Misrepresentation is defined as '[t]o give an incorrect or misleading representation of.'" State v. Dixon, 337 S.C. at 459, n. 4, 523 S.E.2d at 786, n. 4 (citing AMERICAN HERITAGE DICTIONARY (2nd ed. 1985)).

As in Dixon, the evidence in this case indicates that Respondent gave his name to Donald Martin with the knowledge that because they were acquainted and Respondent had visited in Martin's home many times before, Martin would allow him to enter the home again, unaware of Respondent's intent to commit a felony. Petitioner submits that the PCR court erred in finding that Respondent satisfied his burden of proving that Counsel's choice not to move for directed verdict on the issue of consent constituted ineffective assistance under these circumstances. As the trial judge instructed the jury on the burglary – 1st degree charge, "there must be an entry of a dwelling without consent [and e]ntering without consent . . . is to enter a dwelling by using deception, artifice, trick or misrepresentation in order to gain consent or to enter the dwelling." (App. p. 448, lines 11-17).

Petitioner likewise submits that even if this Court finds the PCR court correctly held that Counsel was deficient as to this issue, the PCR court erred in finding that Respondent met his burden of proving that Counsel's allegedly deficient performance prejudiced him. Based on established case law such as State v. Dixon and in light of the facts in this case, the trial court would have denied Counsel's motion. Accordingly, Respondent failed to prove that there was a reasonable probability that his case would have resulted in a different outcome.

For the foregoing reasons, Petitioner submits that the PCR judge erred in granting Respondent's request for a new trial because Respondent failed to meet his burden of proof, and no probative evidence exists to support the court's decision.

## IV. The PCR court erred in granting Respondent's Application where Respondent failed to prove that Counsel's failure to object to portions of the trial court's jury instructions constituted deficient performance where the jury instructions, taken as a whole under the prevailing law at the time, would not have constituted reversible error.

Petitioner submits that the PCR court's granting of Respondent's Application is controlled by an error of law because Respondent failed to prove under Strickland that Counsel rendered ineffective assistance when he failed to object to two phrases that the trial court made in its jury instruction: "your sole objective is to simply reach the truth of the matter" and "simply give both the State and the defendant a fair and impartial trial." (App. p. 437.). "In determining whether a defendant was prejudiced by improper jury instructions, the [PCR] court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

First, in finding that Counsel was ineffective for failing to object to the trial court's jury instructions, the PCR court erred as a matter of law in improperly holding Counsel to the Daniels standard, which was decided more than five years after Respondent was convicted on these charges. State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (finding that jury instructions indicating that a jury is to reach a decision that is "just" and "fair" to all parties are improper and could be misleading, but jury instructions should be reviewed as a whole and isolated instructions which could be misleading do not constitute reversible error). Petitioner submits that the PCR court, in applying Daniels, effectively held that Counsel should have objected based not on what the law actually was at the time of Respondent's trial, but what the law would become. In other words, the PCR court's ruling

suggests Counsel should have been clairvoyant. The law, however, is unequivocal on this point: South Carolina courts "have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (holding Counsel "could not be ineffective" for failing to request a jury charge that would not have been applicable for at least other year). At the time of Respondent's trial and even still today, "[t]he standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violate[d]" the Constitution. State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (quoting Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)) (footnote omitted). Strickland requires that Counsel's performance may not fall below an "objective standard of reasonableness." Because Daniels had not yet been decided at the time of Respondent's trial, the court's instructions were proper at the time of trial, and even if improper, they would not have constituted reversible error. Therefore, according to an objective standard of reasonableness, Counsel acted reasonably in not objecting to the trial court's instructions.

Second, even if this Court finds that these instructions, taken in isolation of the jury instructions as a whole, were improper, courts have refused to reverse a conviction where the instructions as a whole properly informed the fact-finders that a criminal defendant is presumed innocent unless the State is able to prove his guilt beyond a reasonable doubt. Aleksey, 343 S.C. at 26–27, 538 S.E.2d at 251 (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)) (citations omitted) ("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.' However, jury instructions

should be considered as a whole, and if as a whole they are free from error, any *isolated portions* which may be misleading *do not constitute reversible error.*") (emphasis added). In this case, the two statements objected to were made at the very beginning of the jury charge, prior to an extensive charge related to reasonable doubt and the State's burden of proof. (App. p. 437, lines 20–24). In fact, the words reasonable doubt and phrases indicating that the State had the burden of proof and the defendant had the presumption of innocence were used more than twenty times following that introduction. (App. p. 438, lines 20-22; p. 439, lines 1-9, 12-14; p. 440, lines 9-25; p. 441, lines 2-19; p. 448, lines 1-2; p. 449, line 18; p. 454, lines 13-15; App. p. 456, lines 6-11; p. 457, lines 16-18; p. 458, lines 20-21; p. 459, lines 11-13; p. 462, lines 9-18, 25; p. 463, lines 1-4; p. 464, lines 5-10). Thus, the jury instructions, considered in their entirety, were correctly rendered. There is no probative evidence to support a finding that a reasonable likelihood exists that "the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009).

Further, the trial judge made the statement regarding truth-seeking— "your sole objective is to simply reach the truth of the matter"—in the context of instructing the jury on witness credibility. (App. p. 445, lines 24-25). Accordingly, even if this Court determines the instructions were improper, they would not have constituted reversible error. See State v. Aleksey, 343 S.C. at 29, 538 S.E.2d at 252–53 (holding, where truth-seeking instructions were given in context of witness credibility and where the court gave complete instructions on reasonable doubt and burden of proof, that "the instruction as a whole properly conveyed the law to the jury and there [was] not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a

reasonable doubt."). Moreover, even the Daniels court recognized that overwhelming evidence of guilt rendered harmless any error in improperly instructing the jury. Daniels, 401 S.C. at 258, 737 S.E.2d at 477.

Because clairvoyance is not required and because the analysis in Aleksey does not support a conclusion that the trial court's instructions, if objected to, would have resulted in reversible error, no evidence of probative value supports the PCR court's finding that "[C]ounsel's failure to object . . . was deficient conduct." (Order p. 36). Accordingly, the PCR court erred in finding that Respondent satisfied the prejudice prong of the Strickland test.

## CONCLUSION

For the reasons stated above, this Court should reverse the PCR Court's ruling.

Respectfully submitted,

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February 19, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM SPARTANBURG COUNTY
The Honorable Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No. 2013-001284

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Nathaniel Teamer,.....Petitioner,

v.

State of South Carolina,.....Respondent.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the **Brief of Petitioner** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Mr. C. Rauch Wise, Esquire**
**305 Main St.**
**Greenwood, SC 29646**

This 19h day of February, 2015.

SUZANNE H. WHITE
ATTORNEY FOR RESPONDENT

**SWORN to before me this 19th day of February, 2015.**

Ashley Haunt

**Notary Public for South Carolina.**
**My Commission Expires:** 3-18-2023

ALAN WILSON
ATTORNEY GENERAL



February 19, 2015

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

***Re:*** **Nathaniel Teamer v. State of South Carolina**
**Appellate Case No. 2013-001284**
**Lower Court Case No. 2010-CP-42-4049**

Dear Mr. Shearouse:

I am enclosing the original and fifteen (15) copies of the **Brief of Petitioner** and thirteen (13) additional copies of the **Appendix** in the above case.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General
S.C. Bar No. 78225

SHW/ah

cc: C. Rauch Wise, Esquire (2 copies)
Trisha Allen, Victim Services