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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO AIKEN COUNTY  
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

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Appellate Case No.: 2016-000570

JAVIER HICKSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....2

PETITIONER'S ISSUE PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW .....5

ARGUMENT

    I.    Probative evidence supports the PCR Court’s finding that  
          Trial Counsel was not ineffective for failing to object to the  
          trial court’s jury instruction to return a “fair and impartial”  
          verdict. ....6

CONCLUSION.....10

## **PETITIONER'S ISSUE PRESENTED**

- I. Did trial counsel provide ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge's erroneous jury instructions directing the jury to return a "fair and impartial" verdict, which diluted the state's burden of proof and shifted the burden of proof to Petitioner?

## STATEMENT OF THE CASE

Petitioner (Javier Hickson) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was indicted at the December 2009 term of the Aiken County Grand Jury for armed robbery (2009-GS-02-2291) and at the April 2010 term for possession of a firearm during the commission of or attempt to commit a violent crime (2010-GS-02-0679). Petitioner was represented at trial by Michael Routzong, Esquire. Petitioner was found guilty of both charges after a jury trial before the Honorable Doyet A. Early, III. On September 22, 2010, Petitioner was sentenced to imprisonment for twenty-eight (28) years for armed robbery and five (5) years for possession of a firearm during the commission of or attempt to commit a violent crime, to be served concurrently.

A timely notice of appeal was perfected on Petitioner's behalf, and an appeal was perfected by Jerry M. Screen, Esquire. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hickson, Op. No. 2012-UP-661 (Ct. App. filed December 19, 2012). The Remittitur was returned on February 11, 2013.

Petitioner filed an application for post-conviction relief on May 20, 2013. Respondent filed its Return on July 9, 2013. Petitioner filed an amended application for post-conviction relief on March 12, 2015. An evidentiary hearing was held on May 19, 2015, before the Honorable Tanya A. Gee, at the Aiken County Courthouse. Petitioner was represented at the hearing by Lance S. Boozer, Esquire. By order filed March 16, 2016, Judge Gee denied and dismissed Petitioner's post-conviction relief action with prejudice. On November 14, 2016, Petitioner filed a Petition for Writ of Certiorari to this Court. This Return follows.

## STANDARD OF REVIEW

The proper standard for reviewing a PCR 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 PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

### **I. Probative evidence supports the PCR Court's finding that Trial Counsel was not ineffective for failing to object to the trial court's jury instruction to return a "fair and impartial" verdict.**

Petitioner's argument that the PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to the trial judge's jury instruction is without merit.

In a PCR action, the petitioner bears the burden of proving the allegations in his 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 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 (1984); Butler, supra.

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, supra. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, 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, 80 L.E.2d 674). Second, counsel's deficient performance must have prejudiced Applicant 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 117-118.

First, it should be recognized that the PCR judge was in the best position to determine credibility and, as such, her findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993). After observing the witnesses presented at the hearing, closely passing on their credibility, and weighing their testimony accordingly, the PCR Court correctly held that Petitioner's allegation of ineffective assistance of counsel for failing to object to the jury instruction satisfied neither prong of the standard set forth in Strickland.

#### Deficiency

As the PCR Court held, Petitioner's allegation does not satisfy the first prong of Strickland because Trial Counsel was not deficient for not objecting to the jury instruction. In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), the Supreme Court, while still affirming a conviction, instructed a trial judge to remove suggestion from his charges that a criminal jury's duty is to return a verdict that is just and fair to all parties. The instructions given at Petitioner's trial are not analogous to those in Daniels. As the PCR Court observed, the instructions given at Petitioner's trial did not rise to the level of the instructions in Daniels. (App. 518). Judge Early never told the jury to reach a verdict that is fair and just for all parties. Judge Early merely used the words, "fair and impartial," in the context of instructing the jury that they were not to consider possible sentences or punishments when determining their verdict. (Tr. 310). Nowhere did he imply that fairness to "all parties" was to be considered in reaching their verdict, which could be problematic for shifting the burden of proof, which was the case in Daniels.

Furthermore, while the contested language in this case did not rise to the level of the problematic language from Daniels, Judge Early's instructions also correctly and comprehensively explained the relevant legal concepts to the jury. Among other instructions, Judge Early explained to the jury that the State bears the burden of proof, the defendant is not

required to prove his innocence, and the State must prove guilt beyond a reasonable doubt. (Tr. 310). Moreover, Judge Early informed the jury that their verdict must be simply based on the facts as they have found them to be, as applied to the law provided. They were specifically instructed not to base their verdict on passion or anything of that nature. (Tr. 314).

South Carolina case law holds that the Court is to consider jury instructions 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. State v. Aleksey, 343 S.C. 20, 28, 538 S.E.2d 248, 251 (2000). Chief Justice Toal, concurring and writing for a majority of the court in Daniels, reasoned that the adequacy of the trial court's overall instruction, which included explanations of reasonable doubt and burden of proof, cured any possible constitutional deprivation. Daniels, 401 S.C. at 256. Likewise, even if we assume *arguendo* that Judge Early's language, "fair and impartial," was problematic, the adequacy of the overall instruction, taken as a whole, effectively cured any constitutional deprivation. For these reasons, probative evidence supports the PCR Court's finding that Trial Counsel was not deficient, as it was not unreasonable to allow the jury instruction without objection.

#### Prejudice

Notwithstanding the fact that Trial Counsel's assistance was not deficient in this case, Petitioner also fails to satisfy the second prong of the Strickland standard. The PCR Court correctly observed that, even if the charge was objectionable and Trial Counsel should have objected, Petitioner has failed to show how he was prejudiced in light of the overwhelming evidence of guilt. (App. 518). This is reminiscent of Chief Justice Toal's reasoning in Daniels, where she noted that the State's presentation of overwhelming evidence of guilt rendered any error in the jury instruction harmless. Daniels, 401 S.C. at 256. The evidence of guilt in this case

is likewise overwhelming. As noted before the PCR Court, video surveillance supplemented by the corroboration of testimony from multiple witnesses and co-defendants overwhelmingly evidenced Petitioner's guilt in this case. (App. 503). Even if the jury instructions had been improper, the error would have been unimportant in relation to the overwhelming evidence the jury considered. See Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 766 (2008) (finding ineffective assistance of counsel where the evidence of petitioner's guilt was *not* overwhelming). Therefore, there is no reasonable probability that the result of proceedings would have been different for Petitioner even if Trial Counsel was deficient. For these reasons, probative evidence supports the PCR Court's finding that Petitioner failed to show that he was prejudiced by any alleged deficiencies.

The PCR Court's finding that Trial Counsel not ineffective for choosing not to object to the jury instruction was well-supported by the factual record as well as testimony of the parties. Therefore, since the PCR Court's findings were supported by probative evidence, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of post-conviction relief.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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March 30, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County  
Court of Common Pleas  
The Honorable Tanya A. Gee, Circuit Court Judge

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2013-CP-02-1146  
Appellate Case No. 2016-000570

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JAVIER HICKSON,

Petitioner,

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STATE OF SOUTH CAROLINA,

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Ms. Susan B. Hackett, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589**

This 30<sup>th</sup> day of March, 2017

  
MALLORY MORRIS  
Legal Assistant for Respondent