STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Michael G. Nettles, Circuit Court Judge

KENNETH SAMUEL WILLIAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000182

PETITION FOR WRIT OF CERTIORARI

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Whether trial counsel's deficient performance in failing to object to the court's burden-shifting opening instructions prejudiced petitioner by causing the jury to decide between competing and contradictory versions of the crime using the prohibited mandate to "reach a decision as to where the truth lies" instead of whether the State proved its case beyond a reasonable doubt?

STATEMENT

A Beaufort County grand jury indicted petitioner for murder, first-degree burglary, and strong arm robbery and on July 26, 2010, petitioner was tried before the Honorable Thomas W. Cooper and a jury. App. 1, 10, ll. 5 – 13. Angela McCall-Tanner and James John Bannon represented the State. App. 1. Gene G. Hood represented petitioner. App. 1. The jury convicted petitioner of all three charges. App. 559, ll. 16 – 24. Judge Cooper sentenced petitioner to a total of thirty years' imprisonment. App. 578, ll. 3 – 9. The Court of Appeals affirmed petitioner's conviction and the Supreme Court denied certiorari. App. 660.

On July 30, 2014, petitioner filed a PCR application. App. 582. On October 17, 2016, a hearing was held before the Honorable Michael G. Nettles. App. 597. James K. Falk represented petitioner. App. 598. Ruston Neely represented the State. App. 598. On December 28, 2016, Judge Nettles denied petitioner's PCR application. App. 659. This petition follows.

ARGUMENT

Trial counsel's deficient performance in failing to object to the court's burden shifting opening instructions prejudiced petitioner by causing the jury to decide between competing and contradictory versions of the crime using the prohibited mandate to "reach a decision as to where the truth lies" instead of whether the State proved its case beyond a reasonable doubt.

"It is critical that jurors understand the proper **application** of the reasonable doubt standard." State v. Daniels, 401 S.C. 251, 264, 737 S.E.2d 473, 479 (2012) (emphasis added). The Court should grant certiorari in this PCR case to consider whether a judge's hypothetical examples in a jury charge can distort a jury's application of the reasonable doubt standard and dilute the State's burden of proof. Even well-intentioned phrases and examples—like the one given by the trial judge in this case—can result in prejudicial consequences for a criminal defendant. Such consequences are necessarily driven by the facts of a particular case and, in this specific instance, tipped the balance from what likely would have been an acquittal or a hung jury to a conviction.

In petitioner's case, the jury heard conflicting evidence from the people who were at the crime scene. The State introduced petitioner's statements to police officers. Petitioner did yard work for the octogenarian decedent, Jack Koch ("Koch"). App. 150, ll. 2 – 7. Petitioner also helped Koch acquire sexual services from young women. App. 165, ll. 6 – 20. The day before Koch's death, Koch and petitioner drove around trying to find a young woman for Koch. App. 165, ll. 6 – 20. They were stopped by police and the investigators reviewed the dash camera video showing Koch and petitioner together in Koch's truck. App. 222, ll. 3 – 25. They told the police they were looking for a housekeeper for Koch. App. 166, ll. 3 – 11.

Petitioner spent the next day partying with Timothy Skinner ("Skinner"). App. 168, ll. 5 – 7. Petitioner and Skinner were with two girls. App. 247, ll. 1 – 7. One of the girls, Jenny Chase ("Jenny") was Skinner's girlfriend. App. 315, ll. 18 – 20. The other girl, Lisa Schoenemann ("Lisa"), admitted drinking alcohol and using crack cocaine during the party. App. 296, l. 17 – 297, l. 8. Skinner, Jenny, and Lisa were all friends from school. App. 274, l. 17 – 275, l. 6. Petitioner did not go to school with the other three and was older. App. 274, l. 17 – 275, l. 6.

The group ran out of money. App. 246, ll. 12 – 22. They decided to go to Koch's house to see if Koch would pay Jenny or Lisa for sex. App. 169, l. 20 – 169, l. 2. They went to Koch's house in Skinner's van. App. 172, ll. 6 – 10. They arrived at Koch's house sometime between 10:00 PM and midnight. App. 247, ll. 11 – 16.

Petitioner told the police that he, Skinner, and Jenny went to Koch's door while Lisa stayed in the van because she was too intoxicated. App. 247, ll. 17 – 24. Koch opened the door and talked to Skinner. App. 248, ll. 2 – 8. Petitioner told the police that "all hell broke loose." App. 248, ll. 2 – 12. "[A]ll of a sudden, Skinner went off and started attacking the old man." App. 248, ll. 5 – 12. Petitioner told Skinner they needed to leave, but Skinner repeatedly hit Koch. App. 248, ll. 13 – 17. Koch fell to the floor, bleeding. App. 248, l. 18 – 249, l. 2. Petitioner cut his hand trying to pull Skinner off Koch. App. 249, ll. 9 – 24. Skinner took Koch's wallet. App. 171, ll. 2 – 10. The State's pathologist testified that Koch did not die from Skinner's beating, but from a heart attack. App. 408, l. 11 – 411, l. 20.

Lisa, who was only charged as an accessory after the fact to robbery, testified for the State. App. 303, ll. 8 – 13. She gave three statements to the police. App. 303, ll. 2 – 4. She claimed she knew nothing about the plan to exchange sex for money at Koch's. App. 302, ll. 8 –

18. However, she eventually admitted telling the police that "Jenny may be prostituting." App. 315, ll. 15 – 17.

Importantly, Lisa told the police that Jenny never left the van. App. 312, ll. 24 – 25. Lisa said Skinner gave directions on the drive to Koch's house and petitioner never said a word. App. 311, l. 22 – 312, l. 3. Skinner and petitioner were inside Koch's house with the door closed for fifteen or twenty minutes. App. 311, ll. 6 – 18. Lisa also told the police in her first interview that when the two men returned to the van, Skinner was the only one sweating. App. 304, ll. 2 – 6.

Jenny also testified for the State and, like Lisa, was only charged with accessory after the fact to robbery. App. 335, ll. 18 – 23. Jenny described herself as a drug addict and a drifter. App. 320, ll. 12 – 18. She was living with Skinner. App. 336, l. 24 – 337, l. 1. After drinking and using crack all day, Jenny said the idea of "dancing" for Koch to make some money became "more inviting." App. 321, l. 19 – 322, l. 8.

Directly contradicting Lisa's testimony, Jenny testified that she did not stay in the van, but went up on Koch's porch with Skinner and petitioner. App. 322, l. 24 – 323, l. 3. Lisa told the police that Jenny never left the van. App. 312, ll. 24 – 25.

Jenny claimed that Koch threatened to call the police and told the trio to "get out of here." App. 324, l. 4 – 17. Fearing she would be caught driving drunk, Jenny "left the porch immediately." App. 324, ll. 12 – 17. Unlike Lisa's testimony that both men went into Koch's house with the door closed, Jenny said Skinner returned to the van while petitioner talked to Koch. App. 325, ll. 1 – 13. In Jenny's account, she backed the van out of Koch's driveway and left with Skinner and Lisa. App. 325, ll. 1 – 18. Skinner then told her to go back to Koch's

house on the chance that petitioner was able to talk Koch into giving them some money. App. 325, ll. 1 – 18.

Jenny turned the van around and they saw petitioner walking down the road near Koch's house. App. 328, ll. 3 – 14. Skinner briefly got out of the van to let petitioner enter and sit in the back. App. 328, l. 20 – 329, l. 12. Jenny was upset and cursing. App. 329, ll. 16 – 23. Petitioner told the group he was able to borrow $57.00 from Koch and he gave the money to Skinner to divide. App. 329, l. 16 – 330, l. 9.

Jenny admitted lying to police. App. 332, l. 25 -333, l. 1. In her first interview she claimed she did not leave the van. App. 333, l. 2 – 334, l. 11. On cross-examination, Jenny admitted that Koch "could have" told the men to "get those whores out of here." App. 338, ll. 1 – 5. Jenny said she did not know whether Skinner was offended by Koch's description of his girlfriend and denied seeing anyone touch Koch. App. 338, ll. 6 – 23.

Skinner did not testify and was also charged with murder. App. 10, ll. 5 – 13. The State attempted to try Skinner and petitioner together, but Judge Cooper severed the trials. App. 39, ll. 5 – 8. Therefore, the jury heard several different versions of what happened the night of the crime from three sources: (1) Lisa's versions, in which Jenny never left the van and petitioner and Skinner returned from Koch's house with Skinner being the only one sweating; (2) Jenny's versions, in which she went to the door but quickly returned to the van and drove away with Lisa and Skinner, leaving petitioner at the scene alone; and (3) petitioner's statements, in which Skinner beat Koch while petitioner tried to pull Skinner away. All three of these versions could not be true and the State carried a heavy burden to persuade the jury to believe Lisa and/or Jenny and then infer petitioner killed Koch either acting alone or acting in concert with Skinner.

Before hearing these conflicting witnesses, the trial judge included the following statements in his opening instructions to the jury on how they should process evidence during the trial:

- But on the matter of evidence, you're actually a judge because when it comes to evidence, you have to judge the truthfulness and the weight and value of the things that are presented to you. App. 115, ll. 14 – 18

- But once I decide that you can hear the testimony, or that you can look at the photograph or some other item of evidence, from that point on what you do with it is entirely up to you. You've got the right to decide whether you believe it or not, how truthful it is, what weight you should give it. App. 115, l. 23 – 116, l. 3.

- Any time there is an issue that is in dispute, any time a question exists as to whether or not you're going to believe something, how do you decide? Well, you know how to decide. You use your good common sense; you use your sense of logic and reason. You apply your experiences in life. App. 116, ll. 17 – 22.

- It is a simplistic example, and I use it perhaps not meaning to demean anything that will go on in this courtroom because the issues here are far more important than this example suggests. But if any of you have more than one child, or if you've got more than one grandchild, you know exactly what I mean when the two of them come to you and one of them says he hit me, and the other says no, she hit me first. **Well, you've got to make a decision somehow or another. And somehow or another you do it.** You put the questions in your mind, you let them run through the machinery of your common sense, **and you reach a decision as to where the truth lies.** App. 116, l. 23 – 117, l. 13 (emphasis added).

Trial counsel did not object to the court's opening instructions. App. 120, ll. 7 – 13.

The solicitor ended her opening statement by telling the jury that defense counsel would "try to muddy the water for you. Mr. Hood wants you to look over here and look over here." App. 125, ll. 17 – 21. She ended by telling the jury she wanted them to "bring back a verdict that speaks truth and justice in this case." App. 125, ll. 22 – 25. Compounding his own error in

failing to object to the trial judge's burden shifting instructions, trial counsel then told the jury in his opening statement that his job was not to muddy the waters "because I'm here to **seek the truth**. And I think **we're all here to seek the truth**, and that's what we're all about. **That's why you're here.**" App. 127, ll. 3 – 8 (emphasis added). Bookending her opening statement and capitalizing on the trial judge's erroneous charge, the solicitor began her closing argument by telling the jury the definition of "verdict": "It means **to speak the truth**, render justice. **As the judge told you in the beginning**, and he'll remind you again at the end, **that's your duty, your job**." App. 458, ll. 7 – 11 (emphasis added).

At the PCR hearing, petitioner extensively argued that trial counsel performed deficiently by not objecting to the court's opening instructions. App. 602, l. 13 – 612, l. 18. Petitioner argued that the trial judge's example shifted the burden of proof because "the jury does not have to choose which witness is telling the truth." App. 603, ll. 14 – 22. Petitioner cited Daniels. App. 603, ll. 14 – 22. During the discussion on whether the charge was error, the court and the parties also extensively discussed State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). The PCR court ultimately ruled that trial counsel was not deficient because "the charge was proper." App. 661-62.

The PCR court committed a legal error because the trial judge's instruction shifted the burden of proof and violated the instructions of Daniels and Aleksey. In Daniels, the trial judge erred by telling the jury that that they were "acting for the community" and "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Daniels at 256-58, 737 S.E.2d at 475-76. The Court held, "It is troubling that the trial court concluded his instruction with statements that could have distracted the jury from their core functions: to examine evidence and make factual determinations, weigh credibility, and **perhaps most**

importantly, decide whether the State has proven its case beyond a reasonable doubt." Id. at 260, 737 S.E.2d at 478. "The injection of extraneous language only serves to distract the jury from performing their critical role." Id.

Here, like in Daniels, the trial judge's "extraneous language" concerning the need to decide which competing version of events was true distracted the jury from its "critical role" of deciding whether the State met its burden of proof. The jury was free to decide that neither Lisa nor Jenny were credible and that, for that reason, the State failed to prove petitioner was guilty beyond a reasonable doubt. When the State's witnesses are not credible and the proof fails, the proper resolution is an acquittal, not using common sense to "somehow" decide who is telling the truth. The jury did not have to decide "somehow or another" about which witness was telling the truth; the jury had to decide whether the State proved its case beyond a reasonable doubt. App. 116, l. 23 – 117, l. 13. The PCR court erred in finding the trial court's charge "was proper." App. 662.

Trial counsel performed deficiently because as early as 1998, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) and again in 2000 when Aleksey was decided, burden-shifting charges were been condemned by the Supreme Court. Aleksey at 26-27, 538 S.E.2d 248, 251-52 (2000). Petitioner was tried in July 2010. App. 1. Trial counsel should have been well aware of the impropriety of jury instructions diluting the burden of proof by telling juries they needed to seek the truth or how to decide cases other than using the reasonable doubt standard. Viewing this case through the lens of ineffective assistance of counsel can remind attorneys of the importance of paying attention and critically thinking about every word the trial judge says during his charge. Trial counsel admitted at the PCR hearing that he had difficulty paying attention when the judge was speaking and, because of a courtroom's many distractions, "you

miss things." App. 649, l. 20 – 650, l. 4. The jurors paid attention and asked multiple questions about the law during their deliberations. App. 511, l. 10 – 557, l. 11.

Trial counsel's error prejudiced petitioner. Petitioner's case does not fall into the harmless error trap of the published decisions addressing burden-shifting instructions. The facts of this case involved two witnesses whose stories could not both be true. Like most criminal cases, none of the primary fact witnesses were priests, doctors, or otherwise pillars of the community; they were drug addicts and prostitutes. To prove its case beyond a reasonable doubt, the State had to convince the jury to believe witnesses whose credibility was inherently suspect.

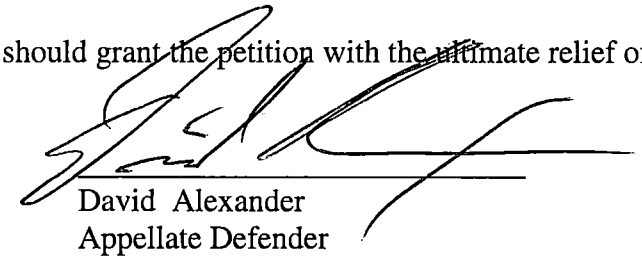
The impermissible instruction told the jury they had to decide which one was telling the truth and this instruction was in their mind throughout this case. The trial judge again erred in his closing charge, telling the jury that "once you have decided where the truth lies, you will take the truth that you find, and you will wrap it in the mantel of the law that I am now giving you. And those two things will come together—the truth that you find and the law that I give you—to result in a verdict which will speak the truth of this case." App. 495, ll. 5 – 10.

The question of petitioner's guilt was a close one for this jury and they asked multiple questions of the court during deliberations. App. 511, l. 10 – 557, l. 8. They asked whether petitioner could be guilty because he "was present during the incident." App. 511, ll. 15 – 19. They asked for "the definition of murder in regards to multiple people." App. 515, ll. 4 – 6. They asked how many times Skinner was in the house. App. 520, ll. 9 – 12. After request, the judge recharged them on the elements of the crimes. App. 528, l. 7 – 536, l. 10. The jury asked whether "the lack of taking action to help someone after they have been beaten constitute aiding and abetting murder or malice." App. 538, ll. 15 – 18. The jury retired for the night and

returned the next morning and asked a question about reasonable doubt. App. 549, ll. 12 – 19. The judge gave an Allen charge. App. 553, l. 20 – 556, l. 15. The jury only reached a verdict after receiving the Allen charge. App. 556, l. 21 – 559, l. 11. In this close case where the State's case rested on contradictory witnesses and accomplice liability, trial counsel's failure to object to the burden-shifting instructions prejudiced petitioner. This Court should reverse and grant petitioner a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new trial for petitioner.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kenneth S. Williams, #140886, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of October, 2017.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of October, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023