

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

 ORIGINAL

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Certiorari to Sumter County

**RECEIVED**

Honorable Brooks P. Goldsmith, Circuit Court Judge

NOV 13 2017

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TIMOTHY DONALD DINGLE,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000103

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT.....3

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL .....8

**ISSUE PRESENTED**

Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the trial judge instructed the jurors that, “The State of South Carolina and the defendant are both entitled to, and they both certainly expect, a fair and impartial verdict at your hand” when the instruction diluted the State’s burden of proof and deprived Petitioner of the right to a fair trial?

## STATEMENT

In May of 2012, the Sumter County Grand Jury indicted Petitioner Dingle for two counts of murder and two counts of arson first degree, indictment #2012-GS-43-0773. On August 12, 2013, Petitioner proceeded to jury trial before the Honorable George C. James, Jr. Timothy W. Murphy represented Petitioner at trial. Ernest E. Finney, III, John P. Meadors and Tyler B. Brown prosecuted the case. The jury returned verdicts of guilty and Judge James sentenced Petitioner to two concurrent life sentences for the murder charges and two concurrent 30 year sentences for the arson charges, to be served consecutively to the murder sentences. A timely notice of intent to appeal was filed and the direct appeal perfected. On June 3, 2015, the South Carolina Court of Appeals dismissed the appeal. State v. Dingle, 2015-UP-272 (S.C. Ct. app. June 3, 2015).

On June 24, 2015, Petitioner filed an application for post-conviction relief [PCR}. The State filed a return on October 1, 2015. On March 15, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Lance Boozer represented petitioner at the PCR hearing. Daniel Gourley represented the State. In a written order signed December 19, 2016, Judge Goldsmith denied relief and dismissed the application. A timely notice of intent to appeal was served on January 18, 2017. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the trial judge instructed the jurors that, “The State of South Carolina and the defendant are both entitled to, and they both certainly expect, a fair and impartial verdict at your hand” when the instruction diluted the State’s burden of proof and deprived Petitioner of the right to a fair trial.

At the close of the jury instructions the judge told the jury, “The State of South Carolina and the defendant are both entitled to, and they both certainly expect, a fair and impartial verdict at your hand.” (App. p. 478, lines 12-16). Trial counsel failed to object to the charge. (App. p. 480, lines 1-5). In the amended application for post-conviction relief Petitioner alleged that trial counsel was ineffective in failing to object to an improper jury instruction. (App. p. 557, lines 11-22). Trial counsel did not recall the improper instruction but agreed that judges have been instructed to remove from their instructions language regarding fair and impartial verdicts. (App. p. 593, line 13 – p. 594, lines 1-8).

In the order of dismissal the PCR judge wrote, “This court finds Applicant’s allegation that Trial Counsel was ineffective for failing to object to the jury instructions is meritless. This Court finds Trial Counsel’s actions fell well within the reasonable professional norms. Applicant has failed to meet his burden in proving that trial counsel was ineffective and that he was prejudiced by Trial Counsel’s actions, and this allegation must be denied and dismissed with prejudice.” (App. p. 609). The PCR judge erred.

The judge’s instruction to the jury was improper. In State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), the trial judge told the jury, “This court is of the confirmed opinion that whatever verdict you reach will represent truth and justice for all parties that are involved in this case.” The South Carolina Supreme Court found that any objection to the judge’s statement was not reserved, but wrote:

Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is “just” or “fair” to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the “all parties involved” in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012).

Recently, the South Carolina Supreme Court decided State v. Beaty, No. 2015-000718, 2016 WL 7474479 (S.C. Dec. 29, 2016), reh'g granted (Mar. 24, 2017). In Beaty the trial judge, in opening remarks to the jury, stated:

This ... trial ... is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is [sic] often slow, deliberate, and repetitive. [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth. [Y]ou also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical. [Y]ou the jurors find [the facts] from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.

[I]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.[A]fter argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus surrender [sic] a true and just verdict.

Beaty, No. 2015-000718, 2016 WL 7474479, at \*1. Beaty challenged the comments on appeal.

While the South Carolina Supreme Court found error, the Court found that Beaty failed to show prejudice sufficient to warrant reversal. The Court, however, wrote:

It is true, as the trial judge noted, that the comments here can be distinguished from Aleksey in that his was a “statement” and not a jury charge. Further, the remarks were not linked to either reasonable doubt or circumstantial evidence as was condemned in Aleksey. However, we agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a

just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

State v. Beaty, No. 2015-000718, 2016 WL 7474479, at \*2 (S.C. Dec. 29, 2016), reh'g granted (Mar. 24, 2017).

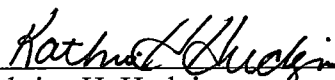
The judge's instruction to the jury in the present case that, "The State of South Carolina and the defendant are both entitled to, and they both certainly expect, a fair and impartial verdict at your hand" was improper. The instruction diluted the State's burden of proof and deprived Petitioner of the right to a fair trial. While the Beaty case was decided after Petitioner's trial, the Daniels cases make clear that trial judges should not charge that a jury's duty is to return a verdict that is just or fair to all parties. Trial counsel should have objected to the improper instruction.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was deficient in failing to object to the improper instruction. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Petitioner is entitled to a new trial.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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TIMOTHY DONALD DINGLE,

PETITIONER

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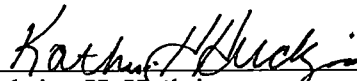
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Timothy Donald Dingle states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Brooks P. Goldsmith, which was held on March 15, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve her as counsel for Timothy Donald Dingle.

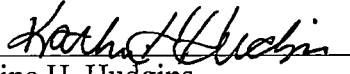
Respectfully Submitted,

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 13th day of November, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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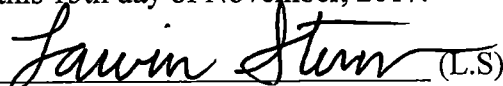
RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Timothy Donald Dingle, #298989, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 13th day of November, 2017.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 13th day of November, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.