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JAN 25 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

January 25, 2018

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

Re: Jimmy Lee Sessions, Respondent v. State of South Carolina, Petitioner
Case No. 2014-CP-26-8318

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Copies of the orders which are to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Jessica E. Kinard

Jessica E. Kinard
Assistant Attorney General
SC Bar #77889

JEK/mm
Enclosures

cc: James K. Falk, Esquire
South Carolina Department of Corrections
Horry County Clerk of Court
Solicitor Jimmy A. Richardson, II
Office of Appellate Defense
Trisha Allen, Director – Victim Advocacy Division

STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 25 2018

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Brooks P. Goldsmith, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2014-CP-26-8318

Jimmy Lee Sessions, Respondent,

v.

State of South Carolina, Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Brooks P. Goldsmith's order dated December 21, 2017, and filed January 5, 2018, granting post-conviction relief to the Respondent by way of denial of a motion for reconsideration. The original order granting post-conviction relief was signed February 3, 2017, and filed February 10, 2017. The State received notice of entry of the order denying its motion on January 8, 2018. A copy of the underlying PCR order on appeal is attached to this notice.

By: *Jessica Elizabeth Kinard*
JESSICA ELIZABETH KINARD
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case 2014-CP-26-8318

Jimmy Lee Sessions,Respondent,

v.

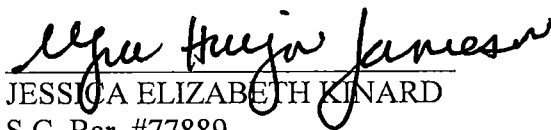
State of South Carolina,Petitioner.

PROOF OF SERVICE

I, Jessica Elizabeth Kinard, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

James K. Falk
Falk Law Office
38 Broad Street, 3rd Floor
Post Office Box 1058
Charleston, South Carolina 29402

I further certify that all parties required by Rule to be served have been served this 25th day of January, 2018.

Ju 
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STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
Jimmy Lee Sessions, #215137,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

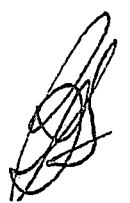
IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
Case No. 2014-CP-26-8318

ORDER GRANTING PCR RELIEF

2017 FEB 10 AM 8:58
Horry County
JIM LEE SESSIONS
Horry County, SC
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PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Circuit Court. In July 2007, the Horry County Grand Jury indicted Applicant for two counts of Murder (2007-GS-26-2962, 2007-GS-26-2963) and one count of Armed Robbery (2007-GS-26-2961). In July 2008, the Horry County Grand Jury indicted Applicant for Burglary, first degree (2008-GS-26-2698). Johnny Gardner, Esquire, represented Applicant on all charges. On February 2-6, 2009, Applicant proceeded to a jury trial before the Honorable Steven H. John. The jury found Applicant guilty as indicted. Judge John sentenced Applicant to life imprisonment for Murder (2007-GS-26-2962) and another term of life imprisonment for Murder (2007-GS-26-2963) to run concurrently with the former Murder charge. Additionally, Judge John sentenced Applicant to a term of thirty (30) years imprisonment for Armed Robbery (2007-GS-26-2961) and a term of thirty (30) years imprisonment for Burglary, first degree (2008-GS-26-2698) with both charges to run concurrently with the Murder charge (2007-GS-26-2962).



Applicant filed a timely notice of appeal. Joseph L. Savitz III, Esquire, and LaNelle C. DuRant, Esquire, of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 30, 2013. State v. Sessions, Op. No. 2013-UP-063 (S.C. Ct. App. filed January 30, 2013). By Order dated July 11, 2014, the South Carolina Supreme Court denied the Petition for a Writ of Certiorari to review the Court of Appeals' Opinion. The remittitur was returned to the circuit court on July 22, 2014.

Applicant filed a timely Application for Post-Conviction Relief in which he alleged ineffective assistance of counsel. James K Falk was appointed to represent applicant, and filed an Amended Application for Post-Conviction Relief setting forth additional specific grounds for relief to include:

1. Appellate Counsel was ineffective in failing to include in Applicant's appeal the issue of whether the Court erred in charging the Jury on the issue of Third Party Guilt.
2. Once certain jurors were exposed to prejudicial remarks from the victims; families and friends, Trial counsel was ineffective for not either moving for a mistrial or seeking to have those jurors subjected to individual voir dire.
3. Trial counsel was ineffective for not procuring a transcript of the first trial which ended in a hung jury before proceeding to Applicants' retrial.
4. Trial counsel was ineffective for not calling Libby Pierce as an alibi or witness.
5. Trial counsel was ineffective for not objecting to that portion of the prosecutions' closing argument which impermissibly bolstered the testimony of its own witnesses.



6. Trial counsel was ineffective for not objecting to the prosecutions' impermissible "golden rule" arguments during the State's opening and closing arguments.
7. Trial counsel was ineffective for merely asking that prejudicial remarks be stricken and not seeking a mistrial, when during the closing argument prosecutor told the jury that the defense lawyers knew their clients were guilty.

On November 15, 2016 Horry County Court of Common Pleas conducted a final hearing in this matter. Prior to the start of the hearing the parties agreed to conduct a joint hearing on cases Christopher Stephens v. State of South Carolina, 2014-CP-26-7977 and Jimmy Lee Sessions v. State of South Carolina, 2014-CP-26-8318. James K Falk Esq. was present representing both applicants. Jessica Kinard, Esq. was present representing the State of South Carolina. Present in person and testifying as witnesses were: Applicant Jimmy Lee Sessions, Applicant Christopher Stephens, Sessions' trial counsel Johnny Gardner, Esq., Stephens' trial counsel Bobby G. Frederick, Esq., and Libby Pierce, applicant's alibi witness. Present but testifying via telephone was Robert Dudek, Esq. Prior to the start of the hearing, both applicants were advised of the potential conflict of interest caused by James Falk's joint representation, and both applicants waived any objection to the joint representation.

Having heard the testimony of the witnesses and arguments of counsel the Court makes the following findings of fact and conclusions of law:



FINDINGS OF FACT

1. Trial counsel testified that a theory of third party guilt was a substantial part of their trial strategy. In his closing argument trial counsel argued that the forensic evidence did not inculcate their client and instead pointed to the presence of other individuals being present at the scene.
2. The trial judge charged the jury on the law of third part guilt as follows: *Evidence offered by an accused as to the commission of a crime by another person must be limited to facts that are inconsistent with the accused's guilt, and to such facts which raise an inference as to his innocence. There must be such connection with the crime, such facts or circumstances which tend to point out the other person as the guilty party.*
3. Mr. Frederick made a timely objection to the court's charge on third party guilt. Mr. Frederick asserted that the charge as stated should not have been given or the jury should have charged that it was free to consider evidence of third party guilt. At the hearing Mr. Frederick testified that he should also have objected to the charge on the grounds that it impermissibly shifted that Defendant's burden of proof, but that ne neglected to so do.
4. The appeal that Mr., Savitz filed on Jimmy Lee Sessions' behalf was similar to the appeal filed by Mr. Dudek for Sessions' co-defendant Mr. Stephens. Both appellate counsel raised one of the same issues namely whether the court should have admitted testimony from the state's victimology expert Mike Prodan.
5. Mr. Dudek testified that he believed that the third party guilt charge impermissibly shifted defendant's burden of proof, but that he believed that trial counsel failed to preserve the objection on that ground, which is why he did not raise the issue on appeal. Mr. Dudek testified that had trial counsel preserved as grounds for objection that the



charge permitted impermissible burden shifting, then he would have included the issue in his appeal. Mr. Dudek acknowledged that there could have been additional grounds to argue that the third party guilt charge was erroneous, including that the charge as given could have confused the jury.

6. Applicant met his burden of proof that Appellate Counsel provided ineffective assistance of counsel by failing to assert on appeal the trial court's third party guilt jury charge erroneous as it was likely to have confused the jury.

7. Applicant met his burden of proof that Trial Counsel provided ineffective assistance of counsel by failing to preserve the objection that the court's third party guilt charge permitted impermissible burden shifting.

8. Regarding the other grounds for relief that Applicant set forth in his Application and or raised at the hearing, the Court finds that Applicant did not meet his burden of proof.

CONCLUSIONS OF LAW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard v. Catoe, 372 S.C. 318 at 331, 642 S.E.2d 590 at 596. (S.C. 2007). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a



reasonable doubt respecting guilt.' " *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The Court's charge on Third Party Guilt was erroneous

The trial judge is required to charge the current and correct law of South Carolina. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). 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. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). The substance of the law is what must be instructed to the jury, not any particular verbiage. State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980).

The court's charge on third party guilt was erroneous on two grounds: 1) the jury was likely to have been confused whether they were to make their own relevancy determination before considering defendant's third party guilt evidence; and, 2) it impermissibly shifted the state's burden of proof by suggesting that defendant was required to proffer evidence to prove his innocence. Issues regarding the relevancy of evidence is left to the sound discretion of the trial court. Rules 401 & 402 SCRE, State v. Sweat, 362 S.C. 117, 606 S.E.2d 508, State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct.App.2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (S.C. Ct. App 2008). The language used in the court's third party guilt charge accurately reflected the relevancy determination that trial courts should conduct in considering the admissibility of defendant's third party guilt testimony. Holmes v. South Carolina, 547 U.S. 319, 328, 126 S.Ct. 1727, 1733 (2006) citing State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (S.C. 1941). However, by including this language in the court's jury charge, the court



shifted this relevancy determination to the jury. The imposition of this relevancy determination upon the jury was likely to have caused confusion.

In addition to its likelihood to have confused the jury, the court's third party guilt evidence impermissibly shifted the state's burden of proof. Jury charges that cause burden shifting presumptions are unconstitutional. State v Neva, 300 S.C. 450, 388 S.E.2d 791 (S.C. 1990); Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (S.C. 1993). A defendant is not required to present a defense and can rely entirely on the weakness of the State's case since the state has the burden of proving guilt beyond a reasonable doubt. State v Adkins, 353 S.C. 312 577 S.E.2d 460; State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977). The inclusion of the phrase: *and to such facts which raise an inference as to his innocence* in the jury charge was likely to have led the jury to believe that defendant had some burden of proof or production on this issue. Therefore the court's charge is likely to have lead the jury to believe that since defendant asserted a third party guilt defense, the defendant had burden of proving his innocence by showing that a third party committed the offense. Defendant was under no obligation to proffer any evidence proving his innocence.

Trial Counsel was ineffective for failing to preserve issue for appeal

Trial counsel can be held ineffective for failure to object to erroneous and or burden shifting jury charge. Gibson v State, 416 S.C. 260, 786 S.E.2d 121 (S.C. 2016); (finding that was deficient for not objecting to jury charge that malice may be inferred from use of a deadly weapon) Taylor v. State, Id., (finding that counsel was deficient in failing to object to a jury charge on intent element which shifted the burden of proof to the defendant); and, Dandy v. State, 301 S.C. 303 391 S.E.2d 581, (S.C. 1990), (finding that trial counsel



was ineffective for failing to object to jury charge requiring defendant to prove self-defense by a preponderance of evidence). Although trial counsel objected to the court's jury charge on the general ground that it was improper. Trial counsel's failure to assert that the court's charge was burden shifting was ineffective performance. Defendant was prejudiced by trial counsel's performance because the failure to preserve the issue on those grounds is the reason why the issue was not raised on appeal.

Appellate counsel was ineffective for not raising erroneous jury charge as grounds for appeal

On appeal Mr. Savits raised the following issues: 1) that the court erred in admitting the introduction of defendant's tennis because the State failed to establish provenance of the shoes before December 2008; and, 2) that the court erred in admitting testimony from SLED's victimology expert. Although trial counsel did preserve a general objection to the court's third party guilt charge, appellate counsel did not include the issue in the appeal. Although this Court did not hear from Mr. Savits, at the PCR hearing, this Court notes that Mr. Dudek acknowledged that he could have included the third party guilt jury charge issue on appeal but that he believed that he would prevail on the issue of the inadmissibility of the victimology testimony.

Defendants are constitutionally entitled to effective appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, (1985), Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). When a claim for ineffective assistance of counsel is based upon appellate counsel's failure to raise viable issues, the court must determine whether appellate counsel failed to present significant and obvious issues on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir 1986). Having found that the court's third party guilt




charge was likely to have confused the jury; and that trial counsel did preserve a general objection to the inclusion of the charge, appellate counsel was ineffective for not including the issue in his appeal. This court finds there is a reasonable probability that had appellate counsel included this issue on appeal, the appellate court would not have affirmed defendant's conviction.

Wherefore, I find Applicant has carried his burden of proof on ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

Therefore, Applicant's application for Post-Conviction Relief is granted and Applicant's convictions for 2007-GS-26-2961, 2007-GS-26-2962, 2007-GS-26-2963, & 2008-GS-26-2698 shall be set aside.

IT IS SO ORDERED!



Hon. Brooks P. Goldsmith
Presiding Judge Horry Circuit Court

_____, SC
February 3, 2017