

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge  
\_\_\_\_\_

TOBY EUGENE MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

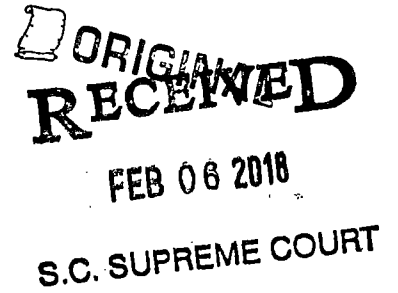
APPELLATE CASE NO 2017-001360  
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PETITION FOR WRIT OF CERTIORARI  
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LANELLE CANTEY DURANT  
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The PCR court erred in not finding trial counsel ineffective for failing to object to the trial judge’s instruction to the jury: “Your sole objective is to simply reach the truth in the matter,” which was burden shifting and instructed the jury to use the incorrect truth standard instead of the correct reasonable doubt standard which was prejudicial to Petitioner Moore. ....9

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**ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for failing to object to the trial judge's instruction to the jury: "Your sole objective is to simply reach the truth in the matter," which was burden shifting and instructed the jury to use the incorrect truth standard instead of the correct reasonable doubt standard which was prejudicial to Petitioner Moore?

## STATEMENT

On January 3, 2011, a confidential informant (CI) with the code name Loopee went to the Spartanburg County Public Safety Department and spoke to Officer Jeff Kirby. Loopee told Officer Kirby that he had been to Toby Moore's house and saw marijuana. Loopee had made controlled buys for marijuana for Officer Kirby previously. App. 41, ll. 2 – App. 43, ll. 21.

Based on the CI Loopee's information, Officer Kirby obtained a search warrant from the magistrate's office. Because the CI had told Officer Kirby that Petitioner Moore kept a gun on his person, Officer Kirby requested a "no-knock" search warrant. App. 43, ll. 25 – App. 44, ll. 25.

On January 6, 2011, the tactical team executed the search warrant because drug search warrants were considered "high-risk" according to Supervisor Doug Harwell. App. 45, ll. 3 – 15; App. 59, ll. 3 – 13. Sergeant Mark Hillers was the team leader for the tactical unit. App. 105, ll. 8 – 24. Because the warrant was a no-knock warrant, he believed there were weapons inside the house. App. 106, ll. 1 – 24. Two men were designated to be a distraction for the remaining team to enter the front. The two men had tried to push a "flashbang" inside the window to "get eyes inside the house" before the team entered but were not able to do so. However, the two were able to force a distraction device, which was very loud, inside the house and began screaming "police, search warrant." The distraction device was to keep the team entering the front safe. App. 107, ll. 4 - App. 110, ll. 25; App. 67, ll. 2 – 21.

The house was dark and cluttered. Officer Harris was the first man in. As he reached the middle room, he screamed that he was shot. Sergeant Hillers began to fire at that point. App. 115, ll. 13 – App. 118, ll. 25. Supervisor Doug Harwell heard multiple shots before Officer Harris was brought out. Three people were found in the house. App. 67, ll. 18 – App. 68, ll. 24.

Amanda Gentry and William Rogers were found on the sofa in the front room. App. 135, ll. 1-25. Petitioner Moore was found in the bathroom in the back of the house. The shots that hit Officer Harris were determined to have come from that direction. App. 247, ll. 13 - App. 249, ll. 12.

Officer Jeff Cooper had his weapon drawn as they entered the house. He saw the two people on the sofa but did not think they were a threat until he saw the man pull a firearm. The officers were screaming "police." Officer Cooper shot at the man on the sofa until the man dropped his weapon. Officer Cooper thought he fired at the man six to eight times. App. 219, ll. 1 - App. 222, ll. 9. Rogers was taken to the hospital where he died shortly afterward. App. 360, ll. 1-20.

Found in the house were 7.17 grams of crack cocaine; 36.95 grams of cocaine; and numerous pills; and 111.15 grams of marijuana. App. 162, ll. 3 - App. 164, ll. 25; App. 585, ll. 4 - 8; App. 392, ll. 1 - App. 394, ll. 2. A Hi-Point 45 caliber handgun was found in the bathroom. App. 339, ll. 6 - 25.

In June 2011, the Spartanburg County Grand Jury indicted Petitioner Moore on one count of attempted murder; possession with intent to distribute (PWID) cocaine base within one-half mile of a school; PWID cocaine base or methamphetamine; PWID marijuana; trafficking in cocaine; and possession of a firearm during the commission of a violent crime. In January 2012, the Grand Jury indicted Moore on three counts of attempted murder. App. 658 - App. 673.

On March 21-23, 2012, Petitioner Moore proceeded to trial before the Honorable J. Derham Cole and a jury. Moore was represented by Tanya Jones, and the state was represented by Derrick B. Bulsa. App. 1. Pretrial, defense counsel Jones asked the court to allow another attorney, John Mobley, to take over Petitioner's case because Moore's family had already paid

Attorney Mobley. App. 32, ll. 7 – App. 36, ll. 14. Defense counsel Jones moved for a continuance to allow Attorney Mobley to prepare the case for trial. The judge denied the motion for a continuance because he said that defense counsel Jones was ready for trial and Attorney Mobley needed more time. The judge said Moore’s case was the next case up for trial and it was going forward. App. 36, ll. 15 – App. 37, ll. 16.

During the trial, Petitioner Moore did not testify. App. 413, ll. 1 – 9.

The trial judge at the beginning of the jury charges instructed the jury:

Your sole objective is to simply reach the truth in the matter.  
By doing that you will have fulfilled your obligations as jurors,  
and that is simply to give both the state and the defendant a fair  
and impartial trial.

App. 446, ll. 12 – 15. Defense counsel did not object. App. 446, ll. 12-25.

During the deliberations the jury asked the judge for a reinstruction on malice aforethought, assault and battery of a high and aggravated nature, and assault and battery first degree. The judge complied. App. 479, ll. 9 – App. 481, ll. 25. The jury returned verdicts of guilty as indicted on all of the charges. App. 482, ll. 22 – App. 484, ll. 11.

The judge sentenced Moore to thirty years on each of the attempted murder charges; twenty-five years on the trafficking cocaine; fifteen years on the PWID cocaine base; ten years on the PWID cocaine base within one-half mile of a school; five years on the PWID marijuana; and five years on the possession of a firearm during a crime of violence. All sentences were to run concurrent. App. 488, ll. 15 – App. 489, ll. 18.

Petitioner Moore’s mother retained Attorney John Mobley to appeal Moore’s convictions and sentences. App. 609, ll. 1 – 16. The South Carolina Court of Appeals affirmed Moore’s

convictions and sentences on January 22, 2014. State v. Moore, Op. No. 2014-UP-025 (Ct. App. filed January 22, 2014).

On July 10, 2014, Petitioner Moore filed an application for post-conviction relief (PCR). App. 492. The state filed a return on November 18, 2014. App. 505. An evidentiary hearing was held on June 16, 2016 before the Honorable R. Ferrell Cothran, Jr. Petitioner Moore was represented by Leah B. Moody, and the state was represented by Alicia Olive. App. 512.

Petitioner Moore testified at the PCR hearing that he was “forced into being stuck with trial attorney, Ms. Jones.” Moore explained that his family had hired Attorney John Mobley to represent him at his trial. His family had already paid Mr. Mobley. However, the trial judge, Judge Cole, would not allow Attorney Mobley to take his case. The judge told Moore that he would have to go to trial with Ms. Jones because she said that she was ready for trial. Moore did not believe that she was. Moore said he really did not have “any conversation” with Ms. Jones about defenses because he had plans for the private attorney. He did not understand the elements of his charges and Ms. Jones did not explain them. App. 517, ll. 1 – App. 522, ll. 24.

Moore said that one of his major allegations that trial counsel was ineffective was that she did not object when the judge told the jury during the judge’s jury charge that their sole objective was to seek the truth in the matter and that by doing so they would have fulfilled their obligation as jurors. Moore cited the case of State v. Need, 508 S.E. 2n at 857 (1998) where Moore explained the “high court exclaimed” that they took the opportunity to strongly urge trial courts to avoid using any “seek language” when charging jurors on reasonable doubt or circumstantial evidence because it shifted the burden of proof to the defendant. App. 567, ll. 11 – App. 568, ll. 21.

Moore testified that trial counsel was ineffective in not objecting to this jury charge because the charge was prejudicial to Moore. It was prejudicial because there was “a reasonable and strong likelihood that the jurors applied the challenge instruction in a way that violated the Constitution” because they used the “seek language” as the standard instead of reasonable doubt. App. 568, ll. 22 – App. 569, ll. 24.

Trial counsel Jones testified at the PCR hearing via telephone because she was then living in Oklahoma City, Oklahoma. App. 581, ll. 9 – 19; App. 515, ll. 8 – 25. She explained again that Petitioner Moore “would not cooperate with her a lot” because he wanted Mr. Mobley to represent him. Therefore it was hard for her to “build a defense.” App. 587, ll. 15 – App. 588, ll. 15.

Trial counsel explained that Mr. Mobley was retained and when he appeared for the call docket, he asked for a continuance in order to prepare for trial. However, the trial judge, Judge Cole, said the case was going to trial and he denied the continuance. The judge told Ms. Jones to handle the trial because she was ready. App. 588, ll. 18 – App. 589, ll. 23.

According to trial counsel, Petitioner Moore’s version of events was that it was not his residence as he did not live at that house; he was not a drug dealer; and the drugs were not his. Moore’s main concern in going to trial she believed was to focus on the fact that William Rodgers was killed by the police. App. 585, ll. 11 – 23.

Trial counsel Jones admitted that she did not object to the judge’s jury charge when he told the jury that their objective was to seek the truth. She did not feel there was anything objectionable about it. Ms. Jones testified:

I didn’t, no. And I do know sometimes people do try to object to, you know, getting to the truth of the matter, because it’s really a reasonable doubt standard and not truth. I’ve never gotten any traction on that.

So I might have just missed it. But that would be the only maybe questionable ---and I agree it probably shouldn't be in there—but I can't think of one case in terms of that ever, you know, getting changed. And they were all standard instructions from my memory—

App. 591, ll. 10 – App. 592, ll. 1.

Appellate counsel, John Mobley, also testified at the PCR hearing. He explained that he handled the appeal instead of returning the fees he was paid to represent Moore at trial. App. 601, ll. 12 – App. 602, ll. 5. Mr. Mobley testified that the only issue he raised was the directed verdict motion based on the drug charges because he did not see any other issues of merit. He said that even his directed verdict issue was “a stretch” because it “was a clean trial.” App. 602, ll. 6 – App. 603, ll. 19; App. 608, ll. 1 – 25.

The PCR judge issued an order on May 23, 2017 denying Petitioner Moore's PCR application and dismissing it with prejudice. App. 617 – App. 632. The judge found Moore failed to satisfy his burden of proving “either deficiency or prejudice” regarding trial counsel's failure to object to the jury charge. App. 625. The judge's order provided that trial counsel testified that the state's evidence against Moore was “very strong.” The judge also found that Moore did not show that the instructions were incorrect when taken as a whole. The judge held that Moore also failed to show that the outcome would have been any different considering the evidence against Petitioner. App. 626.

PCR counsel filed a notice of appeal on June 20, 2017. App. 633. Petitioner Moore filed a *pro se* 59 (e) motion to reconsider or alter/amend the judgment on June 27, 2017. App. 636. The assistant attorney general with the case filed a letter with the Spartanburg Clerk of Court informing the Clerk's Office that Petitioner Moore's appeal was pending before the Supreme Court. Therefore, the Spartanburg County Court of “General Sessions” was without jurisdiction

to entertain the motion. The letter also informed the Clerk that Petitioner Moore was represented by counsel, Leah Moody, so the state did not consider the *pro se* documents part of the action. App. 652.

On July 10, 2017, the Supreme Court sent a letter to the Division of Appellate Defense informing the Chief Appellate Defender of Petitioner Moore's *pro se* motions. App. 653. The Chief Appellate Defender sent a letter in response to the Supreme Court on July 20, 2017, informing the Court that Petitioner Moore's PCR counsel, Leah Moody, had filed a notice of appeal on June 20, 2017 prior to Moore's *pro se* 59 (e ) which was filed June 27, 2017. Therefore, the Rule 59 (e), SCRCP, was not filed timely and jurisdiction remained with the Supreme Court. App. 654.

Because the notice of appeal was timely filed, this petition for a writ of certiorari follows.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for failing to object to the trial judge's instruction to the jury: "Your sole objective is to simply reach the truth in the matter," which was burden shifting and instructed the jury to use the incorrect truth standard instead of the correct reasonable doubt standard which was prejudicial to Petitioner Moore.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), the Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth," run the risk of unconstitutionally shifting the burden of proof to the defendant.

In State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), the Supreme Court held that the circumstantial evidence charge that instructed jurors to "seek some other rational or logical explanation other than the guilt of the accused" was error. However the error was harmless because the judge had instructed the jury 26 times during his charge that the state had the burden of proof beyond a reasonable doubt.

The Court also held in State v. Needs, *id.* that trial courts should avoid instructing jurors on that same "seek" language when charging either reasonable doubt or circumstantial evidence as such language ran the risk of "unconstitutionally shifting the burden of proof to a defendant."

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), the Supreme Court held that the trial court's instruction to the jury that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case" was improper. The Court wrote that such a charge could alter the jury's perception of the burden of proof substituting justice and fairness for the presumption of innocence, and the state's burden of proof beyond a reasonable doubt.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The PCR court erred in not finding trial counsel ineffective for failing to object to the trial judge’s jury charge instructing the jury that their “sole objective” was to find the truth. It was prejudicial to Moore because the judge set the stage early for the jury to use the truth standard instead of reasonable doubt. The judge’s instruction to the jury was given at the beginning of the jury charges which set the standard and the duty of the jurors. By not following very closely with the reasonable doubt standard, the judge set the standard as to “reach the truth.” Then the judge told the jury their “obligation” was to provide a “fair and impartial trial to both the state and the defendant.” This again set an improper standard for the jury to focus on fairness instead of the presumption that Moore was innocent.

**CONCLUSION**

Based on the above, certiorari should be granted; Petitioner Moore's convictions and sentences reversed and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of February, 2018.

STATE OF SOUTH CAROLINA

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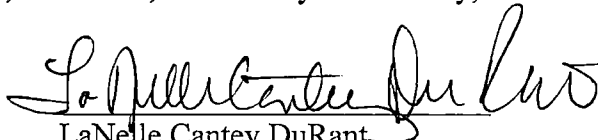
RESPONDENT

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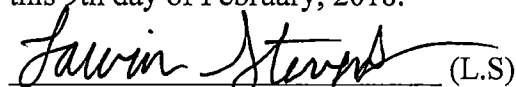
CERTIFICATE OF SERVICE

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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 Valerie Garcia Giovanoli, 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 Toby Eugene Moore, #350242, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of February, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 9th day of February, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.