STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-000182

KENNETH SAMUEL WILLIAMS, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENTS'S ISSUE PRESENTED

Did the PCR court properly find Petitioner's allegation of ineffective assistance of counsel for failing to object to the trial court's opening instruction was meritless, where the opening instruction did not improperly shift the burden of proof away from the State, but rather merely explained in layman's terms the jury's role in evaluating witnesses, and where the trial court repeatedly stressed the State's burden of proof throughout his instructions?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. During its October 2007 term, the Beaufort County Grand Jury indicted Petitioner for murder (2007-GS-07-1918), first-degree burglary (2007-GS-07-1920), and strong arm robbery (2007-GS-07-1919). On July 26, 2010, Petitioner proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. Gene Hood, Esquire ("Trial Counsel"), represented Petitioner at trial. Assistant Solicitors Angela McCall-Tanner, Esquire, and James John Bannon, Esquire, prosecuted the case. The jury found Petitioner guilty as indicted of all charges. On July 29, 2010, Judge Cooper sentenced Petitioner to imprisonment for thirty years for murder, thirty years for first-degree burglary, and fifteen years for strong arm robbery, all to be served concurrently.

A timely notice of appeal was filed and an appeal was perfected on Petitioner's behalf. Appellate Defenders Susan B. Hackett and Tristan M. Shaffer, of the Office of Appellate Defense, represented Petitioner on appeal. On October 24, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions finding the trial court did not err by instructing the jury on accomplice liability or refusing to instruct the jury on the lesser-included offense of involuntary manslaughter. State v. Williams, Op. No. 2012-UP-573 (Ct. App. 2012). Petitioner filed a petition for a rehearing on November 6, 2012. The South Carolina Court of Appeals denied the petition on November 30, 2012. Petitioner filed a petition for writ of certiorari on February 26, 2013. The South Carolina Supreme Court denied the petition on June 11, 2014. The remittitur was issued June 26, 2014.

On July 30, 2014, Petitioner filed an application for post-conviction relief. The State made its return on October 26, 2015. PCR Counsel James K. Falk, Esquire, ("PCR Counsel") filed an amended application on his behalf on September 30, 2016. An evidentiary hearing into the matter was convened on October 17, 2016, before the Honorable Michael G. Nettles. Petitioner was present at the hearing. Assistant Attorney General Ruston Neely represented the State. Judge Nettles denied and dismissed the application with prejudice by order of dismissal filed December 28, 2016.

Subsequently, Petitioner filed a timely notice of appeal on January 30, 2017. Petitioner then filed a petition for writ of certiorari on October 6, 2017. This return follows.

STATEMENT OF THE FACTS

Petitioner's charges resulted from an incident on September 9, 2007, in which he robbed and killed eighty-one year old Jack Koch ("Victim") in his own home. Petitioner knew Victim and occasionally did yardwork for him. (App. p. 123, ll. 18-19). After a night of drinking and smoking crack, Petitioner and three accomplices were in search of more money and drove to Victim's home. (App. p. 123, ll. 12-25). When Victim asked them to leave, Petitioner proceeded to force him back into his home and beat him in the head. (App. p. 124, ll. 11-15). Victim was on the floor within seconds, and the attack caused him to suffer a fatal heart attack. (App. p. 124, ll. 16-24; p. 415, ll. 8-17). While Victim was lying on the floor, they ripped his wallet out of the back pocket of his pants. (App. p. 125, l. 25 – p. 126, ll. 1-4). Victim's son came home in the early morning hours to find Victim lying face-down on the floor in a pool of blood. (App. p. 148, l. 25 – p. 149, ll. 1-5).

RELEVANT PCR HEARING PROCEEDINGS

At the PCR hearing convened on October 17, 2016, Petitioner's PCR Counsel argued the trial judge's opening jury instruction improperly shifted the burden of proof, and specifically argued the jury instruction was contrary to this Court's holding in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). (App. p. 602, ll. 16-20; p. 603, ll. 2-25 – p. 604, ll. 1-17). The PCR judge noted he believed this Court in Daniels was reasoning it is not a good idea to tell a jury they need to do "what is just and what is right to everybody concerned," and the PCR judge explained such a situation is "completely different" from the present case where the jury instruction at issue was merely addressing how to resolve questions of fact. (App. p. 608, ll. 19-24). Furthermore, the State presented and distinguished State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). (App. p. 609, ll. 20-25 – p. 611, l. 1). The State also noted neither Daniels nor Aleksey resulted in reversals, and the language in the present case was less problematic than those cases. (App. p. 611, ll. 11-25 – p. 612, ll. 1-4).

Trial Counsel testified he had no concerns about the trial judge's initial instructions. (App. p. 649, ll. 20-25). While Trial Counsel explained, "you miss things," in the courtroom when the judge is speaking and your client is trying to get your attention among other distractions, but he reaffirmed he still did not believe the jury instruction was burden shifting. (App. p. 649, l. 25 – p. 650).

STANDARD OF REVIEW

This Court must affirm the PCR court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey, 363 S.C. at 368).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRCP; 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 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at

690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR court properly found Petitioner's allegation of ineffective assistance of counsel for failing to object to the trial court's opening instruction was meritless, where the opening instruction did not improperly shift the burden of proof away from the State, but rather merely explained in layman's terms the jury's role in evaluating witnesses, and where the trial court repeatedly stressed the State's burden of proof throughout the instructions.

Petitioner argues Trial Counsel was deficient for not objecting to an improper burden-shifting opening instruction by the trial judge which prejudiced Petitioner by relieving the State of its burden to prove guilt beyond a reasonable doubt. As the PCR court correctly found, the jury instruction did not improperly shift the burden of proof to the defense. (App. p. 662). Therefore, Trial Counsel was not ineffective for not objecting to the instruction, and the PCR court properly found Petitioner failed to overcome the presumption Trial Counsel made all significant decisions in the exercise of reasonable professional judgement. (App. pp. 661-662).

Petitioner challenges the following selections from the trial judge's opening instruction:

> • "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. p. 115, 11. 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. p. 115, 11. 23-25 – p. 116, 1. 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. p. 116, 11. 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. p. 116, ll. 23-25 – p. 117, ll. 1-13).

Petitioner argues these selections from the jury instructions improperly shifted the burden of proof away from the State. "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)). "However, 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." Id. (citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). The standard of review for jury charges challenged on this basis is whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. Id. (citing Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370 (1990)). Chief Justice Toal, concurring and writing for a majority of this Court in State v. Daniels, a case in which the trial judge instructed the jury that their verdict was to represent "truth and justice for all parties involved," reasoned the adequacy of the trial judge's overall instruction, which included explanations of reasonable doubt and burden of proof, cured any possible constitutional deprivation. 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012).

In this case, the PCR Court correctly observed the trial court's opening instructions to the jury merely explained in layman's terms how a jury can address conflict in witness testimony. (App. p. 662). The PCR Court cited Aleksey, which held there was not a reasonable likelihood

the jury applied the instruction inconsistent with the State's burden of proof beyond a reasonable doubt where the instructions concerning "seeking the truth" were given in the context of the jury's role in determining witness credibility. Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252. (App p. 662). While it should be noted neither conviction was reversed in Aleksey or Daniels, the instructions given in this case were even less problematic than either those cases. In Daniels, the trial judge instructed the jury to reach a *verdict* "seeking truth and justice for all parties involved." 401 S.C. at 256, 737 S.E.2d at 475 (emphasis added). Moreover, in Aleksey, the trial judge instructed the jury their *one single objective* was to seek the truth. 343 S.C. at 26, 538 S.E.2d at 251 (emphasis added). Nevertheless, this Court did not find either instance to be reversible error. Clearly, these charges were more ambiguous than in the present case where the trial judge merely gave a relatable example to the jury to aid in evaluating the credibility of conflicting witness testimony. At no time did the trial judge instruct or imply to the jury they only had to reach a "true" verdict rather than a verdict reflecting proof beyond a reasonable doubt.

Notwithstanding the fact the challenged selections from the jury instruction were proper, but any alleged misstatements would have been cured by the correct statements of law throughout the jury charge given by the trial court at the conclusion of all the evidence. A constitutional violation would occur if the erroneous jury instruction shifts the burden of proof to something other than the State's burden to prove guilt beyond a reasonable doubt. See Aleksey, 343 S.C. at 27, 538 S.E.2d at 251. Again, this evaluation must consider the jury instruction as a whole, rather than isolated portions. Id. at 28, 538 S.E.2d at 251. "In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed 'in its entirety and not in isolation.'" Gibbs v. State, 403 S.C. 484, 495, 744 S.E.2d 170, 176 (2013)

(citing Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)). In this case, the trial judge repeatedly stressed the State's burden of proving guilt beyond a reasonable doubt to the jury. Early in his opening instruction, the trial judge instructed the jury that the defense was under no obligation to provide an opening statement, evidence, or testimony. (App. p. 112, ll. 21-25; p. 113, ll. 12-16). The judge instructed the jury Petitioner was presumed innocent, did not have to convince the jury of his innocence, and the burden rested on the State to prove his guilt beyond a reasonable doubt. (App. p. 117, ll. 14-25 – p. 118, ll. 1-7). The trial judge then properly explained the concept of reasonable doubt and explained they must find Petitioner not guilty if they are not firmly convinced of his guilt after hearing all the evidence and testimony. (App. p. 118, ll. 8-22). Furthermore, the trial judge's closing jury charge reiterated the State's burden of proof and Petitioner's presumption of innocence. (App. p. 487, ll. 5-20). The trial judge further stressed that the presumption of innocence is a "substantial right," and not "an empty legal phrase." (App. p. 487, ll. 21-25). The trial judge proceeded to once again restate the State's burden of proof, and then further explained a criminal case requires more than one party's evidence to be more likely true than not true, such as in a civil trial, but rather the State must meet the more powerful burden of proof beyond a reasonable doubt. (App. p. 488, ll. 12-20). The trial judge again explained the concept of reasonable doubt, and further instructed the jury Petitioner was entitled to "every reasonable doubt which arises in this case." (App. p. 489, ll. 8-14). In addition to the abundance of proper instruction regarding the State's burden of proof found in the trial judge's instruction, the Solicitor also stressed the State's burden of proof in her statements, specifically, "The burden of proof is all on me." (App. p. 125, ll. 13-16).

As the PCR Court correctly found, the trial judge's jury charge, in conjunction with the reasonable doubt and burden of proof charges, was an adequate and fair statement of law, and the

charge was proper. (App. p. 662). Trial Counsel therefore cannot be deficient for not objecting to a proper jury instruction. Furthermore, Petitioner cannot demonstrate prejudice from a proper jury charge which, in any event, contained abundant proper statements of law to cure any alleged misstatements. For these reasons, there is ample probative evidence and case law to support the PCR Court's dismissal of Petitioner's allegations as meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

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Attorney General

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By: Christian Saville
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Feb. 26, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-000182

KENNETH SAMUEL WILLIAMS, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Appellate Defender David Alexander
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 26 day of February, 2018.

Christian Saville

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FEB 26 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari from Beaufort County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2017-000182

KENNETH WILLIAMS, #140886, PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, RESPONDENT,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **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:

David Alexander, Esquire
SC Commission of Indigent Defense- Appellate Division
Post Office Box 11589
Columbia, SC 29201

This 26th day of February, 2018

Tamieka Russell-Brown
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
FEB 26 2018
S.C. SUPREME COURT

February 26, 2018

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

Re: **Kenneth Williams, #140886 v. State of South Carolina**
Appellate Case No. 2017-000182
Lower Court Case No. 2014-CP-07-1841

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville

Christian A. Saville
Assistant Attorney General
SC Bar No. 103272

CAS/trb
Enclosures

cc: David Alexander, Esquire (2 copies)