STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

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DONTAVIOUS JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001487

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# PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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# INDEX

## ISSUE PRESENTED

Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge repeatedly instructing the jury to "act for the community" and "reach a fair and just verdict" where the instruction deprived Petitioner of his right to a fair trial by improperly shifting the state's burden of proof and creating a reasonable likelihood the jurors substituted the trial court's repeated concepts for the state's burden to prove guilt beyond a reasonable doubt?

## STATEMENT

On November 8, 2010, a Darlington County grand jury indicted Petitioner for grand larceny (2010-GS016-1974) and burglary in the first degree (2010-GS-16-1975). App. 560-561; App. 563-564. The state, represented by Patti M. Parker and John Holt, called the case to trial before the Honorable J. Michael Baxley and a jury. App. 1. Matthew Swilley and Will Grove represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 386, l. 17 – App. 387, l. 5.

During the sentencing presentation, the state admitted Petitioner had no prior record. App. 391, l. 9. The solicitor remarked that he had no "adult record." App. 391, l. 9. The solicitor informed the judge that Petitioner had "several pending files" in her office, however. App. 391, ll. 7-12. The solicitor then informed the judge that Petitioner had been arrested for distribution of crack cocaine, attempted armed robbery, strong armed robbery, two counts of petit larceny, assault and battery of a high and aggravated nature, burglary first degree, and possession of a firearm during the commission of a violent crime. App. 392, ll. 4-14. The local sheriff at the time added to the solicitor's remarks by describing Petitioner and "his associates" as "literally terroriz[ing] the people of Darlington County, in the hill area, and around Hartsville." App. 393, ll. 2-6. Although recognizing that Petitioner had no prior record, the sheriff, as the solicitor had done, emphasized Petitioner's "numerous pending charges, and, of course, his juvenile record." App. 393, ll. 7-10. Despite the sheriff's knowledge that Petitioner's juvenile record was "not admissible," he still made the judge aware of "things that he ha[d] done before he became an adult." App. 393, ll. 7-10.

Judge Baxley relied heavily upon the local sheriff's commentary when he explained that based on the sheriff's remarks, Petitioner was "a one person crime wave" in the community.

App. 400, ll. 17-19. The judge emphasized the "multiple charges" pending against Petitioner. App. 400, l. 19. Despite Petitioner denying guilt as to those charges and his constitutional right to the presumption of innocence, the judge stated as follows:

> [A]lthough you have not been convicted of any of those, it is clear that you have been involved in a substantial amount of criminal activity in this community, including this burglary for which there was ample and clear evidence that you were involved in this burglary.

App. 400, l. 24 – App. 401, l. 4. Based upon Petitioner's "substantial criminal activity on his record," Judge Baxley sentenced Petitioner to twenty-five years imprisonment for burglary and five years imprisonment for grand larceny. App. 401, ll. 8-12; App. 562; App. 565.

Petitioner filed a notice of appeal, which was perfected by Tristan M. Shaffer and undersigned counsel. App. 405-416. The sole issue on appeal concerned whether Judge Baxley erred in failing to grant a mistrial when a member of the jury venire announced that Petitioner was a suspect in a burglary of her parent's home. App. 405-416. On August 1, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Jackson, 2012-UP-476 (S.C. Ct. App. filed Aug. 1, 2012); App. 441-442. Remittitur issued on August 17, 2012. App. 443.

On February 22, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 444-453. The state's return was dated May 29, 2014. App. 454-458. Through counsel, Lance Boozer, Petitioner amended his PCR application. App. 459-460. On July 27, 2015, the matter proceeded to an evidentiary hearing before the Honorable Thomas A. Russo. App. 461. Boozer represented Petitioner. App. 461. Joshua L. Thomas represented the state. App. 461. At the conclusion of the hearing, Judge Russo took the matter under advisement. App. 521, ll. 21-23. By an order filed October 15, 2015, Judge Russo denied Petitioner relief. App. 524-535.

On December 23, 2015, Boozer wrote to this Court asking to file a belated notice of appeal, explaining the date for filing had been calendared incorrectly. App. 536-540. The state

consented to the filing. App. 536-540. This Court denied the request on January 8, 2016. App. 541. Remittitur issued on January 26, 2016. App. 542.

On February 11, 2016, Petitioner filed a second PCR application requesting a belated PCR appeal. App. 543-549. In its return, the state agreed that Petitioner's request for a belated appeal of his PCR application was meritorious. App. 550-555. The state confirmed that Petitioner's prior PCR counsel inadvertently missed the deadline to file the notice of appeal. App. 550-555. Thus, the state concluded Petitioner "did not knowingly and intelligently waive his right to appellate review of his PCR hearing." App. 550-555. The state consented to a belated review of the denial of his prior PCR application. App. 550-555. By an order filed March 16, 2017, the Honorable Roger E. Henderson granted Petitioner a belated appeal of his PCR application. App. 556-559.

On July 6, 2017, Petitioner received written notice of the entry of the order granting him relief. With the assistance of the Chief Appellate Defender, Petitioner served his notice of appeal on July 7, 2017. Petitioner now files this petition for writ of certiorari.[1]

[1] Pursuant to this Court's instructions in King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner is also filing a petition for writ of certiorari addressing the PCR judge's grant of the belated PCR appeal.

## ARGUMENT

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge repeatedly instructing the jury to "act for the community" and "reach a fair and just verdict" where the instruction deprived Petitioner of his right to a fair trial by improperly shifting the state's burden of proof and creating a reasonable likelihood the jurors substituted the trial court's repeated concepts for the state's burden to prove guilt beyond a reasonable doubt.

**Relevant Facts**

*Trial*

Judge Baxley instructed the jurors they had "one objective, and that is to keep that in mind which is to seek and find the truth." App. 332, ll. 20-25. When describing how to weigh evidence, Judge Baxley told the jurors "that evidence that weighs with you is evidence that convinces you of its truth." App. 333, ll. 24-25. Shortly thereafter, he told the jurors to "reach a verdict that is just and fair" in the case. App. 334, ll. 16-18. When telling the jurors about reasonable doubt, Judge Baxley explained that "a reasonable doubt is a doubt that makes an honest, sincere, conscious juror in search of the truth, hesitate to act." App. 335, ll. 16-19.

Near the end of his charge, Judge Baxley explained throughout the trial he had been "referred to as Your Honor," which was "a title ... assigned to the position that [he was] privileged to hold." App. 342, ll. 18-22. According to Judge Baxley, the honorific was "because this court is entrusted with the honor of this county, this community, this state, and indeed this nation to see to it that every trial here is fair, and every verdict here is just." App. 342, l. 22 – App. 343, l. 1. He explained the jury would "take the preservation of the honor of this community, county, state, and nation with [them] into the jury room" when deciding the case.

App. 343, ll. 1-4. Judge Baxley expressed his confidence that the jury would "reach a verdict that is just and that is fair in this case." App. 343, ll. 15-17. He further explained that "everyone is entitled, both sides of this case, to justice, and nothing more and nothing less." App. 343, ll. 17-19. He was "of the confirmed opinion that whatever result [the jury] reach[ed would] in fact represent truth and justice for these parties." App. 343, ll. 20-22.

Trial counsel posed no objections to these instructions.

*PCR hearing*

During the PCR hearing, lead counsel at trial, Matthew Swilley, admitted he did not object to the trial judge instructing the jury to reach a verdict that was just and fair. App. 504, ll. 9-14. He did not recall the instruction for the jury to act for the community and to see to it that every trial was fair and every verdict was just, but he admitted he did not object to the instruction. App. 504, ll. 15-22; App. 504, l. 25 – App. 505, l. 12. He did not have a "big ... issue with that charge." App. 504, ll. 22-23. Swilley admitted he did not object to the judge instructing the jury that both sides were entitled to justice in the case. App. 505, ll. 13-25. He also admitted he did not object to the judge instructing the jury to reach a verdict to represented truth and justice for the parties. App. 505, ll. 13-25. Swilley was unaware of any grounds to support an objection to these erroneous instructions. App. 510, ll. 10-23.

Swilley's co-counsel, Will Grove, also admitted that he did not object to the judge's instructions regarding acting for the community or returning a fair and just verdict for all of the parties. App. 516, ll. 3-8. He said he was not aware of any law to support an objection. App. 516, ll. 7-8.

During argument on the PCR application, PCR counsel explained he "pointed out one, two, three, four, five different sections were [the judge instructed the jury on] 'acting for the

community' and 'reaching a verdict that is just and fair to all parties.'" App. 518, ll. 6-9. Relying upon State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), PCR counsel explained this Court had "instructed all trial judges to ... remove all of that language from their jury charges for fear that it's going to shift the burden of proof improperly from the state, who has all the burden of proof, to either try and find some sort of verdict that's going to work for everybody." App. 518, ll. 10-16. PCR counsel noted that Judge Baxley gave the erroneous instructions "over and over again." App. 518, ll. 17-18. He argued against any reliance on "overwhelming evidence of guilt," explaining the state had failed to present any conclusive evidence of Petitioner's guilt at his trial. App. 518, ll. 18-25.

The state acknowledged that the instruction provided by Judge Baxley was "eerily similar" to the one given in Daniels, supra.[2] However, the state relied upon this Court's conclusion in Daniels, supra, that the instruction was harmless in light of the other instructions given. App. 520, l. 17 – App. 521, l. 1. Additionally, the state argued "overwhelming evidence" to negate prejudice from the erroneous instruction. App. 521, ll. 2-7. This evidence included "his fingerprint, ... his DNA, the stolen goods ... recovered feet from where he lived." App. 521, ll. 2-7. Finally, the state argued that because Petitioner's trial was in 2010, and the Daniels decision was issued in 2012, trial counsel could not "be expected to be clairvoyant" concerning the propriety of the jury instruction given. App. 521, ll. 8-14.

At the conclusion of the hearing, Judge Russo took the matter under advisement, explaining he would render a decision after he had an opportunity to read through the materials provided. App. 521, ll. 16-23.

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[2] The judge who presided over Petitioner's PCR hearing was the judge who issued the erroneous instruction in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). App. 517, ll. 24-25; App. 520, ll. 24-25.

*PCR order denying relief*

The PCR judge found Petitioner "failed to meet his burden to prove trial counsel ineffective in failing to object to Judge Baxley's jury instructions on ... the duty of the jury." App. 532. Regarding Judge Baxley's instructions that the jury was "'acting for the community'" and for the jury "'to reach a verdict that is just and that is fair,'" the PCR judge determined Petitioner's reliance on State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), was misplaced. App. 533. According to the PCR judge, the law in effect at the time of the trial allowed the use of the challenged language because Daniels was not decided until 2012, but Petitioner's trial concluded on December 1, 2010. App. 533. The judge concluded "[t]rial counsel was not deficient for failing to make an objection to what was, at the time, a proper jury charge." App. 533. Thus, the judge determined "trial counsel was not deficient for not raising an objection to this portion of the charge." App. 533.

Although the PCR judge found no deficient performance, the judge analyzed prejudice as well. The PCR judge concluded Petitioner "failed to demonstrate prejudice from the lack of an objection" to the erroneous jury instructions. App. 533. Relying upon Daniels, supra, the court explained "this isolated objectionable language can be harmless if the instructions as a whole are otherwise free from error." App. 533. According to the PCR judge, the trial judge "gave a thorough and proper charge on reasonable doubt, circumstantial evidence, the presumption of innocence and the state's burden of proof." App. 534. Based upon these portions of the jury charge, the PCR judge concluded "the jury instructions as a whole properly conveyed the law to the jury and there is no reasonable probability the jury acted in contravention of the law." App. 534.

Next, the PCR judge determined the prosecution "presented substantial circumstantial evidence of [Petitioner]s guilt," including Petitioner's fingerprints and DNA being found at the scene of the burglary and stolen items found in an abandoned building near Petitioner's residence. App. 534. Based upon that evidence, the PCR judge concluded "there [was] no reasonably likely possibility any error in the jury instructions contributed to the jury's verdict." App. 534. Thus, the judge concluded Petitioner failed to show he was prejudiced by trial counsel's failure to object to the erroneous jury instructions.

**Discussion**

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), the trial judge charged the jury: "'You and I are acting for the community," and that "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.'" Writing for the Court, then-Justice Pleicones determined trial counsel had failed to preserve an objection to this charge at trial. Id. at 256, 737 S.E.2d at 475. Nevertheless, the Court instructed the trial bench "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." Id. According to the Court, "[s]uch 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." Id. Additionally, the Court noted that "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." Id. "These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial." Id.

In a concurring opinion, then-Chief Justice Toal found the objection preserved. Id. Further, the concurrence agreed "that the jury should not have been instructed that their verdict would represent truth and justice for the parties." Id. at 258, 737 S.E.2d at 477. Although the "trial court included several improper statements as part of his jury instruction," the concurrence was persuaded that the errors were harmless because the trial court "prefaced those remarks with full and adequate instructions on reasonable doubt." Id. at 260, 737 S.E.2d at 477. Although the concurrence deemed the errors harmless, the justices made their concerns known:

> It is troubling that the trial court concluded his jury 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. The injection of extraneous language only serves to distract the jury from performing their critical role.

Id. at 260, 737 S.E.2d at 477.

The Court's very serious warning to trial judges regarding language used in jury instructions continued:

> [T]he trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them. The very term "jury" connotes a deliberative body of persons. A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. Judges and juries are not, as this trial judge put it, "in it together." While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.
>
> Judicial instructions to the jury in a criminal case that "whatever verdict you reach will represent truth and justice for all parties," that "we must see to it that the trial is fair and the verdict is just" and that you and I are "in it together," may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a "regular guy." However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.
>
> It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the state's constitutional duty to prove guilt beyond a reasonable doubt.

Id. at 263-264, 737 S.E.2d 479-480 (internal citations omitted).

For years, the South Carolina Supreme Court has warned trial judges against using ambiguous and burden-shifting language in jury instructions. In State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000), upon which the Daniels Court relied, made clear that "[j]ury 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.'" Id. (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-868 (1998))(alterations in original).

Despite these warnings, judges have continued to instruct juries to "search for the truth," "render verdicts that represent truth and justice for all parties," and issue "fair and just verdicts." See e.g., State v. Pradubsri, 420 S.C. 629, 638, 803 S.E.2d 724, 729 (Ct. App. 2017)(instructing the jury that reasonable doubt "'is doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act'" despite an objection and an agreement by the judge to remove the line from his charge); State v. Deleston, 2016-UP-055 (S.C. Ct. App. filed Feb. 10, 2016)(explaining the judge instructed the jury that a trial was "'a search for the truth in an effort to make sure that justice is done'"), *cert. dismissed as improvidently granted* State v. Deleston, 2017-MO-013 (S.C. Sup. Ct. filed July 19, 2017); State v. House, 2014-UP-048 (S.C. Ct. App. filed Feb. 5, 2014)(affirming despite the trial judge instructing the jury (1) that a reasonable doubt "makes an honest, sincere juror in search of the truth to hesitate to act" and (2) that it was their duty to "determine the truth" and "arrive at a verdict which speaks the truth"); State v. Partain, 2012-UP-311 (S.C. Ct. App. filed May 16, 2012)(addressing an issue raised where the judge instructed the jury that its job was "'to search for the truth'").[3] Clearly, this Court's warnings to trial judges regarding the dangers of these types of charges and the request that trial judge's remove the instructions from their general sessions charges have been ignored by the trial bench. In order for this Court's admonitions to be taken seriously, something other than a warning must be issued.[4]

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[3] Petitioner does *not* cite these unreported cases for precedential value. Petitioner cites these unreported cases to demonstrate that this Court's repeated warnings regarding the dangers of the jury charge at issue have gone unheeded by the trial courts.

[4] Petitioner notes that in State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016), this Court held it was improper for a trial judge to inform the jury in comments or in a concluding jury charge "that its role is to search for the truth, or to find the true facts, or to render a just verdict." This Court explained "[t]hese phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged

Trial counsel's failure to object to the judge's repeated instruction to the jury regarding "acting for the community" and requiring them to arrive "at a true and just verdict" in the case, which was "eerily similar" to the instruction in Daniels, supra, that whatever verdict rendered would represent truth and justice for all parties involved in the case, was deficient performance resulting in prejudice. But see Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 114-115 (2016)(holding trial counsel was not ineffective for failing to object to a similar instruction when no case law existed rendering the instruction improper per se because "reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law"). In Teamer, the judge charged the jurors: "'Your sole objective of course is to simply reach the truth in the matter, and by doing that you will have fulfilled your obligations as jurors, and that is to simply give both the [S]tate and [Respondent] a fair and impartial trial.'" Id. at 182, 786 S.E.2d at 114-115 (alterations in original). Although likening this charge to the one held verboten in Daniels, supra, this Court, nevertheless, held trial counsel was not ineffective in failing to object to the instruction. Id. at 183, 786 S.E.2d at 115.

In the instant case, the judge's instruction diluted the state's burden of proof and shifted the burden to Petitioner. Trial counsel erred in failing to object, and despite the fact that Daniels, supra, had not been decided at the time of Petitioner's trial, Aleksey, supra, had been decided and was the foundation for Daniels, supra. The question is not whether a specific charge had been deemed improper at the time of Petitioner's trial. The question is whether the legal concepts

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crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Id. This Court again "caution[ed] 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." Id. Petitioner further notes this Court granted the petition for rehearing filed in the case on March 24, 2017, and heard argument on June 15, 2017. As of this writing, this Court has not issued an opinion.

supporting the objection were developed and whether counsel's performance fell below an objective standard of reasonableness. Given this Court's prior decision warning judges to avoid burden-shifting jury instructions, trial counsel's performance was deficient.

The remaining portions of the jury charge could not save this egregious error in light of the evidence presented, the sheer number of times the erroneous instruction was given, the trial judge's other erroneous instruction concerning guilt or innocence, the exclamation by a jury venire member that Petitioner was a suspect in a burglary of her parents' home, and the state's closing argument denigrating defense counsel.

Judge Baxley told the jury that its duty was to determine whether Petitioner was guilty or *innocent*. Specifically, when instructing the jury not to consider the fact that Petitioner did not testify, Judge Baxley explained this was not a factor to be considered in "the question of the guilt or innocence of the defendant." App. 337, ll. 12-15. Quite simply, that is not what a jury is required to do. The judge's instruction to determine Petitioner's innocence compounded the erroneous language directing the jury to "act for the community" and return "fair and just verdict."

The question of innocence, of acting for the community, and of returning a fair and just verdict for all parties invoked the information the jurors heard on the first day of the trial when a venire member stated that she knew Petitioner because he was a suspect in the burglary of her parents' home. See App. 18, ll. 17-18 (a juror stating that she knows Petitioner because "[h]e is actually somebody they are looking at in connection to robbing my parent's house"). Despite the efforts to sanitize the jury from those remarks, the members of the venire heard the remarks and would have recalled those remarks during deliberations, particularly, when the judge instructed

them to determine guilt or innocence, to act for the community, and to return a fair and just verdict for all parties.

The state used its closing argument, not to prove its case, but as an opportunity to denigrate the defense. After describing the jobs of individuals in the courtroom, such as the court reporter and the clerk, the solicitor explained that he would tell the jury "what defense counsel does." App. 358, ll. 8-9. According to the solicitor, "Defense counsel has a lot of tricks. But their bread and their butter is to do what they like to call muddy the waters." App. 358, ll. 9-11. He continued, "They want to take all of our evidence and everything that we have produced, and they just want to just scramble it up just a little bit, and they want to say things like put a well in there." App. 358, ll. 11-14. He warned the jurors not to allow "the things that they say and the tricks that they use mess you up." App. 358, ll. 19-20. He accused defense counsel of looking at a witness condescendingly when the witness explained her background and what she had done, "like it is not good enough. And where she went to school wasn't good enough." App. 358, l. 24 – App. 359, l. 1. Along these lines, he claimed, "And they want to ask questions really fast, and then whatever answer you give them they are going to try to scramble you up, and make you look like you don't know what you are talking about." App. 359, ll. 1-5.

The solicitor continued:

> Another one of their favorite things is, is they take your answer and they bring it up in their closing, and they make you sound like an idiot.
>
> I think he asked Deputy Pierre a few questions, and the answer would have been, I don't know, I didn't see that. Deputy Pierre got up there and told the truth. He didn't give you the question in his closing. Mr. Grove simply came up here and said, he answered one time, I don't know. It is preposterous the way they link things together sometimes.

App. 359, ll. 6-14.

It is axiomatic that "[a] solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors." State v. McFadden, 318 S.C. 404, 413, 458 S.E.2d 61, 66 (Ct. App. 1995). "[T]he argument may not be calculated to arouse the jurors' passions or prejudices and its content should stay within the record and its reasonable inferences." Id. (citing State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). Although a "solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle." State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). While a solicitor "may fairly point out matters which the jury should not consider," the solicitor may not denigrate opposing counsel. State v. Lunsford, 318 S.C. 241, 246-247, 456 S.E.2d 918, 922 (Ct. App. 1995); see also State v. Parker, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011)(noting that "[i]t is generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel")(internal citation omitted).

Trial counsel rendered ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the Constitution by failing to object to the trial judge's repeated instruction for the jury to act for the community in alignment with the judge and to return a fair and just verdict for all parties. Although the leading case, Daniels, supra, had not been decided at the time of Petitioner's trial, this Court had decided Aleksey, supra, and trial counsel was under a duty to be aware of the underlying constitutional principles involved. Trial counsel may not rely upon a lack of clairvoyance in this instance because the legal concepts undergirding Daniels, supra, existed long before the decision was rendered. Trial counsel's deficient performance was prejudicial due to the judge's instruction on innocence, the revelation by a jury venire member

that Petitioner was a suspect in another burglary, and the state's closing argument in which he denigrating trial counsel.

## CONCLUSION

Petitioner respectfully requests this Court reverse the PCR court, find trial counsel rendered ineffective assistance and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2018.

RECEIVED
MAR 01 2018
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

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DONTAVIOUS JACKSON,

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V.

STATE OF SOUTH CAROLINA,

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 Pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix have been served on Dontavious Jackson, #343868, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of March, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of March, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.