STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

R. Lawton McIntosh, Circuit Court Judge

ERIC DARIEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001685

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 4

ARGUMENT

By failing to object to portions of an audio recording of Petitioner's statement to police wherein a police officer improperly shifted the burden of proof to Petitioner and gave his lay opinion regarding how the shooting occurred, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution. 5

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967) 2

In re Winship, 397 U.S. 358 (1970) 13, 14

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) 4

Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) 4

Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) 14

Sandstrom v. Montana, 442 U.S. 510 (1979) 14

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 4

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 4, 16, 17

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) 20

State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 17 at 12) 21

State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) 12, 13

State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) 18, 19, 20

State v. Deleston, 2016-UP-055 (S.C. Ct. App. filed Feb. 10, 2016) 21

State v. House, 2014-UP-048 (S.C. Ct. App. filed Feb. 5, 2014) 21

State v. Miller, 676 S.E.2d 546 (N.C. Ct. App. 2009) 12

State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) 20

State v. Partain, 2012-UP-311 (S.C. Ct. App. filed May 16, 2012) 21

State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1997) 11, 12

State v. Pradubsri, 420 S.C. 629, 803 S.E.2d 724 (Ct. App. 2017) 21, 22

State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002) 11

Strickland v. Washington, 466 U.S. 668 (1984) 4, 11, 15, 16

Rules

Rule 701, SCRE 14

ISSUE PRESENTED

By failing to object to portions of an audio recording of Petitioner's statement to police wherein a police officer improperly shifted the burden of proof to Petitioner and gave his lay opinion regarding how the shooting occurred, did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

On December 16, 2008, a Jasper County grand jury indicted Petitioner for murder. App. 363-364. The state, represented by Steven H. Knight, called the case to trial before the Honorable Carmen T. Mullen and a jury on February 8-10, 2010. App. 1. Michael McCloskie represented Petitioner. App. 1. Ultimately, the jury acquitted Petitioner of murder, but found him guilty of the lesser-included offense of voluntary manslaughter. App. 239, ll. 14-22. Judge Mullen sentenced Petitioner to eighteen years' imprisonment. App. 249, ll. 3-6; App. 365. Thereafter, Petitioner, through counsel, filed a motion to reconsider his sentence. App. 251. On June 8, 2010, Judge Mullen heard arguments on the motion. App. 252. At the conclusion of the hearing, Judge Mullen reduced Petitioner's sentence to fifteen years' imprisonment. App. 260, ll. 19-20; App. 365.

Petitioner filed a notice of appeal and was represented by Robert M. Dudek, Chief Appellate Defender, on appeal. App. 263. Appellate counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on December 13, 2011. App. 263-276. On appeal, Petitioner challenged the trial judge's refusal to "direct a verdict of acquittal as a matter of law based on self-defense where it was undisputed the decedent attacked [Petitioner] and injured him, and [Petitioner] shot him in self-defense." App. 263-276. On May 16, 2012, the Court of Appeals dismissed Petitioner's appeal in an unpublished opinion. App. 277-278; State v. Darien, 2012-UP-307 (S.C. Ct. App. filed May 16, 2012). Remittitur was issued on June 5, 2012. App. 279-280.

On February 21, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 281-290. The matter proceeded to an evidentiary hearing on March 3, 2016, before the Honorable R. Lawton McIntosh. App. 299. J. Rutledge Johnson represented the state, and

James K. Falk represented Petitioner. App. 300. By an order dated May 17, 2016, Judge McIntosh denied Petitioner relief from his conviction and sentence. App. 350-361. Receiving notice of the order on July 22, 2016, Petitioner's counsel filed served a notice of appeal on August 10, 2016. On April 24, 2017, Petitioner filed his petition for writ of certiorari. The state responded on September 8, 2017. On March 7, 2018, this Court granted certiorari and ordered briefing. This brief of petitioner follows.

STANDARD OF REVIEW

Recently, this Court clarified the standard of review an appellate court reviewing a PCR action must use when analyzing claims of ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668, 688 (1984). Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839-840 (2018). This Court explained the "standard of review in PCR cases depends on the specific issue" raised on appeal. Id. at 180, 810 S.E.2d at 839. The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, the appellate court will "will review questions of law de novo, with no deference to trial courts." Id. at 180-181. In another recent case, this Court explained the appellate courts give "great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). "Questions of law are reviewed de novo," and the reviewing court must "reverse the PCR court's decision when it is controlled by an error of law." Id. See also Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

ARGUMENT

By failing to object to portions of an audio recording of Petitioner's statement to police wherein a police officer improperly shifted the burden of proof to Petitioner and gave his lay opinion regarding how the shooting occurred, trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

Around 7 p.m. on September 29, 2008, Montana Wilber, Jr., an officer with the Jasper County Sheriff's Office, and other deputies, responded to an emergency 911 call from Petitioner in reference to a shooting. App. 66, ll. 10-21; App. 69, ll. 19-21; App. 71, ll. 14-21; App. 72, ll. 13-14. While emergency medical personnel tended to Richard "Bubba" Furman, Wilber and his colleagues arrested Petitioner. App. 66, l. 22 – App. 67, l. 10.[1] Petitioner cooperated fully with the police and provided Wilber with his handgun. App. 67, ll. 11-14; App. 72, ll. 15-19. Petitioner also expressed his fear that Bubba's family members, who were present at the shooting, would harm him. App. 70, ll. 2-9.

Petitioner suffered head injuries in the confrontation with Bubba. App. 76, ll. 10-14. Therefore, the police transported him to the hospital for a medical evaluation prior to interrogating him at the police station. App. 76, ll. 18-24. The emergency room physician who treated Petitioner found bruises around Petitioner's face and scalp. App. 160, l. 17 – App. 161, l. 4.

There was no question that Petitioner shot and killed Bubba. The only question for the jury to resolve was whether the shooting was murder, voluntary manslaughter, or self-defense.

[1] Richard "Bubba" Furman was pronounced dead at the scene. App. 80, ll. 2-17.

The statement

Prior to the start of trial, the judge inquired about "any pretrial motions." App. 34, ll. 17-18. The prosecutor indicated some concern with Petitioner's statement, but explained that trial counsel did not "have any problems or any motions." App. 36, ll. 13-17. Trial counsel explained his understanding that a hearing on the statement was "mandatory." App. 36, ll. 18-20. However, trial counsel stated he had "no grounds to challenge the statement." App. 38, ll. 12-13. Thereafter, Donald Hipp with the Jasper County Sheriff's Office, testified regarding his interrogation of Petitioner on September 30, 2008. App. 39, l. 6 – App. 46, l. 18. The state sought to publish the audio recording for the judge during the hearing. App. 43, ll. 19-25. Trial counsel objected, explaining the hearing was to determine the voluntariness of the statement, "not ... the contents of the statement." App. 44, ll. 5-13. Trial counsel assured the trial judge he had had an opportunity to review the recording and there was no need for the judge to hear the recording during the pre-trial proceeding. App. 44, ll. 14-25.

According to Hipp, Detective Jeff Crosby was present for the interrogation as well. App. 42, ll. 9-12. Also, Hipp explained the interrogation was audio-recorded. App. 42, ll. 13-19; State's Trial Exhibit #2. After Hipp's testimony, trial counsel explained that if Crosby were going to "testify to basically the same thing" as Hipp, then trial counsel had "no objection to proffering that testimony as such." App. 46, l. 25 – App. 47, l. 2. The state indicated Crosby's testimony would mirror Hipp's, and the judge inquired directly of Crosby, who agreed that his testimony would be the same as Hipp's. App. 47, ll. 3-10. Thereafter, trial counsel stated there were "no grounds of any substance for [him] to challenge the voluntary nature of this statement given by [Petitioner], and for that reason [he would not] argue." App. 47, ll. 13-16. The judge then found the statement voluntary and in compliance with the Constitution. App. 47, ll. 17-21.

The state's case-in-chief

Shakaria White and Bubba were in a romantic relationship. App. 82, ll. 16-25. Around 7 p.m., Shakaria was driving her car in which Bubba was a passenger. App. 83, ll. 6-16. Upon seeing Petitioner at his sister's home, Bubba instructed Shakaria to turn the car around. App. 83, ll. 20-23. Petitioner was going to see his son, Jamontay Darien, who lived with his mother, Tamika Furman, who was also Bubba's sister. App. 121, ll. 2-25; App. 173, ll. 2-11. Shakaria complied with Bubba's direction, stopping the car at Tamika's house. App. 83, l. 24 – App. 84, l. 4. Bubba "jumped out of the car and went straight at" Petitioner. App. 84, ll. 5-7.

Shakaria originally told the police that Bubba hit Petitioner immediately upon exiting the car, but she told the jury that Petitioner struck the first blow. App. 92, ll. 19-25. The two men argued and then started fighting. App. 84, ll. 8-17; App. 109, ll. 10-17; App. 122, ll. 20-22. The physical fight ended when Bubba got up and started walking toward Shakaria, but some words were still exchanged. App. 84, l. 25 – App. 85, l. 3; App. 123, ll. 8-10; App. 126, ll. 15-19. Although numerous people were trying to intercede, "nobody could get Bubba off of" Petitioner. App. 88, ll. 19-24; App. 93, l. 25 – App. 95, l. 7; App. 98, ll. 18-20; App. 122, l. 23 – App. 123, l. 6; App. 126, ll. 11-14. In fact, in the words of Shakaria, "nobody could do nothing with Bubba when he's mad," and he was "very upset" with Petitioner. App. 95, ll. 1-7; App. 123, ll. 10-11. Some witnesses claimed Bubba told Shakaria to take him home and he wanted his gun. App. 85, ll. 2-3; App. 90, ll. 2-3; App. 98, ll. 21-22; App. 105, ll. 1-4; App. 128, ll. 2-6. Others indicated Bubba told Shakaria to get his gun, suggesting the gun was close by and readily available for Bubba's use. App. 178, ll. 15-23. Petitioner heard Bubba say, "Get my gun," and he believed

Bubba was going to kill him immediately. ***; App. 213, ll. 17-23. Shakaria then heard shots "ring out." App. 85, ll. 4-5; App. 88, l. 25 – App. 89, l. 1.[2]

The first shot missed Bubba. App. 98, ll. 22-24; App. 110, ll. 15-24; App. 124, ll. 8-10. Although some witnesses claimed Bubba was walking away when the first shot rang out, Leon Darien explained that Bubba was "standing still" at that time. App. 184, ll. 8-10. Jamontay Darien admitted that Bubba walked away from Petitioner initially, but Bubba "[t]hen ... turned back around. Then the first shot happened." App. 112, ll. 1-7; App. 116, ll. 4-17.

Bubba then charged at and tackled Petitioner. App. 98, ll. 24 – App. 99, l. 8; App. 102, ll. 5-13; App. 105, ll. 10-14; App. 110, l. 25 – App. 111, l. 3; App. 115, ll. 12-15; App. 116, ll. 14-17; App. 124, ll. 11-25. The two men went down to the ground, where Bubba continued to punch Petitioner. App. 111, ll. 4-5; App. 115, ll. 16-18; App. 116, ll. 18-19; App. 125, ll. 15-22; App. 127, ll. 15-22. Petitioner shot approximately three more times while the men were struggling on the ground. App. 111, ll. 8-12; App. 116, ll. 20-22.[3]

When the prosecution called the law enforcement officers in order to introduce Petitioner's statement made subsequent to his arrest, trial counsel stipulated to the voluntariness of the statement. App. 145, l. 20 – App. 146, l. 5. Unsurprisingly, the statement was admitted without objection. App. 150, ll. 2-5. While the prosecutor was playing the audio tape of the interrogation, trial counsel objected "to anything about any kind of arrests or anything else." App. 150, ll. 13-14. The judge sustained the objection and instructed the jurors that "the last

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[2] The evidence was conflicting on the number of gunshots. Shakaria White heard five. App. 88, l. 25 – App. 89, l. 1. Bubba's daughter, Y'Briana Furman, heard three. App. 102, ll. 3-4. Jamontay Darien referenced four. App. 110, ll.15-16; App. 111, ll. 8-12; App. 116, ll. 20-22. Tamika Furman heard three or four. App. 123, l. 23-24; App. 125, ll. 6-8.

[3] According to the pathologist, the deceased suffered three gunshot wounds. All of which were potentially fatal. App. 135, ll. 13-15; App. 140, ll. 12-18; App. 141, ll. 18-25.

portion of that tape was improper" and "should not be before" them. App. 150, ll. 18-20. She ordered the jurors "not to consider it in any way" in their deliberations. App. 150, ll. 20-21. Trial counsel took no exceptions to the curative instructions and made no additional motions. App. 150, ll. 23-25.

The defense

Leon Darien, Petitioner's cousin, saw Petitioner and Bubba fighting. App. 177, l. 6. Bubba "was on top of [Petitioner] punching [Petitioner] in the face and ramming his head into the ground." App. 177, ll. 7-10. Petitioner yelled for help. App. 177, ll. 10-11. Petitioner's mother lived nearby and she ran to her son's rescue. App. 177, ll. 11-12. Finally, Bubba got up. App. 177, l. 13. Petitioner was "dazed" and required Leon's assistance in walking toward his mother's house. App. 177, ll. 13-14; App. 181, ll. 3-5. Petitioner could not have gotten away from Bubba due to his dazed state. App. 180, ll. 18-20. Petitioner was shaking and unsteady on his feet. App. 182, ll. 1-9.

Leon heard Bubba tell Shakaria to go get his gun. App. 177, ll. 17-23. Leon next saw gunfire, but the shot missed Bubba. App. 178, ll. 18-20; App. 183, ll. 15-17. Bubba then "rushed" Petitioner. App. 178, ll. 20-21; App. 184, ll. 4-18. Leon saw gunfire again, and Bubba and Petitioner fell to the ground. App. 178, l. 23 – App. 179, l. 2. According to Leon, the "gunshots were as Bubba attacked [Petitioner], and as both of them [were] falling." App. 179, ll. 15-18; see also App. 184, ll. 21-22.

Order denying post-conviction relief

By an order dated May 17, 2016, Judge McIntosh denied Petitioner relief from his conviction and sentence. App. 350-361. Finding trial counsel's testimony credible, the PCR judge noted that trial counsel "admitted he did not consider redacting the police statements

before the trial, but should have." App. 354; App. 356. The order explained that on the tape, Petitioner's prior jail time was discussed. App. 354. Although trial counsel failed to move to exclude those portions or redact those portions prior to trial, trial counsel requested and received a curative instruction during the trial. App. 354-355. Additionally, the tape included a police officer "saying that he had nothing to prove and talking about the shooting" of Bubba. App. 355. The judge noted trial counsel "testified the biggest issue concerning [Petitioner]'s statements to the police was the police's statements to Petitioner." App. 355. "Specifically, one police officer stated to [Petitioner], 'you do not have the right to take someone else's life' and 'I have nothing to prove ... The court has to decide those things.'" App. 355. According to the order, counsel admitted he did not ask for curative instructions or move for a mistrial regarding those statements. App. 355. Importantly, counsel "stated he did not have a trial strategy as to the statements." App. 355.

After citing the applicable law for reviewing a trial lawyer's conduct for ineffective assistance of counsel, the PCR judge concluded trial counsel "effectively represented [Petitioner] concerning his statements to law enforcement." App. 358. Despite recognizing that trial counsel "testified that he should have objected to the statements prior to them being published to the jury," the judge determined trial counsel's "decision to not challenge [Petitioner]'s statement" was based on information provided by Petitioner. App. 358-359. Thus, the court reasoned, trial counsel's actions could not be challenged as unreasonable thereafter. App. 359. Noting that a curative instruction is deemed to have cured any alleged error, the PCR court erroneously noted that trial counsel asked for and received a curative instruction concerning the statements made by the police officer during the interrogation. App. 359. The court concluded Petitioner failed to meet his burden of proof. App. 359.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "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." Id. at 686. 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. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

Deficient performance

"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.

"It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove the accused committed the crime charged." State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1997). "This rule stems from the constitutional presumption of innocence and the State's burden of proving the accused guilty." State v. Primus, 349 S.C. 576, 584, 564 S.E.2d 103, 107 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him." Posey, 269 S.C. at 503. "He would clearly be

deprived of that right if an adverse inference is permitted to be indulged against him because of its exercise." Id.

In State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 658 (2015), this Court acknowledged "the propriety of law enforcement interrogation techniques, including misrepresenting the existing and strength of the evidence against an accused, as well as asking the accused to produce evidence voluntarily. This Court explained that "[s]uch matters are typically examined *in camera* when the trial court is making a preliminary determination as to the admission of a confession." Id. "But such evidence will rarely be proper for a jury's consideration." Id. at 406, 768 S.E.2d at 659.

During Brewer's interrogation, the "investigators frequently referenced *and quoted* many purported eyewitnesses to Brewer shooting both victims. This evidence was hearsay, offered for the sole purpose of proving the truth of the matter asserted, establishing Brewer's guilt to all charges." Id. at 406-407, 768 S.E.2d at 659 (emphasis in original). This Court implored trial courts and lawyers to exercise "caution" "in the admission of such evidence to ensure that all out-of-court statements are either 'admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay.'" Id. at 407-408, 768 S.E.2d at 659 (quoting State v. Miller, 676 S.E.2d 546, 556 (N.C. Ct. App. 2009)). This Court reminded trial courts that "'the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court.'" Id. at 408, 768 S.E.2d at 659 (quoting Miller, supra). This Court held the officer's insistence that Brewer prove his innocence during the interrogation video had

"*no* place before the jury." Id. (emphasis in original). This Court found it "chilling" to have "to *remind* the state that an accused is presumed innocent and that the state has the burden to prove guilt beyond a reasonable doubt." Id. (emphasis added).

In the audio recording of Petitioner's interrogation, the officer challenged Petitioner's rendition of the facts – self-defense – by telling Petitioner that the officer did not have anything to prove. Specifically, the officer juxtaposed himself – someone who was not at the scene at the time of the shooting – with Petitioner – someone who was at the scene at the time of the shooting. The officer was not the one at the scene, and therefore, the officer was not the one who had to prove anything. The obvious implication was that Petitioner was at the scene and was the person who *had* to *prove* something. The officer's statement shifted the burden of proof to Petitioner. Contrary to the officer's claims during the interrogation, the officer was the person who had to prove the case. As a representative of the state, it was the officer's duty to marshal the evidence in the case. Petitioner had no burden whatsoever; yet, the officer told him that he did – and by extension, the jury. The officer's improper statement regarding the burden of proof conveyed the improper burden to the jury.

In its return, the state argued that trial counsel could not be expected to object to burden-shifting by the officer because "Brewer's guidance was not yet in existence at the time of Petitioner's trial." Ret. at 9. The state's argument neglects to acknowledge that the impropriety of shifting the burden of proof to the defendant in a criminal trial is as old as the Constitution itself. See In re Winship, 397 U.S. 358, 361 (1970) (explaining "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation"). The Brewer decision made clear it was not creating new law; in fact, this Court was clear the Brewer decision was a "reminder" to the state not to introduce evidence that

violated the basic constitutional principle that the burden of proof rests with the state. The timing of the Brewer opinion is irrelevant to the analysis.

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.

Winship, 397 U.S. at 363 (internal quotations omitted). In light of the reasonable doubt standard's vital role, the United States Supreme Court held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364; see also Sandstrom v. Montana, 442 U.S. 510, 520 (1979); Lowry v. State, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008). Again, the timing of Brewer is irrelevant.

In addition to improperly shifting the burden of proof during the interrogation, the officer gave his opinion on how the shooting occurred and whether Petitioner's conduct was justified under the law. Pursuant to the South Carolina Rules of Evidence, a non-expert witness may offer opinion testimony in very limited circumstances.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

Rule 701, SCRE.

On the tape, an officer stated, "You don't have the right to take a man's life," "You shot him in the back," and opined that Petitioner was "too close for that shot to have been fired in self-defense." App. 317, ll. 17-21. In essence, the officer was offering his opinion regarding whether Petitioner acted in self-defense. His statements were not rationally based on his

perception, but were based upon his use of a technique to alter Petitioner's "confession" or attempt to get Petitioner to change his story. The officer's opinion regarding whether the shooting was self-defense was not helpful to a clear understanding of the testimony or a determination of a fact in issue. The officer lacked any special knowledge, skill, experience, or training to offer such an opinion. There was no evidence to suggest he had any experience in crime scene reconstruction or had taken the necessary steps in order to reconstruct the crime scene. Whether Petitioner had the right to take a man's life and whether Petitioner was "too close" for the shooting to be in self-defense were matters for the jury.

Trial counsel had the audio recording prior to trial and had reviewed it numerous times. He was well aware of what the tape contained. Nevertheless, trial counsel failed to move prior to trial to exclude any portions of the tape – even the portions regarding Petitioner's prior criminal record. It was only during the trial that counsel objected to those portions. Trial counsel performed deficiently by failing to avail himself of the opportunity to move to redact the objectionable portions of the tape. Not only did trial counsel fail to move to redact prior to trial, but he failed to pose any objection when the tape was played in open court before the jury to the improper burden-shifting and lay opinion.

Prejudice

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 694. 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. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the

fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

In determining prejudice, "the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls, 422 S.C. at 188, 810 S.E.2d at 843. "In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury." Id. "In general, the stronger the evidence presented by the state, the less likely the PCR court will find the applicant has met his burden of proving prejudice." Id. Typically, "this Court has used the phrase 'overwhelming evidence of guilt'" to describe this analysis. Id.

"Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Id. at 189, 810 S.E.2d at 844. Instead, a court must balance the impact of counsel's error against the strength of the state's case on the point in question. Id. The strength of the state's case is but "one significant factor the court must consider – along with the specific impact of counsel's error and other relevant considerations – in determining whether the applicant has met his burden of proving prejudice." Id.

> [F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice ... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable

> probability ... the factfinder would have had a reasonable doubt' cannot possibly be met.

Id. at 191, 810 S.E.2d at 845.

By all accounts – including the state's account at the PCR hearing – this was a close case. The state charged Petitioner with murder, but Petitioner claimed self-defense. In light of the evidence, the jury was instructed with the offenses of murder and voluntary manslaughter, and instructed on the legal justification of self-defense. The jury acquitted Petitioner of murder, but found him guilty of manslaughter. Trial counsel's deficient performance in permitting the jurors to hear the officer improperly shifting the burden of proof and providing improper lay opinion testimony regarding whether the shooting was the result of self-defense was prejudicial to Petitioner.

The specific impact of the recording was devastating on Petitioner's defense. In the recording, an officer of the law placed the burden of proving self-defense on Petitioner. In the recording, an officer of the law placed the burden of proving what occurred during the shooting on Petitioner. Both were improper and went directly to Petitioner's defense. In the recording, an officer of the law gave his opinion on the ultimate issue in the case – whether Petitioner acted in self-defense. The officer's improper lay opinion went directly to Petitioner's defense. By permitting a member of law enforcement to opine on the legal implications of Petitioner's account of what occurred and on what the officer believed occurred, trial counsel allowed the jury to rely upon the officer's interpretation of the law and the facts.

Contrary to the state's assertion, the evidence against Petitioner was not overwhelming. Petitioner concedes that some of the witnesses claimed Bubba was walking away when Petitioner first shot at him. However, two witnesses indicated Bubba was facing Petitioner when Petitioner fired the first shot. All of the witnesses agreed that Bubba was angry and aggressive.

Bubba's sister indicated that the fist fight, which Bubba undisputedly won, only angered Bubba more. Almost all of the witnesses heard Bubba indicate that he was going to get a gun when he finally stopped waling on Petitioner. Although some suggested Bubba intended to leave and return with a gun, others, including Petitioner, indicated Bubba's desire for a gun was immediate.

The PCR judge erred in finding that trial counsel's conduct was not deficient or prejudicial due to the trial judge's issuance of a curative instruction. Such a finding is not supported by the record. Trial counsel objected to the discussion of Petitioner's prior criminal record and the curative instruction addressed that portion of the interrogation tape. The PCR judge's reliance on the curative instruction was error.

Examining the jury charges as a whole reveals additional errors not objected to by trial counsel that contributed to the prejudice resulting from the improper burden-shifting language used by the officer during the interrogation and improper lay opinion espoused by the officer during the interrogation. The judge told the jurors that she had been referred to as "Your Honor" throughout the trial because the Court was "entrusted with the honor of this community, the honor of this state, and the honor of this country in seeking that every case tried here receives fair and impartial justice." App. 233, ll. 23 – App. 234, l. 2. Then, the judge placed into the jury's "care and keeping the preservation of the honor of this community, the honor of this state, and the honor of this country." App. 234, ll. 3-5.

Thereafter, the judge told the jury that "everyone is entitled to justice in this case, both the state and the defendant." App. 234, ll. 18-19. She told the jury to return a verdict that "represent[ed] truth and justice for all parties." App. 234, ll. 20-22.

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, this Court instructed the trial judge "to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties." Id. According to this 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, this 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.

This 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, this 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'").[4] 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.

Recently, this Court decided State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed Dec. 29, 2016) (Shearouse Adv. Sh. No. 17 at 12), addressing an issue akin to the erroneous jury charge given in this case. This Court held that "a trial judge should refrain from informing the jury, whether through comments or through a charge on the law that its role is to search for the truth,

[4] 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.

or to find the true facts, or to render a just verdict." Id. 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 crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Id. This Court "instruct[ed] trial judges to avoid these terms and any others 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.

Due to the evidence in the case, the admitted "close call" between manslaughter and self-defense, and the erroneous jury charges as a whole, there is a reasonable probability that the result of the trial would have been different had trial counsel moved to exclude the objectionable portions of the audio recorded statement that shifted the burden of proof to Petitioner to prove what happened, including that he acted in self-defense, and permitted improper lay opinion on the law and the circumstances surrounding the shooting.

CONCLUSION

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

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Jasper County

R. Lawton McIntosh, Circuit Court Judge

ERIC DARIEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Eric Darien, #275549, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 6th day of June, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of June, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 07/03/2023