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JUN 22 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
The Honorable R. Ferrell Cothran, Circuit Court Judge

Toby Eugene Moore,

Petitioner,

vs.

The State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The PCR court did not err in finding counsel was not ineffective for failing to object to the trial court's instruction that the jury's role is to "reach the truth in the matter" because the jury instructions as a whole conveyed the State's burden to prove guilt beyond a reasonable doubt and counsel was not required to be clairvoyant.

STATEMENT OF THE CASE

In June 2011, the Spartanburg County Grand Jury indicted Petitioner for possession with intent to distribute ("PWID"), cocaine base within one-half mile of school (2011-GS-42-2965). PWID marijuana (2011-GS-42-2966), PWID methamphetamine or cocaine base (2011-GS-42-2967), trafficking in cocaine 28-100 grams and possession of a weapon during the commission of a violent crime (2011-GS-42-2969(A)), and attempted murder (2011-GS-42-2968). Petitioner was subsequently indicted in January 2012 for three additional counts of attempted murder (2012-GS-42-0064, -0065, and -0066). Tanya R. Jones, Esquire, represented Petitioner. On March 23, 2012, Petitioner proceeded to a jury trial before the Honorable J. Derham Cole. The jury found Petitioner guilty of all charges as indicted. Judge Cole sentenced Petitioner to concurrent terms of thirty years for each count of attempted murder, twenty-five years for trafficking cocaine, ten years for PWID cocaine base within a half-mile of a school, five years for PWID marijuana, and five years for possession of a weapon during the commission of a violent crime.

Petitioner filed a timely notice of appeal. John T. Mobley, Esquire represented Petitioner on appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Moore, Op. No. 2014-UP-025 (S.C. Ct. App. filed January 22, 2014). The Remittitur was returned on February 7, 2014.

Petitioner filed an application for post-conviction relief (PCR) on July 10, 2014. Following an evidentiary hearing at the Spartanburg County Courthouse on June 16, 2016, the Honorable R. Ferrell Cothran, Jr. denied relief on May 23, 2017.

STATEMENT OF FACTS

The Spartanburg Public Safety Department sent a tactical team to Petitioner's residence to execute a no-knock search warrant in connection with a narcotics investigation on January 6, 2011. App. pp. 58-60; p. 218. The tactical team arrived and set up a perimeter around the house. Part of the team went to the front door to prepare to breach the door, and another part of the team deployed a distraction device called a "flashbang" in a different part of the house. App. p. 67. The flashbang emits a very bright light and very loud noise for the purpose of distracting the inhabitants from the front door where the breach takes place. App. p. 67; p. 87. When the flashbang was deployed, the tactical team began screaming: "Police, search warrant! Police, search warrant!" and continued shouting this as they used a battering ram to breach the door and enter the home. App. p. 67; p. 88; pp. 265-66. Officer Jason Harris explained from the first hit on the door with the battering ram the officers were yelling "police, search warrant" so the occupants know why they are there. App. p. 199, lines 18-21. Officer James Bogan explained the purpose of yelling this is so suspects know it is the police and not an intruder. App. p. 187. The house was pitch-black when Officer Harris— the first to enter—walked inside. App. p. 116. Seconds later the officers were under fire. App. pp. 117-20. Officer Harris was shot first and fell to the ground. App. p. 117.

Officer Harris explained he went into the house carrying a gun with a light mounted on it. Upon entering he flashed the light on two people on the couch who put their hands up. He turned in the other direction and saw flashes and heard pops that he knew to be gunfire. He fell down with pain in his hip upon the second shot. App. pp. 200-02. Officer Shane Morrow testified the shots that hit Harris came from the back bathroom. App. p. 261. Officer Hillers returned fire as the inhabitants continued firing at the other officers who entered behind Harris. App. p. 118.

Officer Hillers testified Amanda Gentry and William Rogers were on the couch in the front room when they entered. App. p. 135. Officer Morrow saw a weapon in Rogers' hand. App. p. 262. Rogers at first did not present a threat until he pointed his weapon at the officers. Officer Jeff Cooper shot at Rogers until he dropped his weapon. App. p. 219, lines 21-24; p. 221. Officer Morrow also shot at Rogers. App. pp. 247-48. Officer Adrian Patton pulled Rogers outside and ensured an ambulance was on the way. App. pp. 269-70. Rogers ultimately died at the hospital. App. p. 361.

The officers then proceeded to the back of the house, and found Petitioner in the bathroom holding his hands out of the door in response to the officers' instructions to "Let me see your hands." App. pp. 248-49. A Hi-Point 45 caliber handgun was also found in the bathroom. App. p. 339, lines 6-17; p. 348, lines 1-12. The fired bullet surgically removed from Officer Harris matched that weapon. App. p. 207, lines 19-22; p. 261; pp. 309-10; p. 339, lines 6-15; p. 348, lines 9-14; pp. 368-69. Officer Hillers testified when he returned inside of the home to check to make sure Petitioner was not shot, Petitioner "turned, looked at him dead in [the] eye and grinned ear to ear as he was being handcuffed." App. p. 127. A subsequent search of the residence revealed additional firearms – long guns were found along with a good bit of ammunition. App. pp. 98-100. Law enforcement also recovered cocaine, crack cocaine, marijuana, and pills. App. pp. 73-79.

Dr. Brian Thurston treated Officer Harris. He explained Officer Harris was brought in as a code trauma, the highest level of trauma activation. The bullet was removed in the emergency room and handed to law enforcement. Officer Harris sustained a large caliber gunshot wound to his lower abdomen. Dr. Thurston explained that while the injuries did not turn out to be life threatening: "A matter of millimeters could certainly have made a difference with regards to life or limb in him."

App. pp. 357-58 (direct quote, p. 358, lines 22-23).

Chemist Beth Stuart testified the substances she received included 36.95 grams of cocaine and 7.17 grams of crack cocaine. App. 161-62. Amongst the pills were 10.83 grams of MDMA, also known as ecstasy. Other pills included hydrocodone, morphine, and Xanax-type anxiety medications. App. p. 164.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the

fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

The PCR court did not err in finding counsel was not ineffective for failing to object to the trial court's instruction that the jury's role is to "reach the truth in the matter" because the jury instructions as a whole conveyed the State's burden to prove guilt beyond a reasonable doubt and counsel was not required to be clairvoyant.

Petitioner argues that counsel was ineffective because he did not object to the following language during the trial court's instructions to the jury:

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

App. p. 446, lines 12-15. The PCR court did not err in denying the PCR application because (1) any case law that might actually support Petitioner's claim was decided after Petitioner's trial and counsel is not required to be clairvoyant, and (2) the instruction, to the extent it may be considered erroneous, did not prejudice Petitioner, especially considering the instructions as a whole which repetitiously and adequately informed the jury of the State's burden to prove Petitioner guilty beyond a reasonable doubt.

This language bears a degree of similarity to the language this Court warned trial judges not to use in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). Importantly, as discussed further below, Daniels was decided on October 10, 2012, and Petitioner's trial took place on March 21-23, 2012, nearly seven months before this Court decided Daniels. While the instruction in the instant case is merely similar to Daniels, the instruction is nearly identical to the instruction in Teamer v. State, 416 S.C. 171, 786 S.E.2d 109 (2016), a case Petitioner fails to cite. This Court found the PCR court erred in granting Teamer relief because Teamer's trial, like Petitioner's, occurred prior to this

Court issuing Daniels, and therefore, counsel was not required to be clairvoyant and anticipate this Court's decision in Daniels.

In Daniels, the trial court advised the jury, "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.*" Daniels, 401 S.C. at 257, 737 S.E.2d at 476 (Toal, C.J., majority(second opinion)) (emphasis in original). The trial court also told the jury, "You and I are *acting for the community* and *that is why we see to it that this trial is fair and the verdict is just.* Id. at 257-58, 737 S.E.2d at 476 (emphasis in original). Justice Pleicones, in his concurring opinion, found the issue was not preserved, but cautioned trial judges to not use the instruction. The majority opinion, which follows Justice Pleicones's concurring opinion, found the issue preserved and the instruction was erroneous, but ultimately found the error harmless, finding: "The adequacy of the trial court's entire overall instruction cured any possible constitutional deprivation. In addition, the State presented overwhelming evidence of Appellant's guilt, rendering any error in the jury instruction harmless." Id. at 257, 737 S.E.2d at 475. Chief Justice Toal further noted, "In the instant case, the trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those remarks with full and adequate instructions on reasonable doubt." Id. at 260, 737 S.E.2d at 260.

Chief Justice Toal noted the language could have distracted the jury from their core functions of evaluating the evidence and making factual determinations to decide if the State proved its case beyond a reasonable doubt. Id. However, Chief Justice Toal found the instruction as a whole properly conveyed the law to the jury and it was not reasonably likely the jury acted in contravention of the reasonable doubt standard. Id.

In concluding its findings, this Court remonstrated further the trial court's instructions suggesting the trial court and jury were "in it together" was erroneous and only served to distract the jury from its core functions, noting the importance that jurors understand the proper application of the reasonable doubt standard. Id. at 263-64, 737 S.E.2d at 479-80.

Missing from Petitioner's analysis is the case that is controlling. Teamer v. State, 416 S.C. 171, 786 S.E.2d 109 (2016). Like Petitioner's trial, Teamer was tried before Daniels was issued. Nonetheless, the PCR court granted relief on the grounds that Teamer's counsel should have objected to language in the instructions found improper in Daniels. This Court reversed the PCR court's findings because it noted Teamer's counsel was not required to be clairvoyant and anticipate this Court's decision in Daniels. Teamer, 416 S.C. at 183, 786 S.E.2d at 115. Of course, as mentioned above, the language in the instant case is identical to the trial court's instruction in Teamer.

Petitioner avoids Teamer and only hints at Daniels. Instead, Petitioner argues that "reach" language is on par with the "search" or "seek" language this Court has advised trial courts to not use in their reasonable doubt instructions, relying on State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) and State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). In Aleksey, this Court found a charge to the jury to "search for the truth" was improper, while in Needs, this Court found an instruction on circumstantial evidence improper for charging the jury to "seek some other rational or logical explanation other than the guilt of the accused." Neither case suggested that language advising the jury its objective is to "reach the truth" was improper. In this regard, therefore, trial counsel is not ineffective because this Court has not condemned an instruction using "reach" language. Therefore, the clairvoyance rule from Daniels applies in the instant case, even if Petitioner

has altered the argument slightly. Simply put, because case law at the time of trial did not put Petitioner's counsel on notice that the language was objectionable, counsel's performance did not fall below professional norms.

Of course, the jury's duty is to determine or "reach" the truth. A "fact" is defined by the American Heritage Dictionary as "4.a. Something having real, demonstrable existence. b. The quality of being real or actual." Houghton Mifflin, The American Heritage Dictionary (2d ed. 1982). "Fact-finding" is "[t]he discovery or determination of facts or accurate information." Id. Therefore, the **central function** of the trial process in both criminal and civil cases is to discover the truth. See Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); see also State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); see, e.g., Carella v. California, 491 U.S. 263, 265 (1989) (explaining that burden-relieving jury instructions "subvert the presumption of innocence accorded to accused persons and also invade **the truth-finding task assigned solely to juries** in criminal cases." (emphasis added)).

As part of the truth-seeking process, the State carries the burden to prove a criminal defendant's guilt for every element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); see also Burr v. Florida, 474 U.S. 879, 880 (1985) ("[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)). However, the jury must analyze the evidence presented by both parties to determine the facts – in other words, the truth.

In the instant case, like cases with isolated use of the prohibited "search" language in the jury instructions, the charge as a whole is a correct statement of law and did not reduce or shift the State's

burden. "An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

Regarding a jury charge on reasonable doubt, "[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 5 (1994). In a criminal case, a trial judge is only required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, and no specific language or wording is required to be used to advise the jury of that burden of proof. Id. In order to meet the requirements of the Constitution, jury instructions as a whole must only correctly convey to the jury the concept of reasonable doubt. Id.

Significantly, our state supreme court has repeatedly recognized trial judges are not required to specifically define reasonable doubt when instructing the jury in criminal cases. See State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge's refusal to define reasonable doubt during the jury instructions) *overruled on other grounds by* State v. Giles,

407 S.C. 14, 754 S.E.2d 261 (2014). Nonetheless, our state supreme court held "[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.'" (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

In the instant case, there is not a reasonable likelihood the jury misapplied the "reach the truth" language in an unconstitutional manner because of the trial court's repetitious and through instructions on the State's burden to prove its case beyond a reasonable doubt. The trial court advised the jury, "You'll decide the facts, apply the law and arrive at a fair and just decision." App. p. 446, lines 3-4. "It is your exclusive duty to determine what the facts are." App. p. 446, lines 5-6. The trial court told the jury that Petitioner's plea of not guilty "places upon the state the burden of proving the allegations that they have set forth in each of those indictments . . . ; and therefore the burden is upon the state to establish the defendant's guilt beyond a reasonable doubt before you may find him guilty of any crime that has been alleged against him." App. p. 447, line 20 – p. 448, line 4.

The trial court explained the burden of proof further, explaining the burden is never on the defendant and always upon the State to prove the State's accusation beyond a reasonable doubt. App. p. 448, lines 5-10. The trial court told the jury it was a "cardinal rule of law" that every defendant shall always be presumed innocent. App. p. 448, lines 11-15. That presumption remains with the defendant from the time of the arrest and "[t]hat presumption of innocence will be with Mr. Petitioner even as you go back into your jury room to begin with your deliberations in this case, and

that presumption of innocence will be with him in that jury room, and it'll be with him forever unless you twelve jurors unanimously determine that his guilt has been proven beyond a reasonable doubt." App. p. 448, line 15 – p. 449, line 9. "But it's only if, unless and until you are satisfied of his guilt beyond a reasonable doubt that the presumption of innocence would no longer be applicable." App. p. 449, lines 7-10.

The trial court defined reasonable doubt and admonished the jury to resolve any reasonable doubt on any factual issue in favor of the defendant. App. p. 449, line 24 – p. 450, line 2. The trial court commanded jurors that if the jury had any reasonable doubt as to any charge, the charge must be resolved in the defendant's favor. App. p. 450, lines 3-7. The trial court later advised the jury, "Your sole obligation and duty in this case is to determine whether or not the defendant has been proven guilty of some crime beyond a reasonable doubt." App. p. 457, lines 16-19.

After reading the elements of the many charges and advising the jury that the fact the defendant did not testify cannot be held against him, the trial court again reiterated the State's burden of proving guilt beyond a reasonable doubt and advised the jury a defendant "is never required to prove anything . . . ." App. p. 472, lines 15-19. **The trial court referred to the reasonable doubt standard thirty-seven times during its instructions to the jury.**

Because the jury charge as a whole was free from error and emphasized the State's burden of proving Petitioner guilty beyond a reasonable doubt, Petitioner was not prejudiced by the isolated portion of the instruction. For instance, in Needs, this Court found "seek" language in the circumstantial evidence instruction harmless where the reasonable doubt standard was referred to twenty-six times. Needs, 333 S.C. at 154-55, 508 S.E.2d at 867-68. Daniels also found harmless error in light of the instructions provided in that case. Daniels.

In the instant case, the extensive instructions on the State's burden of proof beyond a reasonable doubt ensured the jury would not reach a verdict without applying the reasonable doubt standard. Therefore, Petitioner was not prejudiced by the alleged deficiency. Strickland. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition for writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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Senior Assistant Attorney General

BY: _____
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ATTORNEYS FOR RESPONDENT

June 22, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-001360

Toby Moore, ...Petitioner,

v.

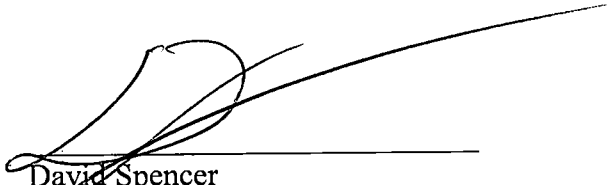
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, David Spencer, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 22nd day of June, 2018.



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JUN 22 2018
S.C. SUPREME COURT

June 22, 2018

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

Re: **Toby Moore, #350242 v. State of South Carolina**
Appellate Case No.: 2017-001360
Lower Court Case: 2014-CP-42-2768

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

David Spencer
Senior Assistant Attorney General
SC Bar #68571

DS/lm
Enclosures

cc: LaNelle C. Durant, Esquire
Trisha Allen, Director - Victim Advocacy Division