

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Jasper County
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2016-001685

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S.C. SUPREME COURT

ERIC DARIEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

- I. The PCR court properly found Petitioner failed to prove ineffective assistance of counsel where the challenged comments by law enforcement constituted neither burden-shifting nor opinion testimony by lay witnesses, where the comments were minor interrogatories in the context of an exchange in which Petitioner was allowed to present his version of events, and where thorough and proper instructions from the court cured any conceivable prejudice.
 - A. The PCR court properly denied relief where the challenged comments by law enforcement did not suggest Petitioner bore the burden of proof while merely explaining his guilt would be determined by a jury, where the jury was repeatedly instructed throughout the trial that the State bore the burden of proving Petitioner's guilt beyond a reasonable doubt, and where the recorded exchange with law enforcement allowed Petitioner the opportunity to present his version of events without the perils of testifying at trial.
 - B. The PCR court properly denied relief where the challenged comments by law enforcement did not constitute a lay opinion on facts of the case, and notwithstanding, there is no possibility of prejudice therefrom as the merely interrogatory comments pertained to facts of this case which were not in dispute, where any possible misinterpretation was cured by proper jury instruction, and where Petitioner benefited greatly from presenting his version of events.

STATEMENT OF THE CASE

In December 2008, the Jasper County Grand Jury indicted Petitioner for murder (2008-GS-27-0728). Charles B. Macloskie, Esquire (“Trial Counsel”), represented Petitioner at trial. Steven H. Knight, Esquire (“Solicitor”), prosecuted the case. Petitioner proceeded to a jury trial on February 8, 2010, before the Honorable Carmen T. Mullen. Petitioner was convicted of the lesser-included offense of voluntary manslaughter. On February 10, 2010, Judge Mullen sentenced Petitioner to imprisonment for eighteen years for voluntary manslaughter. Petitioner subsequently filed a motion to reconsider the sentence. On June 8, 2010, Judge Mullen reduced the sentence from eighteen years to fifteen years for voluntary manslaughter.

Petitioner filed a timely notice of appeal and was represented on appeal by Appellate Defender Robert M. Dudek (“Appellate Counsel”). Appellate Counsel filed a brief on Petitioner’s behalf pursuant to Anders v. California, 386 U.S. 738 (1967). In the brief, Appellate Counsel argued the trial judge erred by refusing to direct a verdict of acquittal as a matter of law based on self-defense. On May 16, 2012, the Court of Appeals dismissed Petitioner’s appeal and granted Appellate Counsel’s motion to be relieved. State v. Darien, Op. No. 2012-UP-307 (Ct. App. 2012). The remittitur was issued on June 5, 2012.

Petitioner filed an application for post-conviction relief on February 21, 2013. An evidentiary hearing into the matter was convened on March 3, 2016, before the Honorable R. Lawton McIntosh. Petitioner was present at the hearing and represented by James K. Falk, Esquire (“PCR Counsel”). Assistant Attorney General J. Rutledge Johnson, Esquire, represented Respondent. Judge McIntosh denied and dismissed Petitioner’s application by an order of dismissal signed May 17, 2016.

Petitioner filed a petition for writ of certiorari on April 24, 2017. Respondent filed its

return on September 8, 2017. By order dated March 7, 2018, this Court granted the petition and ordered further briefing. Petitioner's brief was submitted on June 6, 2018. This brief of Respondent follows.

STATEMENT OF FACTS

Petitioner killed his unarmed relative Richard “Bubba” Furman (“Victim”) by shooting him three times in the back. App. p. 135, ll. 12-15; p. 141, ll. 18-25. This is undisputed.

On September 29, 2008, Victim spotted Petitioner at the home of Victim’s sister, who was the mother of Petitioner’s child. App. p. 83, ll. 14-23; p. 107, ll. 18-21. Testimony at trial indicated there was “bad blood” between Petitioner and Victim before this incident. App. p. 84, ll. 8-12; p. 232, ll. 2-10. When Victim spotted Petitioner, he exited his girlfriend’s (“Ms. White”) car to confront Petitioner and the two began arguing. App. p. 84, ll. 2-12. Ms. White witnessed the events and testified Petitioner started the fight by swinging at Victim. App. p. 84, ll. 13-17. During the ensuing struggle, Victim was able to position himself on top of Petitioner and inflict injuries around Petitioner’s face that later required only ice and an anti-inflammatory such as Motrin. App. p. 160, l. 17 – p. 161, l. 9; p. 177, ll. 8-11. Victim walked away from the fight on his own volition. App. p. 85, ll. 1-3; p. 177, ll. 8-14.

After Victim willingly walked away from the fight, testimony at trial indicated Victim asked Ms. White to take him home to get his gun. App. p. 90, l. 2; p. 98, ll. 20-22. Petitioner fired the first shot at Victim’s back while Victim was walking away. App. p. 85, ll. 2-9; p. 98, l. 22. Victim turned around and ran to tackle Petitioner, at which point Petitioner fatally fired three rounds into Victim’s back at close range while the two struggled. App. p. 111, ll. 3-10; 135, ll. 12-15; p. 141, ll. 18-25. Victim was unarmed throughout the entire encounter. App. p. 89, ll. 3-5.

Petitioner’s Interview at Issue

After reading Petitioner his Miranda rights, Investigator Donald Hipp interviewed the Petitioner the day following the incident and recorded the interview on an audio tape. State’s Ex. #2. At the Jackson v. Denno hearing, Trial Counsel informed the court he had reviewed the tape

and there was nothing to suggest Petitioner's statement was not voluntarily and freely given. App. p. 44, ll. 14-22; p. 47, ll. 13-16. Throughout the interview, Petitioner relayed his own version of the events and claimed Victim had been threatening him for a month and he had many issues with Victim. Petitioner also claimed he only shot when Victim began "coming" at him. State's Ex. #2 at 12:47. Petitioner admitted to shooting Victim but claimed he did not shoot to kill him. State's Ex. #2 at 16:57.

While the vast majority of the interview was comprised of a substantive discussion of the facts of the case, Petitioner now challenges brief statements Investigator Hipp made to elicit a response from Petitioner in the context of the interview. While discussing the discrepancy in different versions of events with Petitioner, Investigator Hipp remarked, "I wasn't out there. I'm not the one to prove something." State's Ex. #2 at 22:40. Petitioner took issue with the fact he was charged with murder despite what he apparently felt was self-defense, to which Investigator Hipp replied, "Listen to me, you don't have the right to take someone else's life." State's Ex. #2 at 21:45. Petitioner reasserted he was acting in self-defense. Immediately following Investigator Hipp's remark that he was not out there and was not the one to prove something, Petitioner was told audibly, "That's for the court to decide. Court's got to decide whether it was self-defense or not." State's Ex. At 22:50. Again, near the conclusion of the exchange, Petitioner was again informed it was for the court, and specifically a jury, to decide whether Petitioner was guilty or not. State's Ex. #2 at 24:40. Yet again, Petitioner was informed the fact he was charged with murder did not mean he was guilty and "it was not for [the interviewing officers] to decide." State's Ex. #2 at 25:00.

Relevant PCR Hearing Testimony

Trial Counsel testified his trial strategy was to pursue a self-defense claim, but the

forensics “didn’t bear [the self-defense claim] out.” App. p. 305, ll. 4-10. While Trial Counsel testified he did not strategically abstain from moving for the recorded interview be redacted, Trial Counsel explained he arrived at a strategy of self-defense on Petitioner’s statement and what Petitioner told him. App. p. 305, ll. 6-8.

Trial Counsel recalled he received Petitioner’s statement to law enforcement in discovery and reviewed it numerous times. App. p. 304, ll. 3-10. As to the admissibility of the statement, Trial Counsel explained he did not believe there was a legal argument to keep out Petitioner’s statement, as he previously articulated at trial. App. p. 47, ll. 13-16; p. 312, ll. 9-12. Trial Counsel testified he should have asked for some of the law enforcement’s statements on the tape to be redacted. App. p. 314, ll. 1-4. As to the statement that Petitioner did not have a right to take a man’s life, and the alleged burden-shifting comment, Trial Counsel testified he did not ask for curative instructions or move for mistrial. App. p. 322, ll. 11-19.

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1, SCRPC; 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, 466 U.S. at 687.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286

S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” Id. At 117-18, 386 S.E.2d at 625.

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. Strickland, 466 U.S. 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

I. The PCR court properly found Petitioner failed to prove ineffective assistance of counsel where the challenged comments by law enforcement constituted neither burden-shifting nor opinion testimony by lay witnesses, where the comments were minor interrogatories in the context of an exchange in which Petitioner was allowed to present his version of events, and where thorough and proper instructions from the court cured any conceivable prejudice.

A. The PCR court properly denied relief where the challenged comments by law enforcement did not suggest Petitioner bore the burden of proof while merely explaining his guilt would be determined by a jury, where the jury was repeatedly instructed throughout the trial that the State bore the burden of proving Petitioner’s guilt beyond a reasonable doubt, and where the recorded exchange with law enforcement allowed Petitioner the opportunity to present his version of events without the perils of testifying at trial.

Petitioner argues Trial Counsel was ineffective for failing to object to portions of the video interview which included alleged burden-shifting comments by law enforcement. However, ample probative evidence refutes this allegation as law enforcement officers never indicated Petitioner bore the burden of proof, the comments were clearly made in the context of

asking Petitioner to clarify what happened, and the same officers explained his guilt was an issue for the jury during the interview. Furthermore, notwithstanding the lack of burden-shifting in the comments at issue, Petitioner cannot satisfy his burden of proving prejudice because the trial court repeatedly instructed the jury that the State bore the burden of proving the charges against Petitioner beyond a reasonable doubt and Petitioner enjoyed a presumption of innocence.

i. The statement by law enforcement did not shift the burden of proof.

The PCR court properly denied relief and found Trial Counsel effectively represented Petitioner regarding the statements made by law enforcement because the challenged statements never amounted to burden-shifting. App. p. 358. Due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime for which an accused is charged, while a defendant is ordinarily not required to prove anything at all. In re Winship, 397 U.S. 358, 364 (1970); see generally State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) (recognizing the burden may be on the defendant to establish a defense only in limited circumstances). In the present case, the statements Petitioner challenges do nothing to contradict this principle.

During the recorded interview, Investigator Hipp remarked, “I wasn’t out there. I’m not the one to prove something.” State’s Ex. #2 at 22:40. Shortly thereafter, as Petitioner proceeded to question why he was charged with murder, the accompanying law enforcement officer explained, “That’s what the court’s for. The court’s got to decide whether it was self-defense or not.” Petitioner continued to argue he shot Victim in self-defense to which law enforcement replied, “You’re being charged with murder, that doesn’t mean you’re guilty of murder. That’s for a court to decide whether you’re guilty or not, for the jury.” State’s Ex. #2 at 24:40. At no point in the interview did law enforcement assert Petitioner bore the burden of proving his

innocence. Moreover, at no point did law enforcement assert it was their place to judge whether Petitioner is guilty or not guilty. Throughout the interview, as Petitioner argued about why he was being charged, the law enforcement officers repeatedly explained the issue of whether he was guilty of murder would be determined by the court, specifically the jury. State's Ex. #2 at 24:40.

Investigator Hipp's statement, "I wasn't out there. I'm not the one to prove something," was clearly made in the context of the specific conversation in which Petitioner was questioning law enforcement as to why he was charged with murder. Indeed, Investigator Hipp was not there at the time of the incident, and was logically unable to answer his own questions about the incident. Furthermore, Investigator Hipp was correct in asserting it would not be his role to prove Petitioner guilty of murder. The Solicitor would be tasked with proving Petitioner's guilt beyond a reasonable doubt, obviously not Investigator Hipp. Furthermore, as the officers correctly explained to Petitioner, the question of his guilt would be determined by a jury, not the police officers. State's Ex. #2.

The innocuous statement in this case is not analogous to alleged burden-shifting statements which actually have been held by this Court to be improper. For example, this Court has repeatedly held *jury instructions* on reasonable doubt which charge the jury to "seek the truth" are disfavored for their risk of unconstitutionally shifting the burden of proof away from the State. State v. Aleksey, 343 S.C. 20, 26, 538 S.E.2d 248, 251 (2000). For example, in State v. Daniels, 401 S.C. 251, 253, 737 S.E.2d 473, 474 (2012), this Court held the jury should not have been instructed to reach a verdict that would "represent truth and justice for all parties that are involved." In Daniels, the actual jury instructions erroneously advised that a *verdict* was to represent truth and justice to all parties, as of course opposed to the jury's verdict reflecting the

State's proof of guilt beyond a reasonable doubt. In this case, law enforcement rendered no comment or speculation as to what the jury's *verdict* should be, nor did law enforcement suggest the burden of proof should be anything other than the State's burden of proving Petitioner guilty beyond a reasonable doubt. Rather, the officer merely mentioned they were not present during the incident as a rhetorical device to elicit clarifying information from Petitioner as well as address Petitioner's questions regarding the nature of his charge and repeatedly explained to Petitioner a jury would determine his guilt. State's Ex. #2. It should also be noted this Court nevertheless affirmed the convictions in both Aleksey and Daniels despite the burden-shifting concerns.

Respectfully, while this case is a far cry from cases historically held by this Court to involve burden-shifting, Petitioner's reliance on State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015), is similarly misplaced. In Brewer, a recorded police interview was played for the jury in which law enforcement repeatedly and unequivocally instructed the defendant to "prove his innocence," if he was indeed innocent. Id. at 406. As this Court summarized, law enforcement in Brewer insisted "*ad nauseum*" that the defendant prove his own innocence. Id. at 408. First, it should be noted that while this Court felt the need to "briefly comment" on this issue, this Court did not reverse Brewer's murder conviction on this ground, but rather reversed on the basis of an unrelated issue involving the improper admission of hearsay statements by law enforcement. Furthermore, the isolated statement by law enforcement in Petitioner's case falls well short of the statements *repeatedly* made in Brewer. In Brewer, law enforcement explicitly instructed the defendant to prove his own innocence on multiple occasions. Id. at 405. In this case, Investigator Hipp merely noted he was not present at the scene and not the one to prove something in the context of his conversation with Petitioner. In this case, law enforcement never instructed

Petitioner to prove his own innocence or suggested he needed to. In this case, the officers made no mention of Petitioner proving anything at all.

Notwithstanding the fact this case falls well short of the problematic language in Brewer, and the fact the issue was not dispositive in Brewer, it should be noted Brewer was decided approximately five years after Petitioner's trial was held in 2010. Our courts have repeatedly refused to hold trial counsel to a standard of clairvoyance which would require them to anticipate future decisions by the Court. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding "the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . ."); Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Approximately five years after Petitioner's trial, this Court in Brewer commented, "Law enforcement's *ad nauseam* insistence that Brewer prove his innocence has *no* place before the jury." Brewer, 411 S.C. at 408 (emphasis in original). Therefore, notwithstanding the fact the facts of this case fall well short of the facts of Brewer, Trial Counsel also cannot be held ineffective for failing to object pursuant to the guidance of an opinion which would not be rendered until approximately five years later. Respectfully, Petitioner primarily relies on guidance from an opinion not in existence at the time of Petitioner's trial, and from a case in which law enforcement insisted "*ad nauseum*" that the

defendant “prove his own innocence” by turning in his handgun, where Petitioner’s case included only a rhetorical explanation by the investigator that he was not present at the incident and therefore did not have all the facts.

ii. Trial Counsel strategically used the recorded interview to present Petitioner’s version of the facts to the jury while Petitioner did not have to testify at trial.

Trial Counsel’s performance regarding the statement at issue is all the more reasonable as the interview allowed Petitioner to effectively relay his version of the events to the jury without requiring Petitioner to take the stand. “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). In his brief, Petitioner commented, “Importantly, counsel ‘stated he did not have a trial strategy as to the statements.’” Br. P. 10. However, Trial Counsel did testify the trial strategy in this case was based on self-defense, and the recorded interview fit squarely into the strategy of self-defense and Trial Counsel repeatedly referenced the interview in his closing argument. App. p. 305, ll. 4-10. The recorded interview afforded Petitioner the valuable opportunity to present his version of the facts, and specifically, make his argument the shooting was in self-defense. In the interview, Petitioner recounted a “tussle” ensuing after Victim hit him. State’s Ex. #2 at 08:30. From there, he claimed Victim proceeded to punch him in the head repeatedly while threatening his life. State’s Ex. #2 at 08:40. Notably, Petitioner then claimed to have heard Victim remark he was “going to the car to get his gun,” and then felt it was time to protect himself. State’s Ex. #2 at 09:30. After Victim had returned to said car, Petitioner claimed, Victim began rushing Petitioner and grabbed him at which point Petitioner shot at Victim to protect himself. State’s Ex. #2 at 09:47. Throughout the rest of the interview, Petitioner remained

adamant he only shot Victim in self-defense. In fact, Petitioner told law enforcement he was not shooting to *kill* Victim and claimed, “I would give my life to get his back.” State’s Ex. #2 at 16:57; 19:03. Petitioner therefore set forth his self-defense argument by way of the video without having to subject himself to cross-examination or impeachment on the witness stand.

Other instances in record raise the inference Trial Counsel’s decisions regarding the recorded interview actually were motivated by trial strategy. While Petitioner noted Trial Counsel testified at the PCR hearing he did not have a trial strategy regarding the interview, it is important to consider the PCR hearing was held six years after Petitioner’s trial. The passage of time can often wear on the memories of well-reasoned decisions made in the “heat of battle” of avenues not pursued, objections withheld, or evidence not presented. Here, the record suffices to reveal Trial Counsel’s strategic decisions where Trial Counsel did not articulate them six years after the trial. See Wood v. Allen, 558 U.S. 290 (2010) (affirming state PCR court’s finding that counsel made a strategic decision not to inquire further into a the petitioner’s report about his mental deficiencies where the record supported that finding, despite Counsel not articulating the strategy). The record reveals Trial Counsel strategically used the recorded to present Petitioner’s side of the story and repeatedly made use of the interview in his closing argument. For example, when explaining the element of malice to the jury, Trial Counsel told the jury:

Well, remember when you hear that charge and when you deliberate on whether or not there’s malice in this case on the part of [Petitioner] what he told Detective Donald Hipp when he was interviewing him. And he gave a thorough interview, didn’t he? One of the things he said: “I didn’t intend to kill nobody.” App. p. 208, ll. 13-18.

“I didn’t intend to kill nobody.” Another thing that he mentioned in the interview – and I know that the interview was kind of hard to understand because Eric talks so fast, but the fact of the matter is I heard him say distinctly: “I would give my life to get him back.” Now, tell me: Is that an indication that somebody’s heart is filled

with malice? App. p. 209, ll. 5-10.

Furthermore, Trial Counsel later referenced Petitioner's recorded interview to support his argument Petitioner thought Victim was armed and dangerous, and even suggested the jury listen to the interview again, clearly emphasizing the interview as part of his trial strategy:

Do you remember [Petitioner's] testimony when he talked – not his testimony – the statement when he gave his statement voluntarily to Donald Hipp? Do you remember that? He didn't know whether he had a gun or not ... He heard the threat, "Get my gun," coming out of the mouth of [Victim] and his thought was: I thought this man was going to kill me now." ... *If you don't remember it that way and have any doubt about it, let's play it back for you.*" App. p. 213, ll. 17-25 (emphasis added).

Clearly, Petitioner's exchange with law enforcement in the interview formed a substantial basis of Petitioner's defense at trial, although the recollection of this calculation may have been blurred by the years between the trial and Petitioner's PCR hearing. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight..." Strickland, 466 U.S. at 689. Furthermore, as previously noted, there is no authority to support the allegation that the investigator's isolated statement in this case, which was almost immediately followed by explanation Petitioner's guilt would be determined by a jury and made in the context of responding to Petitioner's questions, could have shifted the burden of proof away from the State. Accordingly, the PCR Court properly found Trial Counsel effectively represented Petitioner regarding the statement at issue, and this Court should affirm the PCR court's dismissal.

iii. Petitioner was not prejudiced by the statement because the jury was properly instructed of the State's burden of proof throughout the trial.

Notwithstanding the fact the statement at issue did not shift the burden of proof away from the State, the PCR court also properly denied relief because this allegation is decisively

devoid of prejudice. First, there is no reasonable probability the jury was misled regarding the burden of proof in this case when the trial judge's instructions as well as the arguments by attorneys repeatedly instructed the jury on the State's burden of proof beyond a reasonable doubt. Clearly, the jury applied the instructed law and found the State failed to prove murder in this case. Any risk of burden-shifting as a result of the comment at issue was cured by these repeated correct and adequate statements of law. Even when unconstitutional burden-shifting does occur, the error may still be harmless beyond a reasonable doubt. Daniels, 401 S.C. at 260. In cases where burden-shifting has actually been found, this Court has repeatedly found the burden-shifting was cured by adequate jury instructions which properly convey the law. In Daniels, this Court found an a jury charge instructing the jury to render a verdict "fair and just to all parties," but nevertheless held the error was harmless in light of the full and adequate instructions on the State's burden of proof beyond a reasonable doubt. 401 S.C. at 260. Even more recently in State v. Beaty, 423 S.C. 26, 32, 913 S.E.2d 502, 505 (2018), this Court found a trial judge's opening remarks improper where the judge advised the jury the trial was a "search for the truth to make sure justice is done." Again, this Court nevertheless held review of the entirety of the trial judge's opening comments as well as the rest of the trial record revealed there was no prejudice from the potentially burden-shifting comments. Id. at 34. It should also be noted cases such as Beaty and Daniels have found no prejudice when a judge problematically instructed the jury regarding burdens of proof, whereas in this case the comment at issue only came from an interviewing member of law enforcement.

In this case, the trial judge correctly informed the jury during her opening instructions that because Petitioner has pled not guilty, the State bore the burden of proving each of their allegations beyond a reasonable doubt, and it is up to the jury to determine whether the State has

met that burden. App. p. 54, ll. 5-9. In fact, the trial judge also informed the jury in her opening instructions that the law given to them by the court was the only law they were allowed to consider. App. p. 55, ll. 1-3. Shortly thereafter, Trial Counsel further noted in his opening argument Petitioner did not have to prove anything, the State bore the burden of proof beyond a reasonable doubt, and the State must prove beyond a reasonable doubt this was not a case of self-defense. App. p. 63, ll. 14-18. Later, Trial Counsel reasserted in his closing argument Petitioner was not required to prove anything, including self-defense, and the State had the burden of proving this was not a case of self-defense beyond a reasonable doubt. App. p. 209, l. 25 – p. 210, l. 4. Trial Counsel continued to stress the State’s burden of proof beyond a reasonable doubt throughout his closing, and even ended his closing argument by advising the jury the law requires them to find Petitioner not guilty if they had a reasonable doubt. App. p. 214, ll. 4-23; p. 215, ll. 9-18. Finally, the trial judge’s jury charge instructed the jury the burden was on the State to prove Petitioner’s guilt beyond a reasonable doubt, and an individual charged with a crime in South Carolina is never required to prove themselves innocent. App. p. 222, ll. 5-9. The trial judge continued to instruct the jury that no matter how serious a charge, a defendant is always presumed innocent until their guilt is proven beyond a reasonable doubt. App. p. 222, ll. 10-19. Furthermore, the trial judge explained the presumption of innocence in terms of a “robe of righteousness” that remains with a defendant until their guilt is proven beyond a reasonable doubt. App. p. 222, l. 20 – p. 223, l. 4. The trial judge also fully explained the concept of reasonable doubt. App. p. 223, ll. 5-14. Even further, the trial judge stressed to the jury the State’s burden of proof is even higher in a criminal case than that of a plaintiff in a civil case. App. p. 223, ll. 15-22. The trial judge reiterated the jury must apply the law as she provided, and the jury was required to abandon any other idea of what the law is or ought to be. App. p. 224, l.

18 – p. 225, l. 1. Yet again, the trial judge reemphasized the State’s burden of proof beyond a reasonable doubt as to every charge. App. p. 227, l. 23 – p. 228, l. 4; p. 229, ll. 4-8. Finally, the trial judge charged Petitioner was not required to prove self-defense, but rather the State was required to disprove self-defense beyond a reasonable doubt. App. p. 232, l. 18 – p. 233, l. 3.

The jury therefore was thoroughly advised of the State’s burden of proving Petitioner’s charges beyond a reasonable doubt. Indeed, they were specifically instructed by the trial judge to accept the law as she provided it to them and to disregard their own ideas of the law. Certainly, this served to override any incorrect idea regarding the burden of proof the jury would have somehow gleaned from the lone statement by the interviewing law enforcement officer. It is not conceivable the jury somehow interpreted the officer’s statement, which makes no reference to Petitioner proving anything, to bind them to an erroneous legal standard rather than the correct legal standard repeatedly enumerated by the very judge presiding over the trial.

iv. Petitioner was not prejudiced by the admission of the interview or statement, but rather benefited from having his version of events presented to the jury at length which well overshadowed the short comment by Investigator Hipp in the context of the recording.

As previously noted regarding Trial Counsel’s strategic use of the contents of the admitted interview, Petitioner benefited greatly from the interview being played for the jury. Notwithstanding the fact the comment at issue did not constitute burden-shifting, Petitioner’s benefit of having his version of events presented to the jury without requiring Petitioner to testify far outweighed any conceivable detriment from the comment by law enforcement. “The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if he chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions.” Brown v. State,

340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). In this case, Petitioner received the reward of telling his story, which supported the enumerated trial strategy of self-defense, without the risks associated with taking the stand.

The importance of the views expressed by Petitioner in the recorded interview is apparent. Again, Petitioner described in the interview a “tussle” ensuing after Victim hit him. Petitioner claimed Victim then proceeded to repeatedly punch him in the head while threatening his life before ceasing to, as Petitioner allegedly believed, get his gun from the car. State’s Ex. #2 at 08:30. According to Petitioner, he felt it was time to protect himself when he heard Victim remark he was going to the car to get his gun. State’s Ex. #2 at 9:30. After Victim had returned to said car, Petitioner claimed, Victim began rushing Petitioner and grabbed him at which point Petitioner shot at Victim to protect himself. State’s Ex. #2 at 09:47. Throughout the rest of the interview, Petitioner remained adamant he only shot Victim in self-defense. In fact, Petitioner told law enforcement he was not shooting to *kill* Victim and claimed, “I would give my life to get his back.” State’s Ex. #2 at 16:57; 19:03. Petitioner even asserted in the interview if he would not have shot Victim, it would have been Victim speaking with law enforcement while Petitioner would have been dead. State’s Ex. #2 at 20:30.

Trial Counsel was able to reference Petitioner’s interview extensively in his closing argument to argue Petitioner acted in self-defense as well as without malice:

Well, remember when you hear that charge and when you deliberate on whether or not there’s malice in this case on the part of [Petitioner] what he told Detective Donald Hipp when he was interviewing him. And he gave a thorough interview, didn’t he? One of the things he said: “I didn’t intend to kill nobody.” App. p. 208, ll. 13-18.

“I didn’t intend to kill nobody.” Another thing that he mentioned in the interview – and I know that the interview was kind of hard to understand because Eric talks so fast, but the fact of the matter is I

heard him say distinctly: "I would give my life to get him back." Now, tell me: Is that an indication that somebody's heart is filled with malice? App. p. 209, ll. 5-10.

Do you remember [Petitioner's] testimony when he talked – not his testimony – the statement when he gave his statement voluntarily to Donald Hipp? Do you remember that? He didn't know whether he had a gun or not ... *He heard the threat, "Get my gun," coming out of the mouth of [Victim] and his thought was: I thought this man was going to kill me now.* ... If you don't remember it that way and have any doubt about it, let's play it back for you." App. p. 213, ll. 17-25 (emphasis added).

It is clear Petitioner's enumerated trial-strategy of self-defense was primarily supported by the interview. Petitioner suffered no prejudice but enjoyed great benefit from Trial Counsel's representation regarding the interview. Not only was Petitioner able to present an argument of self-defense without being impeached on the witness stand, but Petitioner was also able to present evidence he acted without malice, and was subsequently acquitted of murder. App. p. 241, l. 14.

v. Petitioner's acquittal for murder demonstrates the benefit he received from the recorded conversation being played before the jury.

Trial Counsel's aforementioned closing argument emphasized the State's burden of proving malice in order to convict Petitioner of murder. App. p. 208, ll. 5-18; p. 209, ll. 5-10. The combination of Petitioner's statements in the interview and Trial Counsel's references to the statements apparently won favor with the jury as Petitioner was acquitted of murder and convicted of the lesser included offense of voluntary manslaughter. This is despite the fact eyewitness testimony at trial indicated Petitioner started the fight. App. p. 84, ll. 13-17. This is despite the undisputed fact Petitioner shot Victim three times in the back. App. p. 135, ll. 12-15; p. 141, ll. 18-25. This is despite the fact, contrary to Petitioner's version of events presented in the interview, Petitioner's own cousin testified Victim did not rush Petitioner until Petitioner had

already shot at him and missed. App. p. 178, ll. 16-22.

It is easily conceivable that absent the challenged interview and the information elicited by the comments Petitioner now challenges, the jury would have convicted Petitioner of murder rather than voluntary manslaughter. Petitioner would have this Court find a jury somehow read so far into an isolated statement made by law enforcement in the context of an over twenty minute interview that they then applied an incorrect burden of proof despite being repeatedly instructed the trial judge and attorneys of the State's burden of proof beyond a reasonable doubt. Petitioner would also have this Court ignore the benefit Petitioner received from having his version of events, to include self-defense, presented to the jury without requiring him to testify. There is no reasonable probability the outcome of Petitioner's trial would have been preferable for Petitioner had the jury not heard the recorded interview. Accordingly, the PCR court's proper denial of relief should be affirmed.

B. The PCR Court properly denied relief where the challenged comments by law enforcement did not constitute a lay opinion on facts of the case and, notwithstanding, there is no possibility of prejudice therefrom as the interrogatory comments pertained to facts of this case which were not in dispute, any possible misinterpretation was cured by proper jury instruction, and Petitioner benefited greatly from presenting his version of events.

Petitioner, after receiving great benefit from the information elicited by law enforcement's comments, now alleges Trial Counsel should have challenged three comments made during the recorded interview as improper opinion testimony by lay witnesses. Again, the PCR court properly denied relief and found Petitioner failed to satisfy his burden of proving ineffective assistance of counsel regarding this allegation. First, Trial Counsel was not deficient for failing to challenge the comments as they did not constitute an inappropriate lay opinion on the facts. Notwithstanding, any inappropriate comment on the facts was cured by the trial judge's

repeated instruction to the jury they were to determine the facts and the State bore the burden of disproving self-defense beyond a reasonable doubt. Moreover, the comments by law enforcement were cumulative and concerned undisputed facts of this case. Accordingly, this Court should affirm the PCR court's proper denial of relief.

Respectfully, the actual comments at issue made by law enforcement appear to be misconstrued by Petitioner or misstated in Petitioner's brief. During the twenty-eight minute interview, Petitioner began questioning law enforcement as to why he was being charged with murder after the shooting, to which Investigator Hipp explained, "You don't have the right to take somebody else's life." State's Ex. #2 at 21:40. Also, in the context of the conversation regarding Petitioner's version of events, Investigator Hipp questioned Petitioner, "How is it [Victim] sustained gunshots in the back and not the front?" State's Ex. #2 at 11:45. Here, the alleged lay opinion testimony was actually a genuine question asked of Petitioner when law enforcement was conversing with Petitioner and allowing Petitioner to tell his story. This is slightly different from Petitioner's brief which cites PCR Counsel's characterization of the comments at the PCR hearing rather than the actual comments made in the interview, as Petitioner's brief alleges Investigator Hipp stated, "You shot him in the back." BOR p. 14. Furthermore, while Petitioner's brief cites to PCR Counsel's argument at the PCR hearing that law enforcement implied Petitioner was too close to Victim for this to be self-defense, Respondent finds no such example in the actual recorded interview.

i. The comments did not constitute improper opinion testimony by lay witnesses.

Notwithstanding, law enforcement's question as to how Victim sustained gunshots in the back and explanation to Petitioner that he does not have the right to take someone's life did not constitute improper lay opinion testimony. A non-expert witness may only offer opinion

testimony in 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.

First, the comments at issue were not testimony at all, but rather part of the investigatory conversation in the recorded interview. Investigator Hipp did not make these comments from the witness stand or to prove any facts, rather during the interview in which he was attempting to elicit Petitioner's version of events. Furthermore, the comments do not constitute opinions. Clearly, "You don't have the right to take somebody else's life," was not stated as an opinion, but rather a broad, generalized answer to Petitioner's continued questioning as to why he would be charged with murder as a result of the shooting. Of course, this comment was also qualified by law enforcement's assurance, "You're being charged with murder. That doesn't mean you're guilty of murder. That's for the court to decide, the jury." State's Ex. #2 at 24:40. Regarding Investigator Hipp's question as to how Victim sustained gunshots in the back, this was a genuine interrogatory. Investigator Hipp was not offering his opinion regarding how Victim got shot in the back or whether Victim got shot in the back, as that fact is undisputed, but rather allowing Petitioner to present his version of events to law enforcement. State's Ex. #2 at 11:45.

ii. Petitioner's reliance on Brewer is misplaced.

Respectfully, Petitioner's reliance on State v. Brewer to demonstrate ineffective assistance of counsel is misplaced, as neither the issue nor facts, which were actually in dispute in Brewer, are not analogous to the present case and, notwithstanding, the opinion in Brewer was issued five years after Petitioner's trial. The issue considered in Brewer was whether the trial

court erred in admitting *hearsay* statements made by law enforcement during their interrogation of the defendant. Id. at 406. Most notably, law enforcement made the statement to Brewer that many witnesses had seen him shoot the victim, which was also untrue as witnesses only saw Brewer shoot one of the victims. Id. at 405. Therefore, not only did the jury in Brewer hear the *hearsay* statements indicating witnesses identified Petitioner as a shooter of the both victims, but also the inadmissible statement was an outright falsity and misrepresentation of the evidence in the case. By contrast, in Petitioner's case, no inadmissible hearsay was introduced by way of the video. More importantly, law enforcement made no misleading comments on the facts in Petitioner's case, and the comments now challenged merely pertained to facts which were never in dispute at trial. Lieutenant Hipp merely asked Petitioner how Victim was shot in the back, and the fact Victim was shot in the back was never in dispute at trial. Petitioner himself admitted Victim was shot in the back. The autopsy clearly showed Victim was shot in the back. App. p. 135, ll. 12-15; p. 141, ll. 18-25. As previously noted, this question gave Petitioner the opportunity to explain his version of the events, that he shot Victim in the back when Victim was rushing at him and bringing him to the ground. Lieutenant Hipp never offered an opinion on how Victim came to be shot in the back. At no time in the interview did law enforcement comment on facts of this case which were ever in dispute, nor did law enforcement misrepresent the evidence in the case or introduce hearsay statements before the jury.

Notwithstanding the facts of this case being a far cry from those in Brewer, the opinion from Brewer was not in existence during Petitioner's trial. Trial Counsel therefore could not have relied on any guidance from Brewer. "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Trial Counsel was not

deficient for failing to use Brewer, not yet in existence, to object to the statements at issue in this case which were neither hearsay nor a lay opinion on facts in dispute.

iii. Petitioner was not prejudiced because notwithstanding there was no comment on facts in dispute, but also any potential to mislead was cured by jury instructions.

As previously noted, Petitioner cannot establish prejudice to satisfy his burden of proving the second prong of Strickland because law enforcement made absolutely no comment on facts in dispute in this case. Without the comments by law enforcement, the jury would still have no reason to doubt the uncontroverted fact Petitioner shot Victim three times in the back. Nothing the jury heard would have misled them regarding the facts and circumstances of this case, and therefore Petitioner has failed to prove prejudice from what he alleges to be inadmissible opinion testimony by lay witnesses.

Notwithstanding, any imaginable prejudice was cured by the trial judge's thorough and proper jury instruction to include the jury's province as fact-finders and the State's burden of proving Petitioner's guilt beyond a reasonable doubt as well as disproving self-defense beyond a reasonable doubt. See State v. Shuler, 353 S.C. 176, 187-88, 577 S.E.2d 438, 444 (2003) (Improper comments on the law can be cured by a trial court's instruction to the jury correcting potential misinterpretations by the jury); See also State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978) (possibility jury might have interpreted solicitor's comment as indicating State's evidence was conclusive proof of defendant's guilt was negated by charge). In the present case, the trial judge repeatedly instructed the jury on their role as the *sole* judge of facts in this case and it was their place to determine what inferences should be drawn. App. p. 54, ll. 10-19. In her closing jury instruction, the trial judge properly reemphasized the jury's role as the sole judges of fact in criminal cases. App. p. 225, ll. 2-13. Furthermore, the trial judge properly instructed the jury

Petitioner bore no burden of proving self-defense and it was the jury's responsibility to determine whether the State disproved self-defense beyond a reasonable doubt. App. p. 232, l. 18 – p. 233, l. 3. This corroborated Trial Counsel's earlier statements to the jury that Petitioner did not have to prove self-defense or anything at all, and the State had the burden of Petitioner did not act in self-defense beyond a reasonable doubt. App. p. 209, l. 25 – p. 210, l. 4.

iv. The challenged comments allowed Petitioner to present his theory of events.

Petitioner challenges the interrogatory comments made by law enforcement which actually framed Petitioner's argument and allowed Petitioner the opportunity to present his version of events supporting his defense theory to the jury without testifying at trial. By way of the conversation in which law enforcement questioned him as to how Victim was shot in the back and noted that one does not have the right to take another person's life, Petitioner was able to tell his story that he only shot Victim in self-defense and without malice. As previously noted, Petitioner's story to law enforcement in the interview included Victim repeatedly punching him in the head while threatening Petitioner's life, as well as Petitioner's belief Victim had gone to get a gun. Petitioner repeatedly asserted he only shot Victim in self-defense. In fact, Petitioner told law enforcement he was not shooting to *kill* Victim and claimed, "I would give my life to get his back." State's Ex. #2 at 16:57; 19:03. Petitioner even asserted in the interview if he would not have shot Victim, it would have been Victim speaking with law enforcement while Petitioner would have been dead. State's Ex. #2 at 20:30. Again, this formed the basis of Petitioner's self-defense strategy as Trial Counsel was able to argue in favor of self-defense and against the presence of malice in closing based on Petitioner's responses to law enforcement's questioning. App. p. 208, ll. 13-18; p. 209, ll. 5-10; p. 213, ll. 17-25. Of course, Trial Counsel's use of this material was demonstrably effective as the jury acquitted Petitioner of murder and only

convicted him of the lesser included offense of voluntary manslaughter.

Therefore, given the lack of actual lay opinion testimony in this case, the uncontroverted nature of the facts, and the trial judge's thorough instructions to the jury, there is no reasonable probability the comments at issue effected the outcome of the trial. Furthermore, the comments now challenged by Petitioner were part of an exchange affording Petitioner an invaluable opportunity to present his version of events to a jury without subjecting himself to the perils of testifying. The statements more likely benefited Petitioner than prejudiced him as he was acquitted of his murder charge. Accordingly, Petitioner has failed to satisfy his burden of proving he was prejudiced by Trial Counsel's performance. This Court should therefore affirm the PCR court's proper dismissal.

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By: 
ATTORNEYS FOR RESPONDENT

November 5, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Jasper County

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2016-001685

ERIC DARIEN,

RECEIVED

NOV 05 2018

S.C. SUPREME COURT

Petitioner,

v.

STATE OF SOUTH CAROLINA,

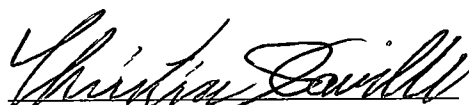
Respondent

CERTIFICATE OF SERVICE

I, Christian Saville, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Susan B. Hackett, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589

I further certify that all parties required by Rule to be served have been served. This 5th day of November, 2018.



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ATTORNEY GENERAL

November 5, 2018

RECEIVED
NOV 05 2018
S.C. SUPREME COURT

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

Re: Eric Darien v. State of South Carolina
Appellate Case No. 2016-001685
Lower Court Case No. 2013-CP-27-00111

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar #103272

CS/cc

cc: Susan B. Hackett, Esquire
Victim Advocacy Division (without enclosure)