

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**ORIGINAL**

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Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

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KEENAN COAKLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002156

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PETITION FOR WRIT OF CERTIORARI

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### **ISSUES PRESENTED**

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the judge defined reasonable doubt to the jury as, “. . . a doubt that would make an honest, sincere, conscientious juror, who’s searching for the truth in the case to hesitate to act or take some action.”?
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the judge’s circumstantial evidence charge?
3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to request an adequate jury charge with regard to multiple defendants and failing to object to the inadequate charge given?

## STATEMENT

In April of 2011, the Charleston County Grand Jury indicted Petitioner, Keenan Coakley, for armed robbery, indictment #2011-GS-10-2078. On December 2, 2013, Petitioner with two co-defendants, Jarrett Graddick and Kevin Smalls, proceeded to jury trial before the Honorable R. Markley Dennis, Jr. The jury returned verdicts of guilty as to Petitioner and co-defendant, Graddick. Co-defendant Smalls was allowed to enter a guilty plea to accessory after the fact. Judge Dennis sentenced Petitioner to sixteen (16) years in prison. The judge sentenced Graddick to twenty (20) years in prison. The judge sentenced Smalls to sixty (60) days to be followed by five (5) years of probation. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Coakley, Op. No. 2015-UP-412 (S.C. Ct.App. Filed August 12, 2015).

On November 2, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on June 9, 2016. Petitioner, through counsel, filed an amendment to the PCR application on July 18, 2017. On October 2, 2018, an evidentiary hearing was held before the Honorable Michael G. Nettles. James K. Falk represented Petitioner at the PCR hearing. Kelly Oppenheimer represented the State. In a written order signed November 19, 2018, Judge Nettles denied relief and dismissed the application. A timely notice of intent to appeal was served on December 6, 2018. This appeal follows.

## ARGUMENTS

- 1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the judge defined reasonable doubt to the jury as, “. . . a doubt that would make an honest, sincere, conscientious juror, who’s searching for the truth in the case to hesitate to act or take some action.”**

During the jury instructions when defining reasonable doubt the trial judge told the jury, “What is reasonable doubt? A reasonable doubt is a doubt that would make an honest, sincere, conscientious juror, who’s searching for the truth in the case to hesitate to act or take action. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant’s guilt.” (App. p. 862, lines 5-11). Trial counsel failed to object to the charge. In the amendment to the PCR application Petitioner alleged that trial counsel provided ineffective assistance of counsel by, “Failing to object to the Court’s use of the phrase ‘searching for the truth’ in its charge on reasonable doubt. (TR. 862 l. 8).” (App. p. 1016).

During the PCR hearing when asked about the failure to object to the instruction as burden shifting, trial counsel answered, “Well, frankly, I think, I, I couldn’t agree with your characterization. I still – I don’t think it shifted any burden, and I did not object to it.” (App. p. 1-26, lines 16-18). In the order of dismissal the PCR judge distinguished the present case from State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), writing:

Here, unlike in Daniels, the trial court never indicated to the jury they had an obligation to seek the truth<sup>1</sup>. Indeed, the trial court never instructed the jury Applicant had to prove anything. Rather, the trial court merely stated: “A reasonable doubt is a doubt that would make an honest, sincere conscientious juror, who’s searching for the truth in the case to hesitate to act or take some action.” Tr. 862. Such an instruction does not indicate there is an obligation to seek the truth. Accordingly, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

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<sup>1</sup> As discussed below, the Daniels case involved an instruction to the jury that “whatever verdict you reach will represent truth and justice for all the parties that are involved in this case.”

(App. p. 1068). The PCR judge erred. The appellate courts have strongly indicated that the “seek the truth” language should be removed from jury charges. The instruction in the present case that defined reasonable doubt using the “seek the truth language” unconstitutionally shifted the burden of proof to the defendant. Trial counsel was ineffective in failing to object to the charge.

In State v. Daniels, 401 S.C. 251, 257, 737 S.E.2d 473, 476 (2012), the judge instructed the jury, “Your verdict in this case is not to be based on sympathy, compassion, prejudice or some other emotion or other consideration that is not found in the evidence. 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.* (emphasis added).” The judge additionally instructed the jury, “You are not called to serve as jurors very often. And the proper performance of the duty requires each of you to reach the hithe [sic] of freeing your mind of all improper influences. 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.*” Daniels, 401 S.C. at 257–58, 737 S.E.2d at 476.

In regard to the “fair and just” language” the Court wrote:

Although the issue is not preserved, we instruct 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. Such 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. Moreover, 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. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

Daniels, 401 S.C. at 256, 737 S.E.2d at 475.

In her concurring opinion former Chief Justice Toal wrote:

As a final note, although no constitutional error occurred, the 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. 50A C.J.S. *Juries* § 1 (2004). The very term “jury” connotes a deliberative body of persons. *Id.* 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. *Id.* Judges § 7 (2004). 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 of the 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. Thus, I join the Justice Pleicones’s admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

Daniels, 401 S.C. at 263–64, 737 S.E.2d at 479–80. The “fair and just” language discussed in Daniels shares the same constitutional concerns as the “seek the truth” language in the present case.

The instruction in the present case is almost identical to the instruction given in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). In Needs the judge, while instructing the jury on circumstantial evidence, told the jury, “[a] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror *in search of the truth* in the case hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable

person would not hesitate to rely and to act upon it in the most important of his or her own affairs.” 333 S.C. at 152, 508 S.E.2d at 866. While finding the error harmless, the Court wrote:

We again take this opportunity to strongly urge the trial courts to avoid using any “seek” language, or any of the other offending terms described above, when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant. We have identified two appropriate ways to define reasonable doubt and two appropriate ways to charge circumstantial evidence. Trial courts should rarely find it necessary to deviate from those approved charges.

Needs, 333 S.C. at 155–56, 508 S.E.2d at 867–68 (n. #12, #13 omitted).

In State v. Aleksey, 343 S.C. 20, 26 538 S.E.2d 248, 251 (2000), the judge, while instructing the jury on determining the credibility of witnesses, told the jury:

Obviously you do not determine the truth or falsity of a matter by counting up the number of witnesses who may have testified on one side or the other.

Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is to seek the truth, to seek the truth regardless of from what source that truth may be derived.

Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

As in Needs, the Court in Aleksey warned about instructing the jury to seek the truth writing, “Jury instructions on reasonable doubt which charge the jury to “seek the truth” are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to a defendant.’ State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998).” Aleksey, 343 S.C. at 26–27, 538 S.E.2d at 251. The Court in Aleksey found the “seek” language did not warrant reversal because it did not appear in the reasonable doubt or circumstantial evidence charge. “While we have urged trial courts to avoid using any “seek” language when charging jurors on either reasonable doubt or circumstantial evidence (see State v. Needs, 333 S.C. 134,

155, 508 S.E.2d 857, 867–68 (1998)), the “seek” language here did not appear in either the reasonable doubt or circumstantial evidence charges, but in the instructions on juror credibility. Both the reasonable doubt and circumstantial evidence charges were complete and proper.” Aleksey, 343 S.C. at 27, 538 S.E.2d at 251–52.

At the time of Petitioner’s trial in December of 2013, the trial judges had been instructed to avoid the “seek the truth” language in jury charges. Despite the warnings in Daniels, Needs and Aleksey, the trial judge in the present case used the disfavored “seek the truth” language. The “seek the truth” language in the present case appeared during the charge on reasonable doubt not during the charge on witness credibility as in Aleksey. Trial counsel was ineffective for failing to object to the charge.

After Petitioner’s trial in 2013, the South Carolina Appellate Courts continued to instruct trial judges to avoid the “seek the truth” language in jury charges. In State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), the South Carolina Supreme Court wrote:

However, we agree with Appellant 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, or to find the true facts, or to render a just verdict. These phrases could 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 the jury believes best serves its perception of justice. “We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt.

(n.#2 omitted) *cf.* State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties). In Beaty the Court found error in the Judge’s preliminary comments to the jury that a trial is a search for the truth as well as comments about “find true facts” and a “true and “just verdict.”

The Court, however, found the error did not warrant reversal because, “the remarks were not linked to either the reasonable doubt or circumstantial evidence charge as was condemned in Aleksey.” Beaty, 423 S.C. at 34, 813 S.E.2d at 506. In contrast, in the present case the charge to the jury to determine the true facts was not only linked to but part of the reasonable doubt charge.

In State v. Patterson, 425 S.C. 500, 511, 823 S.E.2d 217, 223–24 (Ct. App. 2019), the South Carolina Court of Appeals wrote:

Our supreme court has consistently cautioned against using language that suggests the object of a trial is to find “the truth.” See State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (“These phrases could 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 the jury believes best serves its perception of justice.”); State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding while it was improper for the trial court to charge the jury “that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties,” the issue was unpreserved); State v. Aleksey, 343 S.C. 20, 28 n.2, 538 S.E.2d 248, 252 n.2 (2000) (“Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of ‘the truth’ in jury charges is unconstitutional.”); State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998) (noting jury instructions on reasonable doubt which charge the jury to “seek the truth” are disfavored because they “[run] the risk of unconstitutionally shifting the burden of proof to a defendant”). Accordingly, we believe the trial court erred in making such statements in its comments to the jury, and we take the opportunity to reiterate our supreme court’s instructions that trial courts should “avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant’s guilt beyond a reasonable doubt.” Beaty, 423 S.C. at 34, 813 S.E.2d at 506.

In Patterson this Court found that the trial judge’s opening remarks to the jury that a trial is a search for the truth were error but found that the error did not warrant reversal because the improper comments came at the beginning of trial “rather than during the charge on the State’s burden of proof at the end, which, we believe, is when such a statement would have the most prejudicial effect. See Daniels, 401 S.C. at 256, 737 S.E.2d at 475 (‘Such 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.')" Patterson, 425 S.C. at 512, 823 S.E.2d at 224. In contrast, in the present case the improper comments were made during the charge on the State's burden of proof at the end of the trial where the statement had the most prejudicial effect.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Counsel was deficient in failing to object to the jury charge using the repeatedly disfavored "seek the truth" language in defining reasonable doubt. Petitioner was prejudiced by the deficient performance. Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. In re Winship,

397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). The Due Process Clause of the Fourteenth Amendment “safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.” Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). The charge to the jury “to determine the true facts” unconstitutionally diluted the State’s burden of proof beyond a reasonable doubt. A constitutionally deficient reasonable doubt instruction cannot be harmless error. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993). The charge in the present case, that a reasonable doubt is a doubt that would make an honest, sincere, conscientious juror, **who’s searching for the truth in the case** to hesitate to act or take action, unconstitutionally diluted the State’s burden of proof beyond a reasonable doubt. The failure to object cannot be harmless.

**2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the judge’s circumstantial evidence charge.**

During the jury instructions when defining circumstantial evidence the judge told the jury:

Now, evidence in a case such as this, there are two types of evidence, which you generally consider. Quite frequently, they consist of both types. Sometimes one more than the other, but it really doesn't matter because it's customary to use both types of evidence.

One would be direct evidence. And direct evidence is typically testimony regarding a sensory perception. I saw something, I heard something, I felt something or the like. And if you are firmly convinced as to the truthfulness of that testimony, then it would establish that particular fact and circumstance.

The other would be circumstantial evidence. And that, unlike direct evidence, is when a person testifies of a number of facts. And if you're firmly convinced as to the reliability and the truthfulness of each of those facts and you link them, then either through deductively, deductive reasoning, you reach another conclusion, you reach another conclusion, that, likewise, if you're firmly convinced of that conclusion, it would establish that particular fact or conclusion.

I will tell you that it is quite common to use both and the law makes absolutely no distinction between the value or the weight to be given either to direct or circumstantial evidence. Nor is there any greater degree of certainty required of

circumstantial evidence and direct evidence. Rather, you should weigh all of the evidence and decide what you find to be credible and believable.

(App. p. 867, line 10 – p. 868, lines 1-20). Trial counsel failed to object to the charge. In the amendment to the PCR application Petitioner alleged that trial counsel provided ineffective assistance of counsel by, “Failing to object to the Court’s circumstantial evidence charge. (TR.867 l. 25 – 868 l. 10).” (App. p. 1016).

In the order of dismissal the PCR judge wrote, “The language given by the trial court contains the correct definition and adequately covers the law as outlined in Grippon. Furthermore, Counsel testified he had no reason to object to the circumstantial evidence charge as given. Given the fact the Grippon language is still good law and counsel believed he had no reason to request the language in Logan, this Court finds Applicant has wholly failed to meet his burden. Accordingly, this allegation is denied and dismissed with prejudice.” (App. pp. 1071-1072). The PCR judge erred. The judge’s circumstantial evidence charge in the present case does not contain the correct definition of circumstantial evidence and does not adequately cover the law as outlined in Grippon.

In State v. Grippon, 327 S.C. 79, 83–84, 489 S.E.2d 462, 464 (1997), the South Carolina Supreme Court recommended a change to the traditional circumstantial evidence charge and wrote:

Therefore, in a criminal case relying in whole or in part on circumstantial evidence, once a proper reasonable doubt instruction is given, we recommend the jury be instructed as follows:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances

indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty. 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 12.04 (4th ed.1992).

In State v. Cherry, 361 S.C. 588, 601 606 S.E.2d 475, 482 (2004), the South Carolina Supreme Court held that the charge from Grippon “is the sole and exclusive charge to be given in circumstantial evidence cases in this state.”

Then in State v. Logan, 405 S.C. 83, 99–100, 747 S.E.2d 444, 452–53 (2013), also decided prior to Petitioner’s trial in December of 2013, the Supreme Court wrote:

Thus, we hold that trial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Cf. Littlejohn, 228 S.C. at 328, 89 S.E.2d at 926 (explaining the traditional circumstantial evidence charge); Grippon, 327 S.C. at 83–84, 489 S.E.2d at 463–64 (finding a circumstantial evidence jury instruction including “reasonable hypothesis” language unnecessary); Cherry, 361 S.C. at 600–02, 606 S.E.2d at 481–82 (holding the Grippon charge as the exclusive charge for circumstantial evidence cases). This holding does not prevent the trial court from issuing the

circumstantial evidence charge provided in Grippon and Cherry. However, trial courts may not exclusively rely on that charge over a defendant's objection.

In the present case trial counsel should have requested the circumstantial evidence charge found in Logan specifically instructing the jury that to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt and if these circumstances merely portray the defendant's behavior as suspicious, the proof has failed. Trial counsel should have objected to the charge because it did not contain the language discussed in Logan. As discussed in Logan, the trial judge could not exclusively rely on the Grippon charge over Petitioner's objection. Trial counsel, however, did not object. Trial counsel was deficient.

Additionally, trial counsel should have objected to the circumstantial evidence charge given because the charge does not contain the definition of circumstantial evidence found in Grippon. Importantly, the charge does not instruct the jury that circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The charge given is inadequate and confusing. Trial counsel was deficient in failing to object to the circumstantial evidence charge.

There is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. As discussed in issue one, the reasonable doubt instruction given unconstitutionally shifted the burden of proof to the defendant. In discussing the circumstantial evidence charge, both Grippon and Logan specifically require a proper reasonable doubt charge. "Therefore, in a criminal case relying in whole or in part on circumstantial evidence, **once a proper reasonable doubt instruction is given**, we recommend the jury be instructed as follows:" Grippon, 327 S.C. at 83–84, 489 S.E.2d at 464 (emphasis

added). “Thus, we hold that trial courts should provide the following language as a circumstantial evidence charge, **in addition to a proper reasonable doubt instruction**, when so requested by a defendant.” Logan, 405 S.C. at 99–100, 747 S.E.2d at 452–53 (emphasis added). Viewing the jury instruction as a whole in light of the evidence presented at trial, the trial judge’s instruction on circumstantial evidence was inadequate.

In State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011), the South Carolina Supreme Court wrote:

“In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.” State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Id. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

“[T]he trial court is required to charge only the current and correct law of South Carolina.” Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). “The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “The substance of the law is what must be charged to the jury, not any particular verbiage.” Adkins, 353 S.C. at 318–19, 577 S.E.2d at 464.

The jury charge, when read as whole, does not adequately cover the law on reasonable doubt or circumstantial evidence. Trial counsel’s error requires reversal.

**3. The PCR judge erred in refusing to find trial counsel ineffective for failing to request an adequate charge with regard to multiple defendants and failing to object to the inadequate charge given.**

During the jury instructions on multiple defendants the judge told the jury, “But it’s important to realize that there are three separate indictments, three separate defendants and three separate determinations that you will have to make. And each party is entitled to a fair and

impartial determination based on your assessment of the evidence.” (App. p. 859, lines 14-20). Trial counsel failed to object to the charge. Later the judge instructed the jury, “To assist you, Mr. [Juror], in recording the verdict, I’ve prepared three verdict forms. That is necessary because there are three separate cases, as we have discussed.” (App. p. 878, lines 17-20). In the amendment to the PCR application Petitioner alleged that trial counsel provided ineffective assistance of counsel by:

Failing to request an adequate charge regarding multiple defendant similar to the following:

There are [two, three, etc.] defendants in this case. Each is charged with Armed Robbery or its lesser included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your view of the testimony and evidence, which you alone are to pass upon. See South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr, § 1-27.

(App. p. 1016).

In the order of dismissal the PCR judge wrote, “The trial court made the jury very aware there were three separate indictments and three separate defendants, and the jury was to render verdicts for each defendant individually. As no particular verbiage is required, this Court finds the charge given adequately covered the law.” (App. p. 1075). The PCR judge erred. The charge given failed to specifically state that the verdicts for each defendant did not have to be the same. Trial counsel was ineffective in failing to request an adequate charge in regard to multiple defendants and in failing to object to the charge as given.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Trial counsel was deficient in failing to request a correct statement of the law as provided in Judge Anderson’s South Carolina Request to Charge. The charge given did not cover the substance of the Judge Anderson’s charge because it failed to state that the verdicts for each defendant did not have to be the same. Trial counsel was deficient in failing to object to the charge as given. There is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.

In State v. Brandt, 393 S.C. 526, 549–50, 713 S.E.2d 591, 603 (2011), the South Carolina Supreme Court wrote:

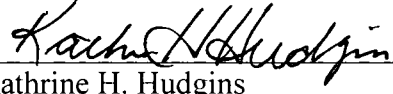
“A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.” State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). “However, if the trial judge refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request.” Id. “It is error for the trial court to refuse to give a requested instruction which states a sound principle of

law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.’ ” State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)). “If there is any evidence to support a charge, the trial court should grant the request.” Williams, 367 S.C. at 195, 624 S.E.2d at 445.

If trial counsel had objected to the charge as given and requested the Judge Anderson charge, the trial judge’s refusal to charge would have been reversible error because the charge given did not cover the substance of the requested charge, specifically failing to state that the verdicts for each defendant did not have to be the same. There was evidence in the record to support the charge. Trial counsel’s error requires reversal.

**CONCLUSION**

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 31<sup>st</sup> day of July, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

\_\_\_\_\_  
KEENAN COAKLEY,

PETITIONER

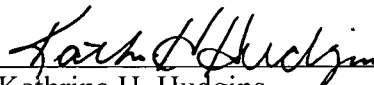
V.

STATE OF SOUTH CAROLINA,


RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Keenan Coakley, #358058, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 31<sup>st</sup> day of July, 2019.

  
\_\_\_\_\_  
Kathrine H. Hudgins  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 31<sup>st</sup> day of July, 2019.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: October 26, 2019

RECEIVED  
JUL 31 2019  
S.C. SUPREME COURT