

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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On Writ of Certiorari to Charleston County  
Maite D. Murphy, Post-Conviction Relief Judge  
Deadra L. Jefferson, Trial Court Judge  
Appellate Case No. 2018-000867

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**RECEIVED**  
**Oct 22 2020**  
**SC Court of Appeals**

DALE GOULD,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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**BRIEF OF PETITIONER**

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## **ISSUE PRESENTED**

Did the post-conviction relief court err by finding trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of an item is strong evidence of intent to control its disposition or use because the court failed to undertake the necessary prejudice analysis to determine if the result of Gould's trial would have been different had counsel objected and because Gould failed to establish any resulting prejudice from counsel's failure to object to this erroneous charge where the evidence established Gould was not merely present but was in actual possession of the cocaine in question?

## STATEMENT OF THE CASE

During its January 2014 term of court, the Charleston County Grand Jury indicted Respondent Dale Gould (Gould) for Distribution of Cocaine (2014-CP-10-0320). He was represented by Melisa Gay, Esquire. Assistant Solicitors J. Whit Sowards and Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On November 19, 2014, Gould proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Deadra L. Jefferson, circuit court judge. The jury convicted Gould as indicted. Judge Jefferson sentenced Gould to the mandatory minimum sentence of ten years imprisonment, as this was Gould's third drug offense.

A notice of appeal was filed and an appeal perfected on Gould's behalf by Appellate Defender Laura R. Baer of the South Carolina Commission on Indigent Defense-Division of Appellate Defense. On appeal, counsel filed a brief of appellant pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the trial court erred in denying Gould's motion for a directed verdict but indicating the appeal was without merit and asking to be relieved as counsel. Thereafter, Gould moved to withdraw his appeal. By written order filed on October 1, 2015, the South Carolina Court of Appeals dismissed Gould's appeal. The remittitur was returned to the circuit court on October 22, 2015.

Thereafter, on April 1, 2016, Gould filed an application for post-conviction relief alleging various grounds of ineffective assistance of counsel. The State served its return on June 23, 2016, requesting an evidentiary hearing be held on the application. On November 27, 2017, Gould, through counsel Rodney D. Davis, filed an amended application alleging specific ineffective assistance of counsel claims, including the one subject to the grant of relief: ineffective assistance of counsel for failing to object to the jury charge mentioning "strong evidence." An

evidentiary hearing into the matter was convened January 30, 2018, at the Charleston County Courthouse before the Honorable Maite D. Murphy, circuit court judge. Gould was present at the hearing and represented by counsel Davis. Respondent was represented by Assistant Attorney General Rasheeda N. Cleveland of the South Carolina Attorney General's Office. Gould testified on his own behalf. The State presented testimony from trial counsel Gay. At the conclusion of the hearing, the post-conviction relief court took the matter under advisement.

Thereafter, by order signed on March 29, 2018, and filed on April 9, 2018, the court granted post-conviction relief and remanded the matter back to the court of general sessions for a new trial, finding trial counsel was ineffective for failing to object to the trial court's "strong evidence" jury instruction.

The State filed a timely notice of appeal. On September 28, 2018, the State served and filed its petition for writ of certiorari. On February 13, 2019, Gould filed his return to the petition. The South Carolina Supreme Court transfer the case to this Court pursuant to Rule 243(l), SCACR. By order filed September 22, 2020 and amended September 29, 2020, this Court granted certiorari and ordered further briefing.

## STATEMENT OF THE FACTS

In October of 2013, the narcotics investigation division of the Charleston Police Department (CPD) was conducting an investigation into cocaine sales at the Joe Pasta restaurant on King Street in downtown Charleston. (App. 60-62, 64, 88-95). The investigation was led by Investigator Patrick Gill and included Detective Melanie Frederick with CPD, who was working as an undercover officer, and College of Charleston student Taylor Boyd, who was working with CPD as a confidential informant. (App. 60-62, 64, 78-80, 88-90). Boyd had recently been issued a citation as a minor in possession of alcohol and had informed CPD she knew someone selling cocaine out of Joe Pasta—restaurant manager Dale Gould. (App. 79-80, 103-04). The goal of the operation was to introduce Detective Frederick to Gould with the intent she could make long-term purchases of narcotics from Gould. (App. 79, 95-96, 98).

On October 10, 2013, Detective Frederick and Boyd, participated in an undercover operation to purchase narcotics from Gould at Joe Pasta. (App. 60-62, 64, 80). Boyd was brought to the CPD station and was thoroughly searched for money and contraband. (App. 61, 80). After ensuring Boyd was clean, CPD officers equipped her with an audio recording device and briefed her as to the undercover operation. (App. 61, 80-81). Officers also equipped Detective Frederick with audio and video recording devices. (App. 62, 72). Detective Frederick, Investigator Gill, Boyd, and other CPD officers then went to the general vicinity of Joe Pasta, where Boyd had agreed to meet Gould. (App. 64, 82).

Detective Frederick and Boyd were dropped off down the street from Joe Pasta and proceeded inside the restaurant alone, still equipped with their respective recording devices. (App. 65, 82). Detective Frederick and Boyd ordered food and waited for Gould to arrive. (App. 65, 82). Boyd and Gould had been texting and Gould arrived shortly thereafter. (App. 65, 82).

The three (Detective Frederick, Boyd, and Gould) then went outside the restaurant and Boyd introduced Detective Frederick, who was undercover, as her friend. (App. 82). Boyd and Detective Frederick indicated they were going to a friend's birthday party and wanted cocaine to bring. (App.83, 179). The three then went back inside the restaurant and eventually Gould told Detective Frederick and Boyd to come inside the restaurant's office. (App. 73, 82-83). Gould asked Detective Frederick to shut the office door and she complied. (App. 73, 83). Once the office door was shut, Gould pointed to a package on the floor that Detective Frederick identified as cocaine based on her training and experience. (App. 75). While neither woman saw Gould put the cocaine on the floor, Boyd indicated it was "obvious" the cocaine had been placed on the floor. (App. 83-84). Gould picked up the cocaine and sampled it several times and tried to get both Detective Frederick and Boyd to sample the cocaine without success. (App. 84). While in the office, Detective Frederick held the package of cocaine briefly. (App. 87). Gould appeared anxious that the women were members of law enforcement and made comments that he did not want to go to prison for distributing cocaine. (App. 84). Eventually, Gould told the women to return to the restaurant and they complied. (App. 74, 84). Gould left the office a short time later and approached Detective Frederick and Boyd, where he again motioned towards a bag on the floor that Detective Frederick recognized as cocaine based on her training and experience. (App. 74, 84-85). Detective Frederick picked up the cocaine. (App. 84-85). Detective Frederick and Boyd finished their meal, paid the bill, and left Joe Pasta with the cocaine. (App. 85-87).

Immediately after leaving Joe Pasta, Detective Fredrick and Boyd met with Investigator Gill and turned over the cocaine. (App. 75, 85). Investigator Gill had been able to monitor the entire encounter with Gould without interruption based on the recording equipment on Detective Frederick and Boyd. (App. 97). CPD chemist Renee Hilton later confirmed the substance was

0.23 grams of cocaine. (App. 136-38). Gould was subsequently arrested for distribution of cocaine—his third drug offense.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The post-conviction relief court erred as a matter of law in finding trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that actual knowledge of the presence of an item is strong evidence of intent to control its disposition or use because the court failed to undertake the necessary prejudice analysis to determine if the result of Gould's trial would have been different had counsel objected and because Gould failed to establish any resulting prejudice from counsel's failure to object to this erroneous charge where the evidence established Gould was not merely present but was in actual possession of the cocaine in question.**

In granting relief, the post-conviction relief court found trial counsel was constitutionally ineffective for failing to object to the trial court's instruction advising the jury that actual knowledge of the presence of an item is strong evidence of intent to control its disposition or use following the Supreme Court's decision in State v. Cheeks, 401 S.C. 322, 727 S.E.2d 480 (2013). This ruling is an error of law requiring reversal, as the post-conviction relief court wholly failed to undertake the required prejudice analysis necessary to determine if there is a reasonable probability that the result of the proceeding would have been different but for counsel's failure to object to the erroneous jury instruction. Furthermore, had the post-conviction relief court analyzed prejudice as required, the only logical conclusion the court could have reached is that the result of Gould's trial would not have been different, as the record firmly establishes Gould was not merely present, but rather, was in actual possession of the cocaine and distributed it to Detective Frederick. Therefore, Gould cannot establish the result of the proceeding would have been different but for counsel's failure to object to the "strong evidence" jury charge. Because the post-conviction relief court erred as a matter of law in neglecting to undertake the required prejudice analysis, this Court should reverse the post-conviction relief court's erroneous grant of relief.

Crucially, Gould not only had the burden of establishing trial counsel was deficient for failing to object to the jury charge in question but also had the burden of establishing that but for

this erroneous jury charge, there is a reasonable probability that he would not have been convicted of distributing cocaine. Gould, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Gould, like any other applicant seeking post-conviction relief, has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Gould must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “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 unprofessional errors, the result of the proceeding would have been different.” Id. 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Harrington v. Richter, 562 U.S. 86 (2011).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . ,") and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696 (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

When an applicant has alleged trial counsel was ineffective for failing to object to an allegedly impermissible jury charge, the post-conviction relief court must not only find that the jury charge was erroneous but also find the error of failing to object to this jury charge impacted an applicant's conviction. See Lowry v. State, 376 S.C. 499, 507–08, 657 S.E.2d 760, 764–65 (2008) (noting “an unconstitutional jury instruction will not require reversal of the conviction if the [c]ourt determines beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained” (internal citations omitted)). It is crucial that a post-conviction relief court not only find a jury charge was erroneous and counsel failed to object, but also must find there is a substantial likelihood that the applicant would not have been convicted but for these errors.

The purpose of a trial court's jury instructions is “to enlighten the jury and to aid it in arriving at a correct verdict.” State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge is required to charge only the current and correct law of South Carolina, and the law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009); see State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003) (“In general, the trial judge is required to charge only the **current and correct law** of South Carolina, . . . and the law to be charged to the jury is determined by the evidence at trial.” (citations omitted and emphasis added)).

In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), which was decided over a year prior to Petitioner's trial, our Supreme Court overruled prior precedent and instructed the bench to no longer use the “actual knowledge/strong evidence” charge. In Cheeks, appellant Derrick Lamar Cheeks, who was tried with his uncle, co-defendant Ricky Cheeks, was convicted of trafficking in crack cocaine in excess of 400 grams and possession of crack with intent to

distribute within proximity to a school and received concurrent sentences of twenty-five years for trafficking and ten years for proximity. Id. at 324, 737 S.E.2d at 482. During trial, Cheeks raised a defense of mere presence and the trial court repeatedly instructed the jury that “mere presence at the scene of a crime is insufficient evidence, in and of itself, to support a guilty verdict.” Id. at 327, 737 S.E.2d at 483. When instructing the jury on trafficking by possession, the trial court stated,

Now, possession, to prove possession the State must prove, beyond a reasonable doubt, that the defendant in the, in the case both had the power and the intent to control the disposition or use of the crack cocaine. Therefore, possession, under the law, can either be actual or constructive.

Now, actual possession means that the crack cocaine was in the actual physical custody of the defendant. Constructive possession means that the defendant had dominion or control or the right to exercise dominion or control over either the crack cocaine or the property on which the crack cocaine was found.

Now, mere presence at a scene where drugs are found is not enough to prove possession. **Actual knowledge of the presence of the crack cocaine is strong evidence of a defendant's intent to control its disposition or use.** The defendant's knowledge and possession can be inferred when a substance is found on property under the defendant's control. However, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in this case and to be given the amount of weight you think it should have. Two or more persons may have joint possession of a drug.

Id. (emphasis in Cheeks). Cheeks’s counsel objected to this jury instruction, “arguing that it was a comment on the facts and the weight of those facts, and that it nullifies or at least conflicts with the mere presence charge.” Id. The trial court, noting Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994), overruled Cheeks’s objection. Id.

On appeal, Cheeks argued the trial court erred in charging the jury that “[a]ctual knowledge of the presence of crack cocaine is strong evidence of a defendant’s intent to control

its disposition or use.” Id. at 325, 737 S.E.2d at 482. The Supreme Court agreed with Cheeks that this jury instruction was impermissible because it “this charge both improperly weighs the evidence, and that it largely negates the mere presence charge.” Id. at 328, 737 S.E.2d at 484. The Supreme Court noted, “[t]his charge converts all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug.” Id. at 329, 737 S.E.2d at 484. The Court concluded, “[w]e now overrule Solomon and instruct the bench to no longer use the “strong evidence” charge, which is derived from a statement on the sufficiency of the evidence in Kimbrell. Id. However, the Supreme Court found Cheeks could not establish any reversible error, “as there was no evidence that he was ‘merely present’ at Markley’s house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant’s guilt, he cannot demonstrate prejudice warranting reversal from the adjective ‘strong’ used in the charge.” Id.

Following its decision in Cheeks, the Supreme Court issued a subsequent published opinion on the same issue in co-defendant Ricky Cheeks’s case, again reminding the bench of its decision roughly a year earlier holding the “actual possession/strong evidence” charge “unduly emphasized the evidence, and deprived the jury of its prerogative to draw inferences and to weigh evidence” and that “the charge converted all persons merely present who have actual knowledge of the drugs on the premises into possessors of that drug and largely negated the mere presence charge, and erroneously conveyed that a mere permissible evidentiary inference was, instead, a proposition of law.” State v. Cheeks, 408 S.C. 198, 200, 758 S.E.2d 715, 716 (2014). As with his co-defendant, the Court again found Cheeks could not establish any prejudice because “[t]here was no evidence that petitioner was ‘merely present;’ rather, petitioner provided

financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs. Id. at 200, 758 S.E.2d at 716.

In the present case, the trial court improperly instructed the jury that “[a]ctual knowledge of the presence of the cocaine is strong evidence of the Defendant’s intent to control its disposition and use” in violation of Cheeks. (App. 214, 252). Trial counsel failed to object to this jury instruction when it was originally given (App. 214, 219) and again when the trial court re-instructed the jury after the jury requested to be re-charged (App. 252, 255). During the evidentiary hearing, trial counsel admitted she failed to object to this erroneous charge and did not provide any strategic reason for her failure to object. (App. 388). The State does not challenge the post-conviction relief court’s finding that trial counsel should have objected to this charge and failed to do so, thereby rendering her performance deficient.

However, despite trial counsel’s clear failure to object to an improper charge, the post-conviction relief court erred as a matter of law when it wholly failed to undertake a prejudice analysis. Instead of undertaking this required and crucial prejudice analysis, the court merely stated in conclusory fashion that “Applicant was therefore prejudiced by Trial Counsel’s failure to object to the trial judge’s use of the term ‘strong evidence’ in his instruction to the jury.” (App. 405). By failing to undertake any analysis to determine if Gould established the requisite prejudice needed for relief, the post-conviction relief court erred as a matter of law and its erroneous grant of relief requires reversal.

Moreover, Gould cannot establish any resulting prejudice from trial counsel’s failure to object to the erroneous jury instruction because there is no evidence he was merely present. In contrast, the evidence presented at trial firmly established Gould was in possession of cocaine and distributed that cocaine to an undercover law enforcement officer who was recording the

encounter. Therefore, the post-conviction relief court's erroneous findings are not supported by the record.

In both Cheeks opinions, the Supreme Court ruled neither petitioner could establish any resulting prejudice from the trial court's erroneous instruction because there was no evidence either were "merely present" in the house where the drugs were located. See Cheeks, 408 S.C. at 200, 758 S.E.2d at 716 ("However, we also find petitioner was not prejudiced by the charge. There was no evidence that petitioner was 'merely present;' rather, petitioner provided financial assistance to the drug operation, aided and abetted the operation, and was in actual possession of the drugs."); Cheeks, 401 S.C. at 329, 737 S.E.2d at 484 ("Appellant cannot show prejudice from the charge in this case, however, as there was no evidence that he was 'merely present' at Markley's house when the search warrant was executed. Rather the evidence was that he was actively cooking crack cocaine when the warrant was served, and that he possessed the 650 grams of crack found on the kitchen counter. Further, in light of the overwhelming evidence of appellant's guilt, he cannot demonstrate prejudice warranting reversal from the adjective 'strong' used in the charge.").

In Gould's case, there is similarly a dearth of evidence that Gould was "merely present" when cocaine was distributed to Detective Frederick and Boyd. Evidence presented at trial firmly established Gould met with Detective Frederick and Boyd for the express purpose of providing the women with cocaine, possessed and used cocaine in front of Detective Frederick and Boyd, and offered both women cocaine, all of which was recorded by multiple recording devices. Similarly, Gould expressed fear he would be sent to prison for providing the women with cocaine and went through great lengths to conceal his distribution, including moving the women to three different locations in and around Joe Pasta before leaving the cocaine on the ground near

the women and advising them of its presence in an effort to have them take it. Gould cannot establish prejudice from the trial court's jury instruction because there is no evidence he was "merely present" during the distribution of cocaine to Detective Frederick and Boyd.

Because Gould cannot establish any requisite prejudice and because the post-conviction relief court failed to conduct an actual prejudice analysis, the post-conviction relief court erred as a matter of law in finding trial counsel constitutionally ineffective. Based on the foregoing, the post-conviction relief court erred in granting Gould relief and remanding his case to the court of general sessions for a new trial. Therefore, this Court should reverse the lower court's grant of post-conviction relief where it wholly failed to conduct the proper analysis before granting relief and Gould cannot establish there is a substantial likelihood he would not have been convicted but for counsel's failure to object to the strong evidence jury instruction.

**CONCLUSION**

For all the foregoing reasons, this Court should reverse the post-conviction relief court's erroneous grant of post-conviction relief.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

October 22, 2020

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**PROOF OF SERVICE**

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I, Megan Harrigan Jameson, certify that pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, a true copy of Brief of Petitioner has been served upon Respondent by electronically mail a copy to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Appellate Defender Lara M. Caudy  
lcaudy@sccid.sc.gov

I further certify that all parties required by Rule to be served have been served.

This 22<sup>nd</sup> day of October 21, 2020.

*s/Megan Harrigan Jameson*  
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October 22, 2020

**RECEIVED**

**Oct 22 2020**

**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Supreme Court  
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Columbia, South Carolina 29211  
(By Electronic filing only – [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org))

Re: Dale Gould v. State – Appellate Case No. 2018-000867

Dear Ms. Kitchings:

Enclosed please find the original Brief of Petitioner, along with proof of service, for filing in the above-referenced post-conviction relief appeal.

Sincerely,

*s/Megan Harrigan Jameson*

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
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MHJ/  
Enclosures

cc: Appellate Defender Lara M. Caudy (by email only)  
Victim Advocacy Services