STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Nov 09 2020

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable William A. McKinnon, Circuit Court Judge

GONZALES REESE WARDLAW,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000730

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to question the decedent's fiancée about decedent's gun possession when she told the police during an interview that decedent had guns and Petitioner testified that the decedent brought the gun to the marijuana sale and threatened Petitioner, resulting in a scuffle over the gun and fatal shooting?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to impeach the decedent's fiancée with her prior statement to police that the decedent sold marijuana when at trial she testified that she had no idea that he sold marijuana?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the judge, in opening comments to the jury, stated that a trial is a search for the truth to ensure a fair and just verdict?

4. Did the PCR judge err in refusing to find trial counsel ineffective for failing to request the Logan circumstantial evidence charge?

STATEMENT

In June of 2012, the Lexington County Grand Jury indicted Petitioner for murder, indictment #2012-GS-32-1261. (App. pp. 426-427). On February 10, 2014, Petitioner proceeded to jury trial before the Honorable Thomas A. Russo, Senior. Elizabeth C. Fullwood represented Petitioner at trial. Samuel R. Hubbard, III and David Shawn Graham prosecuted the case. The jury found Petitioner guilty. Judge Russo sentenced Petitioner to life in prison. A timely notice of intent to appeal was filed and the direct appeal perfected pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). (App. pp. 429-443). The South Carolina Court of Appeals dismissed the appeal. State v. Wardlaw, 2015-UP-296 (Ct. App. filed June 17, 2015). (App. pp. 444-445).

On August 25, 2015, Petitioner filed an application for post-conviction relief. (App. pp. 446-469). On September 29, 2015, Petitioner filed a *pro se* amended application. (App. pp. 470-491). The State filed a return on November 16, 2016. On July 30, 2017, Petitioner, by counsel, filed an amended application. (App. pp. 498-503). The State filed a second amended return on December 27, 2018. (App. pp. 504-516). On April 3, 2019, an evidentiary hearing was held before the Honorable William A. McKinnon. Aimee J. Zmroczek represented Petitioner at the PCR hearing. Carolina Scrantom and Samuel Bailey represented the State. In a written order signed May 31, 2019, Judge McKinnon denied relief and dismissed the application. (App. pp. 737-768). On June 24, 2019, Petitioner filed a motion to reconsider. (App. pp. 769-772). On December 3, 2019, Petitioner filed a memorandum in support of altering and amending the order of dismissal. (App. pp. 773-798). On January 3, 2020, the State filed a response in opposition to Petitioner's motion to alter or amend. (App. pp. 799-827). On April 8, 2020, Judge McKinnon

signed a written order denying the motion to alter or amend. (App. pp. 828-842). A timely notice of intent to appeal was served on May 4, 2020. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to question the decedent's fiancée about decedent's gun possession when she told the police during an interview that decedent had guns, Petitioner testified that the decedent brought the gun to the marijuana sale and threatened Petitioner, resulting in a scuffle over the gun and fatal shooting.

On the night of the shooting Petitioner arranged to meet Thomas Hoefer, the decedent, at the Olive Garden to buy two and a half ounces of marijuana with half an ounce of the purchase to include "kush," a more potent and expensive cannabis strain. (App. p. 310, lines 5-23). Petitioner had known Hoefer since middle school and purchased marijuana from him five to ten times. (App. p. 308, line 21 – p. 309, lines 1-11). Petitioner considered Hoefer a friend. (App. p. 309, lines 12-15).

Shaqquana Outing, Hoefer's fiancée, testified at trial that she, Hoefer and their eight-month-old daughter drove to the Olive Garden where Hoefer told her he was going to meet someone. (App. p. 147, lines 14-20; p. 149, lines 8-19). Outing testified that once they arrived at the Olive Garden Hoefer got out of the car. (App. p. 149, lines 15-16). Outing did not know who he was meeting and could not see the meeting. (App. p. 149, lines 10-12; p. 151, lines 13-14).

Petitioner met Hoefer at the Olive Garden and Hoefer gave Petitioner two baggies of marijuana. (App. p. 312, lines 15-25). The baggies, however, did not contain the agreed two and half ounces and contained no "kush." (App. p. 312, lines 19-21; p. 313, lines 1-8). Petitioner told Hoefer he did not want the marijuana and tried to hand the baggies back. (App. p. 313, lines 9-13). Hoefer told Petitioner, "No, these your drugs now. I just want my money." (App. p. 313, lines 13-14). When Petitioner refused, Hoefer pulled out a gun and said, "Nigger, I'll kill your ass." (App. p. 313, lines 19-20). Petitioner did not have a weapon. (App. p. 312,

lines 13-14). The two wrestled for the gun and the gun just went off. (App. p. 314, lines 21-24). Petitioner, not knowing if Hoefer had been shot or not and afraid that he would get another weapon, fled the scene with the gun. (App. p. 316, lines 1-5). Petitioner admitted that he threw the gun in the Broad River. (App. p. 316, lines 14-15).

At trial, during the cross-examination of Outing, counsel referenced an interview she gave police several days after the shooting and asked:

> Q: Okay. And you acknowledged to them that he [Hoefer, the decedent] had been involved in some illegal things, correct?
>
> A: Correct, in the past when he was in high school, yes, ma'am.
>
> Q: Well, didn't you tell them on that day that some of those things were ongoing, but you hope – had hoped that he was getting out of that because, you know, now that you two had a child?
>
> A: No, ma'am. I acknowledged them that he was changing, that he has changed because he had a child and he did not do those things that he did previously before.
>
> Q: So you had no idea that he dealt in marijuana?
>
> A: Not at the time, no, ma'am.
>
> Q: Why did you think then that he was going around the corner of the Olive Garden just to talk to someone for a couple of minutes?
>
> A: I actually thought that maybe that was a friend or maybe he wanted to speak to someone away from me.
>
> Q: Did you ask him why he was going around there?
>
> A: No, I did not.

(App. p. 156, line 23 – p. 157, lines 1-18). Outing was not asked any additional questions. Trial counsel failed to specifically question Outing about whether she had ever seen Hoefer with a gun.

In the application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failing to request, examine, and present records to prepare for cross-examination and impeachment purposes;" (App. p. 499). During the PCR hearing Petitioner testified that he knew Hoefer had guns and knew he used to keep guns with him. (App. p. 544, lines 1-21). During the PCR hearing trial counsel testified that she listened to a taped interview of Outen by the police. (App. p. 576, lines 1-23). The interview was admitted in evidence at the PCR hearing as Applicant's exhibit #3. (App. p. 575, lines 4-5; p. 576, lines 9-16). During the interview Outing told the police about Hoefer's drug dealing and gun possession. When asked about the ability to impeach and the brevity of the cross examination of Outing, trial counsel testified, "Certainly. I just thought it was sort of a minor matter and not really worth – and since she was emotional you would have been beating up on her sort of." (App. p. 579, lines 11-13). The record reflects that the cross examination was less than two pages in length. (App. pp. 156-157). During summation PCR counsel argued that trial counsel was ineffective in failing to question Outen about Hoefer's gun possession. (App. p. 681, line 4 – p. 682, 683, 684, lines 1-5).

In the order of dismissal the PCR judge wrote:

> Moreover, as to any related claim that trial counsel prejudicially failed to impeach or cross-examine the victim's girlfriend about her knowledge of the victim's drug dealing and/or ownership of guns and bullets, trial counsel testified that she deemed the victim's character a minor matter. Again, no one disputed that the victim was engaged in a drug deal. Further, trial counsel recalled that the victim's girlfriend provided emotional testimony on direct examination and was evasive during her cross-examination. As a result, trial counsel testified that she made a decision not to "beat up" the victim's girlfriend in front of the jury; she was the mother of the victim's child. And while Applicant testified at PCR that he had reason to fear the victim was a violent person, trial counsel credibly testified that Applicant never told her about the victim's violent nature during the course of representation, for which trial counsel kept comprehensive notes. Trial counsel was aware of the victim's prior convictions, but she further assessed at PCR that the introduction of the victim's purported bad character was dicey: it may not

> have been admissible and she may not see it wise to tarnish or otherwise blame the victim in front of the jury.

(App. pp 756-757). The PCR judge erred. Trial counsel knew of Hoefer's possession of guns based on listening to the police interview with Outen, Applicant's #3. Petitioner's defense was that he acted in self-defense and then the gun accidently discharged. It was important for his defense to establish that Hoefer, not Petitioner, brought the gun to the marijuana sale. Hoefer's prior possession of weapons was not a minor matter. Trial counsel was ineffective in not questioning Outing about Hoefer's gun possession.

In the memorandum in support of altering and amending the order of dismissal PCR counsel outlines specific instances in the taped interview where Outing discusses Hoefer's possession of guns. (App. pp. 780-781). In the memorandum PCR counsel wrote, "At 28:42 Outing talks specifically about seeing the decedent with a gun with hollow tips. She knew he had "guns" and stated she had seen the decedent with a "9" black gun with hollow tips in it. At 28:51 she describes the other gun she knew he had a "deuce-deuce" describing it as a small gun." (App. p. 781). Unfired hollow point cartridges were collected from the scene of the shooting. (App. p. 189, lines 10-15).

In the order denying Petitioner's motion to alter or amend the PCR judge wrote:

> Applicant challenges this Court's denial and dismissal of Ground M, wherein Applicant alleges that counsel did not subject the State's case to a meaningful adversarial testing because she strategized against impeaching the victim's girlfriend with her recorded statement. Applicant asserts the recorded statement may have been utilized to bolster Applicant's case for self-defense by insinuating he had reason to be fearful when dealing with the victim. *See* PCR Tr. at 53-56. The undersigned considered this allegation in its Order, denying and dismissing the claim, specifically finding "trial counsel's collective strategy concerning treatment of the victim, the victim's girlfriend, and the bullets objectively reasonable, especially given Applicant's failure to inform trial counsel about victim's alleged violent reputation." Order at 20-22.

(App. p. 835). The PCR judge again erred.

Trial counsel was ineffective in failing to question Outen about Hoefer's gun possession. Again, the testimony about Hoefer's gun possession was important to establish that Hoefer, not Petitioner, brought the gun to the marijuana sale. The State argued in closing that it did not make sense for Hoefer to have brought the gun to the marijuana sale, although the State seems to concede that Hoefer was the dealer. (App. p. 382, lines 3-22). Counsel knew about Hoefer's gun possession from listening to the recording of Outen's interview with police. Failure to question Outen about Hoefer's gun possession was not a valid trial strategy when Petitioner asserted that he acted in self-defense and then the gun accidently discharged.

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 ineffective for failing to question Outing about Hoefer's gun possession. There was no valid strategic reason for failing to question about the gun possession. An attorney's performance is not immunized from 6th Amendment challenge by simply labeling the actions as "trial strategy." Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984). There is a reasonable probability that if counsel had questioned Outing about Hoefer's gun possession, the result of the proceedings would have been different. Hoefer's prior possession of weapons was not a minor matter. Petitioner's defense was that he acted in self-defense and then the gun accidently discharged. It was important for his defense to establish that Hoefer, not Petitioner, brought the gun to the marijuana sale. Trial counsel's deficient performance requires reversal.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to impeach the decedent's fiancée with her prior statement to police that the decedent sold marijuana when at trial she testified that she had no idea that he sold marijuana.

In addition to telling police about Hoefer's gun possession, Outing also told police in her interview about Hoefer's drug dealing. Applicant's exhibit #3. At trial, however, Outing testified that she had no idea Hoefer was selling marijuana. As discussed above with reference to trial counsel's failure to question Outen about Hoefer's gun possession, during the cross-examination of Outing, counsel referenced the interview she gave police several days after the shooting and asked:

> Q: Okay. And you acknowledged to them that he [Hoefer, the decedent] had been involved in some illegal things, correct?
>
> A: Correct, in the past when he was in high school, yes, ma'am.
>
> Q: Well, didn't you tell them on that day that some of those things were ongoing, but you hope – had hoped that he was getting out of that because, you know, now that you two had a child?

A: No, ma'am. I acknowledged them that he was changing, that he has changed because he had a child and he did not do those things that he did previously before.

Q: So you had no idea that he dealt in marijuana?

A: Not at the time, no, ma'am.

Q: Why did you think then that he was going around the corner of the Olive Garden just to talk to someone for a couple of minutes?

A: I actually thought that maybe that was a friend or maybe he wanted to speak to someone away from me.

Q: Did you ask him why he was going around there?

A: No, I did not.

(App. p. 156, line 23 – p. 157, lines 1-18). Trial counsel failed to ask Outen about her prior statements to police about Hoefer's drug dealing.

In the application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failing to impeach lay witnesses;" (App. p. 500). When asked about the cross-examination of Outen at the PCR hearing, trial counsel testified, "Well, I confronted her with the fact that she made an inconsistent statement to the officers shortly after the incident and the fact that she told them that she knew some of the things were ongoing, but she was hoping that he was getting out of the drug business since they had a child together." (App. p. 577, lines 2-7). The prior inconsistent statement referenced by trial counsel at the PCR hearing is unclear from a review of the cross examination of Outen. Trial counsel admitted, however, that at trial Outing denied knowing that Hoefer was selling marijuana. (App. p. 577, lines 8-11). When asked about the failure to impeach with the prior statements to police, as with the failure to question about Hoefer's gun possession, trial counsel testified that the ongoing drug dealing was a minor matter and she did not want to beat up the witness. (App. p. 579, lines 11-13). Again, the record reflects that the cross examination was less than two pages in length. (App. pp. 156-157). The

cross examination of Outen was inadequate. Trial counsel was ineffective in failing to impeach Outen with her prior statements to police about Hoefer's drug dealing.

In the order of dismissal the PCR judge wrote:

> Moreover, as to any related claim that trial counsel prejudicially failed to impeach or cross-examine the victim's girlfriend about her knowledge of the victim's drug dealing and/or ownership of guns and bullets, trial counsel testified that she deemed the victim's character a minor matter. Again, no one disputed that the victim was engaged in a drug deal. Further, trial counsel recalled that the victim's girlfriend provided emotional testimony on direct examination and was evasive during her cross-examination. As a result, trial counsel testified that she made a decision not to "beat up" the victim's girlfriend in front of the jury; she was the mother of the victim's child. And while Applicant testified at PCR that he had reason to fear the victim was a violent person, trial counsel credibly testified that Applicant never told her about the victim's violent nature during the course of representation, for which trial counsel kept comprehensive notes. Trial counsel was aware of the victim's prior convictions, but she further assessed at PCR that the introduction of the victim's purported bad character was dicey: it may not have been admissible and she may not see it wise to tarnish or otherwise blame the victim in front of the jury.

(App. pp 756-757). The PCR judge erred. While the drug sale was acknowledged at trial, the jury should have known about Hoefer's drug dealing, just as the jury should have known about Hoefer's gun possession. Both go to Petitioner's assertion that he acted in self-defense and then the gun accidentally discharged. Applying the Strickland standard discussed above, there is a reasonable probability that if Outen had been properly cross examined, the result of the proceeding would have been different.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the judge, in opening comments to the jury, stated that a trial is a search for the truth to ensure a fair and just verdict.

The trial judge told the jury at the start of the trial, "This trial is a fundamental part of our democracy. It is a search for the truth in making sure that justice is done between the parties that are before the Court. Searching for the truth and making sure that justice is done often times is a slow, very deliberate, sometimes its repetitive, in other words, very different from what you may have seen in the movies, read in books or seen on television. " (App. p. 120, lines 4-12). The judge also told the jurors, "Now, you've just taken an oath to try this case and to reach a fair and a just verdict and so you are also expected to be professional, reasonable and ethical in your performance of your duties, which I have absolutely no doubt you'll do." (App. p. 120, line 25 - p. 121, lines 1-4). The judge also told the jury, "Now, in determining what the true facts are in this case, it's going to be up to you to decide whether or not the testimony of a witness is believable." (App. p. 125, lines 22-25). Trial counsel failed to object to the judge's comments to the jury.

In the application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failing to object to improper and prejudicial judicial comments during opening remarks;" (App. p. 499). During the PCR hearing trial counsel admitted that she should have objected to the comments by the judge. (App. p. 568, line 5 – p. 569, 570, lines 1-8). In the order of dismissal the PCR judge wrote:

> Therefore, to the extent that trial counsel did not object to the trial court's opening remark that a trial is a "search for the truth in making sure that justice is done between the parties. . ." and "to reach a fair and just verdict," (R. p. 120-21; *see also* R. p. 125 ("true facts in context of discerning witness credibility)), no prejudice results as a matter of law because the challenged instruction derives from the trial court's explanation of the roles of the parties within the courtroom and does not in any way pertain to or touch upon the burden of proof. (*Compare* R. p. 119-21 *and* R. p. 122-24). The limited nature of this phrase imparted no

> duty upon counsel to object in light of the *Aleksey* decision, which existed at the time of trial, and the failure to object to this limited phrase did not render counsel's performance deficient. Furthermore, pursuant to both *Aleksey* and *Beaty*, the instructions cited by Applicant did not warrant an objection. *Aleksey* at 28-29,538 S.E.2d at 252; *Beaty* at 33-34, 813 S.E.2d at 506. Even had counsel objected and preserved the issue for appellate review, there is no reasonable likelihood of success at that stage given the previous finding of the South Carolina Supreme Court in regards to nearly identical instructions.

(App. p. 762). The PCR judge erred. The improper comments by the judge warranted an objection. Trial counsel, as she admitted, was ineffective in failing to object.

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. at263–64, 737 S.E.2d at 479–80.

In State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), 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 on 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 trial 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 February of 2014, the trial judges had been instructed to avoid the "seek the truth' and "fair and just" 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" and "fair and just verdict" language in his preliminary comments to the jury. After Petitioner's trial in 2014, 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 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 the Court of Appeals 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.

At the time of Petitioner's trial the "seek the truth" and "just and fair" language was discouraged. After Petitioner's trial the South Carolina appellate courts found error in the use of

this language, even in preliminary instructions to the jury. Trial counsel was ineffective in failing to object to the improper comments.

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 ineffective in failing to object to the judge's improper preliminary comments to the jury. Petitioner was prejudiced by the deficient performance. The comments diluted the State's burden of proof in this case where Petitioner asserted that he acted in self-defense and then the gun accidentally discharged. Petitioner meets the two prong test of Strickland and the conviction should be reversed.

4. The PCR judge erred in refusing to find trial counsel ineffective for failing to request the Logan circumstantial evidence charge.

When instructing the jury on the law of circumstantial evidence the trial judge said:

> Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. In other words, it is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.
>
> Now the law makes absolutely no distinction between the weight or the value to be given to wither direct or circumstantial evidence, nor is there any greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in this case. And after weighing all of the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you would find the defendant not guilty.

(App. p. 394). Trial counsel did not object to the instruction and did not request additional language. (App. p. 406, lines 4-15).

In the application for post-conviction relief Petitioner alleged, "Ineffective assistance of counsel for failing to request and preserve objections regarding jury charges;" (App. p. 500). During the PCR hearing trial counsel admitted that she overlooked the fact that the judge failed to give the circumstantial evidence charge from State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). (App. p. 611, line 15 – p. 612, lines 1-20). In Logan the 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.

Logan, 405 S.C.at 99, 747 S.E.2d at 452.

In the order of dismissal the PCR judge noted that the trial judge charged the jury on circumstantial using the language from State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) rather than using the language from Logan. (App. p. 763). The PCR judge wrote that he could ". . . identify no benefit to the *Logan* circumstantial evidence instruction had it been requested and used in lieu of the *Grippon* circumstantial evidence charge." (App. p. 763). The PCR judge then wrote:

> This Court finds that the jury instructions Applicant cited to do not form the basis for a grant of post-conviction relief as a matter of law. Any failure to object caused no prejudice as a complete review of the jury instructions issued in Applicant's case comport with those allowed, or at least deemed not prejudicial, under South Carolina law. Applicant's ineffective assistance of trial counsel allegations regarding failure to object to the trial court's jury instructions are **DENIED** as he has failed to meet his burden of proving *Strickland* error and prejudice.

(App. p. 764)(emphasis in original). The PCR judge erred.

There is clearly benefit in the Logan circumstantial evidence charge. In State v. Herndon, 430 S.C. 367, 845 S.E.2d 499 (2020), the South Carolina Supreme Court held that the trial court's refusal to charge the requested Logan circumstantial evidence charge was reversible error. In Herndon the Court wrote:

> However, in *Logan*, the Court posited that there are different approaches used to analyze direct and circumstantial evidence. *Logan*, 405 S.C. at 97, 747 S.E.2d at 451. The Court reasoned that "evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence." *Id.* The Court found that "defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction." *Id.* at 99, 747 S.E.2d at 452. Therefore, we held the trial court "should" give the specific charge provided in the *Logan* decision, quoted in the introduction of this opinion, when

> requested. *See id.* (explaining the Court's "holding does not prevent the trial court from issuing the [*Grippon* charge]. *However, trial courts may not exclusively rely on that charge over a defendant's objection.*" (emphasis added)).

Herndon, 430 S.C. at 372, 845 S.E.2d at 502 (2020). The jury in the present case should have been properly instructed as to how to analyze the State's circumstantial evidence in a case where Petitioner asserted that he acted in self-defense ant then the gun discharged accidentally.

Pursuant to Strickland, counsel was ineffective in failing to request the Logan circumstantial evidence charge. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. Petitioner meets the two prong test of Strickland and the conviction should be reversed.

CONCLUSION

Based on the above argument, 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 9th day of November, 2020.