

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Colleton County

Honorable William H. Seals, Circuit Court Judge

MAURIO D. RIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-001106

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the trial judge's preliminary comment to the jury that a trial is a search for the truth to make sure that justice is done between the parties because this language diluted the State's burden of proof?

STATEMENT

In August of 2011, the Colleton County Grand Jury indicted Petitioner, Maurio Daetrel Rivers for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime, indictments #2011-GS-15-00549, 00550, 00551. (App. pp. 230-231). On December 12, 2012, Petitioner proceeded to jury trial before the Honorable Diane S. Goodstein. John D. Bryan represented Petitioner at trial. Steven Knight prosecuted the case. The jury found Petitioner not guilty of one count of attempted murder and not guilty of the weapon charge. The jury found Petitioner guilty of one count of attempted murder. Judge Goodstein sentenced Petitioner to thirty (30) years. (App. p. 232). A timely notice of intent to appeal and the direct appeal perfected. A three-judge panel of the South Carolina Court of Appeals heard argument in the case on November 5, 2014, and on December 3, 2014, affirmed the conviction in an unpublished opinion. State v. Rivers, Op. No. 2014-UP-441 (S.C. Ct. App. Filed December 3, 2014). (App. pp. 269-270). Petitioner filed a petition for rehearing and filed a motion to relieve counsel and proceed *pro se*. The Court of Appeals granted the motion to relieve counsel and on April 16, 2015, denied the petition for rehearing. Petitioner then filed a petition for writ of certiorari with the South Carolina Supreme Court that was denied on November 19, 2015.

On June 1, 2016, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 271-284). The State filed a return on April 17, 2017. (App. pp. 285 - 290). On November 15, 2017, Petitioner filed a motion to relieve PCR counsel and an amended PCR application. (App. pp. 291-298). An evidentiary hearing was held on April 1, 2019, and April 3, 2019, before the Honorable William H. Seals, Jr.. Leslie T. Sarji represented Petitioner at the PCR hearing. Benjamin Limbaugh represented the State. In a written order signed December 21, 2019, Judge

Seals denied relief and dismissed the application. (App. pp. 411-420). On January 10, 2020, Petitioner filed a motion to alter or amend pursuant to Rule 59(e) SCRC. (App. pp. 421-424). Judge Seals denied the motion on July 23, 2020. (App. pp. 425-426). A timely notice of intent to appeal was filed on August 7, 2020. This appeal follows.

ARGUMENTS

- 1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial judge's instruction to the jury on accomplice liability/the hand of one is the hand of all when the State failed to show a pre-arranged common design or purpose between the co-defendant and Petitioner to attempt to kill the police officer who was chasing the vehicle driven by Petitioner.**

The jury found Petitioner guilty of the attempted murder of Lieutenant Joseph Burnette with the Dorchester County Sheriff's Office. On July 12, 2011, at 7:00 PM Deputy Justin Eaches with the Dorchester County Sheriff's Office attempted to stop a black car on Interstate 95 for failure to use a turn signal. (App. p. 63, lines 10 – p. 64, lines 1-2). The deputy testified that he saw two black males in the car and he identified Petitioner as the driver. (App. p. 64, lines 13-25). A chase ensued and the deputy asked for assistance from Lt. Burnette. (App. p. 67, line 3 – p. 68, lines 1-9). Lt. Burnette took over the pursuit of the car because of the condition of Deputy Eaches' patrol car and the high rate of speed of the chase. (App. p. 68, lines 1-6). Lt. Burnette testified that he heard gunshots after the car exited the interstate onto Highway 61. (App. p. 87, lines 15-16). Lt. Burnette testified that these first set of shots were fired by the passenger. (App. p. 85, lines 4-7). Lt. Burnette confirmed that the passenger, Bronson Shelley, stuck his head out of the sunroof, looked at the officer and shot at him. (App. p. 92, line. 19 – p. 93, lines 1. 7; p. 96, line 22 – p. 97, lines 1-7).

The black car was eventually struck by Lt. Burnette's patrol vehicle. (App. p. 84, lines 13-15). According to Lt. Burnette, as the black car was traveling backwards out of control before flipping over, he heard a second set of what he later determined to be gunshots. (App. p. 97, line 8 – p. 98, lines 1-20). Lt. Burnette testified that while there were two different sets of shootings, he only saw one person, the passenger and co-defendant, Bronson Shelley, shoot during the first set. (App. p. 97, lines. 4-15). Lt. Burnette did not testify as to who was shooting the second time. According to Lt. Burnette, both the driver and passenger fled from the vehicle after it wrecked. (App. p. 85,

lines. 19-24. Lt. Burnette released his K-9 and Petitioner was apprehended¹. (App. p. 85, line 12 – p. 86, lines 1- 11). Deputy Eaches assisted in the apprehension of the passenger, Bronson Shelley. Shelley had a holster in his pocket when he was apprehended. (App. p. 73, lines 4 – 17).

There were three guns recovered from the wreck scene. One gun, a .38 special, was found on the ground after the car was rolled upright. (App. p. 105, line 21 – p. 106, lines 1-18, p. 107, line 19 – p. 108, lines 1-4). Another gun, a Bursa Firestone .380, was found lying in plain view while the car was still upside down. (App. p. 109, lines 1-4; p. 133, lines). This gun was found with the slide back indicating all bullets had been fired from the weapon. (App. p. 109, lines 1-20; p. 133, lines 11-16). A third gun, a Colt .45, was found inside the glove box of the black car. (App. p. 111, line 11 – p. 112, lines 1-3).

Five shell casings were recovered on Highway 61. (App. p. 116, line 11- p. 117, lines 1-4). These casings matched the Bursa Firestone .380. (App. p. 145, lines 11-12). Bullet fragments were collected at the scene of the wreck. (App. p. 116, lines 19-23; p. 117, lines 6-11). One of the fragments was fired by the .38 special. (App. p. 146, lines 2-3). There were four holes in the windshield of the black car where shots had been fired outward. (Tr. p. 124, line 1 – p. 127, line 1; p. 129, lines 11-12).

Petitioner was charged with the attempted murder of both Lt. Burnette and Deputy Eaches and charged with possession of a weapon during the commission of a violent offense. The jury found Petitioner not guilty of the attempted murder of Deputy Eaches and not guilty of the weapon charge. The indictment for the attempted murder of Lt. Burnette reads, “That in Colleton County, South Carolina, on or about July 12, 2011, the defendant, Maurio Daetrel Rivers, with malice

¹ Petitioner testified at the PCR hearing that he filed a federal civil suit against the officers for allowing the dog to continue to bite him in the groin. (App. p. 333, line 23 – p. 334, lines 1-4). Petitioner testified that he received a settlement of ten thousand dollars (\$10,000). (App. p. 326, lines 15-25).

aforethought accompanied by a present ability to complete the act and the intent to kill, either express or implied, did attempt to kill the victim, Deputy J. Burnette with the Dorchester County Sheriff's Office, while on Augusta Highway, by shooting at the victim; in violation of S.C. Code of Laws Section 16-03-0029 of the South Carolina Code of Laws (1976), as amended.” (App. p. 231). The indictment does not contain accomplice liability language.

In his closing argument the prosecutor discussed the principle of “the hand of one is the hand of all.” (App. p. 169, line 20 - p. 170, lines 1-17). The prosecutor gave the examples of a get away driver and a look out as examples of the hand of one is the hand of all. (App. p. 169, line 25 – p. 170, lines 1-11). The prosecutor emphasized the high speed chase and fleeing from the car to show intent. (App. p. 170, line 18 – p. 171, lines 1-8). Unlike a get away driver or look out example where there is a prior agreement, the high speed chase and fleeing from the car fail to establish a prior agreement between Petitioner and the passenger to shoot at the officers. The prosecutor also argued that the second round of shots came from inside the car on the driver's side. (App. p. 172, lines 6-11). Defense counsel argued that mere presence is not sufficient for accomplice liability. (App. p. 173, line 25 – p. 174, lines 1-13). Defense counsel also argued that it was impractical to believe that Petitioner, the driver, fired the second round of shots at the same time as he was trying to regain control of the car as it spun out of control and flipped over. (App. p. 176, line 13 – p. 177, lines 1-5). In finding Petitioner not guilty of the weapon charge, the jury appears to have rejected the State's argument that Petitioner was the shooter of the second round of shots. The jury's verdict reflects that the jury found Petitioner guilty based on accomplice liability, “the hand of one is the hand of all.” This theory of liability, however, is inapplicable under the facts of this case and should not have been charged to the jury.

Trial counsel did not object when the judge instructed the jury on the law of accomplice liability, “the hand of one is the hand of all.” (App. p. 193, line 17 – p. 194, 195, lines 1-18). Trial counsel only made the following exception to the jury charge, “I thought it was specific intent, and I think you did address that, but not in great detail.” (App. p. 207, lines 24-25). Upon request by the jury, the judge re-charged the law on accomplice liability, “the hand of one is the hand of all.” (App. p. 209, line 23 – p. 210, 211, 212, 213, lines 1-11). When asked if there was anything further after the re-charge defense counsel said, “No, Your Honor, but it might be better if you explain probable and natural consequence, they may conceivably be hung up on the hand of one is the hand of all. I think you address it and say a probable and natural consequence, but you don’t really explain that element, and that might be where the jury is getting confused.” (App. p. 213, lines 19-25). The judge declined to define probable and natural consequence. (App. p. 214, line 8 – p. 215, lines 1-11).

In the PCR application Petitioner alleges ineffective assistance of counsel “for not objecting to the supplemental jury instruction the hand of one is the hand of all.” (App. p. 280). In the amended PCR application Petitioner alleges ineffective assistance of counsel “for failing to object to the jury instructions charging the hand of one is the hand of all.” (App. p. 294). During the PCR hearing Petitioner testified that trial counsel actually requested the accomplice liability charge. (App. p. 330, lines 13-17). At first trial counsel denied requesting the accomplice liability charge. (App. p. 362, lines 3-16). PCR counsel showed trial counsel a document titled, “Defendant’s Request to Charge No. 12 Accomplice Liability” which was admitted in evidence as Applicant’s exhibit #3. (App. p. 362, line 17 – p. 363, lines 1-12; p. 410). Trial counsel then testified, “Well, maybe I did ask for it.” (App. p. 363, line 13). Trial counsel then testified that he did not remember if he submitted the request to the judge or just printed the request for his file. (App. p.

363, lines 16-19; p. 365, lines 18-21). Trial counsel testified that whether he requested the charge or not, he was sure the State would have requested the accomplice liability charge. (App. p. 363, lines 18-19). Trial counsel agreed that he probably did not object to the accomplice liability, “the hand of one is the hand of all” charge. (App. p. 368, lines 9-12).

In the order of dismissal the PCR judge wrote, in regard to the failure to object to the hand of one is the hand of all jury charge, “This Court finds that Applicant has failed to meet his burden and that counsel was not deficient in regards to this allegation. Evidence in the record supports a charge on the hand of one is the hand of all and the charge was appropriately given to the jury. As counsel noted in his testimony, the hand of one is the hand of all was one of the more pivotal points of law in this case. Therefore, this Court finds that counsel was not deficient for failing to object to the charge being given and dismisses this allegation.” (App. p. 416). The PCR judge erred. The charge was not proper because the State failed to establish the requisite prior agreement or arrangement between Petitioner and the passenger to commit an unlawful act that resulted in an attempt to kill the officer. Under the facts of this case the high speed chase and fleeing from the car after the wreck is not sufficient to hold Petitioner accountable under a theory of accomplice liability for the actions of his passenger in shooting at the officers. The evidence did not support the charge.

In the motion to alter or amend pursuant to Rule (59e), Petitioner wrote, “The only evidence against Rivers was his flight or his intent to avoid arrest. There was no evidence presented that Rivers was aware that his passenger possessed a concealed weapon prior to it being fired. Neither was there evidence of an agreement to fire a weapon at the victim. Rivers was charged with weapon possession and was found not guilty. Furthermore, Rivers testified at the PCR evidentiary hearing that he did not know that weapons were in the vehicle.” (App. p. 422). The PCR judge denied the motion the motion to alter or amend. The PCR judge erred. Trial counsel was

ineffective for requesting and then not objecting to the accomplice liability/the hand of one is the hand of all jury instruction when there was no evidence to support the charge. Petitioner was prejudiced by the deficient performance.

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.

In State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276–77 (2017), the South Carolina Supreme Court wrote:

“ ‘Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.’ ”State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (alteration in original) (quoting State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 324 (Ct. App. 2002)) (internal quotation marks omitted). “Mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt.” Id. at 262, 647

S.E.2d at 705. “However, ‘presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a [principal].’ ” *Id.* (alteration in original) (quoting *State v. Hill*, 268 S.C. 390, 395–96, 234 S.E.2d 219, 221 (1977)).

The trial judge should not have charged the jury with the law of accomplice liability/hand of one is the hand of all because the State failed to present evidence of a pre-arranged common design or purpose between Petitioner and the co-defendant for some illegal purpose of which the attempt to murder the police officers was incidental or a natural or probable consequence.² This case is different from most other cases dealing with the hand of one hand of all accomplice liability charge where the parties pre-arrange to meet for some illegal act, usually a burglary or a robbery, and in the process someone is shot or killed. Petitioner was the driver of the car that failed to stop for a minor traffic violation. The co-defendant was a passenger in Petitioner’s car who shot at police. There was no evidence of a pre-arranged plan. Even if the driver, with control of the car, and the passenger could have developed a plan to flee from the police, the shooting is not incidental or a natural or probable consequence of any assumed plan to evade law enforcement.

As to the second round of shots, it is unclear who fired these shots. The judge should not have charged the jury with the law of accomplice liability/hand of one is the hand of all with regard to the second round of shots because, again, the State presented no evidence that Petitioner joined with the co-defendant to accomplish an illegal purpose which resulted in the attempted murder of the officer. At this point, as the car was crashing, it was each man to himself. If Petitioner shot the second round of shots, he was acting as a principle. The jury, however, found Petitioner not guilty of the weapon charge, indicating that the jury did not

² There is mention of a stolen car during the PCR hearing but this was not discussed at trial. (App. p. 304, lines 8-9; p. 355, lines 3-8).

believe that Petitioner was the shooter of the second round of shots. If the co-defendant continued with his shooting spree and fired the second set of shots, he was acting as principle without the assistance of Petitioner. Neither of the shootings is incidental or a natural or probable consequence of any possible pre-arranged plan to flee from the police

Trial counsel was ineffective for requesting and then not objecting to the jury instruction on accomplice liability/hand of one is the hand of all. Petitioner was prejudiced by the deficient performance. The jury appears to have struggled with the instruction, requesting a re-charge on accomplice liability. (App. p. 209, line 23 – p. 210, 211, 212, 213, lines 1-11). The jury, finding Petitioner not guilty of the weapon charge, appears to have found Petitioner guilty based solely on a theory of accomplice liability. There is a reasonable probability that, but for the accomplice liability charge, the outcome of the trial would have been different. The PCR judge erred in refusing to grant relief based on trial counsel's deficient performance.

- 2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the example given by the judge to the jury of accomplice liability because, under the facts of this case, the example was an improper comment on the facts that diluted the State's burden of proof.**

During the erroneous instruction on accomplice liability/hand of one is the hand of all the trial judge gave the following example:

For example, ladies and gentlemen, two people can be responsible and can be guilty of burglary if one – only one person went into the house and one person was the lookout and driving the car or the getaway car and the lookout but only one person actually went into the house at night. Ladies and gentlemen, although only one person went into the house, both people are guilty of burglary in the first degree because they acted together in concert to commit a burglary.

(App. p. 193, line 25 – p. 124, lines 1-8). In the PCR application Petitioner alleged that trial counsel was ineffective for failing to object to the example given by the trial judge. (App. pp. 283-284). In

the amended application Petitioner also alleged that trial counsel was ineffective in failing to object to the example given. (App. p. 295).

During the PCR hearing Petitioner testified, “And the jury basically inferred from another – she gave an example of a burglary and a getaway driver as the example of the hand of one is the hand of all in her jury instruction.” (App. p. 328, lines 12-15). Petitioner testified that trial counsel did not object to the example and then testified, “And I think that was pretty much what prejudiced me the most because it made the jury think that they only thing I had to do to be guilty of attempting to harm the officers was trying to get away driving. And I think that was the most prejudicial thing in the instruction was that.” (App. p. 328, lines 17-22). Trial counsel did not recall objecting to the example. (App. p. 369, lines 9-14). When asked about the burglary/getaway driver example trial counsel testified that he believed the jury would have made the distinction. (App. p. 378, line 25 – p. 379, lines 1-2).

In the order of dismissal the PCR judge wrote, “Applicant alleges counsel was deficient for failing to object to the Solicitor giving an illustration of a burglary and a getaway car as an example of accomplice liability.” (App. p. 417). The PCR judge discussed the law in regard to comments made by a prosecutor and then wrote:

Applicant testified that counsel should have objected to the example being used by the Solicitor. Counsel testified he did not object to the example and did not feel the need to do so. This Court finds that counsel is given latitude in remarks made during closing argument and that the court corrected any potential error by charging on the law of accomplice liability. This Court also finds that even if counsel did err in failing to object, the error would have been harmless and would not have prejudiced Applicant. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

(App. p. 418).

While the prosecutor provided examples of accomplice liability/ the hand of one is the hand of all in his closing argument, (App. p. 169, line 23 – p. 170, lines 1-11), the allegation during the

PCR hearing involved the **judge's** example provided during her jury instruction. In the motion to alter or amend pursuant to Rule 59(e), Petitioner wrote, "The PCR Courts order also states it was the solicitor (S. Knight) who used the example of the getaway car driver and the burglary defining Accomplice Liability when it was in fact the judge (D. Goodstein). Her example shifted the burden of proof to the applicant inferring that to be guilty of the murder attempt, only the evidence of Rivers' flight was necessary." (App. p. 422). The PCR judge denied the motion to alter or amend despite the factual error. The PCR judge erred.

The PCR judge should have corrected the factual error in the order, found trial counsel ineffective for failing to object to the example given by the judge and granted relief. As discussed above is issue one, the whole charge on accomplice liability/hand of one is the hand of all was erroneous because the facts did not support such a charge. Based on the fact that evidence showed that Petitioner was the driver, the example made the charge even more prejudicial.

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.

“Judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. See also Pantovich v. State, 427 S.C. 555, 562, 832 S.E.2d 596, 600 (2019) (“The modern trend, however, has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence.”); State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) (stating “the trial court shall not provide a limiting instruction or otherwise comment to the jury on” suicide-attempt evidence because such a charge may be an improper charge on the facts). Under the facts of this case, the example given by the trial judge veered away from the law and became a charge on the facts. The charge additionally diluted the State’s burden of proof by omitting the requirement that, under the example given, the driver and the person who went into the house had to have had a pre-arranged plan to commit a burglary. Based on this charge the jury could have found liability based solely on Petitioner driving the car and failing to stop for police.

The PCR judge erred in failing to correct the factual error in the order of dismissal and refusing to find trial counsel ineffective for failing to object to the example given by the judge in her charge on accomplice liability. Petitioner was prejudiced by the deficient performance. The example allowed the jury to find Petitioner guilty of attempted murder solely for fleeing from the police and driving the car from which the co-defendant shot at police.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the trial judge’s preliminary comment to the jury that a trial is a search for the truth to make sure that justice is done between the parties because this language diluted the State’s burden of proof.

In her preliminary comments to the jury the trial judge said, “While all of these things may be true at times, this trial is not for entertainment. It is a fundamental part, maybe the fundamental part, of our democracy, a search for the truth in an effort to be sure that justice is done between the parties before the Court. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or in the movies or read in books.” (App. p. 49, lines 15-23). Trial counsel did not object to the comments.

Two days before the PCR hearing the PCR judge allowed Petitioner to verbally amend the PCR application to include the allegation that trial counsel was ineffective for failing to “. . . object to the trial judge’s instructions at the beginning of the trial that the jury’s duty is to quote render a true and just verdict.” (App. p. 303, lines 18-22). During the PCR hearing trial counsel admitted that he was not aware that the judge’s comments were objectionable. (App. p. 360, line 4 – p. 361, lines 1-8).

In the order of dismissal the PCR judge wrote:

Applicant alleges that counsel was deficient for failing to object to the trial judge’s comments at the beginning of the trial that the jury should seek a true and just verdict. Counsel testified that he did not know that this was objectionable. This Court finds that any potential error in not objecting to the comment made by the trial judge was harmless and did not prejudice Applicant. The mention of a true and just verdict was made only one by the trial court and was not repeated. The trial court also included all of the standard language concerning the State’s burden of proof in criminal cases in its colloquy to the jury. This Court finds that Applicant has failed to meet his burden in regards to this allegation and dismisses this allegation.

(App. pp. 8-10). The PCR judge erred.

State v. Daniels, 401 S.C. 251, 737 S.E.2d 473, (2012), was decided in October of 2012, before Petitioner's December 2012 trial. In Daniels, 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)." 401 S.C. at 257, 737 S.E.2d at 476. 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. (emphasis added).

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 December of 2012, 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 “justice between the parties” language in her preliminary comments to the jury. After Petitioner’s trial in 2012, 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 “justice between the parties” 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. Petitioner was prejudiced by the deficient performance.

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.

The PCR judge erred in finding that trial counsel’s failure to object to the judge’s improper preliminary comments to the jury was harmless. Petitioner was prejudiced by the deficient performance. The comments further diluted the State’s burden of proof.

CONCLUSION

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

s/ Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2021.