

In the Supreme Court of the United States

MAURICE SHAUNDELL HOPE,
Petitioner,
vs.

LARRY CARTLEDGE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Fourth Circuit's decision that boilerplate instructions obviate the need for a special-purpose instruction contravene the clearly established case law of this Court that jurors cannot be expected to understand nuances of complicated questions of law without proper instruction?

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Respondent Larry Cartledge, Warden, through the South Carolina Attorney General, hereby makes a brief in opposition to the petition for a writ of certiorari filed by Petitioner, Maurice Shaundell Hope. Petitioner was convicted of one count of armed robbery, one count of kidnapping, one count of criminal conspiracy to commit armed robbery, and one count of possession of a firearm during the commission of a violent crime. After his direct appeal was dismissed, Petitioner filed an application for post-conviction relief in the state circuit court. After the post-conviction relief application was denied, Petitioner appealed the circuit court order denying relief to the South Carolina Supreme Court. The South Carolina Supreme Court denied the appeal. Petitioner subsequently filed a petition for a writ of federal habeas corpus in the United States District Court for the District of South Carolina. The District Court denied the federal habeas petition, but granted a certificate of appealability. After briefing and oral argument, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Order in its majority opinion. Petitioner subsequently filed this petition. Respondent respectfully submits certiorari is not warranted on this petition and must be denied for the reasons set forth herein.

CITATION TO THE OPINION BELOW

The United States Appeals Court for the Fourth Circuit filed its opinion affirming the United States District Court for the District of South Carolina's denial of writ of federal habeas corpus on May 22, 2017. Hope v. Cartledge, 857 F.3d 518 (4th Cir. 2017) (See also App. pp. 2a-26a). The Order denying the

petition for rehearing en banc was filed on June 19, 2017. (Petitioner's App. p. 1a).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and judgment on May 22, 2017. Rehearing was denied on June 19, 2017. Petitioner contends this Court has jurisdiction over the question presented pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts that this case involves the Sixth Amendment right "to have the Assistance of Counsel for his defence." The Petitioner further asserts this issue implicates 28 U.S.C. § 2254(d).

RESPONDENT'S STATEMENT OF THE CASE

Petitioner Maurice Hope ("Petitioner") is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for York County. Petitioner was indicted for one count of Possession of a Firearm During the Commission of a Violent Crime, one count of Kidnapping, one count of Criminal Conspiracy to Commit Armed Robbery, and one count of Armed Robbery. (J.A. 6-13).¹ On September 10, 2008, a jury found Petitioner was guilty of all four charges. (J.A.

¹ Citations to J.A. are referring to the joint appendix filed in the appeal to the Fourth Circuit.

292-93). Petitioner was sentenced to thirty years confinement for kidnapping, thirty years confinement for armed robbery, five years confinement for possession of a firearm, and five years confinement for conspiracy to commit armed robbery conviction, all to be served concurrently. (J.A. 298-99).

A. State Court Challenges to Conviction

Petitioner sought direct review of his conviction, and the appeal was perfected with the filing of a Final Anders Brief of Appellant. (J.A. 307-17). The South Carolina Court of Appeals dismissed Petitioner's appeal. (J.A. 319-20).

Petitioner then filed an Application for Post-Conviction Relief asserting claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. (J.A. 322-28).

An evidentiary hearing in this action was held on October 10, 2012, and on August 28, 2013, the PCR Court filed its Order of Dismissal. (J.A. 375-84). The PCR Court denied relief upon Petitioner's claim that trial counsel was ineffective in not requesting an alibi jury instruction. The PCR Court found trial counsel was deficient for failing to ensure that an alibi instruction was given to the jury and thus, his conduct fell below the reasonable professional standard. (App. 64a). Relying on state law, the PCR Court found that, had a jury instruction on alibi been requested, the trial court would have been required to deliver such a charge because it was supported by evidence presented at trial. See State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (trial court must give requested

charge if it is supported by evidence). (App. p. 64a). However, the PCR Court found that Petitioner had not proven that he suffered prejudice from the lack of an alibi charge. (App. p. 64a). Alibi testimony was presented to the jury, and both attorneys discussed the issue in their closing arguments. Id. The trial court charged the jury that the State had the burden of proof to prove each and every element of each offense beyond a reasonable doubt, and that a defendant is presumed innocent of each and every offense. Id. The PCR Court also found the instructions regarding the presumption of innocence, the instructions regarding assessment of witness credibility, and the trial court's multiple reminders that the State had to prove Petitioner's guilt beyond a reasonable doubt for the elements of each crime alleged were very important. (App. pp. 64a-66a).

The PCR Court found that this charge was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that Mr. Hope was not at home at the time of the crime, and that he was, in fact, at the scene of the crime and committed the crime. (App. pp. 66a-67a). In addition, in this particular case, because the jurors could believe *either* the State's identification witnesses (co-defendants), *or* they could believe the alibi witnesses, *but not both*, the PCR Court found that the crucial issue in this case was credibility. (App. p. 67a). Witness credibility was argued by both sides and was thoroughly charged to the jury. Id.

The PCR Court found that Petitioner's case was analogous to two state cases in which the South Carolina Supreme Court affirmed findings that a

defendant was not prejudiced by a trial attorney's failure to request an alibi instruction, Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) and Gibbs v. State, 403 S.C. 484, 487, 744 S.E.2d 170, 172 (2013), while also distinguishing Petitioner's case from another case in which the South Carolina Supreme Court found a defendant was prejudiced by trial counsel's failure to request an alibi jury instruction; Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). (App. pp. 67a-68a). Clearly, the trial court emphasized the State burden of proving Petitioner's guilty beyond a reasonable doubt. (App. p. 68a). The PCR Court also found "alibi" is a layman's concept in addition to a legal one and the defense of not being at the scene of the crime was clearly presented to the jury. Id. Absent any evidence to the contrary, the PCR Court concluded that Petitioner's alibi witness testimony must have been given little or no weight by the jury and therefore was not convinced that an alibi charge request by Counsel would have affected the outcome of Petitioner's trial. Id.

Petitioner appealed the denial of relief from the PCR Court with the filing of a Johnson² petition for writ of certiorari. (J.A. 387-97). In the petition, counsel argued Petitioner suffered prejudice from trial counsel's deficient failure to secure an alibi charge because based on the inconclusive witness testimony presented, the jury needed a specific instruction that the State had to prove Petitioner was at the scene of the robbery beyond a reasonable doubt. (J.A. 393-95). By Order filed July 11, 2014, the South Carolina

² Johnson v. State, 294 S.C. 310, 364 S.E.2d 201, 201 (1988).

Supreme Court denied the Petition for Writ of Certiorari. (J.A. 406).

B. Federal Habeas Action

On September 2, 2014, Petitioner filed a federal habeas action in the United States District Court for the District of South Carolina. (J.A. 409-30). In this action, Petitioner asserted he was denied effective assistance of trial counsel as a result of counsel's failure to request an alibi jury instruction. (J.A. 424-28). Respondent filed a Motion for Summary Judgment and a Return and Memorandum of Law in Support of Motion for Summary Judgment on November 14, 2014. (J.A. 431-55). Petitioner filed an Opposition and Reply to the Respondent's Motion for Summary Judgment on January 14, 2015. (J.A. 456-77). On June 15, 2015, a Report and Recommendation was issued recommending the Motion for Summary Judgment be granted. (J.A. 478-95). Petitioner filed Objections to the Report and Recommendation. (J.A. 496-507).

By Order filed August 4, 2015, the Honorable R. Bryan Harwell, United States District Judge, granted the Respondent's Motion for Summary Judgment and dismissed the federal habeas petition. (J.A. 508-528). However, Judge Harwell also granted a certificate of appealability. (J.A. 527). After briefing and oral argument, the Fourth Circuit Court of Appeals affirmed the District Court's Order by majority opinion.

RESPONDENT'S STATEMENT OF FACTS

Petitioner and two-co-defendants, Jarrod Heath and Corey Spruell, robbed a Bi-Lo grocery store in Rock Hill, SC. Two male robbers entered the store on January 1, 2008. (J.A. 59-61). Sharon Gordon, a Bi-Lo shopper, testified that as she was getting into her car to leave, she saw another car come into the parking lot and turn off its lights, which was odd considering it was still dark outside. Gordon observed the dark colored four door car that she thought was either a Dodge Stratus or Dodge Intrepid car back into a parking spot. (J.A. 61, 81-2). Gordon saw at least three individuals in the car. (J.A. 82).

After talking with the eyewitnesses at the scene, an investigator talked with Tara Retzer, a former bookkeeper at the Bi-Lo who had quit under suspicious circumstances.³ (J.A. 62, 65-66). The investigator also learned Retzer's boyfriend was Corey Spruell. (J.A. 65). After interviewing Retzer, the investigator next looked into Jarrod Heath's possible involvement in the robbery. (J.A. 66). When the investigator went to speak with Heath, he saw a dark green four-door Chrysler 300 parked in front of his Heath's residence. (J.A. 66).

Heath was later stopped for a traffic violation and arrested for driving under suspension. (J.A. 70-1). During a search of the Heath's vehicle, police found a

³ Prior to her departure, management had planned on talking with her about some cash shortages. (J.A. 111). Also, the money taken from the Bi-Lo was taken from where the bookkeepers worked. (J.A. 62-3).

wallet with Petitioner's identification in the trunk. (J.A. 71). Heath admitted in a statement that he was the driver of the getaway car for the Bi-Lo robbery. (J.A. 73). Law enforcement located a black gun under Heath's bed at his residence. (J.A. 75).

After speaking with Heath, the investigator was looking to arrest Heath's brother (Spruell) and Petitioner. (J.A. 73-4). At Retzer's and Spruell's residence, law enforcement found seven \$100 bills and one \$10 bill. (J.A. 76).

Bill Patton, one of the managers of the Bi-Lo on the morning of the robbery, testified two individuals came into the store wearing ski masks. (J.A. 74). Both had guns, and both were heading in Patton's direction. (J.A. 87). One of the men stopped at the manager's office and held a gun on another manager on staff that morning. (J.A. 87). Patton described that assailant man as being between five-feet, eight inches to five-feet, ten inches tall, being of stocky build, and weighing approximately 200 pounds. (J.A. 87). Patton described the other man as being a little taller and a little bit of a medium build. (J.A. 87).

The taller male went to the cash office. (J.A. 88). When that assailant jumped over the counter to go to the cash office, Patton called 911. The robber stopped and raised his gun at Patton; the robber then spun around and pointed the gun at the bookkeeper. (J.A. 88). Patton and other employees then escaped from the store through the back door. (J.A. 89).

Dana DeRose, a bookkeeper working at the Bi-Lo the morning of the robbery, testified that around 7

a.m., someone jumped over the Dutch door leading to her office. (J.A. 98). When she turned to the side, there was a man pointing a gun in her face. (J.A. 98). DeRose described the man as having a medium build. (J.A. 99). He was a black male approximately five feet, nine inches tall, and he had on a ski mask. (J.A. 99). The man demanded DeRose give him the keys, which she understood meant the keys to the cash drawer. (J.A. 99). She noted the man did not show any uncertainty as to the location of the cash drawer. (J.A. 100).

DeRose testified the man told her to lay down on the ground, and he continued to point the gun at her. (J.A. 101). After she laid down on the ground, the man loaded a dark bag with the money from the cash drawer. (J.A. 101). Don Blair, another store manager, testified someone came into the office in the store shortly before 7 a.m. (J.A. 106-07). He was a stocky African-American male wearing a ski mask while pointing a gun who told Blair, “[d]on’t f-ing move.” (J.A. 107, 108). This robber also told another worker to sit back down and to not move. (J.A. 108).

Blair testified the man, who was nervous and animated, held the gun on them for between forty-five seconds to a minute. (J.A. 109). The man hollered to the other robber that someone was coming. In response, the other assailant came out of the office, and the two left the office. (J.A. 109). Blair noted that the robbers took a little less than \$11,000. (J.A. 110). Both Blair and DeRose narrated the events of the morning of the robbery as shown on the surveillance video. (J.A. 102-05, 111-13).

Petitioner's two co-defendants, Corey Spruell and Jarrod Heath also testified for the State. Spruell, serving time for attempted armed robbery and criminal conspiracy, admitted that he, Heath, and Petitioner went to the Bi-Lo to rob the store. (J.A. 115). Spruell and Petitioner got out of the car and went inside; Heath waited with the car. (J.A. 115). Spruell admitted he was the one who jumped over the counter and got the money from the cash drawer. (J.A. 116). Petitioner made the store employees stay in one place. (J.A. 116). Spruell did not know what kind of gun Petitioner had. (J.A. 116).

After the robbery, the three divided up the money from the robbery at Heath's house. (J.A. 116). Spruell denied having a gun with him during the robbery. (J.A. 118). He acknowledged that his girlfriend used to work at the Bi-Lo, and she knew where the cash was kept. (J.A. 119). However, he denied she helped in planning the robbery. (J.A. 119). Spruell also testified that Heath received \$900 for driving the getaway car. (J.A. 119).

Jarrod Heath, serving time for armed robbery, admitted he was involved in robbing the Bi-Lo with Petitioner and Heath's brother, Spruell. (J.A. 120). Heath had heard Petitioner and Spruell talk about the robbery before it happened. He noted that the plan was for the robbery to happen on New Year's Day. (J.A. 120). Heath agreed to help them with the robbery by driving. (J.A. 121).

On the morning of the robbery, Heath first picked up Spruell. The two picked up Petitioner, and the three drove over to the Bi-Lo in Heath's green

Chrysler 300. (J.A. 121-22). Heath parked the car, and Petitioner and Spruell got out. (J.A. 122). When the two got out of the car, they both had guns, were wearing ski masks, and had a black bag for carrying the money. (J.A. 122-23). When Spruell and Petitioner returned to the car, the three went to Heath's house and divvied up the money in the black bag from the robbery. (J.A. 123).

Petitioner and Spruell got most of the money, but Heath got some for being the driver. (J.A. 123). Heath noted Petitioner and Spruell discussed the robbery. Spruell was the one who jumped the counter, and Petitioner was the one that made sure nobody moved while the robbery was occurring. (J.A. 123-24). Heath also stated he told the investigator what occurred before he was offered a deal by the solicitor's office. (J.A. 124-25).

Heath had given two statements to law enforcement. (J.A. 125-26). He admitted that the amount he received for the robbery was not correct in his first statement, but was correct in the second statement. (J.A. 126). Heath did not know why that store was chosen for the robbery. He initially told law enforcement Spruell did not have a gun, but Spruell actually did have a gun. (J.A. 127). Heath was also confronted with the inconsistency in his proffer agreement as to whether his brother carried a gun into the store. (J.A. 132-33).

Petitioner Presented an Alibi Defense at Trial.

Petitioner's wife, Christian, and several of their roommates testified that Petitioner was at home for a New Year's Eve get together. Christian testified Petitioner arrived home between 12:15 and 12:45 a.m. on January 1. (J.A. 137-38). He was with her the entire morning. (J.A. 139-41). She also recalled they broke their antique bed that morning, and their two male roommates helped them repair the bed a little after 8 a.m. (J.A. 140). Christian maintained that she and Petitioner remained together in the bedroom until around 6 or 6:30 p.m. on January 1. (J.A. 141).

Kendra Gordon also recalled Petitioner arriving home after midnight on New Year's Day. (J.A. 158). Gordon noted no one left the house after 4 a.m., and she recalled Petitioner and Christian going to their bedroom between 6:30 and 7 a.m. (J.A. 159-60). Gordon did not go to sleep until after 9 a.m., and at that time, Petitioner was still at the residence. (J.A. 161).

Calvin Whitlock testified Petitioner got to the house between midnight and 1 a.m. (J.A. 169-70). Whitlock also saw Petitioner and Christian go to bed between 6:30 and 7 a.m. (J.A. 171). After the two went to bed, he heard them having sex. (J.A. 171-72). Whitlock heard something hit the floor, and shortly thereafter, Christian came out and asked Whitlock and Warren Presler for help in putting the bed back together. (J.A. 172). That conversation occurred shortly after 7 a.m. (J.A. 172). It took approximately thirty to forty-five minutes to fix the bed. Whitlock went to sleep between 9 and 9:30 a.m. (J.A. 173-74). No one left the residence before that time. (J.A. 173-74).

Jenny Smith also indicated Petitioner arrived home between 12:15 and 1 a.m. (J.A. 188-89). Petitioner and Christian went to bed around 6:30 a.m. (J.A. 189). Smith heard their bed squeaking and later breaking a little after 7 a.m. (J.A. 190). Whitlock and Presler assisted the two in fixing the bed. (J.A. 190). It took approximately thirty to forty-five minutes to fix the bed. (J.A. 190). Smith did not see Petitioner leave before she fell asleep between 8:30 and 9 a.m. (J.A. 189-91).

Warren Presler also indicated Petitioner arrived sometime after 12:10 to 12:15 a.m. (J.A. 203). Petitioner did not leave his sight that morning. (J.A. 203). Petitioner and Christian went to bed around 6:30, and Presler heard the bed fall. (J.A. 203). Presler assisted in repairing the bed, and the repair took between thirty to forty-five minutes. (J.A. 203-04). Presler did not see Petitioner leave before he went to sleep between 8:30 and 9 a.m. (J.A. 204).

Petitioner testified he arrived home sometime after midnight. (J.A. 215). Around the time the sun was coming up, he and his wife went to bed. (J.A. 215). They did not go to sleep immediately. (J.A. 215). Instead, they broke their bed having sex. (J.A. 216). Shortly thereafter, Petitioner asked Presler and Whitlock for assistance in fixing the bed. (J.A. 216). Petitioner did not recall the exact timing of the issue with the bed. (J.A. 216). Petitioner indicated he did not wake up until early afternoon. (J.A. 222).

Petitioner had been in contact with Spruell before January 1, 2008. (J.A. 217). Petitioner was

selling drugs at the time, and Spruell asked if he could give Petitioner some money to make some additional money for Spruell. (J.A. 217-18). Spruell never told Petitioner where he got the money. (J.A. 218). Petitioner also claimed he did not know anything about the Bi-Lo robbery before it occurred. (J.A. 218).

During cross-examination, Petitioner explained that Spruell gave him \$2500 a couple of days after January 1. (J.A. 241). Petitioner used that money to purchase more of the drugs that he was selling at the time. (J.A. 242). Petitioner did not repay Spruell in full; Petitioner provided a partial repayment, but he used the rest while he was on the run. (J.A. 245-46). The last time he was in Heath's car was Christmas Eve 2007. (J.A. 244). Petitioner admitted the wallet that was found in Heath's car belonged to him. (J.A. 248).

In reply, the investigator testified he went to Petitioner's residence on January 11. Smith, Gordon, Christian, and a male were at the residence when he arrived. None of those individuals advised the investigator that Petitioner could not have committed the robbery because he was with them on the morning it occurred. (J.A. 251-52). Further, Christian never mentioned Petitioner was with her on the morning of the robbery during any of the four to six phone conversations he had with her. (J.A. 252).

Several people were also at the residence when Petitioner was arrested on May 12. (J.A. 253-54). None of those individuals indicated Petitioner could not have committed the robbery because he was at the residence on January 1. (J.A. 254).

Defense closing argument

Defense counsel focused on the State's failure to show beyond a reasonable doubt that Petitioner was involved in the robbery. Counsel noted the key witnesses, Petitioner's codefendants, admitted they had given inconsistent statements to law enforcement. (J.A. 258). Spruell and Heath had lied to police, and they were required to testify exactly as they did in order to get their plea deals. (J.A. 258-59). Counsel pointed out several inconsistencies from the two men's testimony, and further explained their potential motive to lie to protect Spruell's girlfriend from potential charges. (J.A. 259-60). Counsel argued Petitioner was not identified by anyone around the Bi-Lo at the time of the robbery, and Petitioner did not fit the weight description that some of those witnesses provided. (J.A. 261-62). Finally, counsel argued that "a houseful of law abiding citizens swore under oath that Maurice Hope could not have committed these crimes, couldn't have done it, couldn't have been in two different places at one time, he didn't do it." (J.A. 262, l 24 – J.A. 263, l 3). Altogether, the State had not proved its case beyond a reasonable doubt. (J.A. 263-64).

State's Closing Argument

The State argued that Petitioner's alibi witnesses did not hold up to scrutiny. (J.A. 266). Further, Heath's statement to Detective Haire on January 11 provided a good road map of what occurred on the morning of the robbery. (J.A. 266-67). It reasoned that Spruell knew about the cash drawer at

the store. The solicitor noted that Gordon saw the three robbers inside their car. (J.A. 267-68). He also outlined Spruell and Heath's testimony, acknowledging there were some inconsistencies. (J.A. 268-69). The solicitor also noted it was clear Spruell was lying about not having a gun that morning. (J.A. 269). That being said, the solicitor asked the jury to evaluate the credibility and consistency of the alibi witnesses' testimony. (J.A. 270-71). He closed by contending the State had met its burden of proving Petitioner was guilty beyond a reasonable doubt. (J.A. 272-74).

Testimony at Post-Conviction Relief Action Evidentiary Hearing

At the PCR evidentiary hearing, Petitioner testified his defense at trial was alibi. (J.A. 343). Counsel subpoenaed six witnesses who did testify on his behalf. (J.A. 343-44). Counsel failed to request an alibi jury instruction. (J.A. 348). Petitioner felt the result at trial might have been different had an alibi instruction been given. (J.A. 349).

During cross-examination, Petitioner explained alibi "is when you present a defense stating that you were somewhere else during the time that the crime took place." (J.A. 351, ll 8-10). He agreed counsel did present six alibi witnesses, and counsel argued his co-defendants had motive to lie against him. (J.A. 351-52).

Trial counsel testified he presented an alibi defense at trial. (J.A. 358). Counsel acknowledged

there was direct evidence against Petitioner in the form of the testimony of the two co-defendants. (J.A. 359-60). Counsel acknowledged there was no other direct evidence linking Petitioner to the crime. (J.A. 359-60). Counsel also admitted he failed to request an alibi charge. (J.A. 360). Counsel testified,

Well, I say I believe I should have. But the only thing I can recall looking back at the record is that things were kind of chaotic. For whatever reason I did not request the alibi charge. I was a little bit concerned about the credibility of the alibi's testimony because there were a lot of inconsistencies with time and so forth. In retrospect I should have requested an alibi charge.

(J.A. 360, ll 19-25). Counsel stated the trial court did not give an alibi charge. (J.A. 361). The State challenged the credibility of the alibi witnesses. (J.A. 361).

Counsel agreed alibi was a layperson's term, and Petitioner was able to explain what it meant. (J.A. 364). Counsel thought the jury understood why he presented the alibi witnesses, and it was clear they were saying Petitioner was not at the scene when the robbery occurred. (J.A. 364). He did note on redirect that the jury may have understood the significance of an alibi better with an alibi charge. (J.A. 366).

**REASONS WHY THE WRIT SHOULD BE
DENIED**

Certiorari is not warranted in this case.

At issue in this appeal is whether the Fourth Circuit Court of Appeals erred in finding the state PCR court did not unreasonably apply federal law in denying relief upon Petitioner's claim that trial counsel was ineffective in not requesting an alibi jury instruction at trial. This issue, which involves an ordinary application of Strickland on a matter resting in state law, does not warrant further review. The Fourth Circuit's determination that the state PCR Court did not unreasonably apply federal law in finding Petitioner failed to establish he was prejudiced under Strickland was well within the framework this Court has set for evaluating ineffective assistance of trial counsel claims raised in federal habeas actions under the AEDPA.

I. The Fourth Circuit's opinion appropriately applied AEDPA deference and properly assessed Strickland prejudice in finding the South Carolina state courts did not unreasonably apply federal law in denying relief.

The question presented to the Fourth Circuit Court of Appeals was whether Petitioner's trial counsel was ineffective for failing to request a jury charge on the law of alibi, and more specifically, did Petitioner show Strickland prejudice resulting from the lack of an alibi instruction? The Fourth Circuit appropriately reviewed the claim through the

restrictive lens of 28 U.S.C. § 2254. According to the statute, a claim adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of” clearly established federal law as decided by the United States Supreme Court, or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” 28 U.S.C. § 2254(d).

This is a “difficult to meet,” Harrington v. Richter, 562 U.S. [86, 102] (2011), and “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt,” Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam) (citation and internal quotation marks omitted). The petitioner carries the burden of proof. Id., at 25, 123 S.Ct. 357.

Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

To determine whether a particular decision is “contrary to” then-established law, a federal court must consider whether the decision “applies a rule that contradicts [such] law” and how the decision “confronts [the] set of facts” that were before the state court. Cullen, 563 U.S. at 182, Williams v. Taylor, 529 U.S. 362, 405-06 (2000). If the state-court decision “identifies the correct governing legal principle” in existence at the time, a federal court must assess whether the decision “unreasonably applies that

principle to the facts of the prisoner's case.” Cullen, 563 U.S. at 182, Williams, 529 U.S. at 413.

A decision is contrary to United States Supreme Court authority if the state court applies a rule different from the governing law set forth in Supreme Court cases, or decides the case differently on materially indistinguishable facts. Bell v. Cone, 535 U.S. 685, 694 (2002). If there is no United States Supreme Court precedent on a point, the state disposition cannot be contrary to United States Supreme Court precedent. Woods v. Donald, 575 U.S. --, --, 135 S. Ct. 1372, 1377 (2015); Lopez v. Smith, 574 U.S. --, --, 135 S. Ct. 1, 5, (2014).

This is not to say that § 2254(d)(1) requires an “ ‘identical factual pattern before a legal rule must be applied.’ ” Panetti v. Quarterman, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). To the contrary, state courts must reasonably apply the rules “squarely established” by this Court's holdings to the facts of each case. Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009). “[T]he difference between applying a rule and extending it is not always clear,” but “[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” Yarborough v. Alvarado, 541 U.S. 652, [666 [(2004)]. The critical point is that relief is available under § 2254(d)(1)'s

unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no “fairminded disagreement” on the question, Harrington, 562 U.S., at —, 131 S.Ct., at 787.

White v. Woodall, 572 U.S. --, --, 134 S. Ct. 1697, 1706–07 (2014).

The issue is not simply whether the law was, in the opinion of the reviewing court, erroneously or incorrectly applied, but whether the state court’s decision was unreasonable in its application of same. In regard to the facts, state court factual findings reviewed in a habeas action must be presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

To establish that counsel was ineffective, one must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. Id.

In order to prove deficient performance, the applicant must “show ‘that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth

Amendment. ” Harrington v. Richter, 562 U.S. 86, 104 (2011), quoting Strickland, 466 U.S. at 687. “The standard for judging counsel’s representation is a most deferential one.” Id. at 105. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 690.

“[W]hile in some instances ‘even an isolated error’ can support an ineffective assistance claim if it is ‘sufficiently egregious and prejudicial,’ Murray v. Carrier, 477 U.S. 478, 496 (1986), it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” Harrington, 562 U.S. at 111. In assessing prejudice, courts “must consider the totality of the evidence before the judge or jury.” Berghuis v. Thompkins, 560 U.S. 370, 389 (2010)(quoting Strickland). In reviewing the state habeas court’s conclusions, the appellate court’s “inquiry regarding the prejudice prong is twofold: (1) whether the instruction, if requested, should have been given; and (2) if the instruction had been given, was there a reasonable probability that the outcome of the proceedings would have been different.” Lee v. Clarke, 781 F.3d 114, 125 (4th Cir. 2015), as amended (Apr. 15, 2015) (quoting United States v. Luck, 611 F.3d 183, 189 (4th Cir. 2010)).

In South Carolina, “[t]o establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime.” State v. Diamond, 280 S.C. 296, 297,

312 S.E.2d 550, 550 (1984)(quoting State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980)). An alibi charge places no burden on a criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (citing State v. Bealin, 201 S.C. 490, 23 S.E.2d 746 (1943)). An alibi charge is considered especially crucial when the evidence is entirely circumstantial as in this case. Roseboro, 317 S.C. at 294, 454 S.E.2d at 313. The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error. State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980).

Alibi is not an affirmative defense imposing upon the accused the burden of its proof. It does not require testimony of the accused or of witnesses produced by him. It may be established as well by the testimony of witnesses for the prosecution. If the nature of the crime is such that the presence of the accused at the place and time of its commission is essential to his guilt, the burden is upon the State to prove beyond a reasonable doubt that he was then and there present. Where the evidence, taken as a whole, whether adduced by the prosecution or by the accused, is sufficient to raise in the minds of the jury a reasonable doubt as to his presence at the scene of the crime, he is entitled to acquittal.

State v. Mayfield, 235 S.C. 11, 25, 109 S.E.2d 716, 724 (1959) (internal citations omitted).

“It is well settled that counsel's rejection of an alibi charge when the defendant claims that he was in another place at the time of the commission of the criminal act constitutes deficient representation under an objective standard of reasonableness.” Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (citing Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992)); see also Roseboro, 317 S.C. at 294, 454 S.E.2d at 313. In Ford, the South Carolina Supreme Court found the applicant was not prejudiced by trial counsel's failure to request an alibi instruction. The South Carolina Supreme Court noted the evidence at trial found that the applicant's DNA was found on the victim's clothing, his blood type matched the perpetrator's, the applicant and a co-defendant were overheard planning the assault, and the co-defendant was in possession of a wallet containing the applicant's identification immediately after the assault. Id. Since there was overwhelming evidence of guilt, there was not a reasonable probability of a different result. Id.

The Fourth Circuit's opinion in this case shows its review of the state post-conviction relief court's findings on the ineffective assistance of counsel claim correctly reflects this Court's general framework regarding the assessment of ineffective assistance of trial counsel claims under the AEDPA and under Strickland. The majority opinion clearly recognized the standard of review under 28 U.S.C. § 2254(d)(1) is a highly deferential one:

For purposes of this appeal, the “pivotal question is whether the state court’s application of the Strickland standard was unreasonable.” Harrington v. Richter, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). “Under § 2254(d), an unreasonable application of federal law differs from an incorrect application of federal law, and a state court ‘must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.’” Jones v. Clarke, 783 F.3d 987, 991 (4th Cir.), cert. denied, — U.S. —, 136 S.Ct. 186, 193 L.Ed.2d 148 (2015) (quoting Harrington, 562 U.S. at 101, 131 S.Ct. 770).

Hope, 857 F.3d at 523.

The Fourth Circuit’s majority opinion did not minimize the importance of the state crafted alibi instruction. It recognized the important purpose that alibi instructions serve in ensuring a jury understands the State maintains the burden of proof when a defendant presents an alibi defense. However, after reviewing the entire record, including the instructions that were given, the evidence presented at trial, and closing arguments, the Fourth Circuit found it was reasonable for the state PCR Court to find there was not a reasonable probability the result at trial would have been different had an instruction been given.

Federal courts have recognized that there are similar divisions among the circuits regarding whether

the failure to give an alibi instruction would constitute a constitutional due process error. For instance, in Alicea v. Gagnon, 675 F.2d 913, 926 (7th Cir. 1982), the Seventh Circuit Court of Appeals rejected a claim of trial court error for failure to give an alibi instruction, finding such an instruction would have been redundant in light of the jury instructions given. Similarly, the Ninth Circuit Court of Appeals found a federal habeas petitioner was not entitled to relief upon a federal due process claim based upon a trial court's denial of a requested alibi jury instruction. Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir. 1995). In Duckett, the Ninth Circuit noted that several circuits have reached different conclusions in assessing the underlying constitutional concern from the failure to give an alibi charge when requested and warranted by the evidence presented at trial. Id. at 744-45. The Ninth Circuit ultimately denied relief upon the due process claim presented before it; the jury was instructed on every element of the crimes for which the petitioner was tried, and the jury was also told "the defendant is presumed to be innocent until the contrary is proved," and "[t]his presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense." Duckett, 67 F.3d at 745. After reviewing the alibi evidence presented, the Ninth Circuit concluded the petitioner was afforded a fair trial. Id. at 746.

Altogether, it cannot be said the state PCR court unreasonably applied federal law in denying relief upon this claim based upon Petitioner's contention that the lack of an alibi charge was prejudicial because

of potential juror confusion. Not only is this assertion not supported by this Court's precedent, the variety of opinions from different jurisdictions clearly reflect that fairminded jurists do disagree as to whether a strong reasonable doubt and presumption of innocence jury charge renders a failure to give an alibi charge harmless. Ultimately, as discussed further below, whether a defendant suffers prejudice when trial counsel fails to request an alibi instruction when one is warranted, will be dependent upon the facts and circumstances of each individual case. The Fourth Circuit found that the facts of Petitioner's case did not warrant a finding of Strickland prejudice. It was not an unreasonable application of federal law for the state PCR court to find Petitioner was not prejudiced, and to ultimately deny relief upon this claim of ineffective assistance of counsel.

II. This case is not an adequate vehicle for addressing Petitioner's request for a finding that an alibi instruction is fundamentally required.

1. The Fourth Circuit's analysis of this claim of ineffective assistance of counsel, did not minimize the importance of state crafted alibi instructions.

Petitioner contends this Court should utilize his case to reiterate the importance of alibi and other "special purpose" jury instructions. Petitioner's argument is premised upon his belief that an alibi instruction is a "fundamental" instruction. This case is not an appropriate vehicle for addressing

Petitioner's concern. This Court has never held an alibi instruction is required by the Constitution. In light of the type of analysis required in reviewing federal habeas claims adjudicated on the merits under the AEDPA, along with the all encompassing review required in assessing a claim of Strickland prejudice, Respondent submits this would not be an ideal scenario for addressing Petitioner's concern.

A number of courts have found a lawyer's failure to request a specific alibi instruction was not prejudicial under Strickland, based upon the facts and circumstances presented in those cases. See Ford v. State, *supra*; Schmitt v. State, 779 A.2d 1004, 1024 (Md. Ct. Spec. App. 2001)(finding no prejudice after finding counsel not deficient in not requesting alibi instruction because of belief instruction was a meaningless redundancy); Merrill v. State, 716 N.E.2d 902, 906 (Ind. 1999)(finding no Strickland prejudice when counsel did not request an alibi instruction when jury heard alibi defense, and instruction was unlikely to change the outcome of trial); Com. v. Sileo, 32 A.3d 753, 767 (Pa. Super. Ct. 2011)(finding no prejudice under Strickland for claim of ineffective assistance of counsel for failing to request an alibi instruction when there was overwhelming evidence of guilt and there was no reasonable probability sufficient to undermine confidence in the verdict that failure to request instruction would have altered the outcome at trial); State ex rel. Boso v. Hedrick, 391 S.E.2d 614, 621 (W.Va. 1990)(finding no ineffective assistance of counsel in not requesting alibi instruction when circumstances of case involved a question of fact for the jury to resolve in its determination of whether the

State had proved defendant's guilt beyond a reasonable doubt).

Several jurisdictions have found that a general reasonable doubt instruction and presumption of innocence instruction can render the failure to either request or give an instruction on alibi non-prejudicial. For instance, in Riley v. State, 319 Ga.App. 823, 738 S.E.2d 659 (2013), the Georgia Court of Appeals affirmed a trial court's denial of relief upon an ineffective assistance of counsel claim for failure to request an alibi jury instruction. The appeals court noted "the trial court charged the jury on the burden of proof, reasonable doubt, and presumption of innocence of the accused." 319 Ga.App. at 826, 738 S.E.2d at 662. Further, the defendant had testified that he was not at the places he was accused of robbing when the robberies occurred. Id. The court reasoned the absence of the charge did not change the fact that no juror who would have believed the defendant's testimony could find the State had carried its burden of proof. Id. (citing Rivers v. State, 250 Ga. 288, 300, 298 S.E.2d 10, 20 (1982)).

Similarly, the Supreme Judicial Court of Massachusetts has consistently held that it was not error for a trial court to not instruct a jury on alibi when an alibi defense is presented. "An alibi instruction is not required where the charge as a whole makes clear that the Commonwealth must prove beyond a reasonable doubt that the defendant committed the crime for which he was indicted." Com. v. Thomas, 439 Mass. 362, 371, 787 N.E.2d 1047, 1056 (2003) (citing Com. v. Medina, 380 Mass. 565, 404 N.E.2d 1228 (1980)). Also, the New Jersey Supreme

Court and other courts have also consistently held the failure to provide a separate alibi charge does not constitute reversible error. State v. Echols, 199 N.J. 344, 363, 972 A.2d 1091, 1102 (2009) (citing State v. Edge, 57 N.J. 580, 590–91, 274 A.2d 42 (1971) (holding failure to give requested alibi charge was harmless); See also Williams v. State, 99 Nev. 797, 798, 671 P.2d 635, 636 (1983) (“Alibi is not a separate, affirmative defense, but is simply a complete and direct denial of the state's case. Alibi evidence is of obvious import to the jury, and needs no further explanation such as that embodied in a typical alibi instruction.”).

Respondent would note this argument by Petitioner is also inconsistent with the precedents in the jurisdictions Petitioner relies upon in contending “a number of courts have found a lawyer’s failure to request specific alibi instructions to be prejudicial under Strickland.” (Petition, p. 16). In State v. Bolton, 2016 WL 2945172 (Ariz. Ct. App. May 20, 2016), for instance, the Arizona Court of Appeals did not make a finding that the defendant was prejudiced by counsel’s failure to request an alibi instruction. Instead, it found the lower court had abused its discretion in relying upon a conclusion of law that had been expressly rejected by the Arizona Supreme Court.⁴ Id. at *3-5. Also, in Roseboro v. State, 317

⁴⁴ Specifically, the lower court had ignored the Arizona Supreme Court’s opinion in State v. Rodriguez, 192 Ariz. 58, 961 P.2d 1006 (1998), which held that a trial court’s refusal to give an alibi instruction, when requested and warranted by the evidence presented at trial, may be reversible error. Bolton, 2016 WL 2945172 at *3-4.

S.C. 292, 454 S.E.2d 312 (1995), the South Carolina Supreme Court reasoned the applicant had established he was prejudiced by counsel's failure to request an alibi instruction because the evidence presented against the defendant at trial was only circumstantial in nature, and the closing argument presented by the prosecution created an improper impression the defendant had the burden of proving his alibi. *Id.* at 295, 454 S.E.2d at 314. Neither the Fourth Circuit in this case nor these other opinions have minimized the utility of a state's alibi jury instruction, but prejudice is a different matter. Each reflect that the failure of counsel to request such an instruction, is not prejudicial only when the concerns addressed by alibi instructions are not present. Thus, further guidance is not warranted at this time.

2. The procedural posture of this case is not favorable to Petitioner's position that an alibi instruction is fundamentally required.

Petitioner's reliance upon this Court's precedents in *Taylor v. Kentucky*, 436 U.S. 478 (1978), *Jackson v. Virginia*, 443 U.S. 307 (1979), and *Carter v. Kentucky*, 450 U.S. 288 (1981) is misplaced. In *Taylor*, this Court held the Due Process Clause of the Fourteenth Amendment requires a jury be instructed that the law presumes a defendant is innocent to be given. *Taylor*, 436 U.S. at 490. This Court noted it had previously declared "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced

as proof at trial.” Id. at 485. An instruction on the presumption is one way to ensure the jury understands the importance of that right. Id.

In Jackson v. Virginia, this Court held,

in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Jackson, 443 U.S. at 324. Contrary to Petitioner’s assertions, the opinion in Jackson focuses not on the importance of a specific reasonable doubt instruction, but instead upon the review of the sufficiency of the evidence to support a criminal conviction.

In Carter, this Court held that “a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant’s failure to testify.” Carter, 450 U.S. at 305. This Court stated,

[t]he freedom of a defendant in a criminal trial to remain silent “unless he chooses to speak in the unfettered exercise of his own will” is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the

Fourteenth. Malloy v. Hogan, 378 U.S., at 8, 84 S.Ct., at 1493. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.

Carter, 450 U.S. at 305.

These cases do not support Petitioner's contentions that the Fourth Circuit's majority opinion conflicts with clearly established precedent of this Court. None of these cases directly address whether a defendant is prejudiced under Strickland when trial counsel does not request an alibi jury instruction when such an instruction is warranted. Nor do these three opinions even address the issue of whether a failure to give an alibi instruction constitutes constitutional error. Respondent submits the extension Petitioner seeks to support his claim for relief cannot be reached based upon these cases. The cases relied upon by Petitioner were in different procedural postures from his. Both Taylor and Carter were reviewed by this Court in direct review of the petitioners' convictions. And while Jackson was also on appeal from a federal habeas action, the issue presented in Jackson was a very narrow due process issue, not an ineffective assistance of counsel claim.

Unlike Taylor and Carter, the issue presented in this case is not regarding whether a certain jury instruction was constitutionally required. Petitioner never asserted below that an alibi instruction was constitutionally required. As noted by the Fourth

Circuit, the parties agreed that Petitioner would have been entitled to an alibi instruction under state law had such an instruction been requested. The issue in this case, is, instead whether Petitioner was prejudiced by counsel's failure to request such an instruction. Absent a finding that the failure to request an alibi instruction is *per se* prejudicial, the determination that Petitioner was not prejudiced by counsel's failure to request an instruction would very likely not change in light of the facts of Petitioner's case and the fact that the Fourth Circuit majority opinion did not discount the importance of an alibi instruction.

3. **This case is not an adequate vehicle because assessing Strickland prejudice when trial counsel has failed to request a particular jury instruction, by its very nature, requires intensive factfinding review.**

Close review of the Fourth Circuit's opinion reflects that the distinctions made between the majority opinion and the dissent were as much, if not more, based upon the evidence presented at trial than the emphasis placed upon the lack of an alibi instruction. As noted in the majority opinion and by the state post-conviction relief court, the State presented direct evidence by way of the testimony of Petitioner's two co-defendants. This evidence was generally corroborated by other eyewitnesses (i.e., witness seeing the car with three individuals in the parking lot; victims in the store noting two males with guns completed the robbery, and Heath's statement

regarding Petitioner's and Spruell's discussion about the robbery) and a surveillance video that showed the robbery. Further, Petitioner's wallet was found in the trunk of the car used in the robbery, and Petitioner fled the jurisdiction shortly after the robbery. See State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

In light of the fact the jury was clearly instructed the burden was on the State to establish Petitioner's guilt beyond a reasonable doubt, and nothing that occurred during Petitioner's trial provided the jury with a reason to believe Petitioner had any burden of proving his alibi, and also in light of the evidence presented at trial, the state PCR Court did not unreasonably apply federal law in finding Petitioner failed to establish he was prejudiced by counsel's failure to request an alibi instruction. This petition should be denied.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari must be denied.

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