No. 17-___

IN THE

Supreme Court of the United States

MAURICE SHAUNDELL HOPE,

Petitioner,

v.

WARDEN CARTLEDGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole issue in this case is whether the failure of Mr. Hope's trial counsel to request an alibi jury instruction prejudiced Mr. Hope. The alibi instruction would have clarified that the State bore the burden of disproving Mr. Hope's alibi beyond a reasonable doubt. It is undisputed that Mr. Hope's trial counsel was deficient in failing to request such an instruction; that the trial court would have been required to give such an instruction if asked; and that alibi was Mr. Hope's sole defense to criminal charges that resulted in a thirty-year sentence. Over the strong dissent of Judge Thacker, the Fourth Circuit found no prejudice from counsel's deficiency, asserting that it was "inconceivable" that even one juror might have reached a different outcome if instructed on alibi. In so doing, the Fourth Circuit ignored the long history of confusion surrounding an alibi defense, as demonstrated in countless opinions showing that even judges have failed to appreciate how to apply the reasonable-doubt standard to alibi, and further ignored that, reflective of this confusion, most states and federal courts have held that an alibi instruction is necessary—over and above general instructions on the State's burden of proof and the defendant's presumption of innocence.

The question presented is:

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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INTRODUCTION

"The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978). This Court has clearly established that in evaluating the sufficiency of a jury charge, courts must recognize that "[j]urors are not lawyers" and they cannot be expected to derive every possible logical inference from a general legal instruction, such as standard reasonable-doubt and presumption-of-innocence instructions. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981). Certainly, jurors cannot be assumed to understand issues of law that even "court[s] . . . failed to appreciate." *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). Where courts have "failed to appreciate several factors in regard to [a] criticized charge[, w]hat reason is there for assuming that the jury did not also fail to appreciate these factors?" *Id.* at 613.

As the *Strickland* inquiry also makes plain, a defendant's trial counsel bears responsibility in requesting appropriate instructions. Under the familiar two-part inquiry for ineffective assistance of counsel, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694). In jurisdictions such as South Carolina—where

a jury must return a unanimous verdict to convict, *see* S.C. Const. art. V, § 22; App. 96a—the prejudice prong of *Strickland* is met where "'there is a reasonable probability that at least one juror would have struck a different balance.'" App. 10a (quoting *Wiggins*, 539 U.S. at 537).

The Fourth Circuit incorrectly applied the *Strickland* inquiry to the failure of Mr. Hope's trial counsel to request an express instruction on Mr. Hope's alibi defense. Over Judge Thacker's dissent, the majority found that the State court reasonably found no prejudice from that failure. The majority concluded that a jury could be assumed to appreciate the nuances of an alibi defense—namely, that the State bears the burden of disproving alibi, and is required to do so beyond a reasonable doubt—even though scores of judges, spanning more than a century, have failed to make exactly that deduction. This Court's review is warranted to address this contravention of its precedent by the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's denial of Mr. Hope's petition for rehearing en banc is included as Appendix A. The panel opinion is published at 857 F.3d 518 (4th Cir. 2017), and is included as Appendix B. The district court's opinion denying relief but granting a certificate of appealability is available at 2015 WL 4644536 (Aug. 3, 2015) and is included as Appendix C. The South Carolina Supreme Court's denial of Mr. Hope's petition for certiorari is included as Appendix D. The South Carolina Court of Common Pleas' Decision denying post-conviction relief is included as Appendix E.

JURISDICTION

The Fourth Circuit entered judgment on May 22, 2017, App. 2a, and denied rehearing on June 19, 2017. App. 1a. 28 U.S.C. § 1254(1) confers jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment states in relevant part that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The requirements for obtaining habeas relief are set out in 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. Maurice Hope was convicted on weak evidentiary support: The only eyewitnesses who identified Mr. Hope as a participant in the robbery

were two brothers who admitted to their own involvement in the offense but testified—in exchange for their own leniency—that Mr. Hope was the third participant. *See* App. 4a. Their testimony was "riddled with material inconsistencies." App. 23a (dissent). At trial, the prosecution even admitted that one of the brothers "'obviously lied'" in some of his testimony. App. 23a (dissent) (quoting App. 93a).

The only other possible source of identification of the third participant was a store video, but, as the prosecution admitted, "you can't identify anyone" from the video. App. 73a; *see* App. 24a (dissent). Otherwise, the prosecution had only general descriptions from the store employees, who testified that the third robber was a "black male," and "African American," App. 77a; 78a, as is Mr. Hope, though they described an individual significantly smaller in both height and weight than he. App. 24a (dissent).

Mr. Hope's "sole defense" at trial was a classic alibi: Supported by five witnesses—his girlfriend, now wife; three other roommates; and a roommate's friend—Mr. Hope explained that he was at home at the time of the robbery. App. 5a (panel majority). Nevertheless, his trial counsel failed to request an alibi instruction, and the court did not provide one. App. 6a. The jury deliberated for almost as long as the entire trial lasted and asked to rehear portions of the alibi testimony but, without an alibi instruction, ultimately convicted Mr. Hope.[1] App. 6a. The court

[1] The trial lasted 5 hours and 10 minutes, and the jury deliberated 4 hours and 24 minutes. *See* App. 73a; App. 80a; App. 88a-91a; App. 98a-100a.

sentenced Mr. Hope to thirty-years' imprisonment. App. 6a.

2. On collateral review in state court, Mr. Hope brought a Sixth Amendment, ineffective-assistance-of-counsel claim based on his trial counsel's failure to request an alibi instruction. App. 6a-7a. An alibi instruction would have informed the jury that "[t]he burden is on the State to prove beyond a reasonable doubt that the defendant was present at the scene of the crime . . . and was not somewhere else." App. 11a. Such an instruction unambiguously explains that "[t]he State has the burden of disproving the defendant's alibi defense." App. 11a.

The State habeas court found that Mr. Hope's trial counsel was deficient in failing to request an alibi instruction, but it concluded that there was no prejudice. App. 7a.

3. After exhausting state-court relief, Mr. Hope sought a federal writ of habeas corpus. App. 7a. The district court denied the writ but granted a certificate of appealability, because it questioned whether the "boilerplate" reasonable-doubt and presumption-of-innocence instructions that "are given in virtually every criminal case" could substitute for the special-purpose alibi instruction. App. 49a.

4. On appeal, the panel acknowledged that most of the predicates for showing ineffective assistance of counsel were conceded: it was undisputed that Mr. Hope's trial counsel was deficient in failing to request an alibi instruction—thereby satisfying the first *Strickland* prong—and it was undisputed that the trial court would have had to give the alibi

instruction were it requested—thereby satisfying part of the second *Strickland* prong. App. 9a-10a.[2]

The only contested issue was the effect the alibi instruction may have had. The majority ruled that there was not even a reasonable probability that one juror would have reached a different verdict had the jury received an alibi instruction. According to the majority, the boilerplate reasonable-doubt and witness-credibility instructions given in virtually every trial were sufficient to teach the jury that the State bore the burden of disproving alibi. App. 11a-13a. The majority further held that the conviction proved that the jury did not believe the alibi witnesses and did not see the case as close. App. 13a.

Judge Thacker issued a lengthy dissent. App. 16a-26a. She explained that Mr. Hope's case is analogous to cases in which this Court reversed convictions for lack of special-purpose instructions related to the central issues in those cases. *See* App. 16a-18a. Here, without an alibi instruction, the "'jurors plainly did not know . . . that the testimony of Hope's roommates, even if not proven beyond a reasonable doubt by Hope, need only raise a reasonable doubt in their minds that Hope was present at the crime scene.'" App. 22a (quoting *United States v. Alston*, 551 F.2d 315, 319 (D.C. Cir. 1976) (alterations omitted)). The prejudice from the lack of instruction was particularly significant given that "the State's record evidence in this case was incredibly weak." App. 23a.

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[2] It is well-established, and undisputed here, that counsel can be ineffective even where the deficiency relates to State (and not federal Constitutional) law. *See Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

The Fourth Circuit denied Mr. Hope's petition for rehearing and rehearing en banc on June 19, 2017. *See* App. 1a.

REASONS FOR GRANTING THE WRIT

Under the panel's decision, boilerplate instructions given in nearly every case render unnecessary special-purpose instructions, even though they are critical to a jury's proper understanding of essential but complicated issues. The panel's holding conflicts with longstanding and repeated precedent from this Court on the importance of "special purpose" instructions, especially when it comes to the jury's proper understanding of the State's burden of proving guilt beyond a reasonable doubt.

The lack of a special-purpose instruction about how the reasonable-doubt standard applies to *alibi* is particularly prejudicial. Scores of *judges* have failed to appreciate that the prosecution's burden to prove guilt beyond a reasonable doubt requires that it affirmatively *disprove* an alibi, beyond a reasonable doubt. *A fortiori*, there is a reasonable probability that the jury failed to properly apply these standards, even though the jury was generically instructed that the State generally bears the burden of proving the defendant's guilt beyond a reasonable doubt. The well-documented potential for confusion is precisely why specific, express alibi instructions are legally required in numerous circumstances.

The boilerplate reasonable-doubt instructions that the Fourth Circuit relied on did nothing to clarify the complicated legal question of alibi for the jury: They did not explain that the State bore the

burden of disproving alibi. Because the State has conceded all the other elements of the case, and because the State's case is only weakly supported by the record, this case is an excellent vehicle for reiterating the importance of special-purpose instructions.

I. THE PANEL OPINION CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED PRECEDENT ON JURY INSTRUCTIONS

A. This Court Has Clearly Established The Need For Special-Purpose Instructions

This Court has clearly established the importance of "special purpose" jury instructions on complicated legal issues, over and above boilerplate instructions. *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). As Judge Thacker explained, this Court's precedent demands that, "where a particular legal precept is sufficiently fundamental to the defendant's case in a criminal trial, a court may not simply assume that jurors will intuit or deduce that precept from an incomplete or corollary instruction." App. 16a-17a (dissent). "'[I]mplied corollar[ies]'" are insufficient. App. 17a-18a (quoting *Taylor*, 436 U.S. at 485).

1. In *Taylor*, the trial court provided a boilerplate reasonable-doubt instruction, but it refused to instruct the jury that the defendant is presumed innocent and that an indictment is not evidence against the defendant. 436 U.S. at 481. A jury found Taylor guilty. The Kentucky court of appeals affirmed the verdict, holding "'that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not

necessary.'" *Id.* (quoting *Taylor v. Commw.*, 551 S.W.2d 813, 814 (Ky. Ct. App. 1977)). The Kentucky Supreme Court denied review.

This Court granted certiorari and reversed. While the presumption of innocence and the principle that the prosecution bears the burden of proof beyond a reasonable doubt are, technically, not "logically separate and distinct," this Court held that both instructions should be given. *Id.* at 483 (citations omitted). "[T]he ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence," even if "the legal scholar" would not need such guidance. *Id.* at 484. Because of the lack of a "special purpose" presumption-of-innocence instruction, there was "a genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations, rather than on the evidence introduced at trial. That risk was heightened because the trial essentially was a swearing contest between victim and accused." *Id.* at 483, 488. "[T]he Due Process Clause of the Fourteenth Amendment must be held to safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* at 485-86 (citations omitted).

2. The next year, this Court reemphasized the importance of a specific reasonable-doubt instruction in *Jackson v. Virginia*, 443 U.S. 307 (1979). As Judge Thacker noted, *Jackson* expressly establishes that the principle of proving guilt beyond a reasonable doubt "is not simply a 'trial ritual'; it is a 'fundamental . . . substantive constitutional standard' that a factfinder is 'require[d] [to] rationally apply . . . to the facts in evidence." App. 17a (quoting *Jackson*,

443 U.S. at 316-17 (alterations in original)). In fact, as *Jackson* itself noted, even earlier cases from this Court "have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." 443 U.S. at 320 n. 14 (citing cases).

3. Two years later, this Court again emphasized the importance of special-purpose instructions on issues central to a case. In *Carter v. Kentucky*, 450 U.S. 288 (1981), Carter's attorney requested an instruction that a criminal defendant's decision not to testify cannot be used by the jury to infer guilt, but the trial court refused the request. The Kentucky Supreme Court affirmed.

This Court reversed. It worried that "unless instructed otherwise," a jury "may well draw adverse inferences from a defendant's silence." *Id.* at 301. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Id.* at 302. Kentucky argued that the lack of a specific instruction was not prejudicial because the jury was "instructed to determine guilt 'from the evidence alone,' and because failure to testify is not evidence." *Id.* at 303. The Court rejected this argument, because "[j]urors are not lawyers; they do not know the technical meaning of" terms like "evidence." *Id.* The "other trial instructions," like the presumption-of-innocence instruction, could not substitute for an "explicit instruction." *Id.* at 304. The general presumption-of-innocence instruction, while "closely aligned" with the erroneously denied instruction that the defendant's silence is not evidence of guilt, served a "different function[]," and the jury may have "derived

significant additional guidance" from an explicit instruction. *Id.* (citations omitted). *Carter* also explained that "arguments of counsel" could not substitute for an instruction from the court. *Id.*

B. The Lack Of A Special-Purpose *Alibi* Instruction Was Certainly Prejudicial

A jury instruction on the standard and burden of proof for alibi is precisely the type of special-purpose instruction demanded by this Court's precedent. The long history of confusion among judges on this very point shows that particularized guidance is needed and that the lack of such an instruction is prejudicial. "What reason is there for assuming that the jury did not also fail to appreciate" what many "circuit judges" failed to appreciate? *Bollenbach*, 326 U.S. at 613. Indeed, numerous courts, in various contexts, have required alibi instructions precisely to eliminate confusion and afford the defendant due process by a properly instructed jury.

1. Judges Have Routinely Misapplied The Alibi Defense

It has long been established that the State must prove a defendant guilty beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 361 (1970) (citing early sources). Nonetheless, the interplay between that standard and an alibi defense is not intuitive. Many learned jurists across the country—even while recognizing that the government must generally prove a defendant's guilt beyond a reasonable doubt—have mistakenly placed the burden of proving an alibi defense on the defendant, and some have even required the defendant to prove an alibi defense by a preponderance of the evidence.

Then-Judge Blackmun's cataloguing of cases in *Johnson v. Bennett*, 414 F.2d 50, 54 n.4 (8th Cir. 1969) (en banc), is instructive. As *Johnson* notes, the Iowa Supreme Court alone has issued dozens of opinions that have erroneously placed the burden of proof for alibi on a defendant—even while that same court recognized that the State generally bears the burden of proving every element of a crime.

The Iowa Supreme Court is not alone. Some state supreme courts initially believed that, although the government has the burden of proving a defendant's guilt beyond a reasonable doubt, alibi is like other affirmative defenses (such as self-defense) and the burden is on the defendant to prove his or her alibi by a preponderance of the evidence.[3] Other state supreme courts believed that the standard was lower—defendants' alibi evidence only needed to raise a reasonable doubt in juries' minds—but many of these courts still placed the burden of proving an alibi on defendants.[4] Eventually, a consensus

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[3] *See, e.g.*, *State v. Latimer*, 70 S.E. 409, 409-10 (S.C. 1911); *State v. Gadsden*, 50 S.E. 16, 17 (S.C. 1905); *State v. Bodie*, 11 S.E. 624, 629-30 (S.C. 1890); *State v. Paulk*, 18 S.C. 514, 520 (1883), overruled on this ground by *State v. McGhee*, 135 S.E. 59, 60 (S.C. 1926); *Fife v. Commw.*, 29 Pa. 429, 439 (1857).

[4] *See, e.g.*, *State v. Knight*, 285 S.E.2d 401, 407 n.5 (W. Va. 1981); *State v. Alexander*, 245 S.E.2d 633, 636-37 (W. Va. 1978), overruled on this ground by *State v. Kopa*, 311 S.E.2d 412 (W. Va. 1983); *State v. Post*, 123 N.W.2d 11, 19 (Iowa 1963); *Commw. v. Gates*, 141 A.2d 219, 222 (Pa. 1958); *People v. Silvia*, 59 N.E.2d 821, 824 (Ill. 1945), criticized on this ground by *People v. Pearson*, 169 N.E.2d 252, 255 (Ill. 1960); *State v. Wendling*, 164 S.E. 179, 180 (W. Va. 1932); *Morris v. State*, 224 S.W. 724, 725 (Ark. 1920); *State v. Ward*, 173 P. 497, 497 (Idaho 1918); *Wilburn v. Territory*, 62 P. 968, 969-70 (N.M. 1900), overruled on this ground by *State v. Smith*, 153 P. 256 (N.M.

emerged that a defendant should be acquitted if the alibi evidence raised reasonable doubt about the defendant's guilt, but some courts paradoxically still maintained that there was a separate defense of alibi, with its own separate charge, that required a defendant to prove his or her alibi by a preponderance of the evidence.[5] (This approach was ruled unconstitutional in Judge Blackmun's *Johnson* opinion on remand from this Court. *See Johnson v. Bennett*, 414 F.2d 50 (8th Cir. 1969), on remand from *Johnson v. Bennett*, 393 U.S. 253 (1968).)

Landmark criminal-procedure cases from the 1970s resolved much of this confusion as a matter of principle in appellate courts, but not as a practical matter on the ground. This Court, in its 1970 *Winship* decision, unambiguously declared that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

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1915); *People v. Winters*, 57 P. 1067, 1068 (Cal. 1899); *Ackerson v. People*, 16 N.E. 847, 849 (Ill. 1888). Only one case per decade is cited. Otherwise, this footnote, and the Table of Authorities, would never end.

[5] *See, e.g.*, *State v. Stump*, 119 N.W.2d 210, 218 (Iowa 1963), *habeas* granted on this ground sub nom. *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968); *Commw. v. Johnson*, 93 A.2d 691, 699 (Pa. 1953); *State v. Dunne*, 15 N.W.2d 296, 299-300 (Iowa 1944); *State v. Johnson*, 264 N.W. 596, 602 (Iowa 1936), *habeas* granted on this ground sub nom. *Johnson v. Bennett*, 414 F.2d 50 (8th Cir. 1969); *Commw. v. Palma*, 112 A. 26, 27-28 (Pa. 1920); *Raysor v. State*, 63 S.E. 786, 787 (Ga. 1909); *State v. McGarry*, 83 N.W. 718, 719 (Iowa 1900); *Harrison v. State*, 9 S.E. 542, 543–44 (Ga. 1889).

with which he is charged." 397 U.S. at 364. As this Court subsequently explained, *Winship* forbids states from placing the burden of proving any fact necessary for a conviction onto a defendant, *see, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Patterson v. New York*, 432 U.S. 197, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and there are "constitutional limits" precluding states from "reallocat[ing] burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." *Patterson*, 432 U.S. at 210.

Yet, even after appellate courts recognized that defendants do not have the burden of proving their alibi defense (and certainly not by a preponderance of the evidence), and even after *Winship*, trial courts continued to regularly and erroneously charge juries that defendants had to prove their alibi defenses by a preponderance of the evidence—even as these same trial courts acknowledged that the government must prove guilt beyond reasonable doubt.[6] The "reports

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[6] *See, e.g.*, *State v. Evans*, No. 95 CA 31, 1997 WL 219091, at *2 (Ohio Ct. App. Mar. 6, 1997); *Fulton v. Warden*, 744 F.2d 1026, 1030-31 (4th Cir. 1984); *State v. Gladding*, 585 N.E.2d 838, 843 (Ohio Ct. App. 1990); *Harkness v. State*, 590 S.W.2d 277, 279 (Ark. 1979); *Robertson v. Warden*, 466 F. Supp. 262, 264 (D. Md. 1979); *Rogers v. Redman*, 457 F. Supp. 929, 932 (D. Del. 1978); *Halko v. State*, 175 A.2d 42, 48-49 (Del. 1961); *Commw. v. Crooks*, 70 A.2d 684, 684-85 (Pa. Super. Ct. 1950); *Commw. v. Mills*, 39 A.2d 572, 574-76 (Pa. 1944); *Cox v. State*, 8 Ohio Law Abs. 342, 342 (Ohio Ct. App. 1930); *State v. Parks*, 115 A. 305, 306 (N.J. 1921); *Wells v. State*, 145 S.W. 531, 532 (Ark. 1912); *Barton v. Territory*, 85 P. 730, 731 (Ariz. 1906); *Shoemaker v. Territory*, 43 P. 1059, 1061-62 (Okla. 1896); *Walters v. State*, 39 Ohio St. 215, 217 (1883); *Turner v. Commw.*, 86 Pa. 54, 64

are brimming" with decisions where the "trial judge did not perceive the necessary rhetorical inconsistency between an alibi instruction" that placed the burden of proof with respect to an alibi defense on a defendant, "and the beyond-a-reasonable-doubt instruction mandated by *In re Winship*." *Simmons v. Dalsheim*, 543 F. Supp. 729, 745 (S.D.N.Y. 1982). To this day, a few courts still mistakenly hold that the State does not have the burden of proof on alibi defense, i.e., the burden to disprove an alibi.[7]

In short, there is no need to speculate as to the confusion confronting a jury when faced with an alibi defense. Even learned judges have mistakenly believed that defendants bear the burden of affirmatively proving their alibi defenses even while correctly acknowledging that the State has the burden of proving its case beyond a reasonable doubt.

2. Courts Have Recognized The Need For Specific Alibi Instructions, Over And Above General Instructions

The non-intuitive application of the reasonable-doubt standard to the question of alibi and the due-process concerns that attach are why, in numerous contexts, courts have required a special-purpose alibi instruction.

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(1878); *State v. Waterman*, 1 Nev. 543, 562 (1865); *French v. State*, 12 Ind. 670, 673 (1859).

[7] *See, e.g.*, *Wilson v. State*, 198 So. 3d 408, 412 (Miss. Ct. App. 2016) (en banc); *In re K.E.J.*, 2009-Ohio-1818, at ¶ 27; *Drake v. State*, 860 S.W.2d 182, 185 (Tex. App. 1993); *Holmes v. State*, 481 So. 2d 319, 320 n.1 (Miss. 1985).

First, in cases exactly like Mr. Hope's, a number of courts have found a lawyer's failure to request a specific alibi instruction to be prejudicial under *Strickland*—even where the trial court provided boilerplate reasonable-doubt and presumption-of-innocence instructions. *See, e.g.*, *State v. Bolton*, 2016 WL 2945172, at *3-5 (Ariz. Ct. App. May 20, 2016); *State v. McCullough*, 2012 WL 4321286, at *5-8 (Del. Super. Ct. Sept. 18, 2012); *Commw. v. Mikell*, 556 Pa. 509, 518 (1999); *Roseboro v. State*, 454 S.E.2d 312, 313-14 (S.C. 1995).

Second, because of the unique nature of the alibi defense, most states have provided model alibi-specific instructions.[8]

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[8] *See* Alabama Jury Instructions, Criminal, *available at* http://judicial.alabama.gov/library/docs/Alibi.pdf (last visited July 27, 2017); Alaska Criminal Pattern Jury Instructions § 1.40, *available at* http://www.courtrecords.alaska.gov/webdocs/crpji/ins/1.40.doc (last visited July 27, 2017); Arizona Pattern Jury Instructions –Criminal RAJI (Criminal) SDCI 43 (4th ed. 2016); Judicial Council Of California Criminal Jury Instruction 3400 (2017); 5 Conn. Prac., Criminal Jury Instructions § 3.17 (4th ed. 2016); Delaware Criminal Pattern Jury Instructions § 5.61 (rev. 4, 2016), *available at* http://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev4_2016.pdf (last visited July 27, 2017); Florida Standard Jury Instructions in Criminal Cases, JICRIM FL-CLE 3-1 § 3.6(i) (2016); Georgia Suggested Pattern Jury Instructions - Criminal 3.30.10; Hawai'i Criminal Jury Instructions § 7.14 (2017), *available at* http://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf (last visited July 27, 2017); Iowa Criminal Jury Instructions § 200.15 (Oct. 2004), *available at* http://www.lb8.uscourts.gov/researchdirectory/stateresources/documents/iowa-crim-jury-instr.doc (last visited July 27, 2017); Maryland Criminal Pattern Jury Instructions 5:00 ALIBI; Massachusetts District Court Criminal Model Jury Instructions § 9.120 (2009), *available at* http://www.mass.gov/courts/docs/

Third, it is almost uniformly accepted among both federal and state courts that a trial court is required to give an alibi instruction when one is requested, and failure to do so can be reversible error.[9]

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courts-and-judges/courts/district-court/jury-instructions-criminal/criminal-model-jury-instructions.pdf (last visited July 27, 2017); Mich. M Crim JI 7.4 (2017); Miss. Prac. Model Jury Instr. Criminal § 2:1 (2d ed. 2016); Missouri Approved Instructions: Civil and Criminal, MAI-CR 4th §§ 408.04, 408.06 (2017); Criminal Jury Instructions MCJI § 2-119, *available at* https://dojmt.gov/wp-content/uploads/2011/05/chapter2.pdf (last visited July 27, 2017); 1 Neb. Prac., NJI2d Crim. 8.1 (2016-2017 ed.); New Hampshire Criminal Jury Instructions § 3.02 (1985), *available at* https://www.nhbar.org/uploads/pdf/CJI-3-01-1985.pdf (last visited July 27, 2017); New Jersey Model Criminal Jury Charges NJ J.I. CRIM Non 2C Charges (2008); Carmody-Wait 2d New York Practice with Forms § 200:67 (2017); North Carolina Pattern Jury Instructions for Criminal Cases, N.C.P.I.-CRIM. 301.10 (2016); 2 CR Ohio Jury Instructions 421.03 (2017); Oklahoma Uniform Jury Instructions-Criminal 8-57 (2017); Oregon Uniform Criminal Jury Instructions (2009); Pennsylvania Suggested Standard Criminal Jury Instructions § 3.11 (2016); 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 42.13; Vermont Model Criminal Jury Instructions § 9-021 (2017), *available at* http://www.vtjuryinstructions.org/criminal/MS09-021.htm (last visited July 31, 2017); Va. Prac. Jury Instruction § 64:1; 2A-2A-1 Instructions for Virginia and West Virginia § 24-368 (2016); 2A-2A-1 Instructions for Virginia and West Virginia § 24-368 (2016).

[9] Federal cases: *See, e.g.*, *United States v. Fortes*, 619 F.2d 108, 123 (1st Cir. 1980); *United States v. Burse*, 531 F.2d 1151, 1152-53 (2d Cir. 1976); *United States v. Simon*, 995 F.2d 1236, 1243 (3d Cir. 1993); *United States v. Hicks*, 748 F.2d 854, 858 (4th Cir. 1984); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971); *United States v. Hamilton*, 684 F.2d 380, 385 (6th Cir.

Fourth, in this case itself, "[t]he parties accept" that Mr. Hope's trial counsel was deficient in not requesting an alibi instruction, App. 9a, meaning that Mr. Hope's "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The reason the failure to request a special-purpose alibi instruction is "so serious" is precisely because such instructions matter in close cases like this. *Cf. Wiggins*, 539 U.S. at 525 (holding that deficiency is evaluated based on the likelihood of winning or losing an argument).

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1982); *United States v. Braxton*, 877 F.2d 556, 564 (7th Cir. 1989); *United States v. Zuniga*, 6 F.3d 569, 570-71 (9th Cir. 1993); *United States v. Alston*, 551 F.2d 315, 319 (D.C. Cir. 1976).

State cases: *See, e.g.*, *Craig v. State*, 526 So. 2d 644, 646 (Ala. Crim. App. 1988); *Ferguson v. State*, 488 P.2d 1032, 1038-39 (Alaska 1971); *State v. Rodriguez*, 961 P.2d 1006, 1011 (Ariz. 1998) (en banc); *People v. Nunez*, 841 P.2d 261, 267 (Colo. 1992) (en banc); *Brown v. State*, 958 A.2d 833, 839 (Del. 2008); *Gray v. United States*, 549 A.2d 347, 350-51 (D.C. 1988); *Ford v. State*, 848 So. 2d 415, 417 (Fla. Dist. Ct. App. 2003); *Smith v. State*, 486 A.2d 196, 198 (Md. 1985); *Commw. v. Cutty*, 715 N.E.2d 1040, 1045 (Mass. App. Ct. 1999); *Jackson v. State*, 645 So. 2d 921, 926 (Miss. 1994); *Duckett v. State*, 752 P.2d 752, 754 (Nev. 1988) (per curiam); *People v. Ciesluk*, 483 N.Y.S.2d 49, 49 (N.Y. App. Div. 1984); *McGoon v. State*, 177 N.E. 238, 239 (Ohio Ct. App. 1931); *Commw. v. Pounds*, 417 A.2d 597, 603 (Pa. 1980); *State v. Bealin*, 23 S.E.2d 746, 754 (S.C. 1943); *Poe v. State*, 370 S.W.2d 488, 491 (Tenn. 1963). *But see State v. Peetros*, 214 A.2d 2 (N.J. 1965) (per curiam).

C. The Fourth Circuit's Finding Of No Prejudice Based On General Instructions Contradicts This Court's Clearly Established Precedent

As shown above, this Court has clearly established that general instructions are sometimes insufficient, a point the Fourth Circuit ignored. The pillar of the Fourth Circuit's finding of no prejudice is the following logic:

> First, the trial court repeatedly instructed the jury, at least 15 times, that the State must prove Hope guilty beyond a reasonable doubt. Plainly, the jury could not have found Hope guilty of any offense if any juror did not believe beyond a reasonable doubt that he was present during the robbery. The trial court also clearly defined reasonable doubt and repeatedly stated that Hope was to be presumed innocent. Because the jury was fully aware the State bore the burden of proof on each element of each offense, it is inconceivable that the jury was misled on which party bore the burden of proof.

App. 11a-12a.

The majority's conclusion that "plainly" the jury understood who bore the burden of proof and it is "inconceivable" to assume otherwise is premised on the misconception that an instruction repeated is an instruction understood. True, the jury was repeatedly instructed that it could convict only if it found Mr. Hope guilty beyond a reasonable doubt, but there was no explanation of *how* to apply this standard to the case of alibi, i.e., that the government was

required to affirmatively *disprove* the alibi. Since "[j]urors are not lawyers," without an "explicit instruction" on *how* to apply the burden and standard of proof to the complicated situation of alibi, "it may be doubted that [the boilerplate] instruction contributed in a significant way to the jurors' proper understanding." *Carter*, 450 U.S. at 303, 304. Given the "fundamental" content of the instruction, it was critical that the instruction be "more than simply a trial ritual." *Jackson*, 443 U.S. at 316-17. At least, "there is no way of knowing whether a properly instructed jury would have" come to the same conclusion, and there is a reasonable probability that it would not. *Milanovich v. United States*, 365 U.S. 551, 555 (1961). Failure of Mr. Hope's jury to receive an alibi instruction was thus prejudicial.

The constitutional prejudice would have easily been avoided by a non-deficient trial counsel. As Judge Thacker explained, South Carolina's model alibi instruction would have cleanly addressed any confusion as to burdens and standards. App. 18a-20a. It would have unequivocally placed the "burden of disproving the defendant's alibi defense" on the State and would have explicitly described the State's standard of proof in disproving the alibi as "beyond a reasonable doubt." App. 11a; App. 19a. This Court's intervention is needed to correct the prejudice here, in the numerous other cases where a defendant disputes the prosecution's case with an alibi, and, indeed, in all cases where critical special-purpose instructions are omitted.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR EMPHASIZING THE REQUIREMENT THAT JURY INSTRUCTIONS BE MORE THAN MERELY A RITUAL

For several reasons, the facts and procedural posture of this case make it an excellent vehicle in which to correct the Fourth Circuit's approach. At the threshold, this case is a clean, one-issue case: Was the failure to instruct prejudicial? All other predicate issues are undisputed: It is undisputed that Mr. Hope's trial counsel was deficient in failing to request an alibi instruction—thereby satisfying the first *Strickland* prong—and it is undisputed that the trial court would have had to give the alibi instruction were it requested—thereby satisfying part of the second *Strickland* prong. App. 9a-10a.

If there is ever to be a case where a failure to request a special-purpose instruction is prejudicial, Mr. Hope's case is it. Mr. Hope's alibi defense was strong and the State's case was only "weakly supported by the record," making it "more likely to have been affected by errors." *Strickland*, 466 U.S. at 696.

Mr. Hope's alibi was corroborated by five other witnesses. *See supra* at 4-5. They all testified that he was at home at the time of the robbery. Meanwhile, as the dissent notes, the State's evidence was "incredibly weak." App. 23a. "[T]he only State witnesses who positively identified Hope as committing the robbery were Corey Spruell and Jarrod Heath. They were hardly disinterested, honest witnesses; their testimony was riddled with material inconsistencies and traded for dismissed charges and

lighter sentences." App. 23a (citing App. 81a; App. 82a; App. 84a-85a; App. 87a; App. 93a). The other witnesses—employees of the robbed grocery store—described the witness as someone who was 2 to 4 inches shorter and 50 to 70 pounds lighter than Mr. Hope. App. 24a (dissent). As reflected in the jury's lengthy deliberations and their request to hear the alibi evidence repeated, *see supra* at 4-5, the jury must have found that the State's case was only weakly supported in the record, and the jury's verdict was likely premised on a misapprehension of the standard and burden of proof for alibi cases.

The majority suggests that there was other "meaningful evidence" of Mr. Hope's guilt, App. 14a, but that evidence is of little to no probative value.

1. The majority relies on the fact that Mr. Hope fled from the authorities. App. 14a. This Court has clearly established that the fact that an accused flees the scene of the crime is of "doubt[ful] probative value." *Wong Sun v. United States*, 371 U.S. 471, 484 n. 10 (1963). Indeed, such evidence "scarcely comes up to the standard of evidence tending to establish guilt." *Hickory v. United States*, 160 U.S. 408, 417 (1896) (citing *Ryan v. People*, 79 N.Y. 593, 601 (1880)). As *Hickory* notes, innocent people have fled authorities going as far back as the story in Genesis Chapter 31 of Jacob fleeing from Laban. *Id.* at 421 (citing sources).

2. The majority relies on the fact that Mr. Hope's wallet was found in the car of one of the conspirator brothers (Jarrod Heath). App. 14a. But, as the dissent notes, this "is of little probative value

as Hope was undisputedly in Heath's car a week before the robbery." App. 25a.

3. Lastly, the majority relies on "the surveillance video and the testimony from the disinterested third party who saw a suspicious car containing three individuals." App. 14a. The State, however, admitted that "you can't identify anyone" from the video. App. 73a. And the disinterested third party testified only that there were "a minimum of three" individuals, but she "never did see anybody's face"; she never suggested that any of the individuals looked anything like Mr. Hope. App. 75a.

In short, this case is not one where the clearly established error of state court could be harmless based on otherwise strong evidence. It is reasonably probable that a properly instructed jury would have come to a different conclusion, and it was an unreasonable application of clearly established Federal law, as determined by this Court, for the South Carolina court to hold otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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