

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable Kristi Curtis, Circuit Court Judge

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Case No. 2022-001326  
(2022-CP-22-00684)

Stanley Moultrie,

Petitioner,

vs.

The State of South Carolina,

Respondent.

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**AUSTIN PETITION FOR WRIT OF CERTIORARI**

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**S.C. SUPREME COURT**

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## **QUESTIONS PRESENTED**

- I. Whether the PCR court erred in finding Mr. Moultrie did not receive ineffective assistance of counsel where counsel failed to object to the trial court's burden shifting.
- II. Whether the PCR Court erred in finding Mr. Moultrie did not receive ineffective assistance of counsel where counsel failed to object to the solicitor's statements vouching for the State's witness.

## STATEMENT OF THE CASE

Stanley Moultrie was indicted for kidnapping and armed robbery. App. 54–55. He proceeded to a jury trial before the Honorable D. Craig Brown August 22-24, 2016, and was found guilty of armed robbery and not guilty of kidnapping. App. 272. Mr. Moultrie was represented by Jeffrey T. Lucas, III, at trial. Based on his prior record, the trial court sentenced him to life without the possibility of parole (LWOP). App. 277. Mr. Moultrie filed a direct appeal, arguing the trial court erred in denying his motion for a mental health evaluation. *See* App. 307–321. The Court of Appeals affirmed in an unpublished opinion pursuant to Rule 220(b), SCACR. *State v. Moultrie*, 2019-UP-013 (S.C. Ct. App. filed Jan. 9, 2019).

Mr. Moultrie filed a *pro se* application for post-conviction relief (PCR) April 17, 2019, and after retaining counsel, he filed an amended application for PCR November 30, 2020 and a second amended application for PCR March 10, 2021. App. 351–397. Mr. Moultrie proceeded to an evidentiary hearing before the Honorable William H. Seals, Jr. on June 23, 2021, who ultimately denied and dismissed the application with prejudice by order dated July 31, 2021. App. 467–490. Mr. Moultrie failed to timely appeal but after a hearing before the Honorable Kristi R. Curtis., was granted a belated appeal September 22, 2022 pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 505–510.

### Relevant Facts

Joyce Messinger was working at the Shoe Show in Georgetown as the assistant manager on January 20, 2015, when a man entered wearing a blue jumpsuit, a blue cap, and round rimmed glasses. App. 123, 130, 135. He seemed to be looking for something, so Ms. Messinger asked if she could help him. App. 124. The man pulled out a Nike shoe and requested it in size thirteen. App. 124. Realizing it was not in stock, Ms. Messinger picked up the phone to call the Conway

Shoe Show to see if they had a pair. App. 125. The man then grabbed her neck and told her to open the safe, saying he used to work there and knew they had one. App. 125. When she informed him there was no safe, he told her to empty the registers and hand her the money. Tr. 125. He then told her sit on bench facing the employee door as he exited the store. App. 125.

After he left, Ms. Messinger locked all the doors and called 911. App. 126. She later identified Mr. Moultrie as the perpetrator in a photo lineup about ten days later. App. 132. Mr. Moultrie was arrested and charged with armed robbery and kidnapping.

In addition to Ms. Messenger's testimony, at trial the State presented testimony of Sergeant Jason Ward of the Georgetown Police Department. Sergeant Ward testified that when attempting to develop a suspect, he obtained surveillance video from the nearby Walmart and still photos from a nearby Cato. App. 154. The quality of the video was not such that Sergeant Ward could conclusively identify Mr. Moultrie or the type of car. App. 191–92. After contacting the Charleston Police Department for assistance with connecting a suspect with the vehicle on tape, Sergeant Ward obtained a plate number and received the information on Mr. Moultrie. App. 161–62. Officers obtained a search warrant for Mr. Moultrie's residence and found a car matching the tag and description in the video, size thirteen shoes, glasses, and a blue jumpsuit. App. 165–66. The State also offered cell phone records indicating Mr. Moultrie was in the vicinity of the Shoe Show during the time of the robbery. App. 216. The jury found Mr. Moultrie guilty of armed robbery, but not guilty of kidnapping, and he was sentenced to LWOP. App. 272, 277

Mr. Moultrie filed a *pro se* application for PCR April 17, 2019, and after retaining counsel, he filed an amended application for PCR November 30, 2020 and a second amended application for PCR March 10, 2021. App. 351–397. Mr. Moultrie argued, *inter alia*, that he received ineffective assistance of counsel in trial counsel's failure to object to the trial court's burden

shifting language of “searching for the truth” and failing to object to the impermissibly vouching for its witness. Mr. Moultrie proceeded to an evidentiary hearing before the Honorable William H. Seals, Jr. on June 23, 2001, who ultimately denied and dismissed the application with prejudice by order dated July 31, 2021. App. 467–490.

Petitioner now submits this belated petition for a writ of certiorari for the Court’s consideration.

## **ARGUMENTS**

### **I. Trial Counsel Provided Ineffective Assistance in Failing to Object to the Trial Court’s Burden Shifting Statements.**

The PCR court erred in holding that trial counsel was not ineffective for failing to object to the trial court’s repeated reference to the jury’s duty as “searching for the truth” and rendering a “true and just verdict.” As the Court has repeatedly noted, this language is improper and counsel’s failure to object constitutes deficient representation. Furthermore, the statements were prejudicial to Defendant and undercut any confidence in the verdict.

“The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.” *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). The Court has long admonished the use of “seeking” language in jury charges because of the danger that this may shift the burden. *Id.* at 26–27, 538 S.E.2d at 251 (“Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to a defendant.’” (alteration in original) (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998))). In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), Chief Justice Toal noted the impropriety of the use of “searching for the truth” language observing “this language could result in jurors substituting concepts of justice or fairness for the State’s

constitutional duty to prove guilt beyond a reasonable doubt.” *Id.* at 264, 737 S.E.2d at 480 (Toal, C.J., concurring in result<sup>1</sup>); *see Needs*, 333 S.C. at 155, 508 S.E.2d at 867–68, *holding modified by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (“We again take this opportunity to strongly urge the trial courts to avoid using any ‘seek’ language, or any of the other offending terms described above, when charging jurors on either reasonable doubt or circumstantial evidence. Such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof to a defendant.”).

More recently, in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), the Supreme Court reiterated the threat of undercutting the burden of proof and again reprobated the continual use of this type of language in both jury charges and any other comments a trial court may offer. *Id.* at 34, 813 S.E.2d at 506. (“[W]e agree with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.”).

The PCR court concluded that “the court’s remarks, when viewed in their totality, were not offered in a way that lessened the State’s burden of proof and no prejudice to [Petitioner] was shown.” App. 484. It found the mention of the “search for the truth” language in the opening remarks were “not offered as a charge on the law” but “seemingly as preparation of the jury for the slow process that is the practice of law.” App. 484. The PCR court concluded there was no prejudice because the court later correctly stated that the State must prove the elements beyond a reasonable doubt.” App. 484. In considering the language in the jury charge referencing the jury’s

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<sup>1</sup>Technically, Chief Justice Toal’s opinion constitutes the majority of the court, because Justice Kittredge, Justice Hearn, and Justice Burnett all concurred. *Daniels*, 401 S.C. at 264, 737 S.E.2d at 480. However, Justice Pleicones’ opinion, in which only Justice Burnett concurred, is the lead opinion. In keeping with that form, Chief Justice Toal’s opinion is referred to herein as a concurrence and Justice Pleicones as the lead opinion.

search for the truth, the PCR court similarly concluded the trial court sufficiently stated the burden of proof and that it lay with the State. App. 485. It therefore denied relief.

Notably, the PCR court never makes a finding that trial counsel was not deficient<sup>2</sup> and instead tiptoes around the issue and grounds its holding more firmly on a lack of prejudice finding as precedent has before. But this holding downplays the prevalence of the problematic language and how its power to displace the burden of proof was amplified by surrounding language. A review of the statements of the trial court in toto reveals how this notion—that searching for the truth is the overarching duty—permeated the trial and prejudiced Mr. Moultrie. At the start of trial, the court explained that the jury’s “search for the truth” is a hallmark of our system of government: “It is a fundamental part of our democracy, a search for the truth in an effort to make sure that justice is done between the parties before the Court. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive.” App. 109. This pronouncement was just the fifth and sixth sentence spoken by the court to the jury in the case. Although the PCR court concluded this statement was not offered as a charge on the law and it later mentioned reasonable doubt, it was not until well after those statements that the trial court informed the jury “[n]ow what I will now say to you [is] an introduction to the trial of this case” and clarified that the “remarks are not a charge on the law in this case.” App. 110.

The trial court may have *meant* his statement as part of a general introduction about how slow trials can be, but that is not what he said. He said that as a “fundamental part of our

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<sup>2</sup> In its attempt to elicit testimony relevant to deficient representation, the State gets a little cute asking trial counsel if he is clairvoyant. App. 433. However, the law on which *Beaty* is grounded has been around for decades. Indeed, the Court of Appeals has discussed *Beaty* as an echo of precedent, not a novel outgrowth. *State v. Pradubsri*, 420 S.C. 629, 640, 803 S.E.2d 724, 729 (Ct. App. 2017) (noting that *Beaty* “echoes the supreme court’s previous admonition” in *Needs*). The import of *Beaty* is not that the law expanded; it reflects the Supreme Court’s raising its voice a bit louder on the issue since trial courts had continued using the offensive language.

democracy,” the jury was required to search for the truth to make sure “justice is done between the parties”—another sentiment that erodes the burden of proof. *See Daniels*, 401 S.C. at 256, 737 S.E.2d at 475) (lead opinion) (“[W]e instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties. Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt. Moreover, to a lay person, the ‘all parties involved’ in a criminal case may well extend beyond the defendant and the State and include the victim.”). The “parties” are not on equal footing. Quite the opposite, the State carries a rather significant burden of proof, and the defendant enjoys a presumption of innocence. Those are not minor principles to diminish.

A passing reference to the reasonable doubt standard can hardly course correct when the trial court offered no explanation as to what “reasonable doubt” means, never mentions the presumption of innocence, and instead repeats that the jury was to render a “true and just verdict.” App. 112, 116. That is how the jury was invited to view its role and that was the filter placed before it as it observed the evidence then presented. A lay person knows what “truth” means and has some sense of justice and fairness; that person does not know what the term of art “reasonable doubt” might mean<sup>3</sup> or who the “parties” in a criminal trial might be. Trial counsel was deficient in failing to object to this characterization of the jury’s duty and how it upended the burden of proof from the start.

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<sup>3</sup> The reasonable doubt standard may be elemental and well-worn into the minds of those versed in criminal law, but it is hardly in and of itself a self-explanatory concept. *See Victor v. Nebraska*, 511 U.S. at 5 (majority opinion) (“Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication.”).

The other bookend of the trial, the jury charge, heartily failed in curing these defects. The trial court begins the charge by explaining to the jury

it is your exclusive duty to decide all the issues of fact in this case and to determine the effect, value, weight, and truth of the evidence. Both the State and the Defendant have a right to expect that you will carefully consider and evaluate the evidence and apply the law of this case to it so that in the end both the State of South Carolina and the Defendant will receive a fair and impartial trial.

App. 251. Not only does the trial court again lead off by instructing the jury on determining “the truth of the evidence,” but it again aligns the position of the State and Mr. Moultrie by charging the jury to ensure that “in the end both the State [] and the Defendant will receive a fair and impartial trial.” Mr. Moultrie is entitled to a fair trial by an impartial jury under both the United States and South Carolina Constitutions. U.S. Const. amends. VI & XIV; S.C. Const. art. I, §§ 3 & 14; *State v. Kelly*, 331 S.C. 132, 141, 502 S.E.2d 99, 104 (1998). The State is not. It could seem rather unfair to the State and partial to the defense that a defendant can sit warmly in his cloak of innocence and keep quiet while the State must pace around a courtroom with witnesses and exhibits. But that is exactly how a criminal trial is designed to proceed, which is highlighted by the fact that if the State feels it was denied a fair and impartial trial that resulted in an acquittal, it has no recourse. Equalizing the positions of the State and the defendant (again) underscored the language about searching for the truth and elevated the error from mere mischief to a real misrepresentation of the State’s burden of proof.

The trial court continues its references to searching for the truth throughout the charge, including at the close of the charge when it reminds the jury of its “duty . . . to determine the truth in this case . . . and thus arrive at a verdict, which speaks the truth in this case.” App. 262–63. The trial and the charge itself were bounded by these remarks displacing the burden of proof. Examining the charge as whole does not improve matters. Further accentuating these statements

shifting the burden of proof, the trial court also misstated the presumption of innocence, suggesting the defendant's robe of righteousness comes off before deliberations. In its last statement on the presumption of innocence: "the Defendant receives the benefit of the presumption of innocence *until the very end of this trial* when you, the Jury, will deliberate upon the evidence and decide whether the State has proven his guilty beyond a reasonable doubt." App. 253 (emphasis added). The presumption of truth accompanies a defendant until his guilt has been proven beyond a reasonable doubt, not when the trial ends. It shrouds the defendant as the evidence is deliberated until it is (or is not) stripped from him by the weight of the evidence. *State v. Peden*, 157 S.C. 459, \_\_\_, 154 S.E. 658, 660 (1930) ("All persons charged with crime are presumed to be innocent, not only when brought into court, but when on trial, and until that presumption of innocence is overthrown by the State by competent evidence proving the defendant guilty beyond a reasonable doubt. It is not sufficient to say that all persons are presumed to be innocent when brought into court, for the presumption does not stop there, but it follows the prisoner throughout the trial of the case and *until removed by competent evidence as above set forth.*" (emphasis added)). When the trial ends is precisely when the presumption of innocence is vital. The trial court's language therefore similarly recast the standard of proof and dampened the burden on the State.

Yes, the trial court also mentioned reasonable doubt and finally defined it. It also correctly stated the continuing nature of the presumption of innocence twice, and two out of three tries are not bad odds in situations that do not involve constitutional rights and the resultant deprivation of liberty. But the inquiry required is not a tallying up to see whether the trial court said more right things than wrong things. "It is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct." *Victor v. Nebraska*, 511 U.S. at 29 (Blackmun, J., concurring in part). The court must look to "whether there is a reasonable likelihood that the jury

applied the challenged instruction in a way that violates the Constitution.” *Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251. Here, that likelihood is apparent. The trial court assures the jury on both sides of the trial that it needs to treat everyone fairly and just figure out the truth, because that is justice and democracy. Why would a jury reject that direct, layman explanation of its duties and assume that because the trial court used the phrase “reasonable doubt” two dozen times at the end, something different is required. It is a stretch to think the jury would assume the court did *not* mean what it said when it explained both parties should be given a fair and impartial trial and the fabric of our democracy requires it to search for the truth, but it *did* meant the State has the burden of proving the elements of the offenses beyond a reasonable doubt and the defendant enjoys the presumption of innocence unless and until that burden is met (even if it later contradicted itself).

Maybe the jury did parse the language that way and properly applied the burden of proof. But there is a reasonable likelihood it did not, and that structural error defies a harmless analysis. Without the assurance that the jury’s verdict was constitutionally sound, there is nothing to affirm. As the United State Supreme Court explained:

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

*Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (internal citation omitted). Trial counsel’s failure to object the Court’s introductory statements and charge constituted ineffective assistance of counsel. Respectfully, this Court should grant Petitioner certiorari on this claim.

## **II. Trial Counsel Provided Ineffective Assistance by Failing to Object When the Solicitor Vouched for the State's Witness.**

The PCR court also erred in finding the solicitor's unobjected-to statements vouching for the State's witness were not improper. The State is not allowed to thrust the weight of the sovereign behind the credibility of a witness and trial counsel was deficient in failing to object. Furthermore, because of the other statements at trial and the lack of overwhelming evidence, this error cannot be deemed harmless.

“A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.” *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). “A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.” *State v. Kelly*, 343 S.C. 350, 368–69, 540 S.E.2d 851, 860 (2001) (quoting *United States v. Walker*, 155 F.3d 180, 184 (3d Cir. 1998), *rev'd on other grounds and remanded*, 534 U.S. 246 (2002)). “The danger is that a juror might be persuaded to rely on the opinion of others instead of exercising his independent judgment as to the facts.” *State v. Thomas*, 287 S.C. 411, 412–13, 339 S.E.2d 129, 129 (1986). “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Although the PCR court acknowledged that the solicitor attested to the genuineness of the witness's emotions and his own belief in her veracity, it concluded “nothing rose beyond the level

of fair inferences drawn from her testimony.” App. 486. However, the issue here is not whether her believability was a fair inference—it would be a wonder that the State would offer a witness whose testimony did not carry a fair inference of credibility. And the solicitor did more than just invite the jury to rely on inference, he unequivocally told it Messinger was “genuine” in her statements: “What she showed on that stand was pure and genuine in every aspect in every way it could possibly be. This is not acting; she is about as real as it gets. The emotion you saw from that stand was genuine.” App. 234. He went on to say more directly, “I tell you right now that Ms. Messinger’s testimony is by itself, if you find it credible --- *which in my opinion she was* and for the reasons I’ve stated and y’all saw her up there - - if you find her credible that testimony is enough by itself to support a conviction in this case.” App. 237 (emphasis added).

The law here is rather plain. The solicitor’s opinion inescapably carries with it the imprimatur of the Government and he is not permitted to undermine a fundamental jury determination by assuring a jury that he, personally, believed her. And in this case, the threat the jury simply following the solicitor’s lead was magnified by the trial court’s misleading statements as to the burden of proof and the position of the players. As discussed above, the jury’s role was framed as a truth finder and the trial court had assured them the attorneys were “officers of the Court sworn to uphold the integrity and fairness of our judicial system and to help you in the search for the truth.” App. 110. If the solicitor, a guide on the quest for the truth, told them the truth was whatever Ms. Messinger testified, there is little cause to question him. He is, of course, there to uphold integrity and fairness, and it would be unfair to say a woman was speaking the truth unless he knew it to be so. These closing statements infused the trial with unfairness, and trial counsel erred in failing to object.

These statements cannot be considered harmless beyond a reasonable doubt. To establish prejudice, the defendant is required “to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Smith v. State*, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* As the Supreme Court has noted on multiple occasions, “arguments of this kind can rarely be harmless.” *E.g.*, *State v. Thomas*, 287 S.C. 411, 413, 339 S.E.2d 129, 129 (1986).

The solicitor wholly undermined the jury’s province in making an independent determination and exacerbated the prejudice by telling the jury that the credibility determination of Ms. Messinger was entirety of the case. App. 237. And it was not just that the State thought she was credible that proved its case, but the solicitor went a step further and emphasized that the jury could *only* find Mr. Moultrie not guilty if it found “[Messinger was] either lying or she’s just not capable of telling the truth.” App. 242. So the State made the credibility of Ms. Messinger outcome determinative of Mr. Moultrie’s guilt and then assured the jury she was credible. With the evidence framed thus and flanked by the trial court’s assurances that the solicitor would guide them to the truth, this error undermines any confidence in the verdict.

Because the solicitor infected this crucial piece of evidence, there is no overwhelming evidence to save the verdict. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice[ ]the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). Without Ms. Messinger’s testimony, the evidence left is speculative and

circumstantial. A knife was never recovered, there was no DNA or other forensic evidence presented, and Mr. Moultrie never confessed. The only evidence therefore is only some blurry video footage from neighboring stores, cellphone evidence placing Mr. Moultrie in the vicinity, testimony that a car that looked like his was in the parking lot, and the items recovered from his home. Although that may be enough circumstantial evidence to get past a directed verdict, it is hardly “corroborating evidence so strong” that it negates the reasonable probability that the jury would have had reasonable doubt as to Mr. Moultrie’s guilt. Trial Counsel was ineffective for failing to object to the solicitor’s prejudicial statements and this Court should grant Mr. Moultrie’s petition for writ of certiorari.

### CONCLUSION

Mr. Moultrie was denied his constitutional right to effective assistance of counsel and his trial was constitutionally defective because of it. Mr. Moultrie therefore asks that this court grant his petition.

Respectfully submitted,

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