STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WENDY MICHELLE GREEN,

PETITIONER

APPELLATE CASE NO. 2022-001036

Appeal from Laurens County

Honorable Daniel D. Hall, Circuit Court Judge

Opinion No. 2024-UP-249

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Wendy Michelle Green, respectfully requests that this Court grant rehearing. On July 3, 2024, this Court affirmed Petitioner's conviction for trafficking in methamphetamine. State v. Wendy Michelle Green, No. 2024-UP-249 (S.C. Ct. App. July 3, 2024). Counsel respectfully submits that this Court misapprehended the confusion created by the instruction to the jury that, "If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find her not guilty." The instruction confused the jurors and diluted the State's burden of proof. While this Court and the South Carolina Supreme Court have

approved the reasonable doubt instruction given, in this case the jury's request for an additional definition of reasonable doubt and one of the juror's notes demonstrate the confusion created by the instruction. Based on the instruction, the jurors were prevented from finding Petitioner not guilty unless there was a **real** possibility she was not guilty. The jurors, however, could find Petitioner guilty by simply being firmly convinced. Petitioner respectfully seeks rehearing.

The trial judge's jury instruction on reasonable doubt unconstitutionally shifted the burden of proof by implying that Petitioner was required to prove that there was a "real possibility" that she was not guilty and confused jurors as to the State's burden of proof.

Petitioner was the backseat passenger traveling in a car when the car was stopped by Deputy Williams and Deputy Parham of the Laurens County Sheriff's Office for having an improper tag light. (R. p. 45, lines 1-19; p. 50, lines 15-18). Both officers wore body cameras and the videos from those cameras were admitted in evidence, without objection, as State's exhibits #2 and #5. (R. p. 22, lines 1-11). Deputy Williams obtained consent from the driver, Catherine Clark, to search the car. (R. p. 51, lines 5-24). After obtaining consent to search, Deputy Williams asked Clark to step out of the car. (R. p. 52, lines 4-6). Deputy Parham asked the front seat passenger, Jeffrey Green, to step out of the vehicle. (R. p. 163, lines 2-3). Deputy Parham searched Jeffrey Green and then asked him to step back in front of the patrol vehicle. (R. p. 163, lines 4-23).

Petitioner was in the backseat putting a leash on her dog, Levi, when Deputy Williams asked her to step out of the car. (R. p. 165, lines 8-9). Petitioner got out of the vehicle and the driver, Clark, offered to take the dog. (R. p. 165, lines 10-24). Deputy Parham testified that after the dog changed hands he saw a white crystal like substance and a pipe on the ground. (R. p. 166, line 21 – p. 167, lines 1-14). The crystal substance tested positive for 11.53 grams of methamphetamine. (R. p. 228, lines 12-16). None of the three occupants of the car claimed

ownership of the methamphetamine. Petitioner was the only person arrested. (R. p. 67, lines 4-15).

During the charge conference counsel for Petitioner objected to the "real possibility" language included in the reasonable doubt instruction, arguing that the language was burden shifting in violation of both the state and federal constitutions. (R. p. 245, line 9 – p. 246, 247, lines 1-4). Counsel for Petitioner argued:

> I, also think that it's a violation of the state and federal Constitution in the fact that it's burden shifting. The word 'real' can be taken as quantitative in the amount of a possibility, you know. And I think it's ambiguous and creates concern. Like if I told you, hey, there's a possibility you will get struck by lightning walking outside in a thunderstorm versus me saying there's a real possibility you're going to get struck by lightning. There's a very big difference there, you know. Real – you know, if your doctor – if you're getting a surgery and you're saying – you know, the doctor is saying there's a possibility that you may not wake up from this, that would be disconcerting. But if he said there's a real possibility you're not going to wake up from this, that would be really disconcerting, I would say.

(R. p. 246, lines 5-20). Counsel for Petitioner acknowledged prior state case law that supported the language. The judge overruled the objection. (R. p. 247, lines 5-6).

During the charge the judge instructed the jury:

> The presumption of innocence is not a mere legal theory. It is not just a legal phrase. It is a substantial right which every defendant is entitled, unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt.
>
> What is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The burden -- the State has the burden of proving the Defendant guilty beyond a reasonable doubt.
>
> Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in the world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt.

> If based on the consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there's a **real possibility** that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find her not guilty.

(R. p. 318, line 15 – p. 319, lines 1-16) (emphasis added). At the close of the jury instruction Petitioner renewed the previous objections. (R. p. 328, lines 22-23). During deliberations the jury asked for a definition of reasonable doubt and asked, "What happens if we don't agree?" (R. p. 330, line 23- p. 335, lines 1-7; R. p. 355). The judge re-charged the jury on reasonable doubt, again including the "real possibility" language. (R. p. 335, line 16 – p. 336, lines 1-14). One of the attorneys for the State noticed that one of the jurors had a note pad and was writing down the charge. (R. p. 337, lines 17-22). The judge asked the juror to give the notes to the bailiff. (R. p. 338, lines 3-19). The notes were marked as Court's Exhibit #10. (R. p. 340, lines 20-21; R. p. 356). In the note the juror wrote, "R. Doubt – State prove hesitate to act – beyond – firmly convinced of guilt" (R. p. 356). Below that notation the juror wrote, "real possibility – find not guilty" (R. p. 356). The jury's request for the definition of reasonable doubt and the notes by the juror demonstrate the confusion created by the reasonable doubt charge that included the "real possibility language." The judge erred by including the "real possibility" language.

The Supreme Court of the United States wrote, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold 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 with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). "Due process requires the prosecution to prove beyond a reasonable doubt that a defendant is guilty of the crime charged. E.g., S.C. Const. art. I, § 3; In re Winship, 397 U.S. 58, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)." State v. Cherry,

348 S.C. 281, 289, 559 S.E.2d 297, 301 (Ct. App. 2001). In State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016), the South Carolina Supreme Court wrote:

> Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous. Id. When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the Petitioner to warrant a new trial. State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013).

The jury charge in the present case containing the "real possibility" language shifted the burden of proof to Petitioner and confused the jury at to the State's burden of proof.

In United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987), the district court instructed the jury that, "If, based on your consideration of the evidence, you are firmly convinced the defendant was guilty of the crimes charged, any particular defendant, you must find that particular defendant guilty. If, on the other hand, you think there is a real possibility he's not guilty, you must give him the benefit of the doubt and find him not guilty." The Fourth Circuit Court of Appeals criticized the instruction that included the "real possibility" language writing:

> The district court's instruction in this case illustrates the confusion that is engendered by attempting to define a reasonable doubt in terms of a "real possibility" that the accused is not guilty. The district court did not explain the difference that it perceived between a "possibility" and a "real possibility." It failed to tell the jury that the accused did not have the burden of showing a "real possibility" of innocence. Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent. If the court believed that the jury could understand its concept of a "real possibility" and allocate the burden of proof on this issue, there was no reason for it to question the jury's ability to understand the prosecution's obligation to prove the charges beyond a reasonable doubt.

821 F.2d at 973. The Fourth Circuit, however, found the error did not require reversal because the instruction failed to allocate the burden of proof rather than shifted the burden and additional

instructions cured the omission writing, "The instructions taken as a whole properly described the prosecution's burden and the protection the law affords the accused. Therefore, the error, which introduced the unnecessary concepts of being "firmly convinced" of guilt and a "real possibility" of innocence, did not affect the substantial rights of the accused. It should be disregarded. *See* Fed.R.Crim.P. 52." 821 F.2d at 973.

Importantly, in addition to the instruction including the "real possibility" language, the district court also instructed the jury that:

> The law presumes a defendant to be innocent, and the presumption of innocence alone is sufficient to acquit a defendant, unless the jury is satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of the evidence introduced at trial.
>
> A defendant has no obligation to establish his innocence. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt, and this burden never shifts to the defendant. If the jury, after careful and impartial consideration of all the evidence, has a reasonable doubt that a defendant was guilty of the charge under consideration, you must find that defendant not guilty of that charge.
>
> If, on the other hand, the jury finds that the evidence is sufficient to overcome the presumption of innocence and to convince you beyond a reasonable doubt of the guilt of the defendant of the charge under consideration, it must find the defendant guilty of that charge.

821 F.2d at 973.

The instructions given in the present case did not include the additional language, "If the jury, after careful and impartial consideration of all the evidence, has a reasonable doubt that a defendant was guilty of the charge under consideration, you must find that defendant not guilty of that charge." The instruction taken as whole in the present case failed to properly define the State's burden of proof, shifting the burden on Petitioner to prove there is a real possibility that she is not guilty.

In State v. McHoney, 344 S.C. 85, 98–99, 544 S.E.2d 30, 36–37 (2001), the South Carolina Supreme Court wrote:

> We specifically approved a similar reasonable doubt instruction in State v. Darby, 324 S.C. 114, 477 S.E.2d 710 (1996). As we stated in Darby, **"[c]ourts specifically addressing whether the 'real possibility' language lessens the government's burden of proof have held it does not in the context of the preceding language requiring that the juror be 'firmly convinced' of the defendant's guilt."** Id. at 116, 477 S.E.2d at 711 (citations omitted). We also found there is nothing in this language to suggest the defendant bears the burden of proof. Id. Furthermore, the "real possibility" language is found in the proposed jury instruction developed by the Federal Judicial Center, and was cited with approval in Justice Ginsberg's concurring opinion in Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Id. at n. 1. Finally, we approved the use of the "real possibility" language in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), and the Court of Appeals approved the language in State v. Lowery, 332 S.C. 261, 503 S.E.2d 794 (Ct.App.1998).

Respectfully, this Court should revisit the propriety of the reasonable doubt instruction that includes the "real possibility" language. Judge King criticized the "real possibility" language in his dissent in United States v. Walton, 207 F.3d 694, 704–05 (4th Cir. 2000), writing:

> I find such simplicity and clarity to be embodied in the definition of reasonable doubt approved in 1987 by the FJC. This succinct instruction was discussed with approval by Justice Ginsburg in her concurring opinion in Victor. I propose today a slightly modified version of the FJC definition, providing as follows:
>
> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must

find him guilty. If on the other hand, you are not firmly convinced of his guilt, you must find him not guilty.

The sole distinction between the instruction suggested here and that sponsored by the FJC lies in the last sentence thereof. In its closing sentence, the FJC instruction provides:

If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

I would amend this provision to make its language consistent with the penultimate sentence of the FJC instruction. I am convinced that consistency is the best approach, and I find further support in United States v. Porter, 821 F.2d 968 (4th Cir.1987), where we criticized the "real possibility" aspect of the FJC instruction. In Porter, the district court had charged the jury in accordance with the FJC instruction. On appeal, the defendants challenged the "real possibility" language of the instruction, arguing that it was confusing and improperly shifted the burden of proof. While concluding that the district court's instructions taken as a whole properly placed the burden of proof on the prosecution, we criticized the "real possibility" terminology, writing that,

Implying the evidence must show a *real possibility* of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent.

Id. at 973 (emphasis added). Judge Butzner's criticism of the "real possibility" language is persuasive, and I have concluded that the slight modification of the FJC instruction, explained above, would render it of greater assistance to perplexed jurors.

As noted by Judge King in his dissent, the proposed modification of the instruction, omitting the "real possibility" language is discussed in Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 Tex. L. Rev. 105, 147 (1999). As noted by the dissent and the law review article, the Supreme Court of New Jersey adopted the following definition of reasonable doubt, omitting the "real possibility" language:

The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you

> were told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.
>
> Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.

State v. Medina, 147 N.J. 43, 61, 685 A.2d 1242, 1251–52 (1996).

In United States v. McBride, 786 F.2d 45, 51–52 (2d Cir. 1986) (n. 2, 3 omitted), the Second Circuit Court of Appeals expressed concern about the "real possibility" language writing:

> As for the district court's use of the "real possibility" language, found in Federal Judicial Center Committee to Study Criminal Jury Instructions, PATTERN CRIMINAL JURY INSTRUCTIONS § 21, p. 28 (1982), in its proposed instruction relating to the reasonable doubt standard, we suggest caution in the use of such language as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense. While we would agree with the appellant that the "hesitate to act" language suggested in 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 11.14 (3d ed. 1979) and included in the Federal Judicial Center Committee to Study Criminal Jury Instruction, PATTERN CRIMINAL JURY INSTRUCTIONS 6 (1985) would be preferable, we do not find that the use of the "real possibility" language in this case constituted reversible error.

The Hawaii Court of Appeals also expressed concerns about the "real possibility" language writing:

> The use of the words "real possibility," in our view, conflicts with the admonition to the jury that the nature of the doubt with which the jurors must be concerned is one which is "reasonable." Moreover, advising the jury its verdict of "not guilty" rests on whether it "think[s]" there is a "real possibility" the defendant is not guilty invites the jury to abandon the presumption of innocence. The jury here was apprised of its obligation to presume Defendant innocent until the prosecution had proven each element of the crime beyond a reasonable doubt. By tying a verdict of not guilty to the concept of "real possibility," however, Instruction 2A raises an unnecessary inconsistency with the court's direction that the jury must presume the defendant innocent.

State v. Perez, 90 Haw. 113, 127–28, 976 P.2d 427, 441–42 (Ct. App. 1998), aff'd in part, rev'd in part, 90 Haw. 65, 976 P.2d 379 (1999).

The trial judge in the present case erred by including the "real possibility" language in the reasonable doubt instruction. The instruction was confusing and, viewing the instruction as a whole, the instruction failed to properly define the State's burden of proof, and improperly implied that Petitioner was required to prove there is a real possibility that she is not guilty. The error requires reversal.

In affirming the conviction this Court wrote:

> We hold the trial court did not abuse its discretion when it included the phrase "real possibility" within its reasonable doubt charge. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." (quoting State v. Adkins, 353 S.C 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003))); id. ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (quoting Adkins, 353 S.C. at 318, 577 S.E.2d at 464)). Although the trial court included the language "real possibility" in its reasonable doubt charge, when this language is preceded by language that a jury

> must be "firmly convinced" of a defendant's guilt, as it was here, it does not shift the burden of proof away from the State. See State v. McHoney, 344 S.C. 85, 98, 544 S.E.2d 30, 36-37 (2001) ("[C]ourts specifically addressing whether the 'real possibility' language lessens the government's burden of proof have held it does not in the context of the preceding language requiring that the juror be 'firmly convinced' of the defendant's guilt." (quoting State v. Darby, 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996))); *id.* at 98, 544 S.E.2d at 37 ("[T]here is nothing in [the real possibility] language to suggest the defendant bears the burden of proof.").

State v. Green, No. 2022-001036, 2024 WL 3292554, at *1 (S.C. Ct. App. July 3, 2024).

Respectfully, this Court misapprehended the confusion created by the instruction to the jury that, "If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find her not guilty." While this Court and the South Carolina Supreme Court have approved the reasonable doubt instruction given, this case is distinguished by the jury's request for an additional definition of reasonable doubt and one of the juror's notes trying to distinguish firmly convinced of guilt from real possibility of not guilty. The question and note demonstrate that reasonable doubt instruction including the real possibility language created confusion. Based on the instruction, the jurors were prevented from finding Petitioner not guilty unless there was a **real** possibility she was not guilty. The jurors, however, could find Petitioner guilty by simply being firmly convinced. The trial judge erred in using the "real possibility" language in the reasonable doubt instruction. The error requires reversal. Petitioner respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 15th day of July, 2024.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WENDY MICHELLE GREEN,

PETITIONER

APPELLATE CASE NO. 2022-001036

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Andrew D Powell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Wendy Michelle Green, #309706, at Camille Griffin Graham Correctional Center, 4450 Broad River Road, Columbia, SC 29210, this 15th day of July, 2024.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

From: Stock, Chris
To: Andrew Powell; Grace Sommer
Cc: Hudgins, Kathrine
Subject: Green, Wendy - Petition for Rehearing - 2022-001036
Date: Monday, July 15, 2024 4:14:59 PM
Attachments: Green, Wendy - Petition for Rehearing - 2022-001036 - AG Cover Letter.pdf
Green, Wendy - Petition for Rehearing - 2022-001036.pdf

Mr. Powell,

Please find attached for service the Petition for Rehearing for Wendy Green's appeal which will be filed today with the Court of Appeals.

Thank you.
Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330