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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM LAURENS COUNTY  
Court Of General Sessions  
The Honorable Daniel D. Hall, Circuit Court Judge

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Appellate Case No. 2024-001338

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THE STATE,

Respondent,

v.

WENDY MICHELLE GREEN,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## STATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals erred in affirming the trial court where the jury instruction using “real possibility” language was preceded by instructions requiring jurors be firmly convinced of defendant’s guilt.

## STATEMENT OF THE CASE

Wendy Green was indicted by a Laurens County Grand Jury in April 2022 for trafficking methamphetamine. Green was represented by Catherine T. West, Esquire, and Tristan M. Shaffer, Esquire. She proceeded to a jury trial on July 11, 2022, before the Honorable Daniel D. Hall. Green was convicted as charged and sentenced to ten years' imprisonment. The Court of Appeals affirmed the conviction in State v. Green, 2024-UP-249 (Ct. App. 2024). Petitioner's request for rehearing was denied on August 12, 2024. This Return to Petition for Writ of Certiorari follows.

## STATEMENT OF FACTS

Petitioner was traveling in the backseat of a vehicle at around 9:30 PM when it was stopped by Officer Williams and Officer Parham for having an improper tag light. (R. 45). Deputy Williams obtained consent from the driver, Catherine Clark, to search the vehicle. (R. 51). Deputy Williams asked her to step out of the vehicle and for consent to search. (R. 52). Next, Deputy Parham asked passenger Jeffery Green to step out of the vehicle and searched his person. (R. 163). At this point, Wendy Green (Petitioner) was in the backseat putting her dog on a leash. (R. 165). Petitioner was asked to step out of the vehicle and exited while holding the dog. (R. 165). She exited the vehicle with her back towards Officer Parham. (R. 165). Petitioner did not put the dog on the ground, but rather gave the dog to Clark. (R. 166). After the dog changed hands, Deputy Parham saw a white crystal substance and pipe on the ground. (R. 166). Petitioner was then arrested. (R. 67). Later, the substance was determined to be 11.53 grams of methamphetamine. (R. 223).

Prior to jury instructions, Petitioner objected to the “real possibility” language in the proposed jury charge. (R. 245). The Judge stated “I note your objection. I’m going to charge as I have it.” (R. 247). The Judge instructed the jury as follows:

The Defendant has pled not guilty to this indictment. And that puts the plea -- that plea puts the burden on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove her innocence. I charge you that it is an important rule of the law that the Defendant in a criminal trial, no matter what the seriousness of the charges may be will always be presumed to be innocent of the crime for which the indictment was issued, unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations. But it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence is like a robe of righteousness placed around -- about the shoulders of the Defendant, which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. 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. 317-19) (emphasis added). During deliberations, the jury asked for a definition of reasonable doubt. (R. 330). The court repeated the above instruction. (R. 335). During the second instruction, one juror made notes of the definition given including the terms "real possibility", "firmly convinced of guilt", and "hesitate to act." (Court Exhibit 10). Earlier on in the case, the court had instructed jurors to not take notes. (R. 28). The Judge instructed the juror to hand the notes taken over to the bailiff. (R. 339).

## STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). “An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An erroneous jury instruction is not grounds for reversal unless the Petitioner can show prejudice from the erroneous instruction. Harris v. Univ. of S.C., 391 S.C. 518, 706 S.E.2d 45 (Ct. App. 2011).

## ARGUMENT

**The Court of Appeals did not err in affirming the trial court because the jury instruction using “real possibility” language was preceded by instructions requiring jurors be firmly convinced of defendant’s guilt.**

The Court of Appeals properly affirmed the conviction. The Court of Appeals appropriately considered the charge in its entirety and found the instruction properly defined the State’s burden of proof. The trial judge properly preceded “real possibility” language with “firmly convinced” language, noted the State had the burden of proof, and distinguished the level of proof required from that of a civil case. The instruction provided the jury with a clear and concise statement about the applicable law without improperly shifting the State’s burden of proof.

“The purpose of jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.” Seal v. State, 38 N.E.3d 717 (Ind. Ct. App. 2015). The Court of Appeals properly noted when instructing a jury, trial courts have broad discretion so long as the law is clearly and accurately presented. State v. Green, 2024-UP-249 (Ct. App. 2024); See also Am. Future Sys., Inc. v. BBB, 872 A.2d 1202 (2005); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000)(“ An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.”). 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. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987).

South Carolina courts have previously approved near identical jury instructions. In State v. McHoney, the following jury instruction was approved by this Court:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.... If based upon your consideration of the evidence you are **firmly convinced** that the defendant is guilty of the crime charged, then you must find him guilty. If on the other hand you think there is a **real possibility** that he is not guilty, you must give him the benefit of that doubt and find him not guilty. State v. McHoney, 344 S.C. 85, 98, 544 S.E.2d 30, 36–37 (2001) (emphasis added).

The McHoney court noted “real possibility” language does not lessen the burden of proof in the context of preceding language requiring jurors to be “firmly convinced” of defendant’s guilt. Id. Lastly, the court found nothing in the instruction to indicate the defendant had the burden of proof. Id. In State v. Darby, the Court of Appeals also found “real possibility” language did not lessen the government’s burden of proof. State v. Darby, 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996). Similarly in State v. Lowery, this Court approved the charge “if, based on your consideration of the evidence, you are **firmly convinced** that the defendant is guilty ... you must find him guilty. If, on the other hand, you think that there is a **real possibility** he is not guilty, you must give him the benefit of the doubt and find him not guilty.” State v. Lowery, 332 S.C. 261, 265, 503 S.E.2d 794, 797 (Ct. App. 1998) (emphasis added).

Justice Ginsburg’s concurrence in Victor v. Nebraska, explains “the ‘firmly convinced’ standard for conviction ... [is] enhanced by the juxtaposed prescription that the jury must acquit if there is a real possibility that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.” Victor v. Nebraska, 511 U.S. 1, 27 (1994) (Ginsburg, J., Concurring).

In United States v. Porter, the Fourth Circuit Court of Appeals upheld a trial court’s use of a “real possibility” and “firmly convinced” instruction. United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987). The court noted that the terms real possibility and firmly convinced were “unnecessary

concepts.” Id. Nonetheless, the Court stated, “the instructions taken as a whole properly described the prosecution’s burden and the protection the law affords the accused.” Id. These instructions are not only accepted in South Carolina, but they are widely accepted across the nation. Com. v. Hurd, 65 Mass. App. Ct. 788, 789, 844 N.E.2d 259, 261 (2006) (finding instruction using “real possibility” and “firmly convinced” language consistent with state law); United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995) (noting agreement with Justice Ginsburg’s concurrence in Victor v. Nebraska and stating the instruction given was “a correct and comprehensible statement of the reasonable doubt standard”); United States v. Williams, 20 F.3d 125, 131 (5th Cir. 1994) (finding “the ‘firmly convinced’ language, read in the context of the charge as a whole, adequately apprises the jury of the requisite level of proof” and finding the use of “real possibility” language had no infirmity in this portion of the charge either”). When the United States Court of Appeals for the Fifth Circuit approved this charge, it explained “the modifier ‘real’ merely indicates that the jury is not to acquit a defendant if it can conceive of any possibility that the defendant is not guilty.” Williams, 20 F.3d at 125.

The jury charge given by the trial court containing “real possibility” language was proper and did not shift the burden of proof. Like, McHoney and Lowery, the “real possibility” language in the instructions were preceded by language requiring jurors to be “firmly convinced” of Petitioner’s guilt. (R. 319). Since the court comprehensibly defined the reasonable doubt standard, the trial court did not err. As noted in Williams, the modifier real simply conveys that the jury should not acquit if they can conceive of any possibility that the defendant is not guilty. The instructions concisely, clearly, and comprehensively covered the adequate law.

Even if the trial courts use of “real possibility” language was not ideal, Petitioner was not prejudiced because the trial court properly took additional steps to define the State’s burden. The

instructions are to be considered in their entirety. Foster v. Greenville Hosp. Sys., at 497, 575. The trial court explained “the State has the burden of proving the Defendant [is] guilty.” (R. 318). Additionally, the court also distinguished this from a civil case noting criminal cases required more proof and that “reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.” (R. 318-9). Like Porter, the instruction considered in its entirety properly defined the State’s burden. Because the instruction is reasonably free from error, an isolated portion that may be considered misleading does not warrant reversal.

Lastly, notes written and questions made related to reasonable double provide no evidence of prejudice. The use of real possibility language is largely supported by caselaw. The mere fact that questions and notes were made concerning the definition of reasonable doubt provide no evidence that the instructions were incorrect. As noted by the Supreme Court of Rhode Island “reasonable doubt is at best a difficult concept to explain to a lay jury.” State v. Thorpe, 429 A.2d 785, 789 (R.I. 1981). Simple difficulty associated with understanding this legal concept does not prove error in the instructions given. The trial judge took adequate steps to clearly and concisely instruct the jury on a difficult legal subject.

Considered in its entirety, the trial court’s instructions properly defined the State’s burden of proof. The court properly preceded “real possibility” language with “firmly convinced” language, stated the State had the burden of proof, and distinguished the level of proof required from that of a civil case. Therefore, the Court of Appeals properly found the instruction proper. Accordingly, this Petition for Writ of Certiorari should be denied.

**CONCLUSION**


For all the foregoing reasons, it is respectfully submitted that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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