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Oct 29 2026

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Eugene P Warr, Jr, Circuit Court Judge

KENNETH M. CHISOLM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001385

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's preliminary instruction to the jury that a trial was a "search for the truth," where the charge diluted the state's burden of proof, and petitioner was thus prejudiced as a result of trial counsel's deficient performance?

STATEMENT

In September of 2017, the Colleton County grand jury indicted petitioner for three counts of murder, one count of attempted murder, and one count of possession of a weapon during commission of a violent crime. App. 919-920, 923-924, 927-928, 931-932, 935-936. On August 15, 2022, petitioner proceeded to trial before the Honorable Perry Buckner and a jury. App. 1. Tameaka Legette prosecuted the case for the state and David Matthews represented petitioner. App. 2. The jury ultimately found petitioner guilty as indicted. App. 898, l. 22 – 901, l. 21. Judge Buckner imposed a total sentence of life imprisonment, comprised of life as to each murder charge, 30 years as to attempted murder, and 5 years as to the weapons offense, all set to run concurrently. App. 914, l. 17 – 915, l. 18. Petitioner filed a timely notice of appeal; after briefing, the South Carolina Court of Appeals dismissed his appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 917-918.

On February 28, 2025, petitioner filed an application for post-conviction relief (PCR). App. 939-945. On August 1, 2025, the state filed a return. App. 947-951. On September 23, 2025, an evidentiary hearing was convened before the Honorable Eugene P. Warr, Jr. App. 952-1007. Danielle Dixon represented the state and Chelsey F. Marto represented petitioner. App. 952. On May 19, 2026, Judge Warr signed an order denying PCR and dismissing petitioner's application with prejudice. App. 1019.

This petitioner follows.

ARGUMENT

The PCR court erred by refusing to find trial counsel ineffective for failing to object to the trial court's preliminary instruction to the jury that a trial was a "search for the truth," where the charge diluted the state's burden of proof, and petitioner was thus prejudiced as a result of trial counsel's deficient performance.

Relevant facts

Trial

During the trial court's pretrial instructions to the jury, the court informed the jury,

An actual trial is a fundamental part of our democracy. *It is 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 trying to make sure that justice is done* is often slow, it is often repetitive, it is often deliberate, it is the exact opposite of what you may have seen on television, or read in a book, or seen in a movie.

App. 128, ll. 3-12 (emphasis added).

Evidentiary hearing

During petitioner's evidentiary hearing, concerning the trial court's "search for the truth," instruction, trial counsel acknowledged that he could have asked to approach. App. 988, l. 20 – 989, l. 7. He testified, however, that "you don't want to get into an argument with a judge to start things off, just as a matter." App. 989, ll. 7-9. He explained that if an objection is made, attention is drawn to that matter. App. 989, ll. 18-20. Concerning the reasons he did not object, trial counsel cited not wanting to draw attention to the matter, not wanting to get into an argument with the judge, and that he had the course of the trial to communicate to the jury that the state had to prove their case beyond a reasonable doubt. App. 989, l. 18 – 990, l. 6. He acknowledged that the charge was improper. App. 990, ll. 8-12.

In closing, PCR counsel emphasized that trial counsel acknowledged that the “search for the truth,” instruction by the trial court was an incorrect statement of law and contended that trial counsel failed to provide “a meaningful reason why he didn’t object to something that is burden shifting.” App. 1002, ll. 2-6. PCR counsel argued that the search for the trust language communicated to the jury that they “can do whatever they want,” which was a mischaracterization of the law. App. 1002, ll. 6-8.

The PCR court’s ruling

The PCR court determined that pursuant to *State v. Beaty*, 423 S.C. 26, 33, 813 S.E.2d 502, 506 (2018) (citing *State v. Aleksy*, 343 S.C. 20, 27, 538 S.E.2d 248, 251-252 (2000)), the “search for the truth” language utilized by the trial court did not, as a matter of law, shift the burden of proof or prejudice petitioner because they were made at the start of trial and not in conjunction with the trial court’s charge on reasonable doubt or circumstantial evidence. App. 1011-1012. Accordingly, the PCR court concluded that because petitioner could not show prejudice, the claim was denied. App. 1012.

Discussion

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687. Under the second prong, petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.”

Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (citing *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016)).

“[A] trial [court] 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.” *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. Specifically, “[t]hese phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice.” *Id.* Importantly, the *Beaty* Court instructed “trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State had proven the defendant’s guilt beyond a reasonable doubt.” *Id.*; see also *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998) (advising circuit courts to avoid “in search of truth” language in the definition of reasonable doubt because it “runs the risk of unconstitutionally shifting the burden of proof to a defendant”).¹

In *State v. Aleksey*, 343 S.C. at 26, 538 S.E.2d at 251,² the trial judge, at the close of the instruction on determining the credibility of witnesses, told the jury:

Obviously you do not determine the truth or falsity of a matter by counting up the number of witnesses who may have testified on one side or the other. Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is

¹ modified on other grounds by *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004), overruled by *Heatley v. State*, 448 S.C. 230, 933 S.E.2d 631 (2026).

² The *Aleksey* Court also determined that the standard of review for 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. *Id.* at 27, 538 S.E.2d at 251.

to seek the truth, to seek the truth regardless of from what source that truth may be derived. Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

Aleksey challenged the instruction on appeal. The South Carolina Supreme Court in *Aleksey* wrote, “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.’ *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998).” *Id.* at 26–27, 538 S.E.2d at 251. The instruction in *Aleksey* involved credibility of witnesses rather than reasonable doubt. The Court wrote:

While we have urged trial courts to avoid using any “seek” language when charging jurors on either reasonable doubt or circumstantial evidence (*see State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)), the “seek” language here did not appear in either the reasonable doubt or circumstantial evidence charges, but in the instructions on juror credibility. Both the reasonable doubt and circumstantial evidence charges were complete and proper.

Id. at 27, 538 S.E.2d at 251–52. The *Aleksey* Court affirmed finding the instruction as a whole properly conveyed the law to the jury and there was not a reasonable likelihood the jury applied the judge’s instructions to convict appellant on less than proof beyond a reasonable doubt.

In *State v. Patterson*, 425 S.C. 500, 823 S.E.2d 217 (Ct. App. 2019), the trial court made opening remarks to the jury regarding the trial being a “search from the truth.” The South Carolina Court of Appeals noted that “[o]ur supreme court has consistently cautioned against using language that suggests the object of a trial is to find ‘the truth.’” *Id.* at 511, 823 S.E.2d at 223. Our Court of Appeals determined that the trial courts remarks was error, however, the errors did not warrant reversal because the improper comments came at the beginning of the trial rather than during the charge on the state’s burden of proof. *Id.* at 511-512, 823 S.E.2d at 224.

In petitioner's case, the PCR court erred by refusing to find trial counsel rendered ineffective assistance of counsel where counsel failed to object to the trial court's preliminary instructions to the jury that a trial was a "search for the truth." App. 128, ll. 4-12. Specifically, the trial court instructed the jury that a trial "is 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 trying to make sure that justice is done is often slow, it is often repetitive, it is often deliberate, it is the exact opposite of what you may have seen on television, or read in a book, or seen in a movie." App. 128, ll. 3-12. The trial court elicited objections to the preliminary instructions, but trial counsel did not object. App. 129, l. 23 – 130, l. 1. It is well established that, "a trial [court] 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." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. Although the trial court's "truth" language occurred during the trial court's preliminary instructions to the jury, our Courts have nonetheless urged trial courts to avoid using this type of language in their jury instructions to avoid unconstitutionally shifting the burden of proof to a defendant, *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506; *Patterson*, 425 S.C. at 511-512, 823 S.E.2d at 224. In addition, trial counsel acknowledged that the "search for the truth" instruction was an improper charge. App. 990, ll. 8-12. Therefore, petitioner established that trial counsel rendered deficient performance by failing to object to the improper instruction. *Strickland*, 466 U.S. at 687.

Petitioner was also prejudiced by trial counsel's deficient performance. Petitioner's jury was instructed at the start of trial that the purpose of the trial was to search for the truth to ensure justice was done. In doing so, the trial court employed language that runs the risk of unconstitutionally shifting the burden of proof to petitioner as "[t]hese phrases could be

understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice.” *See Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. While the trial court’s “truth” language came during preliminary instructions to the jury, it was not accompanied by a reasonable doubt instruction by the trial court. App. 128, ll. 3-12; *see Patterson*, 425 S.C. at 511-512, 823 S.E.2d at 223-224 (noting that the trial court gave an accurate definition of reasonable doubt during its opening statement). There is a reasonable probability that the trial court’s emphasis to the jury to search for the truth diverted the jury from its obligation to determine whether the state had proven petitioner guilty beyond a reasonable doubt. *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506; *Needs*, 333 S.C. at 155, 508 S.E.2d at 867-68. Thus, the PCR court erred by finding that petitioner failed to prove prejudice flowing from the trial court’s improper use of search for the truth language and from trial counsel’s deficient performance by failing to object. App. 1011-1012; *Strickland*, 466 U.S. at 688.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.



Molly M. Keegan
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2026.

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Counsel for Kenneth Mar Keith Chisolm states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Eugene P. Warr, Jr, which was held on September 23, 2025, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Kenneth Mar Keith Chisolm.

Respectfully Submitted,



Molly M. Keegan
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2026.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this *Johnson* Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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