THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

APPELLANT

APPELLATE CASE NO. 2013-002224

Appeal from Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2016-UP-055

PETITION FOR REHEARING

Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that cross-examination regarding Bryan Rivers having committed a similar armed robbery and shooting two weeks before with the same gun in this case was *not* "evidence **which can have (no) other effect than to cast a bare suspicion upon another**, or to raise a conjectural inference as to the commission of the crime by another." The third party guilt evidence as to Bryan Rivers was compelling – he had also pled guilty -- and it certainly, respectfully, cannot be characterized as "having no other effect than to cast bare suspicion" upon

Rivers. State v. Ryan P. Deleston, 2016-UP-055 (filed February 10, 2016) at p. 2. (emphasis added).

In addition, the trial court's instruction to the jury that a criminal trial was "*a search for the truth*," and not a determination of whether the state *had proved Ryan Deleston guilty beyond a reasonable doubt* was prejudicial because it erroneously instructed the jury on its core purpose and duty. This Court may have overlooked that fact.

As stated at oral argument, the trial judge was simply stubborn for giving this instruction over objection, and refusing to cure it. Respectfully, as long as this Court affirms despite the giving of this horribly improper "seek the truth" instruction – which our Supreme Court has ruled and warned is improper – the improper instruction will continue to be charged. When the Supreme Court warned that this instruction was **disfavored**, a trial judge should not subsequently instruct it over objection. See State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

A. The prior shooting where Ryan Deleston was also merely present.

The solicitor informed the court pretrial that it anticipated the defense would "attempt to argue that the Chopper shooting two weeks prior [to the murder of Marley Lion in this case] should come in because the same gun was used in the Chopper shooting as was used to kill Marley Lion." The solicitor argued the crimes were not sufficiently similar. The defense would counter that the solicitor was largely missing the point since this was admissible evidence of third party guilt.

Referencing Rule 404(b), SCRE, the solicitor further argued, "In more ways than not, the shooting of Chopper is just not the same thing." She stressed several differences she perceived between the two incidents including (1) "Chopper" was someone who was known by Bryan Rivers and the other codefendants and the men had set out to rob him, whereas "Marley Lion just happened

to be in the wrong place at the wrong time" and was not the "intended target" and (2) George Brown drove the men to the "Chopper shooting" while the men walked to Famous Joe's [where the victim was shot inside his car in the parking lot]. R. 5, ll. 1-20.

Additionally, the solicitor argued that under Rule 403 "putting in the evidence that Bryan Rivers shot someone else is more prejudicial than it is probative. It's not probative, because it's nothing like the shooting of Marley Lion." R. 5, l. 21 – 6, l. 1.

The defense argued that: "[T]his doesn't reach the Lyle analysis because its evidence of third-party guilt. We are submitting the Chopper shooting as evidence that somebody else used this weapon in the very same manner that it was used in the Marley Lion shooting, and that this evidence shows that somebody else was the shooter in the Marley Lion murder. That's exactly what third-party guilt evidence is . . . there for, is to allow Mr. Deleston [Appellant] to present a defense that he, in fact, did not do this, and that somebody else was the trigger man. And we think that this other robbery is very relevant." R. 6, ll. 8-20.

The defense further argued that presenting evidence of the "Chopper shooting" does not prejudice the state and certainly does not "prejudice Mr. Rivers in any way. He's already pled [guilty] to charges related to this." R. 6, ll. 21-25. However, the evidence is "probative that somebody else committed this murder. That is the most probative thing that it could possibly stand for. It does not prejudice anybody, and it is probative. It is probative of Mr. Deleston's [Appellant's] innocence and [shows] a third party is guilty." R. 13, ll. 1-6.

Additionally, the defense argued that due process and Deleston's *right to present a complete defense* mandated the admission of this third-party evidence. "This is . . . a person [Bryan Rivers] who puts himself there, and essentially says, Well, Ryan [Appellant] did it. I didn't do it. So it's not that we're just casting mere suspicion on him. He puts himself there. **And to not allow that**

evidence, they're [the state] essentially saying that the Defense can't put up a defense, if we're not allowed to bring in evidence that somebody else was the shooter. That is our defense, is that Bryan Rivers was the shooter, and they're trying to preclude us from saying that." R. 9, l. 14 – 10, l. 1. (emphasis added). Defense counsel reasoned that the testimony regarding the "Chopper shooting" is "relevant to the fact [that] it makes it more likely that he [Bryan Rivers] was the individual with the gun. *He was in the first armed robbery. He was in the second armed robbery. And then the third armed robbery, he says, Well, I didn't have the gun.* And that's just rather convenient in this case." R. 10, ll. 5-11. (emphasis added).

In response to the state's Rule 404(b) argument, defense counsel argued that both of the shootings occurred in the Ardmore area "less than a mile apart. So they're in the same location, using the same weapon, the same individuals, and [the] same plan. It's a common plan." R. 9, ll. 7-12. He later added that both robberies were planned by Julius Brown and executed by the same person, Bryan Rivers, again with the same firearm. R. 11, l. 25 – 12, l. 8. Additionally, the defense pointed out that George Brown was the driver in both shootings. R. 13, ll. 16-24.

The trial judge ruled that the evidence merely casted suspicion on Rivers, and that the crimes were not sufficiently similar to prove a common scheme or plan. R. 20, l. 1 – 22, l. 24. R. 26, l. 7 – 27, l. 16. The next day the defense asked for a more specific ruling on its argument that the exclusion of this evidence violated Appellant Deleston's due process right to present a complete defense. R. 28, l. 13 – 29, l. 14. The judge stated she had already addressed the due process issue, and refused to alter her ruling. R. 31, ll. 5-10.

As this Court will recall, Appellant proffered Julius Brown's testimony regarding the Chopper shooting. Julius testified that George Brown's gun was used in the Chopper shooting, in the robbery of the couple downtown, and in the murder of Marley Lion. R. 138, l. 24 – 139, l. 7; R.

142, ll. 7-10. Julius said that he, Bryan Rivers, George Brown, Rayshawn Milligan, Appellant, and a man named Valentino Hayward were all involved in this shooting. R. 125, l. 6 – 126, l. 10. Valentino Hayward and Bryan Rivers got out of the car with George Brown's gun, but he did not actually see the shooting. Rivers and Hayward eventually ran back from Saint Andrew Garden Apartments through the Shires and into Ardmore where they got back into George's car who then drove the group back to Cashew Street. R. 127, l. 3 – 130, l. 13. The solicitor agreed the following defense proffer regarding Rivers was accurate although he said Rivers did not have immunity, and maintained they could prove Rivers was guilty through other witnesses:

> [W]hat I would cover with him [Rivers] in the context of an overall Cross-Examination would be that . . . about six days after the Marley Lion murder, there was an opportunity for Detective Osborne to have a formal meeting, sit down with Bryan Rivers where they talked on tape and Osborne asked him about being involved in a robbery at the Saint Andrews Garden Apartments with Tino, which he denied, and which was not truthful . . . I would use that to show that . . . when he needed to lie, he knew how to lie.
>
> With regard to the follow-up conversation that he had after his arrest on these charges on July 30th and 31st, I would cover the fact that he now admits that he, on June 1st, rode along on the preplanned robbery of Leroy Townsend, a.k.a. "Chopper," in the Saint Andrews Garden Apartments; that he got $1,300 in cash and drugs; he used the Marley Lion murder weapon to rob Townsend; He shot Townsend in the leg; it was George Brown's gun; that he's not been charged with this armed robbery pursuant to his proffer agreement; and he has not also been charged with attempted armed robbery pursuant to his agreement. And that's the sum and substance of what I would cover with Bryan Rivers.

R. 144, l. 12 – 145, l. 11; R. 145, ll. 14-20; see also R. 243, l. 14 – 244, l. 22.

This Court should respectfully reconsider its opinion that the trial court did not err when it refused to allow the defense to cross-examine Julius Brown and Bryan Rivers about the armed robbery and shooting of Leroy "Chopper" Townsend that occurred approximately two weeks before Marley Lion was murdered. It was undisputed that Bryan Rivers was the shooter in this prior armed robbery, as well as the armed robbery of the couple downtown, and that the same firearm was used

in all three cases. The court's erroneous ruling prevented Appellant from fully developing and presenting his defense that Bryan Rivers was the shooter who killed Marley Lion and that Appellant was merely present at the scene. This evidence should have been admitted pursuant to the rule on third party guilt, Rule 404(b), SCRE, and Appellant Deleston's due process right to present a complete defense.

Third party guilt evidence reconsideration

Evidence of Bryan Rivers' involvement and identity as the armed robber and shooter during the robbery of Leroy Townsend approximately two weeks before the murder of Marley Lion coupled with the evidence that he also robbed a couple at gunpoint in downtown Charleston merely hours before Marley Lion was shot "tends clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car five to six times. See Gregory, 198 S.C. 98, 104–105, 16 S.E.2d 532, 534–535 (1941). This evidence also "raise[s] a reasonable inference" of Appellant's own innocence, especially when considering Appellant's alleged role in both the armed robbery of Leroy Townsend and the robbery of the couple downtown. See Id. According to witnesses, during the robbery and shooting of Townsend, Appellant merely went along for the ride and remained in George Brown's car the entire time. Moreover, when Rivers held the couple up at gunpoint in downtown Charleston, the testimony was that Appellant, while he did get out of the car, merely walked in the opposite direction and had no involvement in the robbery. Based on Rivers' and Appellant's undisputed roles in these two prior armed robberies, both which were extremely close in time to the murder of Marley Lion, again clearly tends to point to Rivers as the guilty party during the attempted armed robbery and shooting of Marley, not Appellant.

Furthermore, Appellant should have been able to present this evidence regarding the armed robbery and shooting of Leroy Townsend because of the clear "train of facts or circumstances" between the three known armed robberies. See Id. When Bryan Rivers was released from prison on June 1, 2012, a train of events began involving the same players (Julius Brown, Rayshawn Milligan, George Brown, Bryan Rivers, and Appellant), the same firearm (George Brown's gun), and a similar plan of robbing individuals who the defendants suspected had cash. Because of the evident connection between the robbery and shooting of Townsend and the attempted armed robbery of Marley Lion, Appellant respectfully requests that this Court reconsider its holding that it was not error for the trial court to rule this evidence of third party guilt was inadmissible. See State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941); Holmes v. South Carolina, 547 U.S. 319 (2006); Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Rule 404 (b), SCRE reconsideration

Again, it was undisputed at trial that Bryan Rivers was the shooter during the armed robbery of Leroy Townsend on June 1, 2012, approximately sixteen days before the murder of Marley Lion. The trial court also found Bryan Rivers' involvement and identity as the shooter in this prior armed robbery was proved by clear and convincing evidence. See R. 20, ll. 15-16.

This Court may have overlooked the fact that there was a close degree of similarity between the attempted armed robbery and murder of Marley Lion and the armed robbery and shooting of Leroy Townsend. Both offenses involved the same people: Bryan Rivers, Julius Brown, George Brown, Rayshawn Milligan, and allegedly Appellant, and were planned by the same person: Julius Brown. Additionally, both robberies occurred near the Ardmore neighborhood within about a mile of each other and George Brown acted as the driver. See R. 9, ll. 7-12. Moreover, the same firearm, which belonged to George Brown, was used in both

shootings. Finally, Stephanie Brown and Appellant's residence on Cashew Street was used as a home base, where the group originated from and returned to after each armed robbery and shooting.

On the other hand, the only noticeable dissimilarities between the two acts were that an additional person, Valentino Hayward, was involved in the robbery and shooting of Leroy Townsend, and that Townsend was known to the men where Marley Lion was not.

This Court should respectfully reconsider its holding that this evidence was not admissible. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013).

Due Process reconsideration

Appellant submits this Court may have overlooked the fact that the trial judge violated Appellant's right to a "meaningful opportunity to present a complete defense" by excluding evidence regarding Bryan Rivers' use of the murder weapon during the armed robbery and shooting of Leroy Townsend two weeks before Marley Lion was killed. See Crane v. Kentucky, 476 U.S. 683, 690 (1986). Based on the United States Supreme Court's holding in Holmes and Crane, and Appellant's due process right to present a defense, Appellant should have been permitted to question Julius Brown and Bryan Rivers about the "Chopper shooting" in front of the jury and fully develop his defense that Rivers was the shooter. Rehearing should be granted.

B. A trial is not "a search for the truth in an effort to make sure that justice is done"

Again, this Court acknowledged in the opinion that "seek the truth" instructions are disfavored, and should be avoided because run the risk of unconstitutionally shifting the burden of proof to the defendant. See State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

As this Court will recall, in the judge's opening instructions to the jury she erroneously told the jurors their purpose:

> Most people do not have the opportunity to come to court as you are doing now, and most people think that from watching television or movies or reading books, that trials are fully of intense drama and riveting circumstances. While all of these things are true at some times, please remember this trial is not for your entertainment. It is a fundamental part of our democracy. **It is a search for the truth in an effort to make sure that justice is done before the parties before you. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or movies or read in books.**

R. 34, l. 3 – 35, l. 2 (emphasis added).

The judge also instructed the jurors:

> Ladies and gentlemen, after the arguments of counsel, and after you have heard the testimony in this case, and I have charged you in the law applicable to this case, **you will be in a position to determine the true facts, and render a true and just verdict.**

R. 40, ll. 17-22. (emphasis added).

Defense counsel objected to the judge's instruction that a trial was "a search for the truth." Counsel objected because this instruction could mislead the jurors into thinking their job was to be "evaluators of the quality of the evidence" which was confusing because a juror would believe "*this was not a question of purely, have they proven their case, but a search for the truth*, this could result in, I think, a more – inappropriate burden for those jurors." Defense counsel asked the judge to modify her instructions to cure this defect. The judge stood by her instructions and denied relief. R. 73, l. 3 – 74, l. 5. (emphasis added).

As stated above, and during oral argument before this Court, the judge was being stubborn in her refusal to cure this erroneous damaging instruction that the jury had to determine the truth about what happened in this case. That was an impossible burden where the witnesses here, as in

many trials, had great incentives to say what they say -- their testimony, and not to say things that may incriminate them.

This Court may have overlooked the fact that this preliminary instruction is far more pernicious than "seek the truth" language in a closing instruction from the trial court, and Appellant continues to emphasize this fact. The reality that this occurred at the opening is all the more problematic, *in that throughout the trial the jurors were concentrating on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual straightforward task of determining whether the state was proving its case beyond a reasonable doubt.* Premature deliberations are prohibited but certainly individual jurors are evaluating the evidence as it is presented, and *the context* in which they are evaluating that evidence based on the judge's initial instructions is very important.

Again, **it is critical whether the jurors are listening to the testimony trying to determine what really happened (a search for the truth) rather than listening in terms of whether the state is meeting its burden of proving guilt beyond a reasonable doubt.**

Long ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language. The Court noted that such "seek the truth" language was unnecessary, and it ran the risk of unconstitutionally shifting the burden of proof to the defendant.

Our Supreme Court recently in State v. Daniels, 401 S.C. 251, 737 S.E. 473 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved the Supreme Court instructed trial judges "[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."

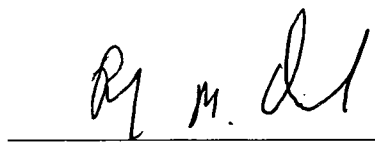
In this case, the judge also told the jury in her opening instruction that at the conclusion of the case they would be in a position to "render a true and just verdict." R. 40, ll. 17-22. This "true and just verdict" language reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "true and just verdict," rather than do what the Constitution requires, determine if the state met its burden beyond a reasonable doubt. See, Jackson v. Virginia, 443 U.S. 307 (1979).

In State v. Aleksey, 343 S.C. 20, 538 SE2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that the "seek" language was used in that case as an instruction on witness credibility. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. The Court in Aleksey therefore found there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt.

Here, conversely, the instruction in this case on the jury's duty being to "search for the truth" was not only included, but became the centerpiece of the judge's instruction to the jury on what a ***criminal trial is all about***. R. 34, l. 3 – 35, l. 2; R. 40, ll. 17-22. In the final analysis the instruction as a whole, such as in a closing instruction, does not save the trial judge from her own respectfully – stubborn – refusal to cure the improper opening instruction that the jury's purpose was to "seek the truth" so that "justice" is done. The jury's purpose was to determine if the state had proved Appellant guilty beyond a reasonable doubt. These two instructions are totally incompatible with each other. The bedrock principle of our criminal justice system is that the

government must prove a citizen's guilt "beyond a reasonable doubt." It is a jury that decides if the government has met that burden. The jury understanding -- **by the judge's opening instruction as a whole** -- that its purpose was to "search for the truth" – which means to decide what it believes really or most likely happened put an impossible wrongful burden on the jury, and it relieved the government of its true burden of proving to the jury Appellant's guilt beyond a reasonable doubt. What the jury believed most likely happened in its search for the truth was very inconsistent with the real burden of proof in a criminal case -- guilt beyond a reasonable doubt – and the instruction denied Appellant his right a fair trial. Rehearing should respectfully be granted on this most fundamental matter.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 25th day of February, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

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Kristi Lea Harrington, Circuit Court Judge

THE STATE,

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V.

RYAN P. DELESTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ryan P. Deleston, #307106, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of February, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of February, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.