

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Dorchester County  
Frank R. Addy, Circuit Court Judge  
\_\_\_\_\_

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JUN - 9 2016

SC SUPREME COURT

TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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INDEX

INDEX ..... 1

ISSUES PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENTS

1.

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner’s mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated “Charleston County Sheriff’s Office Detention Center” at the top of the photograph and listed the “booking date.” ..... 7

**Relevant Facts**..... 7

**PCR Hearing**..... 9

**Order of Dismissal**..... 10

**Discussion**..... 10

2.

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court’s opening instruction to the jury that the trial was a “search for the truth in an effort to make sure that justice is done” since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury’s inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner’s guilt beyond a reasonable doubt..... 16

**Relevant Facts**..... 16

**PCR Hearing**..... 17

**Order of Dismissal**..... 17

**Discussion**..... 18

CONCLUSION ..... 23

## ISSUES PRESENTED

1.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date?"

2.

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt?

## STATEMENT

### **Procedural History**

A Dorchester County Grand Jury indicted Petitioner at the December 3, 2007 term of the Court of General Sessions for the offense of murder. App. 710-711. His case was called to trial on November 15, 2010 before the Honorable Diane Schafer Goodstein, and a jury. App. 1. Assistant Solicitors Russell Hilton and Harrison Bell represented the state, and Sara Jayne Rogers<sup>1</sup> represented Petitioner. App. 1. On November 19, 2010, the jury found Petitioner guilty. App. 501, ll. 3-12. He was sentenced by Judge Goodstein to forty-five years imprisonment. App. 520, l. 25 – 521, l. 2.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Gethers, 2012-UP-576 (S.C. Ct. App. Filed October 24, 2012); App. 567-568. This Court denied the petition for writ of certiorari to review the Court of Appeals' decision. App. 617. William Edgar Salter represented the state, and Elizabeth Franklin-Best represented Appellant.

On July 3, 2014, Petitioner filed an application for post-conviction relief (PCR) raising the issues argued in this petition. App. 618-642. The state filed a return to this application dated February 24, 2015. App. 643-647. The matter proceeded to an evidentiary hearing on October 28, 2015 before the Honorable Frank R. Addy, Jr. App. 648. Assistant Attorney General J. Clayton Mitchell represented the state, and Rodney D. Davis represented Petitioner. App. 648. By order dated January 8, 2016, Judge Addy denied Petitioner relief. App. 702-709.

This petition for writ of certiorari follows.

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<sup>1</sup> Rogers was placed on interim suspension by this Court in December 2011 and later disbarred from the practice of law in July 2015 for professional misconduct involving dishonesty, fraud, deceit, and misrepresentation, among other improper conduct, including failing to keep client funds safe. In re Rogers, 413 S.C. 187, 775 S.E.2d 387 (2015). She had only practiced law for three years before being suspended.

## **Facts at Trial**

The state alleged at trial that Petitioner shot and killed Robert Earl Robinson during an attempted armed robbery in the parking lot of an apartment complex in Summerville. The evidence against Petitioner was mostly circumstantial.

Around 9:30 pm on September 17, 2007, the decedent met his son at a gas station and borrowed two hundred dollars. He told his son “he had to make a little run” and then left. App. 218, l. 12 – 220, l. 9. Minutes before 11:00 pm, dispatch received several 911 calls from residents at the Oak Haven Apartments in Summerville, who reported shots fired in the area. When officers with the Dorchester County Sheriff’s Office responded, they found a Toyota Sequoia parked in the middle of “the lane of travel” of the parking lot with the engine running. The decedent was sitting in the front seat slumped over. He was not breathing. App. 155, l. 1 – 156, l. 16; App. 161, ll. 3-20; App. 278, ll. 6-12. It was later determined that he died from a single gunshot wound to his right arm that entered his chest and struck both lungs and his heart. App. 312, ll. 4-14.

During its investigation, law enforcement discovered the decedent had exchanged numerous telephone calls shortly before his death with a fourteen year old named Veronica, who was a family friend of the decedent. The police also discovered that during this same time period, Veronica had been communicating by telephone with Petitioner. App. 279, l. 18 – 280, l. 16; App. 283, l. 2 – 284, l. 10; App. 286, l. 24 – 287, l. 2; App. 377, l. 16 – 384, l. 8.

While processing the scene, investigators collected a “Bluetooth headset” that was lying in the middle of the road about fifty feet from the Toyota Sequoia. App. 170, ll. 8-19; App. 171, ll. 19-23. They also lifted numerous latent prints from the outside of the decedent’s vehicle. App. 175, ll. 14-19. A latent fingerprint examiner with the South Carolina Law Enforcement Division (SLED) determined that several of these prints belonged to Petitioner. App. 345, l. 11 – 350, l. 7.

On September 22, 2007, Petitioner and Veronica were located in New York City. Both allegedly presented a “fake ID” when questioned by officers with the New York Police Department (NYPD). After their identification was confirmed, they were returned to South Carolina where they were charged with murder. App. 290, ll. 2-24. On March 9, 2009, Veronica and her attorney met with investigators at the Dorchester County Sheriff’s Office. App. 291, l. 7 – 292, l. 10; App. 302, ll. 10-18. She ultimately gave a written statement after the state agreed to keep her case under the jurisdiction of the Family Court. App. 374, ll. 7-11.

In her statement, Veronica allegedly said she called the decedent on September 17, 2007 and asked for money. The decedent agreed to bring her money, but said he would not do so “without getting some.” Veronica claimed she told Petitioner “to get the money because [she] didn’t want to mess with Mr. Earl [the decedent].” In her statement, she said she told Petitioner the decedent was driving a Toyota Sequoia. Afterwards, she allegedly asked Petitioner “if he got the money, and he said no.” Petitioner said the decedent “wouldn’t give him the money.” Veronica claimed in the statement that she did not know Petitioner shot the decedent, but the next day Petitioner allegedly said “we had to go because he got in some stuff.” They ultimately travelled to Virginia by car and then to New York by bus. App. 299, l. 2 – 300, l. 23.

Veronica disavowed most of this statement during her testimony at trial. She admitted she spoke with the decedent by telephone on September 17, 2007 and asked him to bring her money. She said the decedent agreed to bring her money and “was planning to have sex with [her] later on that night.” However, when she called to arrange where they were going to meet and give him directions, the decedent “stopped picking up the phone, so [she] just thought he was lying about bringing [her] the money.” App. 247, l. 3 – 250, l. 9.

Veronica testified that she told Petitioner she “needed him to go pick up money for me” because she “didn’t want to have sex with him [the decedent],” but Petitioner told her “he was going to have to call [her] back because he wasn’t sure if he was going to do that.” She said she “never told him [Petitioner] where to go” since he said he was busy. App. 250, l. 19 – 252, l. 3. She also never told Petitioner the decedent was driving a Toyota Sequoia. After the decedent stopped responding and Petitioner said he was busy, Veronica “just left it alone.” App. 250, ll. 6-9; App. 251, l. 22 – 252, l. 3.

Pursuant to a search warrant, law enforcement collected a buccal swab from Petitioner on September 2, 2010 so it could compare his DNA to evidence collected at the scene. This swab was sent to SLED. App. 187, l. 4 – 188, l. 13. A DNA analyst at SLED determined that DNA lifted from the “Bluetooth headset” found near the decedent’s vehicle matched the DNA profile of Petitioner. App. 425, l. 6 – 428, l. 15.

The jury ultimately convicted Petitioner of murder. App. 501, ll. 3-12. He was sentenced by Judge Goodstein to forty-five years imprisonment. App. 520, l. 25 – 521, l. 2.

## ARGUMENT

1.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner's mugshot from his prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated "Charleston County Sheriff's Office Detention Center" at the top of the photograph and listed the "booking date."

### **Relevant Facts**

During the middle of trial, Investigator John Garrison with the Dorchester County Sheriff's Office testified "that the latent prints that had been located on the [outside] passenger side of the Sequoia [the decedent's vehicle] came back to the defendant [Petitioner]." App. 287, ll. 15-17. He said this fact was used by law enforcement to obtain an arrest warrant for Petitioner for murder. App. 286, l. 23 – 288, l. 1.

Shortly after Garrison's testimony, the state called Javon Wright, an employee of the Charleston County Detention Center, as a witness. Wright testified that at the time of booking, a "set of fingerprints" are collected from an arrestee as well as a photograph. He identified the "major case prints" he collected from Petitioner when he was previously booked at the detention center. These "major case prints," which include prints of all ten fingers and the palms of both hands, were admitted into evidence as State's Exhibit No. 40.

Wright also identified the photograph he took of Petitioner at the time of his prior booking. This booking photograph was admitted into evidence as State's Exhibit No. 41 *without objection*. When asked to tell the jury about this exhibit, Wright stated, "It's a **mugshot of Trevee Gethers**

[Petitioner], **booking date 5-11-07.**<sup>2</sup> App. 323, l. 5 – 325, l. 6 (emphasis added). He further agreed that the arrestee in the mugshot admitted as State’s Exhibit No. 41 “appear[ed] to be the individual seated at the defense table.” App. 325, ll. 7-9.

Trial counsel did not object to the admission of Petitioner’s mugshot from his previous arrest nor did she object to Wright’s prejudicial testimony about the exhibit. App. 325, ll. 10-16.

The court admitted State’s Exhibit No. 40, which was the copy of Petitioner’s “fingerprint card,” with a “condition in place.” App. 325, l. 17 – 326, l. 10. It was later revealed that the “condition” was based on an agreement by the parties to redact “the fingerprint card” because the card “listed his [Petitioner’s] charge that he was booked in on as distribution of Schedule 1, 2, or 3 controlled substance.” Therefore, the actual “fingerprint card” was later substituted for a copy with the listed charge redacted. App. 370, l. 6 – 371, l. 4.

However, trial counsel did not request any redactions on State’s Exhibit No. 41, including “Charleston County Sheriff’s Office Detention Center,” or “Booking Date: 05/11/07” or Petitioner’s basic background information, such as his height and date of birth. See App. 524.

The state subsequently called Kalisha Gill, an expert latent fingerprint examiner with SLED. Gill testified that she received a set of latent prints from the Dorchester County Sheriff’s Office related to this case. She ran the prints through AFIS, the Automated Fingerprint Identification System, and received “a hit.” The “hit” “came back to the fingerprint card bearing the name Trevee Gethers [Petitioner].” App. 345, l. 11 – 346, l. 8. After receiving the “hit,” Gill “manually compared” the latent prints submitted with Petitioner’s known fingerprints and positively identified the prints submitted as belonging to Petitioner. App. 346, l. 12 – 350, l. 7.

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<sup>2</sup> The murder in this case took place on September 17, 2007, approximately four months after the listed booking date on the mugshot admitted as State’s Exhibit No. 41.

There was no further testimony related to Petitioner's mugshot entered as State's Exhibit No. 41.

### **PCR Hearing**

Sarah Jayne Rogers, Petitioner's trial counsel, testified that about four months before trial she was asked by Petitioner's then counsel, John Witherspoon, to take over representation of Petitioner. This was her first murder case as she was mostly a Family Court attorney. App. 672, l. 18 – 673, l. 14. Rogers admitted she no longer practices law and the PCR court took judicial notice that she was disbarred by this Court in July 2015.<sup>3</sup> App. 677, l. 7 – 678, l. 6.

The court asked Rogers "why the State was seeking its [the mugshot's] introduction" and whether the booking photograph was modified in any way "to minimize any suggestion that it was a mugshot." Rogers explained, "The State was discussing the mugshot in its presentation of how they came to associate Mr. Gethers [Petitioner] with this crime and how they got him back to South Carolina, and I do not recall if it was altered." She later clarified that the mugshot was one of the methods the police used to identify Petitioner after he was apprehended in New York.<sup>4</sup> App. 689, l. 16 – 690, l. 12.

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<sup>3</sup> In re Rogers, 413 S.C. 187, 775 S.E.2d 387 (2015).

<sup>4</sup> This testimony is incorrect and in direct conflict with the testimony at trial. Investigator John Garrison with the Dorchester County Sheriff's Office testified at trial that his office "submitted information, **photographs from the driver's license or Highway Department IDs** and we sent that to New York so that they [NYPD officers] could confirm that the person they had in custody was indeed Mr. Gethers [Petitioner]." App. 290, ll. 2-19 (emphasis added). Thus, it was the photograph from Petitioner's driver's license, **not his mugshot**, that was used by authorities in New York to identify him. Moreover, it was the "fingerprint card" collected from Petitioner during his **prior booking**, rather than his mugshot, that was used by law enforcement in South Carolina to identify him as a suspect in this murder.

Petitioner, who raised and briefed this issue in his PCR application, explained that the booking photograph introduced by the state was “the typical photo mugshot” with a picture from the front and a second picture from the side. App. 693, l. 18 – 693, l. 16.

### **Order of Dismissal**

The PCR court found trial counsel was not ineffective for failing to object to the admission of Petitioner’s mugshot. The court found the booking photograph was introduced “to show how law enforcement identified [Petitioner] as a suspect in the murder.” Specifically, the court stated, “This Court finds the booking photo was offered in a relevant line of questioning. Testimony was elicited concerning prints lifted from the automobile where the victim was found murdered. [Petitioner] was identified based upon an earlier set of case prints (State’s Exhibit 40) taken from that earlier arrest. The booking photo tied those prints to [Petitioner].” App. 706-707.

Based on this finding, the court ruled trial counsel was not ineffective for failing to object to the introduction of the mugshot. Moreover, the court found Petitioner failed to prove that if counsel had objected that the objection would have been successful. App. 707.

Notably, the PCR court failed to analyze the allegation using the three part analysis found in State v. Traylor, 360 S.C. 74, 84, 600 S.E.2d 523, 528 (2004)<sup>5</sup> nor did the court cite to any relevant case law in support of its ruling.

### **Discussion**

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the admission of Petitioner’s mugshot from his

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<sup>5</sup> “The introduction of a ‘mug-shot’ of a defendant is reversible error unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” Traylor, 360 S.C. at 84, 600 S.E.2d at 528 (internal citations omitted).

prior arrest approximately four months before the murder where no demonstrable need of the mugshot was established, the mugshot plainly suggested to the jury that Petitioner had a prior record, and the origin of the mugshot was clear as it stated “Charleston County Sheriff’s Office Detention Center” at the top of the photograph and listed the “booking date.”

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and 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.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“The introduction of a ‘mug-shot’ of a defendant is **reversible error** unless: (1) the state has a demonstrable need to introduce the photograph, (2) the photograph shown to the jury does not suggest the defendant has a criminal record, and (3) the photograph is not introduced in such a way as to draw attention to its origin or implication.” Traylor, 360 S.C. at 84, 600 S.E.2d at 528 (citing State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986), State v. Robinson, 274 S.C. 198, 262 S.E.2d 729 (1980), and State v. Denson, 269 S.C. 407, 237 S.E.2d 761 (1977) (emphasis added)).

In Traylor, the defendant argued the trial court committed reversible error in admitting mugshots of him into evidence. Traylor, 360 S.C. at 83, 600 S.E.2d at 528. In the photographs, the defendant was not shown holding a “placard” with an arrest date and there was no indication of a law enforcement agency. However, the photographs “had numerical markings on the side, indicating a height in inches.” Id. at 77-78, 600 S.E.2d at 524-525. Our Supreme Court found the photograph of the defendant was “clearly a mug shot, revealed by the front and side poses, and the height indicators.” Id. at 80, 600 S.E.2d at 528.

Moreover, this Court held the trial judge erred by admitting the mugshot because the state did not have a demonstrable need to introduce it. Id. This Court “rejected the [s]tate’s argument that it could not prove the defendant was in the victim’s home without the mug shots because the defendant’s accomplice testified the defendant was at the scene of the crime, and the victims testified at trial, describing the attack and the identity of the assailants.” State v. Green, 412 S.C. 65, 80, 770 S.E.2d 424, 432 (Ct. App. 2015) (citing Traylor, 360 S.C. at 84, 600 S.E.2d at 528)). Yet, the Court held the defendant suffered no prejudice by the admission of the mugshots because a police officer testified the defendant’s photograph was taken after his arrest for his current charges. Traylor, 360 S.C. at 84-85, 600 S.E.2d at 528.

In Green, the defendant argued the trial court erred in allowing the state to introduce his mugshot because it was unnecessary, cumulative to the state’s case, and prejudicial because it suggested he had a prior criminal record. Green, 412 S.C. at 79, 770 S.E.2d at 431. The Court of Appeals held the state had a demonstrable need to introduce the booking photograph, which included a side view of the defendant’s face, so that the jury could compare the booking photograph to the still photographs from a surveillance video of the robbery, which also showed the side of the assailant’s face. Id. at 82, 770 S.E.2d at 433. The court also held the booking photograph did not

suggest the defendant had a criminal record. While noting the booking photograph included the side view profile picture of the defendant, which is a common feature of mugshots, the court held “this factor alone was insufficient to suggest the defendant had a prior record because the jury knew Green was arrested for the current armed robbery and likely assumed the picture was taken following his arrest.” Id. at 82-83, 770 S.E.2d at 433-434.

Lastly, the court held the mugshot was not “introduced in such a way as to draw attention to its origin or implication.” Id. at 83, 770 S.E.2d at 434 (internal citation omitted). The court noted that the trial judge “cut the ‘top and bottom off’ of the photo to remove any reference to the law enforcement agency” and that the photograph was admitted during a detective’s “testimony that the booking photo was a fair and accurate description of Green when he was arrested for the current armed robbery; therefore, the manner the photo was introduced implied that the booking photo was taken following Green’s current arrest.” Id.

Finally, in Denson, our Supreme Court held the state had a demonstrable need to introduce the defendant’s booking photographs because the defendant’s absence from trial made an in-court identification impossible. Denson, 269 S.C. at 410, 237 S.E.2d at 763. This Court further held that the photographs did not suggest the defendant had a prior criminal record because they “were not the juxtaposed full face and profile photographic display normally associated with ‘mug shots’” and because the jury likely assumed the picture was taken when the defendant was arrested for his current charge. Id. at 412-413, 237 S.E.2d at 764.

Here, trial counsel was ineffective for failing to object to State’s Exhibit No. 41 as the introduction of Petitioner’s mugshot was in clear violation of this Court’s holding in Traylor. First, it was obvious that this photograph was a mugshot, not only because of the front and side poses, but because the top of the photograph stated, “Charleston County Sheriff’s Office Detention Center”

and the body stated, “Booking Date: 05/11/07.” The photograph also included Petitioner’s background information, such as his height, date of birth, gender, and race. Moreover, Javon Wright, the detention center employee, unequivocally testified before the exhibit was admitted that it was “a **mugshot of Trevee Gethers** [Petitioner], **booking date 5-11-07.**” App. 323, l. 5 – 325, l. 6 (emphasis added). Therefore, the introduction of Petitioner’s mugshot clearly drew attention to “its origin and implication.”

Moreover, the mugshot plainly suggested that Petitioner had a prior record since the booking date was four months before the murder in this case. There is absolutely no way the jury could have thought this mugshot was from Petitioner’s current arrest for murder since the booking date was before this murder occurred on September 17, 2007. At an absolute minimum, the jury knew Petitioner had previously been arrested. This alone was highly prejudicial to Petitioner.

Lastly, the state did not have a demonstrable need to introduce the mugshot. Investigator Garrison testified that authorities in New York used Petitioner’s picture from his driver’s license, not his mugshot, to positively identify him before he was returned to South Carolina. Moreover, introduction of the mugshot was not necessary to establish that the “fingerprint card” entered as State’s Exhibit No. 40 belonged to Petitioner as the PCR court found. Petitioner never contested that this “fingerprint card” belonged to him nor did he dispute that his fingerprints were found on the outside of the decedent’s vehicle. Therefore, there was absolutely no need for the state to introduce Petitioner’s mugshot.

Petitioner was prejudiced by trial counsel’s deficient performance because if counsel would have properly objected to the admission of his mugshot and the trial court admitted the exhibit over objection, it would have been reversible error on appeal since the state did not have a demonstrable need to introduce the photograph, the photograph suggested Petitioner had a criminal record, and

the photograph was introduced in a way that drew attention to its origin. See Traylor, 360 S.C. at 84, 600 S.E.2d at 528. Moreover, since the three factors outlined by this Court in Traylor were met in this case, it is highly probable the trial court would have sustained an objection from trial counsel if an objection had been made. Therefore, the PCR court erred by ruling Petitioner “failed to prove that if counsel had objected that the objection would have been successful.” App. 707. There is no evidence to support the PCR court’s ruling.

Respectfully, this Court should hold trial counsel was ineffective, reverse the ruling of the PCR court, and remand for a new trial.

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court’s opening instruction to the jury that the trial was “a search for the truth in an effort to make sure that justice is done” since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury’s inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner’s guilt beyond a reasonable doubt.

### Relevant Facts

In her opening instruction to the jury, the trial judge informed the jury:

[T]his trial is not for entertainment. It is a . . . **search for the truth in an effort to make sure that justice is done** between the State and Mr. Gethers [Petitioner]. **Searching for the truth and making sure that justice is done** is often slow, deliberate, and repetitive, the opposite no doubt of what you may have seen on television, read about in books, our perhaps in the movies.

...

The attorneys before you are advocates for the parties they represent, but first and foremost, they are officers of the court, sworn to uphold the integrity and fairness of our judicial system and to help you in **a search for the truth**. You should expect them to be professional, competent, and ethical in their representation of their clients.

App. 122, l. 10 – 123, l. 4 (emphasis added).

Trial counsel made no objection to this improper instruction.

Additionally, at the conclusion of the assistant solicitor’s closing argument, he told the jury, “There’s only one just verdict in this case . . . There’s one verdict that **speaks the truth**, a verdict that holds the defendant accountable for his heinous and cowardly crimes, a verdict of guilty.” App. 467, ll. 10-15 (emphasis added).

Moreover, at the very end of the trial court’s instruction to the jury, the judge stated, “Now, ladies and gentlemen, I do want to leave you with one conclusion, one final thought . . . **The word**

**‘verdict,’ the word ‘verdict’ comes from the Latin phrase ‘veredicto,’ which means to speak the truth, to speak the truth. *And that is now your task, to speak the truth.***” This was the very last instruction from the court before the judge excused the jury to begin its deliberations. App. 493, l. 19 – 494, l. 15 (emphasis added). This instruction further emphasized the court’s opening remark to the jury that a trial is a “search for the truth in an effort to make sure that justice is done.” See App. 122, l. 10 – 123, l. 4. Trial counsel made no objection to this incorrect instruction. Therefore, it was never corrected before the jury began its deliberations.

### **PCR Hearing**

Petitioner, who raised and briefed this issue in this PCR application, testified at the PCR hearing that his trial counsel should have objected to the court’s opening instruction to the jury that a trial is “a search for the truth” “[b]ecause from my understanding of the law it isn’t for the jury to search for the truth. It’s for the State to prove beyond a reasonable doubt that I committed the crime.” App. 660, l. 16 – 661, l. 10.

Rogers merely testified that she did not think the court’s instruction that a trial is “a search for the truth” was “objectionable.” App. 683, ll. 18-21.

### **Order of Dismissal**

The PCR court found trial counsel was not ineffective for failing to object to the trial judge’s opening instruction to the jury that a trial is a “search for the truth in an effort to make sure that justice is done.” App. 705. In reaching this conclusion, the court stated, “These remarks are part of the standard opening instructions for many judges, and Judge Goodstein’s opening remarks are not an instruction on the law. Additionally, because Judge Goodstein properly instructed the jury on the burden and standard of proof at the close of the case, any error was clearly harmless and did not affect the result.” App. 705.

## **Discussion**

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the trial court's opening instruction to the jury that the trial was a "search for the truth in an effort to make sure that justice is done" since this instruction was fundamentally incorrect, was burden shifting, and misdirected the jury's inquiry from the beginning of the trial forward from the correct legal question of whether the state had proved Petitioner's guilt beyond a reasonable doubt. The trial court erroneous opening instruction was further exacerbated during the judge's charge on the law at the conclusion of the case when she instructed the jury immediately before it was excused to begin its deliberations that its "task" was "to speak the truth." Petitioner was clearly prejudiced by trial counsel's failure to object to the court's incorrect, burden shifting instruction.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686; See Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668).

**Eighteen years ago** in State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998), this Court “strongly urge[d] the trial courts 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 a defendant.” Id.

This Court has also explained that the “seek the truth” language is troublesome when given in conjunction with other confusing or burden shifting language such as a reasonable doubt “is a doubt for which you can give a real reason.” State v. Manning, 305 S.C. 413, 416-417, 409 S.E.2d 372, 374-375 (1991); See State v. Raffalt, 318 S.C. 110, 456 S.E.2d 390 (1995).

Here, the fact that the court’s incorrect instruction occurred at the opening of Petitioner’s trial is 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. In other words, 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 Petitioner’s guilt beyond a reasonable doubt.

Moreover, the trial court’s incorrect instruction was even further exacerbated when the judge instructed the jury *immediately* before it began its deliberation that its “task” was “to speak the truth.” This reinforced in the jurors’ minds that its duty was to “search for the truth” as opposed

to determine whether the state had met its burden of proving Petitioner's guilt beyond a reasonable doubt. This erroneous instruction sent the jury into its deliberation with an incorrect understanding of its duty and the burden of proof in a criminal trial. During its deliberations, the jury was likely focusing on discovering "the truth" as opposed to determining whether the state had met its hefty burden of proving Petitioner's guilt beyond a reasonable doubt.

In State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012), this Court 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. Id. 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." Id.

In this case, the judge also told the jury in her opening that at the conclusion of the case they would be in a position to "render a true and just verdict." App. 130, ll. 8-14; App. 126, l. 22 – 127, l. 1. 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, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

**Sixteen years ago** in State v. Aleksey, 343 S.C. 20, 26-29, 538 S.E.2d 248, 251-253 (2000), the Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the Court in Aleksey noted the "seek" language was used in that case as an instruction on witness credibility. Id. The "seek" language did not appear in either the reasonable

doubt or circumstantial evidence portion of the instruction. Id. 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. Id.

Here, conversely, the instruction to the jury that a trial is a "search for the truth" was not only included, but became the centerpiece of the judge's opening instruction on what a criminal trial is all about. The court's incorrect instruction also became the focus of the jury's deliberation since the judge concluded her charge on the law by instructing the jury that its "task" was to "speak the truth." Therefore, unlike in Aleksey, there is 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. A jury's function is not to "search for the truth" or "speak the truth." It is fundamentally different from truth and justice. The jury's function is to determine whether the state has proved the defendant's guilt *beyond a reasonable doubt*.

Additionally, the judge made clear in her opening instructions that it was the duty of the attorneys to be professional and act as officers of the court "to help you [the jurors] in a search for the truth." That was the antithesis of the jury's real function, which was to determine whether the state proved the defendant's guilt beyond a reasonable doubt.

Significantly, the trial judge never instructed the jury during her opening instruction that her remarks were not an instruction on the law as most judges do. Because the judge failed to inform the jury that her opening remarks were not an instruction on the law, the jury could only have assumed her opening instructions were the law. It is undisputable that the jury naturally looks up to the trial judge and expects guidance from her on how they should act and what their duties are throughout the trial. Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). Thus, there is 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.

When examining the judge's opening instruction to the jury regarding the jury's function in conjunction with her charge immediately before the jury began deliberating that its "task" was to "speak the truth," it is remarkably clear that the incorrect instruction as a whole was burden shifting.

Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function that occurred during both the court's opening remarks and the charge on the law at the conclusion of the trial, this Court should hold trial counsel rendered ineffective assistance of counsel by failing to object and that Petitioner was prejudiced by counsel's deficient performance since the incorrect instruction improperly shifted the burden of proof and tainted the jury's deliberations.

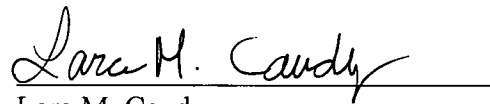
In Needs and Aleksey, eighteen and sixteen years ago respectively, this Court "strongly urged" trial judges to avoid using any "seek the truth" language. Almost two decades later, judges continue to ignore this Court's admonition and are still using this incorrect and burden shifting language. Moreover, the bar, as shown by trial counsel here, continues to fail to object to this inaccurate language despite the significant passage of time since Needs and Aleksey were decided. Both the bench and the bar need a reminder that this incorrect, burden shifting language should be removed from trial courts' remarks and instructions to the jury.

Respectfully, due to counsel's deficient performance and the resulting prejudice to Petitioner, this Court should reverse the ruling of the PCR court and grant Petitioner a new trial.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests this Court reverse the decision of the PCR court and remand for a new trial.

Respectfully submitted,

A handwritten signature in cursive script that reads "Lara M. Caudy". The signature is written in black ink and is positioned above a horizontal line.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of June, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Dorchester County  
Frank R. Addy, Circuit Court Judge

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TREVEE GETHERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000284

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CERTIFICATE OF SERVICE

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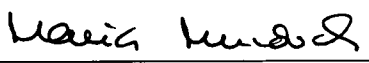
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 9th day of June, 2016.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day  
of June, 2016.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.