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SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2016-001103
Opinion No. 2016-UP-055, filed February 10, 2016
12-GS-10-06361, 6362,6363, 6364

THE STATE,

Respondent,

v.

RYAN P. DELESTON,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED ON CERTIORARI BY PETITIONER

1. Did the Court of Appeals err by affirming the trial court's refusal to allow Petitioner to cross-examine witnesses about an armed robbery and shooting that occurred approximately two weeks before the murder, where it was undisputed that Bryan Rivers was the shooter in the prior robbery and that the same firearm was used in both cases, since this prevented Petitioner from fully presenting his defense at trial, namely that Rivers was the shooter who killed the decedent, Marley Lion, and that Petitioner was merely present at the scene, in violation of Rule 404(b), SCRE, the rule on third party guilt, and Petitioner's due process right to present a complete defense?

2. Did the Court of Appeals err by holding the trial court's opening instruction to the jury that a trial was "a search for the truth in an effort to make sure that justice is done" was not reversible error when this instruction was fundamentally incorrect 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?

INTRODUCTION

This matter comes before the Court by a Petition for Writ of Certiorari dated May 23, 2016. This involves the South Carolina Court of Appeals opinion filed February 10, 2016, The State v. Ryan P. Deleston, Unpublished Opinion No. 2016-UP-055 (S.C. Ct. App. Filed February 10, 2016). The Petitioner made a Rehearing dated February 25, 2016. In his Petition for Rehearing, Deleston asserted the following reasons why he believes rehearing is appropriate:

1. The Court may have overlooked the fact that cross examination regarding Bryan Rivers having committed a similar armed robbery and shooting two weeks before that the same gun in this case was *not* "evidence which can have no other effect than cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another." Petition, pp. 1, 2-8.

    a. Petitioner asserts that the Court should reconsider its opinion that the trial court denied their 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. Petition, p. 5. He claims the ruling at trial prevented Petitioner from fully developing and presenting his defense that Rivers was the shooter who killed Lion and that Petitioner was "merely present" pursuant the evidence of third party guilt, Rule 404 (b) and his due procees right to present a defense. Petition, p. 5-6.

2. The Court may have overlooked that "the trial court's instruction to the jury that a criminal trial was "a search for the truth," and not a determination is whether the State had proved Ryan Deleston guilty beyond a reasonable doubt was prejudicial" and the Supreme Court had warned that a trial judge should not instreuct it over an objection citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000). Petition, p. 2, 8-12.

The Petition for reheaing was denied by the Court of Appeals on April 21, 2016.

Respondent submits that certiorari is not warranted. In summarily denying relief, the Court of Appeals concluded as to the first ground:

1. As to whether the trial court erred in limiting cross-examination: Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts ... may ... be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *State v. Cope*, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013), cert. denied, 135 S.Ct. 400 (2014) ("Where there is a close degree of similarity between the crime charged and the prior bad act, the prior bad act is admissible to

demonstrate a common scheme or plan."); id. ("When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." (*quoting State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 896 (2009))); *id.* at 338 n. 4, 748 S.E.2d at 205 n. 4 (noting we must look at the commonality of the entire crimes when determining admissibility if the purpose of the evidence is to show that the allegedly guilty third party acted pursuant to a common scheme); id. at 341, 748 S.E.2d at 206 ("The admissibility of evidence of third-party guilt is governed by *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941)."); *Gregory*, 198 S.C. at 104–05, 16 S.E.2d at 534 ("[T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; 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, is not admissible." (emphasis added)); *Cope*, 405 S.C. at 339, 748 S.E.2d at 205–06 (addressing a similar due process argument in which the Petitioner relied on *Holmes v. South Carolina*, 547 U.S. 319, 323 (2006), and finding the facts were distinguishable from *Holmes*; holding "[i]t was not the strength of the State's case that led to exclusion of evidence of [the alleged guilty third party's] other crimes. Instead, it was because the other crimes were not sufficiently similar to the crime charged so as to be admissible").

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Concerning the opening instruction issue, the Court of Appeals concluded:

2. As to whether the trial court erred in stating the trial was "a search for the truth in an effort to make sure that justice is done": *State v. Aleksey*, 343 S.C. 20, 26–27, 538 S.E.2d 248, 251 (2000) ("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.' "(*quoting State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) (alteration provided in *Aleksey*))); id. at 27, 538 S.E.2d at 251 ("However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."); *id.* ("The standard for review of an ambiguous [or improper] jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.").

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ARGUMENTS WHY CERTIORARI IS INAPPROPRIATE

I The Court of Appeals did not misapprehend the law or facts. The trial judge did not abuse her discretion in initially denying the Petitioner the right to cross-examine accomplices Bryan Rivers and Julius Brown concerning the fact that Bryan Rivers was the shooter in an armed robbery two weeks prior with the Petitioner being involved where the asserted purpose was to suggest that Rivers was the triggerperson in the death of Marley Lion and that Petitioner was merely present.

A. Any alleged error in the earlier exclusion of evidence of Rivers being the triggerperson in shooting of Leroy "Chopper" Townsend two weeks prior during the cross-examinations of Rivers and Julius Brown was not reversible error where evidence that Rivers shot Townsend was subsequently introduced through the Petitioner's admiited statement and specifically commented upon by the Solicitor in her closing statement to the jury.

B. Any error in its exclusion of the potential cross-examination was harmless beyond a reasonable doubt where similar evidence was presented that Rivers had possessed the weapon in a robbery on the day of the crime and had possessed and presented a weapon earlier the same day. In addition, evidence of Petitioner's guilt was overwhelming, in light of the accomplice liability theory and his own statement.

The Petitioner contends certiorari is required when he claims he was deprived of his constitutional right to present a defense. He contends that he was precluded from presenting evidence in the cross-examination of accomplices Bryan Rivers and Julius Brown that two weeks prior to the murder of Marley Lion, Rivers was a triggerperson involved in a separate shooting of Leroy "Chopper" Townsend with the same weapon that shot Lion. He contends that the evidence was admissible under S.C. Rule of Evidence 404(b), as evidence of third party guilt under the precedent of State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), and as his constitutional right to present a meaningful defense under Holmes v. South Carolina, 547 U.S. 319 (2006). The Petitioner contends that this evidence of the other crime was relevant to his defense because he claimed that Rivers was the triggerperson in Lion's death and that the excluded evidence would support that he was merely present at Lion's death.

In denying relief, the trial judge rejected the proffer under Rule 404(b), South Carolina Rules of Evidence, concluding that there was not a close degree of similarity between the crimes and therefore did not demonstrate a common scheme or plan to establish Rivers as the shooter of Lion.

The trial court further rejected the claim that there was a due process violation. However, subsequently during the presentation of evidence, there was a change in prosecution strategy[1] prior to the conclusion of the state's case and it introduced similar evidence to the jury through the introduction of a partially self-serving statement of Deleston. This statement included information about Rivers shooting Townsend earlier with the murder weapon. For all these reasons, a new trial is not warranted.

The summary order by the Court of Appeals suggests in its citations that the Court opined that the evidence of the other criminal act by Rivers was not relevant because it was not sufficiently similar to be admissible and lacked a sufficient degree of similarlity, citing *Cope*. Respondent submit that the conclusion is correct, but there are also additional reasons why a new trial would not be warranted.

A. The Admission of Evidence of the Shooting of Chopper Townsend by Rivers with the Murder Weapon through the Petitioner's Own Statement (State Exhibit 30) and the Solicitor's Subsequent Comment Concerning the Evidence of the Shooting in Closing Argument Renders the Limitation on Cross-examination Harmless Error.

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[1] At the outset of the opening argument, Solicitor Wilson stated, although the State would show "that it was Deleston that pulled that trigger" that night (R.p. 42, ll. 1-4, Tr.p. 238, ll. 1-4), it was relying on the principle of the hand of one is the hand of all" liability and that "when we prove to you that Julius, 'Little B' [Rivers] and Ryan Deleston were acting together, who pulled the trigger will not be of importance to you." R.p. 42-43, Tr.p. 238-239. Importantly, throughout the opening statement by Solicitor Wilson, no mention is made of her intent to introduce the taped statements of Deleston of July 30, 2012. R.p. 41-51, Tr.p. 237-247. No mention is made of the Petitioner's statement.

However, counsel Pennington does present his defense theory that Bryan Rivers "used the weapon at 2:45 am, one hour before this murder downtown on Rutledge Avenue, to rob that couple that you heard about downtown. And at 4:07 am, he used it again to murder Marley Lion." R.p. 57, ll. 16-20. Also R.p. 59. Tr.p. 253, ll. 16-20. Also Tr.p. 255. ("It is whether or not the State has truly removed all reasonable doubt to show that ---in this instance, that Ryan Deleston would have seen the crazy, irrational act of Bryan Rivers coming."). Counsel Pennington made no mention of Deleston's statement in his opening either. During the testimony of Detective Williams of the Charleston Police Department, the State introduced evidence that Deleston in the evening statement had indicated, among other things that Bryan Rivers had the firearm and went up to the vehicle and shot into the (Lion's) vehicle. R.p. 758, ll. 7-15, Tr.p. 1012, ll. 7-15.

Any exclusion of the proffered evidence through cross-examination of Rivers and Brown that Rivers was the triggerperson in the shooting and attempted armed robbery of "Chopper" Townsend was harmless error because similar evidence was actually admitted within the admitted statement of the Petitioner in the State's case. This evidence from the Deleston statement was directly commented upon by the Solicitor in her closing statement to the jury. For this initial reason, the complaint about the earlier exclusion of similar evidence issue must be dismissed where the similar information was presented to the jury later.

Deleston's Admitted Statement about the Chopper Shooting by Rivers (State Exhibit 30).

Prior to the conclusion of the state's case in chief, the State introduced **State Exhibit 30**, a videotape of the July 30, 2012 evening session of the interrogation of Ryan Deleston. At the **9:33:40** portion of Exhibit 30, Deleston brings up about another robbery they did, but he claimed he did not participate in where they shot a drug dealer named Chopper. At the 9:45 PM portion of the tape, it reflects that Detective Osborne asks Deleston what he knows about the Chopper shooting. Deleston then tells Detective Osborne that Chopper was a big drug dealer and that he had stopped selling to them so they got someone else to call him. According to Deleston, Julius Brown, Bryan Rivers, George Brown and Valentino "Tino" Heyward jumped in the truck to go do the "lick." Deleston stated that they returned with money, dope and Chopper's cell phone. Deleston stated he heard that Rivers (Lil B) had shot Chopper. He said they had two guns with them which they put out beside the house. Deleston says that Tino and Lil B actually did lick while Julius and George stayed in car. Deleston says one of the guns was the murder weapon and other was a 45. Deleston stated that they got about 5 grand and 2 cookies in robbery. R.p. 766- p. 767, Tr.p. 1036- p. 1037. State Exhibit 30 (9:30 – 9:50).

Solicitor Wilson's Closing Comments Concerning Rivers Shooting of Chopper.

Solicitor Wilson commented upon the "Chopper" shooting in her closing argument. In particular, Solicitor Wilson stated:

> Foreseeability? Y'all might not have caught this, or -- or thought about why it was so important to this case when you were watching those three and four hours of the Defendant's statement. Towards the end, just this morning, when Detective Osborne comes in, he tells Deleston, I want to talk to you about some other things, some other crimes. And he starts going through and asking him about other instances. **And some of them Deleston said, I don't know anything about. You might remember the one he did know something about or he claimed to. The shooting of a guy named Chopper. Remember that? He says Bryan Rivers shot a guy named Chopper with the murder weapon. Okay.**
>
> **So Bryan Rivers is now alleged to have shot someone with a murder weapon.** He knows about it, and he goes to an armed robbery with it? He buys into robbing Joe's, he helps out in attempting to rob Marley, and he's going to say it's an accident, it wasn't foreseeable?

R.p. 781, l. 3-21, Tr.p. 1064, l. 3-21. (emphasis added). See State Exhibits 29 and 30. (Statements of Deleston); R.p. 766-767, Tr.p. 1036-1037.

Prejudice not shown when similar evidence is admitted.

In order for this Court to reverse a case based on the alleged erroneous admission or exclusion of evidence, prejudice must be shown. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). "Whether error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.' " State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985), citing State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971). See State v. Joseph, 328 S.C. 352, 371, 491 S.E.2d 275, 284 (Ct.App.1997) (where evidence is merely cumulative to other evidence admitted at trial, the exclusion of such evidence is not an abuse of discretion); State v. Golson, 349 S.C. 421, 429, 562 S.E.2d 663, 668 (S.C.App. 2002) (same); State v. Ferguson, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (exclusion of victim's prior inconsistent statement as substantive evidence was harmless error when other evidence was cumulative of statement).

Because the admitted State Exhibit 30 (Petitioner's statement) included his assertion that Rivers shot Chopper with the murder weapon - the information he sought to develop through the cross-examoination examination of Rivers and Brown – any exclusion or limitation was harmless. Its earlier exclusion was not prejudicial because it would be cumulative to other evidence. The limitation on cross-examination does not warrant a new trial.[2]

B. THE ARMED ROBBERY AND SHOOTING OF LEROY "CHOPPER" TOWNSEND AND THE MARLEY LION ATTEMPTED ROBBERY AND SHOOTING ARE NOT SUFFICIENTLY SIMILAR TO PROVE A COMMON SCHEME OR PLAN UNDER RULE 404(b) THAT ONLY BRYAN RIVERS POSSESSED A WEAPON.

Because of the evident dissimilarities and limited probative value, the trial court did not abuse its discretion in excluding questioning of either Bryan Rivers or Julius Brown on this issue. Deleston contends that the trial judge erred that in excluding the evidence of the June 1, 2012 shooting of Leroy Chopper Townsend by Bryan Rivers. He contends it satisfies the requirement under rule 404(b) because there was a close degree of similarity between the attempted armed robbery of Towsend and the murder of Marley Lion. He draws this similarity from the fact that both offenses involved the same people (Bryan Rivers, Julius Brown, George Brown, Rayshawn,

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[2] It is unclear why the defense did not specifically seek to have Rivers or Julius Brown recalled to further inquire as to the "Chopper" shooting specifically based on the admission of the Petitioner's statements. Perhaps defense counsel, aware of the fact that the admission of this part of Petitioner's statement likely "opened the door" to allow the further development of the evidence within the State's case and would allow witnesses to be recalled within the State's case or presented within the defense case in chief, the defense did not want the lose the right to make the final statement in closing argument. When a defendant in a criminal case offers no evidence, he is entitled to the final closing argument to the jury. State v. Pinkard, 365 S.C. 541, 543, 617 S.E.2d 397, 398 (Ct.App.2005); State v. Rodgers, 269 S.C. 22, 24, 235 S.E.2d 808, 809 (1977) (citing State v. Gellis, 158 S.C. 471, 487, 155 S.E. 849, 855 (1930)). However, rather than seek to re-open the state's case based upon the statement, immediately after State Exhibit 30 is played and the state closes its case, counsel Pennington merely renewed his motion about the inability to cross-examine witnesses in relation to the prior shooting by Bryan Rivers of Chopper without even mentioning or arguing that the similar evidence was presented in Petitioner's statement. R.p. 768, l. 24- p. 769, l. 6, Tr.p. 1038, l. 24- p. 1039, l. 6. Judge Harrington denied the motion. R.p. 770, l. 1-25, Tr.p. 1040, l. 1-25. At that point the defense rested its case without further presentation of any witnesses.

Milligan, and Petitioner) and were planned by Julius Brown. He asserts that both robberies occurred near the Ardmore neighborhood within about a mile of each other and under his description George Brown acted as the driver. Of importance, he contends that the home base for the perpetrators as Stephanie Brown and Petitioner's residence was consistent. Further he contends that the same weapon was used in each. Contrary to the findings of the trial judge, the Petitioner contends the only dissimilarities in the acts where that Valentino Heyward was involved in the first event and not in Marley's robbery attempt. The Court of Appeals summary acceptance of the conclusions of the trial court are supported by the record.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b). Id. State v. Cope, 405 S.C. 317, 337-338, 748 S.E.2d 194, 204 - 205 (2013). "When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Id. The evidence is admissible if the similarities outweigh the dissimilarities. Id. In *Cope*, the Court recognized that even though there was clear and convincing evidence about the facts of the other

crime, sufficient similarity was still required for admissibility. The Cope in *Cope* assessed the nature of each sought crime. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Clasby, 385 S.C. at 155, 682 S.E.2d at 896. Cope, supra.

Like the situation in *Cope*, there are sufficient dissimilarities to support the exclusion of the inquiries about the June 1 shooting during the examination of Rivers and Julius Brown. First, it is clear that the proffered testimony of Julius Brown revealed that he did not have actual knowledge of who possessed and shot Chopper Townsend during the initial event. R.p. 138-143, Tr.p. 342-347. Second, the probative value of the earlier robbery was limited because Petitioner was a participant in the Chopper Townsend robbery and shared in the proceeds, although he was not the triggerperson. Here, the limited probative value that the Petitioner was seeking to show was that Rivers was the triggerperson in the first incident two weeks before. However, it is also undisputed that it was George Brown's gun and that Brown gave the gun to Rivers even before the couple's robbery on June 16.

Further, as pointed out by the Solicitor, and adopted by the trial judge, there were several dissimilarities in the events. See Chart, *Final Brief of Respondent*, p. 11. The Townsend shooting was a conceived plan against a specific target that the perpetrators knew. Unlike Townsend, there was no conceived plan based upon any knowledge that Marley had a significant amount of cash or drugs in his possession, but that it was a spontaneous crime. Unlike Townsend, there was no pre-existing bad blood with Marley. Unlike Townsend, the victim was shot numerous times. Unlike Townsend, the perpetrators were not driven to the scene but walked from Petitioner's residence. Unlike Townsend, Tino was not involved. Unlike Townsend the Petitioner actually went to the scene of the crime. Unlike Townsend, in the Petitioner's statement Deleston confirmed that he had

possession of the weapon at one point at the scene when Rivers tried to give it to them. Unlike Townsend, the attempted robbery of Lion was not the planned target for the crime but was redirected after the employees with the money had left Famous Joe's.

Finally, as acknowledged in the Solicitor's statements, the evidence before the court showed that other individuals had possession of the weapon after the Townsend incident, including Bryan Rivers and George Brown. The probative value of the June 1 incident is minimized where there is uncontested evidence that Rivers possessed and presented the murder weapon within 2 hours before the Marley shooting and was seen waving a gun earlier that same day that the video shoot. More importantly, the probative value of the June 1 incident is limited because the state acknowledged that the criminal charge was based upon the "hand of one hand of all" concept of criminal liability.

The Court of Appeals did not err in implicitly affirming that trial judge did not abuse her discretion in excluding inquiring of Bryan Rivers concerning whether he possessed the gun during the shooting of Townsend two weeks before. The probative value of the exclusion is further minimized when evidence from Petitioner about the Townsend ("Chopper") shooting came in through his statement and harmless beyond any doubt.

EVIDENCE OF THE "CHOPPER SHOOTING" DOES NOT PERTAIN TO THE COMMISSION OF THE CRIME CURRENTLY BEFORE THE COURT AND THUS IS NOT ADMISSIBLE UNDER A THEORY OF THIRD PARTY GUILT.

The third party guilt claim is a "red herring" in this case. Contrary to the bare assertion by the Petitioner, the evidence of the Chopper shooting is not inconsistent with his guilt concerning the Marley Lion shooting. A new trial on this claim is without merit. Deleston contends that he was entitled to present the evidence of the Chopper shooting by Rivers as evidence of third party guilt of Rivers in Lion's death.

The foundation of his claim is that the Townsend evidence suggests that at the Lion crime, only Rivers possessed the weapon rather than Deleston. However, this assertion does not absolve Deleston of his criminal culpability in Lion's death. There was no dispute at the trial that Rivers was involved in the attempted robbery of Lion which led to his death. In fact, Rivers admitted his guilt to the jury under hand of one hand of all and had pled guilty to the Lion crime. R. 255, Also ROA pp. 246-247, 269-282, 297. Under the state's version, although it could prove that Deleston was the triggerperson in Marley's death, under the theory of "hand of one hand of all," Deleston would have been guilty, even if Rivers shot the weapon because he had been a participant in the crime.[3] **In fact, the defense acknowledged in their closing argument that "Ryan was out there as a part of the plan to do a robbery of Marley." R.p. 823, Tr.p. 1106**. "Third party guilt" therefore was not at issue in the case. To the contrary, the Petitioner also ignores that as to the Chopper Townsend shooting, Deleston would have been as guilty as Rivers of the Chopper crime even though he was not the triggerperson but was involved in the planning, went to the scene, and although he remained in the vehicle he shared in the proceeds. As recognized in the Court of Appeals opinion, the rule for the admissibility of evidence of third party guilt comes from State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, our Supreme Court stated:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; 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, is not admissible. . . . But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

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[3] During the jury instructions, the jury was advised about "aider and abettor" (R.p. 844, l. 10-17, Tr.p. 1127, l. 10-17), mere presence (R.p. 844, l. 18-23, Tr.p. 1127, l. 18-23), and "the act of one is the act of all." R.p. 845, l. 8- p. 845, l. 2, Tr.p. 1128, l. 8 – p. 1130, l. 2.

198 S.C. at 104-105, 16 S.E.2d at 534-535 (internal citations omitted). In Gregory, the Supreme Court held evidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded. 198 S.C. at 105, 16 S.E.2d at 534. See 20 Am.Jur. Evidence § 265 (1939)); State v. Burgess, 391 S.C. 15, 23, 703 S.E.2d 512, 517 (Ct.App.2010) (accord).

The evidence of Bryan Rivers' involvement with the Chopper shooting coupled with the evidence that he robbed a couple at gunpoint hours before the Marley Lion shooting does not "tend[s] clearly to point" to Rivers as the individual who approached Marley Lion's car, attempted to rob him, and shot into his car. It ignores the fact that Petitioner was also involved. It ignores the fact that Petitioner conceded in his statement that he was present and aware of the intended robbery. It ignores that fact that proof of possession by Rivers of the weapon in not inconsistent with Petitioner's guilt for the crime of murder. Petitioner failed to show that there was a clear "train of facts or circumstances" between all three known armed robberies – the Townsend shooting two weeks before and the admitted robbery of the couple by Rivers and Lion on the same date.

Although the similar perpetrators were involved and the same gun used, the Chopper shooting differs greatly from the circumstances surrounding the Marley Lion shooting and the armed robbery of the couple downtown. The shooting of Leroy "Chopper" Townsend was one that was targeted and involved "bad blood." The armed robbery of the couple downtown and the attempted robbery and shooting of Marley Lion were both acts toward random victims who the codefendants did not know.

The trial court's holding that the "evidence in question exceeds the scope of the facts that are inconsistent with his [Petitioner's] own guilt. It does not pertain to the commission of the crime currently before this Court" was not an abuse of discretion. The evidence of the Chopper would only

cast "a mere suspicion upon a third party" and "the introduction of this evidence would . . . amount to solely conjectural inference as to commission of a crime by [a] third party." [R.p. 26, l. 7- p. 27, l. 16, Tr. 216, 1. 7-p. 217, 1. 16.]. Under the discrete circumstances of the case where the proffered evidence is not inconsistent with Petitioner's guilt, a new trial is not warranted.

PETITIONER'S DUE PROCESS RIGHT TO PRESENT A COMPLETE DEFENSE WAS NOT VIOLATED BY THE EXCLUSION OF THIS EVIDENCE.

The Petitioner finally asserts that his constitutional right to present a defense was violated by the trial court's failure to allow him to put in evidence that Rivers possessed the murder weapon and shot Townsend two weeks before in a robbery in which Deleston actually has assisted and shared the proceeds. The Constitution guarantees "a meaningful opportunity to present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quotation marks omitted); but "not an unlimited right to ride roughshod over reasonable evidentiary restrictions," Rockwell v. Yukins, 341 F.3d 507, 512 (6th Cir.2003) (en banc). The right to present a complete defense - including the purported third-party culpability defense raised here - thus does not mean that a defendant may introduce whatever evidence he wishes, only that any state-law evidentiary restrictions cannot be "arbitrary" or "disproportionate to the purposes they are designed to serve." Holmes v. South Carolina, 547 U.S. 319, 325–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

Here, the defense was allowed to explore the fact that Rivers had possessed the murder weapon prior to the Lion incident. R. p 293. The assertion that Rivers had possessed the murder weapon in an armed robbery immediately prior to the Lion killing was an uncontested fact. R. 260-261. The robbery of the couple just two hours before was documented throughout the trial by evidence from each of the perpetrators – Julius Brown, Bryan Rivers, George Brown, and the victim. R.175-176, 260-61, 457-458, 702-704, In addition, evidence was presented that during the day before the two robberies, Rivers was waving a gun at the video shoot. R. 535-536. Further, Rivers

conceded that prior to Lion's killing he had a discussion with Petitioner where they attempted to pass the gun between each, a discussion that was documented within the testimony of Rivers, Julius Brown and Petitioner's own evening statement. R. 270-271. Simply put, the exclusion of the Chopper evidence did not prevent Petitioner from articulating that Rivers had used the weapon in a robbery, a robbery that in fact had close temporal proximity to the Lion crime.

Petitioner looks to Holmes v. South Carolina, 547 U.S. 319 (2006), to argue that the standard for presenting evidence of third party guilt has been lowered. In Holmes, the defendant "sought to introduce evidence that another man, White, had actually perpetrated the crimes for which he was charged. He proffered several witnesses who testified White had been in the neighborhood where the crime occurred on the morning it was committed. He also presented testimony of witnesses who claimed White had admitted committing the crimes. The evidence that Petitioner wishes to enter creates only the mere suspicion that Rivers may have held the weapon at the time of Lion's death. Unlike Holmes, the evidence that Petitioner wishes to enter here is evidence of a previous crime not directly related to the Marley Lion shooting. The Holmes case involves very different circumstances than our present case.

In *Cope*, Cope's third party culpability evidence was excluded under the standard rules of admissibility which apply to all evidence by application of Rule 404(b). The attempted showing for using the other act evidence against Sanders was minimally relevant to prove what the defense was seeking it to prove, that Sanders was able to secure entry for his other crimes without a showing of forced entry. The reasoning behind Rule 404(b) is one of relevance balanced against undue prejudice and confusion of the issues. In the state Supreme Court and trial court's reasoning that the other acts were not sufficiently similar, the trial court reasonably applied standards that did not violate the Constitution and thereby did not deprive him of a meaningful defense.

Similarly, the evidence that Rivers had possessed George Brown's gun two weeks before during a robbery that Deleston was a participant was minimally relevant to prove that Rivers possessed the weapon at the Lion robbery, in light of the more temporally probative evidence supporting that defense theory. The exclusion did not undermine his Deleston's right to present a defense. There was extensive evidence presented about Rivers prior possession of weapons during a robbery before the jury. See United States v. Lucas, 357 F.3d 599, 606–07 (6th Cir.2004) (exclusion of third party's prior conviction did not violated defendant's right to present a defense where defendant "was able to explore her theory that [another individual] was in fact the culprit" through other evidence). The Court "may exclude marginally relevant evidence and evidence posing an undue risk of confusion of the issues without offending a defendant's constitutional rights." United States v. Alayeto, 628 F.3d 917, 922 (7th Cir.2010) (citing Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The trial court did not abuse its discretion in the exclusion. [R.p. 31, ll. 5-10, Tr. 227, 11. 5-10.]. This is particularly true when the evidence to support the common scheme would have supported Deleston' guilt as part of the earlier scheme as well.

Any error in the alleged exclusion was harmless error.

Evidence about the Chopper robbery and shooting by Rivers was developed in the admitted statement of Deleston the evening of July 30 and commented on by the Solicitor in her argument. Evidence that Rivers possessed the weapon within two hours of the Lion shooting was presented, as well as evidence that Petitioner and Rivers were conferencing with each other at the Lion crime on who would have the weapon. There was overwhelming evidence of Petitioner's criminal participation in the Lion incident through the testimony of Julius Brown, the surveillance videos which identified similarities with Deleston as opposed to the other perpetrators, and portions of Petitioner's own statement where he acknowledged involvement in the Lion attempted robbery. Under accomplice liability theory, any alleged error could only be harmless error as to murder.

Under these circumstances, a new trial is not warranted.

II. The Court of Appeals reasonably concluded a new trial is not warranted where the trial court stated during the court's opening remarks that a trial was "a search for the truth in an effort to make sure that justice is done" and the "State has the burden of proving each of the elements beyond a reasonable doubt" when viewing the instructions as a whole in the opening and in final instructions on the law which do not dilute the jury's responsibility to determine whether the State had met its burden of proof beyond a reasonable doubt.

A. Further, where no request for a mistrial was made and only a modification of the opening remarks was requested and denied, the issue was not preserved for an appeal where the requested language of the specific modified charge does not appear in the record.

B. Any alleged error in the opening remarks is harmless beyond a reasonable doubt.

During Judge Harrington's **opening charge to the jury** she used the phrase concerning a trial that "it is a search for the truth in an effort to make you sure that justice is done." In his appeal before this court, the Petitioner contends that this "seek the truth" language was an inaccurate instruction and should require a new trial. He contends that this instruction at the opening of the trial would have allowed the jury to concentrate on evaluating the quality of the evidence in a search for the truth rather than thinking in terms of their actual task of determining whether the state had proved its case beyond a reasonable doubt. He states in his brief before this court that the South Carolina Supreme Court one year before the trial in Petitioner's case had instructed courts to remove similar language from their instructions which may potentially alter to 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, citing State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).

Respondent respectfully submits that a new trial is not warranted where the opening charge to the jury by Judge Harrington and use of "search for the truth and making sure that justice is done" language viewed with the opening instructions as a whole did not dilute the jury's sense of responsibility where the jury was specifically instructed in the opening instructions that the instructions were only intended to serve as an introduction to the trial of the case and that the remarks were not a charge on the law which would be instructed at the close of the trial before the jury retires to consider the verdict. R.p. 35, l. 10-15, Tr. p.231, l. 10-15. Further, the Petitioners claim is ameliorated by the language stated by Judge Harrington that "the defendant has pled not guilty to this indictment. The state has a burden of proving each of the elements of the indictment beyond a reasonable doubt it is your duty, ladies and gentlemen, to determine whether the State has met that burden." R.p. 36, l. 3-8, Tr. p. 232, l. 3-8. Furthermore, when viewed with the closing instructions to the jury where the burden of proof was fully and properly charged, the Petitioner's claim that the brief mention of seek the truth in the opening charge does not minimize the jury's responsibility to determine if the State met its burden of proof under the instructions as a whole. A new trial is not warranted. See State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

THE ISSUE IS NOT PRESERVED

Respondent submits this matter is not preserved for review because the precise language of the requested "modified charge" by counsel Pennington after the objection does not appear in the record. R.p. 73, l. 14-16, Tr.p. 269, l. 14-16. An appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record. See Wren v. Kirkland Distrib. Co., 250 S.C. 178, 181–82, 156 S.E.2d 865, 866 (1967) State v. Jenkins, 249 S.C. 570, 155 S.E.2d 624 (1967); State v. Barksdale, 311 S.C. 210, 428 S.E.2d 498 (Ct. App. 1993).

Here, the request at trial that was denied was actually a request for a modified charge and not a request for a new trial. R.p. 73-74, Tr.p. 269-270. At no point was the precise language of the instruction as requested made a part of the record. There is nothing for this Court to act upon concerning the failure to give the requested modification because the particular modification was not stated on the record. The issue must be dismissed for lack of preservation. The Petitioner has the burden of presenting a sufficient record to allow review. State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Hutto, 279 S.C. 131, 303 S.E.2d 90 (1983). Due to the lack of specificity as to the charge Petitioner sought as a modification to the opening remarks, the Court should find no prejudicial error in the trial court's failure to charge the same.

THE OPENING REMARKS TO "SEEK THE TRUTH" WERE NOT REVERSIBLE ERROR

Respondent agrees that this current case law presented shows a general disfavor for the "seek the truth" language, however, does not require a new trial here where the opening remarks were ameliorated by surrounding instructions and where the closing instructions repeatedly expressed the correct burden of proof and was not burden shifting. Petitioner challenges the fact that Judge Harrington in her opening remarks described a jury trial as a search for the truth which Petitioner's trial counsel admitted that he had used himself and heard in other trials. Although the record does not reflect the modified instruction he sought to have the judge use instead, even if the issue is preserved, a new trial is not warranted.

The central function of the trial process in both criminal and civil cases is to discover the truth. See Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating "the central function of [a] trial . . . is to discover the truth"); see also State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"). As part of the truth-seeking process, the State is constitutionally required to prove a criminal defendant's guilt for every element of a criminal offense

beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); see also Burr v. Florida, 474 U.S. 879, 880 (1985) ("[T]he **beacon of the truth-seeking process** in criminal cases is not absolute certainty, but the 'reasonable doubt' standard[.]" (emphasis added)). As a result, it is essential that the trial judge identify the State's burden of proof to the jury by instructing on the necessity that the defendant's guilt be proven beyond a reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5 (1994). However, the trial judge must avoid defining reasonable doubt in a manner that could lead the jury to convict on a lesser degree of proof than proof beyond a reasonable doubt. Id. at 22.

Significantly though,this Court has cautioned trial judges to avoid using language that instructs the jury to "seek the truth" due to the risk that such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. State v. Aleksey, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000). See also State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). However, the Court has specifically declined to hold any mention of "the truth" in jury charges is unconstitutional or require a new trial. See Aleksey, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."). See State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998).

In Deleston's case, the "truth" language in the opening remarks was not given in conjunction with other "confusing or burden shifting language." Cf. Needs, supra. ("seek the truth" language is also 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). The majority in Daniels, like the Court in Aleksey, found that 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. State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012)(Toal, C.J., concurring for the majority). Similarly in State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251-253 (2000), the Court held that there was no reasonable likelihood the jury applied trial court's instructions in an unconstitutional way when an instruction related to witness credibility contained truth seeking language but was "prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof").

Petitioner claims that a preliminary instruction of this type is far more harmful than when the same language is used in a closing instruction from the trial court. Petitioner makes a speculative claim that with this preliminary instruction, the jurors throughout the trial were concentrating only 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. Petition, p. 10. However, he ignores that the trial judge also instructed that they were to be guided by the instructions at the conclusion of the case in their decision and that the state's burden of proof was beyond a reasonable doubt. R.p.35, l. 16- p. 36, l. 8; R.p. 38, l. 11-15, Tr.p. 231, l. 16- p. 232, l. 8; Tr.p. 234, l. 11-15.

Deleston's further suggests this challenged language would lead to prohibited premature deliberations. Petition, p. 10. Petitioner's contention that the jury was inappropriately evaluating the evidence as it is presented is defeated by the clear language in the opening remarks of Judge Harrington. She stated her remarks were only an introduction to the trial and not a charge on the law which would be done at the close of the case. R.p. 35, l. 10-17, Tr.p. 231, l. 10-17. This additional qualification places that challenged language in its proper context. A reasonable juror with these opening remarks would understand that the juror needed to hear all of the evidence before

considering whether or not the state has met its burden of proof, not some speculative on-going premature conclusion about the evidence before the conclusion of the trial.

Petitioner mistakenly argues that the challenged language became the centerpiece of the opening remarks by the trial court. Petition, p. 11. Petitioner highlights language from the opening remarks stating that at the conclusion of the case the jury would be in a position to "render a true and just verdict." [R.p. 40, ll. 17-22, Tr. 236, ll. 17-22.] Using this language, Petitioner again makes a speculative claim that this 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 of proof beyond a reasonable doubt. However, at no time does he point out the critical fact – the jury was instructed in the opening remarks that "the state has the burden of proving each if the elements beyond a reasonable doubt" and that "it is your duty . . .to determine whether the State has met that burden." R.p. 36, l. 4-8, Tr.p. 232, l. 4-8. Furthermore, an important salient factor is that the court had earlier stated that it would not tell them the elements of the crimes until the conclusion of that case "at a later time." R.p. 35, l. 24-25, Tr.p. 231, l. 24-25. Viewing the opening remarks as a whole, a reasonable juror would not interpret it in the manner that Petitioner suggests.

More importantly, his speculation about burden-shifting evaporates when viewed with the actual instructions on the law at the conclusion of the case. First, there was no similar "search for the truth language" included in the actual jury charge at the conclusion of the case. 'R.p. 833-856, Tr.p. 1116-1139. Further, during the actual instructions on the law, the jury was charged with the presumption of innocence including proof beyond a reasonable doubt (R.p. 836, l. 8 – p 837, l. 1, Tr. p. 1119, l. 8 – p. 1120, l. 1) and the explanation of the state's burden of proving defendant guilty beyond a reasonable doubt. R.p. 837, l. 2-21, Tr.p. 1120, l. 2-21. In addition, the jury was charged that the burden of proving the defendant guilty beyond a reasonable doubt "rests with the state

regardless of whether the state relies on direct evidence, circumstantial evidence or some combination of the two."[4]

Concerning accomplice liability, the jury charge included that "the State must prove beyond a reasonable doubt by competent evidence the theory of the hand of one is a hand of all." R.p. 846, l. 8-12, Tr. page 1129, l. 8-12. The jury was also advised that "intent" must be proved "beyond a reasonable doubt." R.p. 847, l. 6-9, Tr.p. 1130, l. 6-9.

Judge Harrington then proceeded to charge on each of the elements of the crimes. As to murder, she instructed "the State must prove beyond a reasonable doubt that the defendant killed another with malice aforethought." R.p. 848, l. 21-24, Tr. p. 1131, l. 21-24. As to attempted armed robbery, Judge Harrington went through each of the elements that "the state must prove." R.p. 850, l. 18 – p 851, l. 9, Tr.p. 1133, l. 18 – p. 1134, l. 9. See e.g. R.p. 850, Tr.p. 1133, l. 24 ("the state must show"); R.p. 851, Tr. p. 1134, l. 9-10 ("the state must prove"); R.p. 851, Tr.p. 1134, l. 15-16 (the

[4] The jury was also charged concerning credibility that it meant believability and "it becomes your duty as jurors to analyze the evidence and determine which evidence convinces you of its truth." R.p. 838, l. 21-23, Tr. p. 1121, l. 21-23. The jury was charged that the defendant is not required to prove his innocence and "the burden of proof remains on the State to prove guilt beyond a reasonable doubt." R.p. 841, l. 4-6, Tr. p. 1124, l. 4-6. The jury was also instructed concerning determining the admissibility of defendant's statement that the "the state has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary." R.p. 842, l. 11-13, Tr.p. 1125, l. 11-13.

Similarly, the jury was instructed concerning evidence of the identification of the defendant as the person who committed the crime, "the state is a burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict the defendant." R.p. 843, l. 2-9, Tr. p. 1126, l. 2-9. The jury was additionally reinstructed concerning the fact that "the burden of proof on the state extends to every element of the crime charged and this includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed or participated in the crime. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty." R.p. 844, l. 10-17, Tr. p. 1127, l. 10-17. The jury was also charged concerning mere presence that the burden was on the State to prove every element of the crime charged. R.p. 844, l. 24-25, Tr. p. 1127, l. 24-25. The instruction further required if "the State's prove the defendant was only present at the scene of the crime and that they had not proved beyond a reasonable doubt any other participation in the crime, then you must find the defendant not guilty." R.p. 845, l. 2-7, Tr. p. 1128, l. 2-7.

State must also prove"); R.p. 852, Tr.p. 1135, l. 2-3 (the State must prove"). As to possession of a handgun with an obliterated serial number that jury was charged the "state must prove beyond a reasonable doubt" the particular elements of that crime. R.p. 852, Tr.p. 1135, l. 10-17. Similarly, the requirement that "the state must prove beyond a reasonable doubt" was charged on the particular elements of the crime of possession of a firearm during the commission of a violent crime. R.p. 852, Tr.p. 1135, l. 18- R.p. 853, Tr. p. 1136, l. 7.

Viewing the instructions as a whole, there is no reasonable likelihood that a juror would conclude that the burden of proof was other than upon the state to prove each of the elements beyond a reasonable doubt. Petitioner claims that the judge's initial instruction to the jury regarding the jury's function is burden shifting due to the lack of instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt, and its emphasis that a criminal trial was a "search for the truth" and also that it was the jury's "solemn responsibility to determine the guilt or innocence of the Defendant. . ." Contrary to the claim in the Petitioner's petition for rehearing , even in the opening remarks the jury was advised "the defendant has pled not guilty to this indictment. The State has the burden of proving each of the elements of the indictment beyond a reasonable doubt." The Petitioner's claim is grounded upon a misstatement of the record of the opening remarks of Judge Harrington. [5]

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[5] Additionally, Petitioner asserts that the judge's statement to the jury that her opening instructions were not instructions on the law should be disregarded. According to Petitioner, the reality, and not the legal fiction, is that the jury "naturally looks up to the trial judge and expects guidance from her on how they should act and what their responsibility were." (Petitioner Brief pg. 39-40). Petitioner refers to instruction as giving the antithesis of the jury's real function "which was to determine whether the state proved the defendant's guilt beyond a reasonable doubt.

However, the Court and the Petitioner should not ignore that Judge Harrington's remarks in the opening statement were expressly stated to them as not being the charge on the law which would be done later. The judge was essentially telling the jury to wait to act until the conclusion of the case when the judge would tell them what their responsibility is in determining a proper verdict. The attempt to enhance the instruction by isolating the language and ignoring the context it is in with the

Significantly, the trial judge thoroughly and repeatedly explained to the jury that Petitioner was presumed to be innocent and the State had the burden of proving Petitioner's guilt beyond a reasonable doubt for every element of the indicted offenses before he could be convicted. Furthermore, at no point in his jury instructions did the trial judge suggest to the jury that it was required to "seek" some reasonable explanation of Petitioner's innocence. See State v. Raffaldt, 318 S.C. 110, 115-116, 456 S.E.2d 390, 393 (1995)(finding a jury charge instructing the jury to "seek some reasonable explanation other than the guilt of the accused" was erroneously burden-shifting but determining any error with that instruction was harmless because the charge as a whole properly explained the State had the burden of establishing Raffaldt's guilt beyond a reasonable doubt). Accordingly, because the trial judge's opening remarks and jury instructions thoroughly explained the State's burden of proof and Petitioner's presumed innocence, the jury charge as a whole was not erroneous and does not warrant reversal. See State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.").

As an alternate ground, any alleged error in the opening remarks is harmless beyond a reasonable doubt. Aleksey, supra. State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 478 (2012) (Toal, C.J., concurring for the majority). First, like in Aleksey, the "seek the truth language did not appear in either the reasonable doubt or circumstantial evidence instructions. Second, as in Daniels, as stated in the Respondent's statement of the facts, the state presented substantial evidence that Petitioner was involved in the criminal act that led to the death of Marley Lion through the testimony of his accomplices in crime. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can

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surrounding instructions is not how a reasonable juror would have viewed it.

be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Based on the overwhelming evidence of guilt presented to the jury and the breadth of the instructions on reasonable doubt, the trial court's allegedly erroneous opening remarks could not have contributed to the guilty verdict. See Lowry v. State, 376 S.C. 499, 509, 657 S.E.2d 760, 765 (2008)("From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' ")(internal citation omitted).

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the Petition for Certiorari should be denied and judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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June 29, 2016
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUN 29 2016
SC SUPREME COURT

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2013-002224

THE STATE,

Respondent,

v.

RYAN P. DELESTON,

Petitioner

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Return to the Petition for Writ of Certtiorari in the foregoing action by depositing two copies of same in the InterAgency Mail to Robert M. Dudek, Chief Appellate Defender, and Laura M. Caudy, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201 this 29TH day of June, 2016.

Donald J. Zelenka

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