STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

PETITIONER

APPELLATE CASE NO. 2016-001103

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEYS FOR PETITIONER

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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?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner at the October 2012 term of General Sessions for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime, and at the December 2012 term for possession of a handgun with an obliterated serial number. R. 924-931. His case was called to trial on October 7, 2013 before the Honorable Kristi Lea Harrington, and a jury. R. 1. Solicitor Scarlett A. Wilson and Assistant Solicitor Bruce DuRant represented the state, and D. Ashley Pennington and John J. Kozelski represented Petitioner. R. 2.

On October 11, 2013, the jury found Petitioner guilty as indicted. R. 859, l. 23 – 860, l. 17. Judge Harrington sentenced Petitioner to life without parole for murder, twenty years concurrent for attempted armed robbery, and five years concurrent for possession of a handgun with an obliterated serial number. R. 865, ll. 2-16. The court did not impose a sentence for possession of a weapon during the commission of a violent crime pursuant to S.C. Code Ann. § 16-23-490(A) since Petitioner was sentenced to life without parole for the murder offense. R. 865, ll. 13-15; See R. 861, ll. 24 – 862, l. 12.

The Court of Appeals affirmed Petitioner's convictions and sentence on February 10, 2016. State v. Deleston, 2016-UP-055 (S.C. Ct. App. Filed February 10, 2016); App. 1-3. Petitioner filed a petition for rehearing on February 25, 2016. App. 4-16. The state filed a return on March 14, 2016. App. 17-46. On April 21, 2016, the Court of Appeals denied the petition for rehearing. App. 47.

On May 23, 2016, Petitioner filed a petition for writ of certiorari to the Court of Appeals requesting this Court review the Court of Appeals' decision. On June 29, 2016, the state filed a

return. By order dated December 1, 2016, this Court granted the petition and ordered further briefing pursuant to Rule 242(i), SCACR.

This Brief of Petitioner follows.

STATEMENT OF THE FACTS

Around 9:00 pm on June 15, 2012, the decedent, Marley Lion, picked up Katherine Ridgway from her apartment and drove to a house party. R. 78, l. 7 – 79, l. 1; R. 80, ll. 13-18. The two had just graduated from high school and were casually dating. R. 77, l. 25 – 78, l. 6. Katherine and Marley, who were both drinking, stayed at the party until around 3:00 am when Marley drove Katherine home. As he dropped her off, Marley "said he was heading home." R. 81, l. 7 – 82, l. 7.

Officer Robert Deal of the Charleston Police Department was dispatched to the Ardmore Subdivision in West Ashley at 4:06 am that morning "in reference to possible shots fired in that area." R. 91, ll. 16-22. While driving through the Ardmore neighborhood, Deal "noticed to the right, in the parking lot of Famous Joe's, . . . a little white vehicle. And it appeared to have a gentleman laying down on the ground beside the vehicle." R. 92, l. 3 – 93, l. 6. Deal went to investigate and see whether the individual needed assistance. R. 97, ll. 6-18. As he approached the man lying on the ground, Deal noticed broken glass nearby. R. 98, ll. 2-3. He asked the man if he was okay and the man responded that "he had been shot five times." R. 99, ll. 1-4.

The man, later identified as Marley Lion, was coherent and told Deal that "he had pulled in there [the parking lot at Famous Joe's] to kind of get some sleep, that he had been out that evening, and he felt that he was too intoxicated to drive. So he . . . was just going to sleep a little bit to be safe." R. 101, ll. 12-18; R. 108, ll. 3-14. According to Deal, Marley said "two black males approached him" and "one was wearing all black, along with blue jeans." Marley said the black male wearing all black with blue jeans "pulled a gun out that appeared to be all black" and "began to fire at him." R. 119, l. 9 – 121, l. 6. After the shooting, the men ran "in the direction of the gravel lot," which is a "cut-through" to the Ardmore Subdivision from Famous Joe's parking lot. R.

101, l. 2 – 102, l. 2. Marley did not provide a clothing description for the second black male. R. 120, l. 17 – 121, l. 6.

Marley ultimately died of his injuries. The cause of death was a gunshot wound to the chest that damaged his abdominal aorta, spleen, and liver. R. 683, ll. 3-6. Marley also had several gunshot wounds to the left thigh and groin region and a gunshot wound to the right arm. R. 683, l. 11 – 696, l. 21. Five projectiles were recovered from his body during autopsy. R. 699, ll. 6-18.

For several weeks after the shooting, law enforcement had no suspects. The shooting was captured on surveillance footage from several nearby businesses. The footage showed there were no witnesses to the shooting. R. 603, ll. 2-15.

On June 27, 2012, Bobby Warthaw contacted the Charleston Police Department and informed a detective that he heard Petitioner, who lived in Ardmore, was attempting to sell a gun for eighty dollars. R. 503, l. 15 – 505, l. 3. Because of the low price, Warthaw suspected this gun was involved in the shooting of Marley Lion. With the assistance of law enforcement, Warthaw and his cousin, Christopher Singleton, who wore a wire, purchased the gun from Petitioner on July 15, 2012 in Ardmore. R. 506, l. 25 – 513, l. 22; 516, l. 22 – 518, l. 20.

The firearm purchased from Petitioner was sent to the South Carolina Law Enforcement Division (SLED) for testing. R. 634, l. 21 – 635, l. 3. An agent at SLED determined that the six cartridge cases collected from the parking lot at Famous Joe's after the shooting and the five bullets recovered during autopsy were fired by this gun. R. 730, l. 3 – 739, l. 21; R. 635, ll. 4-6.

Petitioner was ultimately arrested on July 30, 2012. Bryan Rivers and Julius Brown, who were additional suspects, were also arrested on that date, but for unrelated charges. R. 635, l. 7 – 638, l. 3. All three gave statements to law enforcement. Based on these statements, George Brown was arrested on August 1, 2012. R. 635, l. 7 – 638, l. 3. All four individuals were eventually

charged with the murder and attempted armed robbery of Marley Lion. R. 167, ll. 12-17; R. 249, ll. 6-7; R. 445, l. 12 – 446, l. 17. Rivers, Julius, and George testified against Petitioner at trial in exchange for favorable plea deals. R. 167, l. 12 – 170, l. 6; R. 255, l. 7 – 256, l. 4; R. 482, l. 21 – 483, l. 9. They each explained the events leading up to the murder.

Julius Brown's sister, Stephanie Brown, was Petitioner's girlfriend. In June 2012, Petitioner and Stephanie lived together on Cashew Street in Ardmore. R. 316, ll. 11-25. On June 15, 2012, Julius, Petitioner, Rayshawn Milligan, Bryan Rivers, and George Brown, who despite the same last name is not related to Julius, were at Petitioner's house on Cashew Street. R. 170, ll. 7-22; R. 257, ll. 15-22; R. 317, ll. 4-10. They were "[d]rinking and smoking marijuana." R. 171, ll. 4-6; See R. 257, ll. 2-7; R. 319, ll. 10-16; R. 451, ll. 10-15.

At some point that night, the group left Petitioner's house and drove to downtown Charleston "[l]ooking for licks" or "[r]obberies." R. 258, ll. 8-14; See R. 172, ll. 20-24; R. 453, ll. 13-21. George drove the group in his black Chevrolet Suburban. R. 171, l. 25 – 172, l. 9; R. 320, ll. 6-16; R. 453, ll. 4-12. The men eventually saw a "white couple" who looked like they had been drinking and decided to rob them. R. 259, ll. 15-23; See R. 175, ll. 1-7. Petitioner and Bryan Rivers, who had George's gun, got out of the car. Rivers walked up to the couple, pointed the gun at them, stole the woman's pocketbook, and ran back to the car. R. 172, l. 4 – 176, l. 2; R. 259, l. 11 – 261, l. 5; R. 457, l. 1 – 458, l. 12. Petitioner, however, never approached the couple, but instead walked in the opposite direction. After Rivers got back into the car, George picked Petitioner up from a nearby McDonald's and the group headed back to West Ashley. R. 176, ll. 3-22; R. 262, l. 19 – 263, l. 17; R. 457, l. 1 – 458, l. 19.

On the way back to West Ashley, Rivers went through the pocketbook and discovered there was no money inside. R. 176, l. 23 – 177, l. 9; R. 263, ll. 18-25; R. 459, ll. 3-6. Because this

robbery had been unsuccessful, the group discussed robbing Famous Joe's, a bar in West Ashley near the Ardmore neighborhood. Before going back to Petitioner's house, George drove through the parking lot at Famous Joe's to determine if the bar was "a good target" and to "[s]cope the scene." R. 177, l. 10 –178, l. 15 and R. 264, ll. 1-8; See R. 459, l. 19 – 460, l. 16.

Once back at Petitioner's house, Julius, Rivers, and Petitioner decided to walk down to Famous Joe's. The men planned to wait for the employees to come out of the bar after it closed and rob them. Julius, Rivers, and Rayshawn Milligan claimed George gave Petitioner his gun before the three left and Petitioner put the gun "[i]nside his pants on his hip." R. 179, l. 6 – 182, l. 4; See R. 265, l. 22 – 266, l. 25; R. 326, l. 2 – 328, l. 8; R. 462, l. 3 – 463, l. 12. After the short walk, the three stopped behind a white fence and watched the parking lot in front of Famous Joe's. The men eventually saw the employees coming out of the bar. R. 182, l. 13 – 183, l. 13; R. 267, l. 21 – 268, l. 11. Petitioner was allegedly about to rob them when Marley Lion pulled into the parking lot and "interrupt[ed]" the robbery.[1] R. 183, l. 24 – 184, l. 8; See R. 268, l. 14 – 269, l. 11.

Julius and Rivers claimed that once the employees left, Petitioner said "he [was] going to try to see what Marley Lion had." R. 184, ll. 9-20; See R. 269, ll. 2-17. Julius walked through the parking lot and passed by Marley's car "to scope the scene out" and see "how much people was in the car," but he "couldn't see inside" because the windows were too dark. R. 184, l. 25 – 187, l. 4 and R. 270, ll. 3-15. After walking by the car, Julius walked back to the white fence where Petitioner and Rivers were waiting. R. 187, ll. 5-13; R. 270, ll. 3-15. According to Julius, Petitioner and Rivers were "discussing who was going to go, passing the gun back and forth, and then Ryan [Petitioner] just decided to go." R. 187, l. 14 – 188, l. 4. Rivers also claimed Petitioner "tried to pass [him] the gun, but [he] gave it back. [He] pushed it off." R. 270, l. 16 – 271, l. 5.

[1] Despite referring to Marley Lion by name throughout their testimony, the men did not know who Marley was before this incident. See R. 182, l. 22 – 183, l. 3 and R. 268, l. 17 – 269, l. 1.

Julius and Rivers claimed Petitioner approached Marley's car and knocked on the window. The car alarm went off. Both men thought Marley set the alarm off. After the alarm went off, Petitioner ran back towards Julius and Rivers, but Julius told Petitioner to "get him, get him" and "bust the window." R. 188, ll. 10-25 and R. 271, l. 6 – 272, l. 16. Petitioner allegedly went back to the car and began shooting. According to Julius and Rivers, Petitioner shot five or six times. R. 189, ll. 3-7; R. 272, ll. 17-21. After the shooting, all three men took off running back towards Ardmore. As they were running, they "went up behind this white boy named Jason house," and Petitioner allegedly hid the gun "under the pool." After hiding the gun, they ran back to Petitioner's house on Cashew Street. R. 189, l. 8 – 190, l. 21; See R. 273, l. 5 – 274, l. 8.

Julius gave his explanation of the surveillance footage that captured the parking lot in front of Famous Joe's during the early morning hours of June 16, 2012. He identified George's black Suburban driving through the parking lot at 3:08 am after the group had returned from downtown. R. 208, l. 25 – 209, l. 15. The footage showed the employees "leaving out of Joe's" around 3:33 am and then the employees eventually leaving the parking lot after Marley pulled in and parked. R. 209, l. 16 – 210, l. 14. Julius identified himself walking through the parking lot at 3:44 am "to see if I could see how much people was in the truck." R. 211, ll. 1-15. Starting around 3:56 am, the shooting takes place. Julius claimed Petitioner was the shooter and that he was wearing a striped shirt, blue jeans, and white Nikes. R. 213, l. 6 – 214, l. 9. According to Julius, Rivers was wearing all black that night, including black Nikes.[2] R. 189, l. 12 – 190, l. 3.

Like Julius, Rivers, Rayshawn, and George also viewed the surveillance footage and claimed Petitioner was the shooter. R. 279, l. 15 – 284, l. 13; R. 335, l. 12 – 336, l. 16; R. 467, l. 24 – 469, l. 5.

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[2] As noted above, Marley told Officer Deal that the shooter was wearing all black. R. 119, l. 9 – 121, l. 6.

On cross-examination, Julius admitted when he first spoke to police in June 2012, while the investigation was still in its early stages, he told them they should look at Bryan Rivers because he wears all black and "he and his associates were doing robberies." R. 217, ll. 14-22; R. 219, ll. 8-25. Rivers has an extensive record, including assault with intent to kill, assault and battery of a high and aggravated nature, and numerous drug offenses. He went to prison in 2011 for selling drugs and was released on June 1, 2012, only two weeks before the murder. R. 246, l. 24 – 247, l. 1; R. 248, ll. 2-22.

On the morning of his arrest, Petitioner was interviewed by law enforcement. The first interview began around 9:15 am and ended around 3:00 pm with a few breaks in between. During this first interview, Petitioner did not admit any involvement in the shooting of Marley Lion. However, he did admit to selling the firearm with an obliterated serial number to an informant after he was shown still photographs of him selling the weapon. R. 744, l. 19 – 755, l. 17. Petitioner was interviewed again later that night around 8:00 pm. During this interview, Petitioner told law enforcement that he, Julius, and Rivers "went up to rob [the Famous] Joe's employees, not the business, but the employees, as they were closing up," but as the employees came out, Marley Lion pulled into the parking lot "so they decided to rob Marley." Petitioner "identified Julius Brown as the person walking across in front of . . . Marley Lion's vehicle, and he said that Bryan Rivers had the firearm and went up to the vehicle and shot into the vehicle." R. 756, l. 23 – 759, l. 1.

The jury convicted Petitioner of murder, attempted armed robbery, and the related weapons offense. R. 859, l. 23 – 860, l. 17. He was sentenced to life without parole. R. 865, ll. 2-15.

ARGUMENT

1.

The Court of Appeals erred 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.

Motion

The solicitor argued pretrial:

> The Defense we anticipated . . . would attempt to argue that the Chopper shooting[3] two weeks prior [to the murder of Marley Lion] should come in because the same gun was used in the Chopper shooting as was used to kill Marley Lion. I think that that argument is significantly undercut, because just that very night, an hour or so before Marley was shot, Bryan Rivers used that gun, the murder weapon, to do another robbery downtown. He was involved in that robbery with Ryan Deleston [Petitioner] and with Julius Brown and with George Brown. But if there is a need to show that someone else had, in fact, used that weapon, they're going to have an armed robbery that occurred about one hour before the shooting.
>
> To stretch back two weeks prior, to boot strap that in to try to show that because two weeks prior Rivers shot someone in the leg, that he must have shot and killed Marley Lion, I think, is a stretch.

R. 4, ll. 7-25.

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[3] Leroy Townsend is a drug dealer also known as "Chopper." It was undisputed at trial that Bryan Rivers shot Townsend in the leg during an armed robbery on June 1, 2012, approximately two weeks before Marley Lion was shot and killed. Petitioner, Julius Brown, Rayshawn Milligan, and George Brown were also allegedly involved in this armed robbery. The same gun Rivers used to shoot Townsend was also used to shoot and kill Marley. See R. 125, l. 6 – 131, l. 2.

Referencing Rule 404(b), SCRE, the solicitor further argued, "In more ways than not, the shooting of Chopper is just not the same thing." She stressed several differences she perceived between the two incidents including (1) "Chopper" was someone who was known by Rivers and the other codefendants and the men had set out to rob him, whereas "Marley Lion just happened to be in the wrong place at the wrong time" and was not the "intended target" and (2) George Brown drove the men to the "Chopper shooting" while the men walked to Famous Joe's. R. 5, ll. 1-20.

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

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

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

Additionally, the defense argued that "this is really evidence that should be allowed under just a due process of allowing Mr. Deleston [Petitioner] to present a full defense and saying, I'm not the shooter this is the shooter. . . . [Bryan Rivers] puts himself there, and essentially says, Well, Ryan [Petitioner] did it. I didn't do it. So it's not that we're just casting mere suspicion on him. He [Rivers] puts himself there." Counsel continued, "And to not allow that evidence, they're [the state is] essentially saying that the Defense can't put up a defense, if we're not allowed to bring in evidence that somebody else was the shooter. That is our defense, is that Bryan Rivers was the shooter, and they're trying to preclude us from saying that." R. 9, l. 14 – 10, l. 1. Defense counsel reasoned that the testimony regarding the "Chopper shooting" is "relevant to the fact [that] it makes it more likely that he [Bryan Rivers] was the individual with the gun. He was in the first armed robbery [of Leroy Townsend]. He was in the second armed robbery [of the couple downtown]. And then the third armed robbery [of Marley Lion], he says, Well, I didn't have the gun. And that's just rather convenient in this case." R. 10, ll. 5-11.

In response to the state's Rule 404(b) argument, defense counsel argued that both of the shootings occurred in the Ardmore area "less than a mile apart. So they're in the same location, using the same weapon, the same individuals, and [the] same plan. It's a common plan." R. 9, ll. 7-12. He later added that both robberies were planned by Julius Brown and executed by the same person, Bryan Rivers, again with the same firearm. R. 11, l. 25 – 12, l. 8. Additionally, counsel pointed out that George Brown was the driver in both shootings and that the perpetrators approached the "targeted individual[s]" on foot and fled on foot. R. 7, l. 24 – 8, l. 2; R. 13, ll. 16-24.

Lastly, counsel argued "the Lyle analysis is there to protect a defendant . . . from having the jury hear of these other crimes and prejudice him for that. Here, we're not even dealing with a defendant. We're dealing with a third party. It was a [c]odefendant." R. 15, ll. 7-16. Counsel

asserted that due process requires a lesser standard for admissibility be utilized when evidence of a third party's other offenses or prior bad acts is being offered by a defendant in his or her defense. R. 15, l. 7 – 16, l. 4.

The Court's Ruling

The court ruled that under Rule 404(b), SCRE, "Rivers' armed robbery and shooting of Leroy 'Chopper' Townsend and the Marley Lion attempted armed robbery and shooting are not sufficiently similar, based upon the testimony that has been presented, to prove a common scheme or plan." The judge stressed that "[t]he Chopper shooting involved a victim that was known and targeted by the assailants . . . The Marley Lion shooting involved a victim of circumstance who was unknown to the assailants." The court also pointed out that while there was "bad blood" between "Chopper" and the assailants, "there was no bad blood between the victim and the assailants in the Marley Lion murder." Additionally, she stated, "The victim in the Chopper shooting was a 30-year-old African male, while Marley Lion was a 17-year-old white male. In the Chopper shooting, the victim was shot once, was forced to strip and received a minor injury. Marley Lion was shot five times fatally. In the Chopper shooting, they were driven to the crime scene. In the current case, the assailants walked to the crime scene." Lastly, the court stated, "Finally, the Chopper shooting occurred at 9:30 [pm] at an apartment complex. Marley Lion was killed at approximately 4:00 am in the parking lot of a business." The only "similarities between the two shootings" the court found were "the fact that the gun used [in both shootings] belonged to George Brown and "that Rivers was present at" both crime scenes. Accordingly, the judge held that "Rivers' prior bad act of shooting Chopper was not sufficiently similar to the shooting of Marley Lion to qualify for the common scheme or plan under Rule 404(b)." R. 20, l. 1 – 22, l. 24.

Moreover, the judge found evidence of the "Chopper shooting" was not admissible under a theory of third party guilt because 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." The court further found that the evidence casts only "a mere suspicion upon a third party" and that "the introduction of this evidence would . . . amount to solely a conjectural inference as to commission of a crime by [a] third party." R. 26, l. 7 – 27, l. 16.

After the judge's ruling, court concluded for the day. The next morning, defense counsel invited the court to make a specific ruling on "our claim that separate and apart from state evidentiary law, . . . we have a due process right to offer a defense." Defense counsel stated, "Our contention is, is that under Holmes,[4] and even under State v. Cope,[5] that new South Carolina case from August, where they talk about a lesser threshold analysis for admissibility, where the defense has what is reliable evidence of third-party guilt, that there's a - - as we read the law, and we contend federal law requires, that due process would permit Mr. Deleston [Petitioner] to offer this evidence in his defense under both Holmes and Cope, and that the denial to do so would constitute an unreasonable application of that federal law." R. 28, l. 13 – 29, l. 14.

The judge left her ruling as is and ultimately stated, "I believe I addressed all your due process issues in issuing my ruling and denying the request for that evidence to be brought in." R. 31, ll. 5-10.

Proffer and Renewal of Objection

During the middle of trial, Petitioner proffered Julius Brown's testimony regarding the "Chopper shooting." Julius could not remember when the "Chopper shooting" occurred, but

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[4] Holmes v. South Carolina, 547 U.S. 319 (2006).

[5] State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013).

testified that it was before the murder of Marley Lion. Julius maintained that he, Rivers, George Brown, Rayshawn Milligan, Petitioner, and a man named Valentino Hayward were all involved in this armed robbery and shooting. R. 125, l. 6 – 126, l. 10. According to Julius, George drove the group from Petitioner's house on Cashew Street to "The Shires" where there is a "cut to get to Saint Andrews Garden Apartments" where the robbery and shooting took place. He claimed Valentino Hayward and Bryan Rivers got out of the car with George Brown's gun, but he did not actually see the shooting. Rivers and Hayward eventually ran back from Saint Andrews Garden Apartments through The Shires and into Ardmore where they got back into George's car. George then drove the group back to Cashew Street. R. 127, l. 3 – 130, l. 13. Julius testified that George Brown's gun was used in the "Chopper shooting," in the robbery of the couple downtown, and in the murder of Marley Lion. R. 138, l. 24 – 139, l. 7; R. 142, ll. 7-10.

Defense counsel then went through what testimony he would elicit from Bryan Rivers if he were to proffer his testimony. Counsel explained:

> [W]hat I would cover with him [Rivers] in the context of an overall [c]ross-[e]xamination would be that . . . about six days after the Marley Lion murder, there was an opportunity for Detective Osborne to have a formal meeting, sit down with Bryan Rivers where they talked on tape and Osborne asked him about being involved in a robbery at the Saint Andrews Garden Apartments with Tino [Valentino Hayward], which he denied, and which was not truthful . . . I would use that to show that . . . when he [Rivers] needed to lie, he knew how to lie.
>
> With regard to the follow-up conversation that he [Rivers] had after his arrest on these charges on July 30th and 31st [2012], I would cover the fact that he now admits that he, on June 1st, rode along on the preplanned robbery of Leroy Townsend, a.k.a. "Chopper," in the Saint Andrews Garden Apartments; that he got $1,300 in cash and drugs; he used the Marley Lion murder weapon to rob Townsend; He shot Townsend in the leg; it was George Brown's gun; that he's not been charged with this armed robbery pursuant to his proffer agreement; and he has not also been charged with attempted armed robbery [of Marley Lion] pursuant to his agreement. And that's the sum and substance of what I would cover with Bryan Rivers.

R. 144, l. 12 – 145, l. 11.

The solicitor said there would be no need to have Rivers testify during a proffer based on what counsel indicated he would elicit from Rivers. R. 145, ll. 14-20; R. 243, l. 14 – 244, l. 22.

Defense counsel renewed his objection at the end of this colloquy. See R. 146, l. 18 – 147, l. 1. He also renewed his objection at the end of his cross-examination of Julius and Rivers, and after the state rested. R. 240, ll. 12-15; R. 308, l. 22 – 309, l. 4; R. 769, ll. 3-6.

Opinion of the Court of Appeals

The Court of Appeals affirmed the ruling of the trial court in a brief summary opinion. App. 1-3. Pursuant to Rule 404(b), SCRE, the Court of Appeals held there was not "a close degree of similarity" between the attempted armed robbery and shooting of Marley Lion and the evidence of the "Chopper shooting." App. 2. Under the third party guilt doctrine, the court held the evidence of the "Chopper shooting" was not admissible because it had no "other effect than to cast a bare suspicion upon another." App. 2. Moreover, citing State v. Cope, 405 S.C. 317, 339, 748 S.E.2d 194, 205-206 (2013) and Holmes v. South Carolina, 547 U.S. 319, 323 (2006), the court held evidence of the "Chopper shooting" was not admissible under the due process right to present a complete defense because this prior bad act was "not sufficiently similar to the crime charged so as to be admissible." App. 2.

Discussion

The trial court erred by refusing to allow Petitioner to cross-examine Julius Brown and Bryan Rivers about the armed robbery and shooting of Leroy "Chopper" Townsend that occurred approximately two weeks before Marley Lion was murdered. It was undisputed that Bryan Rivers was the shooter in this prior armed robbery, as well as the armed robbery of the couple downtown, and that the same firearm was used in all three cases. The court's erroneous ruling prevented Petitioner from fully developing and presenting his defense that Rivers was the shooter who killed

Marley Lion and that Petitioner was merely present at the scene. This prior bad act evidence should have been admissible under Rule 404(b), SCRE, the rule on third party guilt, and Petitioner's due process right to present a complete defense.

Rule 404(b), SCRE

"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." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923)) (internal quotation marks omitted). "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." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing Rule 404(b)) (internal quotation marks omitted). "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Clasby, 385 S.C., 148, 154, 682 S.E.2d, 892, 895 (2009)). "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.

"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. Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896). "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. (internal quotation marks omitted). "The evidence is admissible if the similarities outweigh the dissimilarities." Id.

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (internal quotation marks omitted). "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*." Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896) (emphasis added).

Moreover, prior bad act evidence may be offered by one defendant against another. In State v. Good, 315 S.C. 135, 432 S.E.2d 463 (1993), our Supreme Court affirmed the introduction of evidence by one defendant that his codefendant had previously robbed the murder victim. Rejecting all objections to the admissibility of this evidence, this Court noted that "[t]here would be little question about admissibility [of the other crime] if the State had attempted to introduce this evidence," and, as such, "the trial judge did not err in allowing the [codefendant] to introduce it." Id. at 140, 432 S.E.2d at 466.

It was undisputed at trial that Bryan Rivers was the shooter during the armed robbery of Leroy Townsend on June 1, 2012, sixteen days before the murder of Marley Lion. Rivers admitted his involvement in this crime to law enforcement. Accordingly, the trial court correctly found Rivers' involvement and identity as the shooter in this prior armed robbery was proved by clear and convincing evidence. See R. 20, ll. 15-16. Moreover, River's prior bad act was relevant, as required under Rule 401, SCRE, to show that Rivers was the shooter during the attempted armed robbery of Marley Lion.

The trial court abused its discretion by ruling Rivers' prior bad act related to the armed robbery and shooting of Leroy Townsend was inadmissible under the common scheme or plan

exception of Rule 404(b). The similarities between this prior armed robbery and shooting and the attempted armed robbery and shooting of Marley Lion meet or exceed the standards applied by this Court for admission of prior bad act evidence. Both offenses involved the same individuals: Bryan Rivers, Julius Brown, George Brown, Rayshawn Milligan, and allegedly Petitioner, and were planned by the same person: Julius Brown. Additionally, both robberies occurred near the Ardmore neighborhood within less than a mile of each other, George Brown acted as the driver, and the assailants approached on foot in the cover of darkness and fled on foot. See R. 9, ll. 7-12. Moreover, the same firearm, which belonged to George Brown, was used in both shootings. Finally, Stephanie Brown and Petitioner's residence on Cashew Street was used as a home base, where the group originated from and returned to after each armed robbery and shooting. The common plan was simple: approach a targeted individual at night and rob them of their possessions at gunpoint.

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

Because there is an obvious degree of similarity between the two acts and the similarities clearly outweigh the dissimilarities, the trial court should have ruled the evidence of Rivers' prior bad act related to the armed robbery and shooting of Leroy Townsend was admissible to demonstrate a common scheme or plan and to establish Rivers' identity as the shooter during the attempted armed robbery of Marley. See Cope, 505 S.C. at 337, 748 S.E.2d at 204. The court's failure to do so was reversible error.

This Court, along with the Court of Appeals, has repeatedly relied on just one or two similarities when applying Rule 404(b) and Lyle exceptions. See, e.g., Lyle, 125 S.C. at 406,

118 S.E. at 808 (close geographical concentration of offenses); State v. Beck, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000) (concentrated timeline of offenses); State v. Hallman, 298 S.C. 172, 175, 379 S.E.2d 115, 117 (1989) (similarity of method of commencing crimes); State v. Blanton, 316 S.C. 31, 33, 446 S.E.2d 438, 439 (Ct. App. 1994) (similarity in type of abuse perpetrated). The striking commonalities between the armed robbery and shooting of Townsend and the attempted armed robbery and murder of Marley Lion are more than sufficient to satisfy both the identity and common scheme and plan exceptions of State v. Lyle and Rule 404(b).

Finally, evidence of Bryan Rivers' prior bad act was highly probative. The fact that Rivers was involved in the prior armed robbery of Townsend and *admitted to being the shooter* was probative to show that Rivers was the shooter in the attempted armed robbery of Marley Lion and that Petitioner was innocent and merely present at the scene. Moreover, this evidence was not prejudicial to the state or to Rivers. Rivers confessed to being present at the scene during the attempted armed robbery of Marley and had already pled guilty to charges related to the murder. Likewise, it is ludicrous to believe that the state would be prejudiced by Petitioner introducing relevant evidence that tends to prove he did not commit the crime for which he was being tried.

Third Party Guilt

The admissibility of evidence of third party guilt in South Carolina is governed by the rule set forth in 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.

198 S.C. at 104–105, 16 S.E.2d at 534–535 (internal citations omitted); See State v. Burgess, 391 S.C. 15, 22-23, 703 S.E.2d 512, 516 (Ct. App. 2010).

Other jurisdictions that have addressed the admissibility of "other crimes" as evidence of third party guilt have reversed in cases similar to Petitioner's. For example, in State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987), the defendant, who was charged with rape and burglary, sought to introduce evidence of two similar attacks committed by an unidentified individual on the same evening and in the same neighborhood as the assault for which Cotton was on trial. The North Carolina Supreme Court reversed the trial court's exclusion of this evidence, relying on a standard nearly identical to this state's third party guilt rule. Id. at 667, 351 S.E.2d at 279-280. Specifically, the court in Cotton held that where a series of similar assaults appears to have been committed by a third party in a manner and location that suggests that the third party, and not the defendant, could have committed the offense for which the defendant is being tried, it is an abuse of discretion to prevent the defendant from presenting those other crimes to the jury. Id. at 667, 351 S.E.2d at 280.

Here, evidence of Bryan Rivers' involvement and identity as the armed robber and shooter during the robbery of Leroy Townsend approximately two weeks before the murder of Marley Lion, coupled with the evidence that he also robbed a couple at gunpoint in downtown Charleston mere hours before Marley was shot, "tends clearly to point" to Rivers as the individual who approached Marley's car, attempted to rob him, and shot into his car five or six times. See Gregory, 198 S.C. at 104–105, 16 S.E.2d at 534–535. This evidence also "raise[s] a reasonable inference" of Petitioner's own innocence, especially when one considers Petitioner's alleged role in both the

armed robbery of Leroy Townsend and the robbery of the couple downtown. See Id. According to witnesses, during the robbery and shooting of Townsend, Petitioner merely went along for the ride and remained in George Brown's car the entire time. Moreover, when Rivers held the couple at gunpoint in downtown Charleston, the testimony was that Petitioner, while he did get out of the car, merely walked in the opposite direction and had no involvement in the robbery. Based on Rivers' and Petitioner's undisputed roles in these two prior armed robberies, both which were extremely close in time to the murder of Marley Lion, again, clearly tends to point to Rivers as the guilty party during the attempted armed robbery and shooting of Marley, not Petitioner.

Furthermore, Petitioner should have been able to fully present the evidence regarding the armed robbery and shooting of Leroy Townsend because of the clear "train of facts or circumstances" between the three known armed robberies. See Id. When Rivers was released from prison on June 1, 2012, a train of events began involving the same players (Julius Brown, Rayshawn Milligan, George Brown, Bryan Rivers, and Petitioner), the same firearm (George Brown's gun), and a similar plan of robbing individuals who the defendants suspected had cash. Because of the evident connection between the robbery and shooting of Townsend and the attempted armed robbery of Marley Lion, the trial court should have permitted Petitioner to present this evidence as evidence of third party guilt.

Numerous other appellate courts have found reversible error where material and substantiated evidence of similar third party crimes has been excluded. See e.g., Kucki v. State, 483 N.E.2d 788, 790-792 (Ind. Ct. App. 1985) (reversible error to exclude fact that third party was suspected of committing similar crimes in the area, even though evidence suggested the third party was out of state at the time of the offense for which the defendant was being tried);

State v. Burge, 195 Conn. 232, 252, 487 A.2d 532, 545 (1985) (reversible error to exclude evidence regarding third party who "lived in the vicinity of the scene of the crime . . . and had confessed to the recent commission of a similar assault under similar circumstances at a location near to the place where the victim in this case had been assaulted and killed."); Com. v. Jewett, 17 Mass. App. Ct. 354, 357, 458 N.E.2d 769, 771, aff'd, 392 Mass. 558, 467 N.E.2d 155 (1984) (reversible error to exclude evidence that a man who resembled the defendant had recently committed a similar sexual assault under similar circumstances); People v. Bueno, 626 P.2d 1167, 1170 (Colo. App. 1981) (reversible error to exclude evidence of a similar crime from which the defendant had been excluded as a suspect); Com. v. Rini, 285 Pa. Super. 475, 480, 427 A.2d 1385, 1387 (1981) (reversible error to exclude "evidence that someone else committed a crime which bears a highly detailed similarity to the crime with which the defendant is charged."); State v. Bock, 229 Minn. 449, 458, 39 N.W.2d 887, 892 (1949) (reversible error to exclude "crimes of a similar nature [that] have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of defendant as the person who committed the crime charged against him.").

Significantly, in each of these cases, neither the evidence linking the third party to the proffered other crimes, nor the evidence linking the third party to the crime with which the defendant was charged was as strong as the evidence that links Bryan Rivers to both the armed robbery and shooting of Leroy Townsend and the attempted armed robbery and murder of Marley Lion. If, as these cases show, it is reversible error to exclude defense evidence regarding a third party merely suspected of similar crimes, surely it was reversible error to exclude Petitioner's evidence, which proves that a third party, Bryan Rivers: (1) was serially committing

similar crimes at the time of the offense for which Petitioner was being tried and (2) participated in the offense with which Petitioner was charged.

Therefore, while it may be permissible to exclude evidence of similar crimes committed by a third party where witnesses or other evidence tend to exclude the third party from the crime for which the defendant is being tried, such as in Daniel v. State, 395 S.E.2d 638 (Ga. App. 1990), where, as here, the evidence is uncontradicted, entirely competent, highly probative, and essential to the defense, it must be admitted in order to accord the defendant a fair trial.

Due Process Right to Present a Complete Defense

"The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'" Burgess, 391 S.C. at 21, 703 S.E.2d at 515 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "This right is also guaranteed by our State constitution: 'Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....'" Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); see S.C. Code Ann. § 17–23–60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). Furthermore, in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the United States Supreme Court emphasized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." See Burgess, 391 S.C. at 22, 703 S.E.2d at 516.

As the United States Supreme Court reaffirmed in Holmes v. South Carolina, 547 U.S. 319 (2006), the Constitution requires that any evidentiary determination adversely affecting a defendant's right to present a complete defense be rationally related to the purpose of state evidentiary rules—"focus[ing] the trial on the central issues by excluding evidence that has only

a very weak logical connection to central issues." Id. at 330. The Court further exclaimed that "[j]ust because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." Id. (emphasis in original). Further still, the Court asserted, "[W]here the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact . . . " Id.

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 trial court refused to admit the evidence, noting the substantial incriminating evidence presented by the State and concluding that Holmes 'could not overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" Cope, 405 S.C. at 339, 748 S.E.2d at 205 (citing Holmes, 547 U.S. at 324) (internal citations omitted).

On appeal, the United States "Supreme Court held the trial court violated Holmes' right to a 'meaningful opportunity to present a complete defense' by excluding evidence of third-party guilt on the grounds that the State had introduced forensic evidence that, if believed, strongly supports a guilty verdict." Cope, 405 S.C. at 339, 748 S.E.2d at 205 (citing Holmes, 547 U.S. at 330-331).

Here, the trial court likewise violated Petitioner's right to a "meaningful opportunity to present a complete defense" by excluding evidence of Rivers' prior bad act related to the armed robbery and shooting of Leroy Townsend sixteen days before Marley Lion was murdered. Based

on the United States Supreme Court's holding in Holmes and Petitioner's due process right to present a complete defense, Petitioner should have been permitted to question Julius and Rivers about the "Chopper shooting" in front of the jury and fully develop his defense that Rivers was the shooter and that Petitioner was merely present at the scene. Failure to allow Petitioner to present evidence of Bryan Rivers' prior bad act violated his constitutional right to present a complete defense and denied him a fair trial.

Moreover, in Holmes, the United States Supreme Court lowered the standard for presenting evidence of third party guilt. Other jurisdictions have likewise held that a lower standard of admissibility is required when evidence of other crimes is offered by a defendant in exculpation.[6] For example, in State v. Williams, 518 A.2d 234 (N.J. Super. 1986), the Appellate Division of the New Jersey Superior Court reversed the attempted murder conviction of a defendant who had sought to introduce evidence of two other assaults committed nearby both before and after the offense for which he was being tried. Although these other assaults were far from identical to the crime the defendant was charged with, the court held their exclusion nonetheless "eviscerated the defense entirely and denied [the] defendant a fair trial." Id. at 235. Noting that "a lower standard of similarity of offenses is required to justify the use of such evidence by a defendant than is required when the state offers [prior bad act] evidence," the court in Williams held there was a sufficient correspondence between the charged offense—an outdoor stabbing where no sexual assault occurred—and the other crimes—rape abductions where only one victim was stabbed and both victims were transported to off street locations—to rule exclusion of the other offenses was reversible error. Id. at 238-239.

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[6] Other jurisdictions that have held a lower standard of admissibility is required when evidence of other crimes is offered by a defendant base this holding in part on the principle that Rule 404(b) is designed to "protect *a defendant* from the unrestricted admission of bad act evidence." See State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005) (emphasis added).

Consequently, due process requires a lesser standard of admissibility be utilized when evidence of prior bad acts committed by a third party is offered by a defendant to negate his guilt. Under this lesser standard, evidence of the armed robbery and shooting of Leroy Townsend should have admitted. The trial court's refusal to allow Petitioner to present evidence of Rivers' prior bad act violated his constitutional right to present a complete defense and denied him a fair trial.

Respectfully, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

2.

The Court of Appeals erred 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.

Relevant Facts

In the court's opening instructions to the jury, the judge told the jurors their mission:

> Ladies and gentlemen, I wanted to take this opportunity to tell you that this trial probably will be different from what you might expect. Most people do not have the opportunity to come to court as you are doing now, and most people think that from watching television or movies or reading books, that trials are full of intense drama and riveting circumstances. While all of these things are true at some times, please remember this trial is not for your entertainment. It is a fundamental part of our democracy. **It is a search for the truth in an effort to make sure that justice is done before the parties before you. Searching for the truth and making sure that justice is done is often slow, deliberate, and repetitive, the opposite of what you may have seen on television or movies or read in books.**
>
> This courtroom is a place of honor. It is dedicated to the protection and preservation of citizens' rights to what many have called the greatest justice system ever created. The attorneys that are appearing before you here today are advocates for the parties that they represent, but first and foremost, they are officers of this court. They are sworn to uphold the integrity and the fairness of our judicial system.

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

The judge also instructed the jurors:

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

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

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

Opinion of the Court of Appeals

While the Court of Appeals acknowledged the trial court's charge to the jury to "seek the truth" is "disfavored" because such an instruction runs "the risk of unconstitutionally shifting the burden of proof to a defendant," it held the trial court's jury instructions, when considered as a whole, were "free from error." App. 3 (internal citations omitted).

Discussion

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

Sixteen years ago, in State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998), this Court strongly urged trial judges to avoid using any "seek" language. The Court noted that such "seek the truth" language was unnecessary, and it ran the risk of unconstitutionally shifting the burden of proof to the defendant. Id. This Court 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).

More recently, almost one year to the day before this trial, this Court in State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, this Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." 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." R. 40, ll. 17-22. This "true and just verdict" language reinforced in the jurors' minds that it was their duty to "seek the truth" and render

a "true and just verdict," rather than do what the Constitution requires, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

In State v. Aleksey, 343 S.C. 20, 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 on the jury's duty being to "search for the truth" was not only included, but became the centerpiece of the judge's instruction to the jury on what a ***criminal trial is all about***. R. 34, l. 3 – 35, l. 2; R. 40, ll. 17-22. A jury's function is not to search for the truth, and the truth is justice. 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.*

Just last week, in State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed December 29, 2016), this Court ***again*** held the trial judge's remarks that a trial is "a search for the truth in an effort to make sure that justice is done" and that the jury's role is to "search for the truth, or to find the true facts or to render a just verdict" were error. Id. The Court exclaimed, "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice." Id. Moreover, this Court repeated its caution to trial judges that they should "avoid . . . any [terms] that may divert the jury from its obligation in

a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt." Id.

Here, when examining the trial judge's initial instruction to the jury regarding the jury's function it is remarkably clear that her remarks were burden shifting due to the lack of an instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt, and her emphasis that a criminal trial was a "search for the truth" and that it was the jury's "solemn responsibility to determine the guilt or innocence of the [d]efendant..." R. 34, l. 12 – 35, l. 2; R. 38, ll. 16-17; R. 40, ll. 17-22. The trial judge repeatedly emphasized "truth" and "justice" and stubbornly refused to give a curative instruction. Her opening instruction **fundamentally changed the burden of proof from beyond a reasonable doubt to the lower standard of a preponderance of the evidence** and turned this criminal trial into a civil trial. Nothing could be more prejudicial to Petitioner who was being tried for the criminal offense of murder.

The fact that the trial judge stated her instructions to the jury were not instructions on the law is of no consequence given the reality, and not the legal fiction, that the jury naturally looks up to the trial judge and expects guidance from her on how they should act and what their responsibility are. Sosebee v. Leeke, 293 S.C. 531, 362 S.E.2d 22 (1987). That was the reason the judge gave the opening instruction after all. 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, and it was the jury's function to act professionally and "seek the truth" when determining whether the defendant was guilty or innocent. 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.

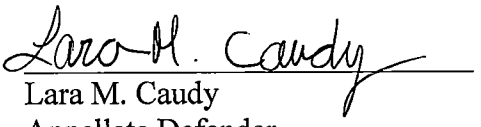
The court's preliminary instruction in this case was very prejudicial to Petitioner because throughout the trial the jurors were concentrating on evaluating the quality of the evidence in a

"search for the truth" rather than thinking in terms of their actual task of determining whether the state was proving its case beyond a reasonable doubt. Certainly, each individual juror was evaluating the evidence as it was presented, and *the context* in which they were evaluating that evidence, based on the judge's initial instructions, was 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 guilt beyond a reasonable doubt.

Given this fundamentally inaccurate instruction on the purpose of a criminal trial and the jury's function, this Court respectfully should reverse Petitioner's convictions and sentence and grant him a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.



Lara M. Caudy
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 3rd day of January, 2017.

RECEIVED

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Donald J. Zelenka, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served upon Ryan P. Deleston, #307106, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of January, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 3rd day of January, 2017.

Maria Herrod (L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.