

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

RYAN P. DELESTON,

PETITIONER

APPELLATE CASE NO. 2016-001103

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REPLY BRIEF OF PETITIONER

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT IN REPLY

The trial court’s opening instruction to the jury that a trial is “a search for the truth in an effort to make sure that justice is done” is reversible error because this instruction, along with similar remarks made by the court such as the jury would “be in a position to determine the true facts, and render a true and just verdict,” diverted the jury from its obligation to determine whether the state had proven Petitioner’s guilt beyond a reasonable doubt and unconstitutionally lowered the burden of proof. These unconstitutional remarks, particularly when considered with the solicitor’s opening statement and closing argument, were unduly prejudicial and warrant a new trial..... 1

CONCLUSION ..... 4

## TABLE OF AUTHORITIES

### **Cases**

<u>Brightman v. State</u> , 336 S.C. 348, 520 S.E.2d 614 (1999) .....	3
<u>In re Winship</u> , 397 U.S. 358 (1990).....	2
<u>State v. Buckner</u> , 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) .....	3
<u>State v. Patrick</u> , 289 S.C. 301, 345 S.E.2d 481 (1986) .....	3
<u>State v. Patrick</u> , 289 S.C. 301, 345 S.E.2d 481 (1986) .....	3
<u>State v. Swilling</u> , 246 S.C. 144, 142 S.E.2d 864 (1965).....	2, 3
<u>State v. Torrence</u> , 305 S.C. 45, 406 S.E.2d 315 (1991).....	3

### **Other Authorities**

Michael D. Cicchini & Lawrence T. White, <u>Truth or Doubt? An Empirical Test of Criminal Jury Instructions</u> , 50 U. Rich. L. Rev. 1139, 1144-445 (2016) .....	2
---	---

## ARGUMENT IN REPLY

The trial court's opening instruction to the jury that a trial is "a search for the truth in an effort to make sure that justice is done" is reversible error because this instruction, along with similar remarks made by the court such as the jury would "be in a position to determine the true facts, and render a true and just verdict," diverted the jury from its obligation to determine whether the state had proven Petitioner's guilt beyond a reasonable doubt and unconstitutionally lowered the burden of proof. These unconstitutional remarks, particularly when considered with the solicitor's opening statement and closing argument, were unduly prejudicial and warrant a new trial.

Respondent concedes the search for the truth instruction used by the trial court in its opening remarks is "generally disfavored," but claims the erroneous instruction does not require a new trial since the court's closing instructions expressed the correct burden of proof. Brief of Respondent at p. 42. Respondent fails to understand the gravity of this burden shifting instruction and its impact on the jury, particularly where it was given at the beginning of the trial. Including this instruction in the opening remarks is drastically more prejudicial than including it during the final instruction on the law because the jurors operate under the wrong impression during the entire trial about their role in a criminal trial. The erroneous instruction led the jurors to believe the very nature and sole purpose of a jury trial is to "search for the truth in an effort to make sure that justice is done" and that the trial must conclude with "a true and just verdict" rather than a verdict that merely complies with the state's burden of proof beyond a reasonable doubt.

The trial court's erroneous opening instruction is reversible error because it fundamentally changed the burden of proof from beyond a reasonable doubt to the lower

standard of a preponderance of the evidence that is used in civil trials. Nothing could be more prejudicial to Petitioner who was being tried for the criminal offense of murder. See Michael D. Cicchini & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Rich. L. Rev. 1139, 1144-445 (2016) (“[T]ruth-related language seems to lower the government’s burden of proof from the constitutionally guaranteed beyond a reasonable doubt standard. That is, ‘seeking the truth’ suggests determining whose version of events is more likely true, the government’s or the defendant’s, and thereby intimates a preponderance of evidence standard.”) (internal footnotes and quotation marks omitted).

Capitalizing on the court’s burden shifting instruction to the jury, the solicitor exclaimed during her opening statement: “*You [the jurors] took an oath to follow the law. And we appreciate in advance you doing that. Because **at the end of this case**, what we’re going to do is, **we’re going to come to you and ask you to give a verdict that speaks the truth.***” R. 50, ll. 17-21 (emphasis added). Moreover, expanding on her opening statement, the solicitor later told the jury during her closing argument: “At the very beginning **I told you we were going to ask for a verdict that spoke the truth, and that’s what we’re asking for.**” R. 804, ll. 18-20 (emphasis added). Aware that Petitioner had strongly objected to its use during the court’s opening instruction as burden shifting and fundamentally changing the jurors’ role, the solicitor reiterated and emphasized the erroneous “truth” language. The solicitor’s request that the jurors “give a verdict that speaks the truth” further confused the jurors’ task. The jurors’ only role was to determine whether the state met its burden of proving Petitioner’s guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1990). Moreover, the solicitor’s request that the jury render “a verdict that speaks the truth” compounded the prejudice to Petitioner caused by the trial court’s erroneous opening instruction. See State v. Swilling, 246 S.C. 144, 152, 142 S.E.2d

864, 868 (1965) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (discussing how the solicitor's capitalization on an erroneous instruction compounds the prejudice to the defendant).

Furthermore, the court's opening instruction was misleading and confusing to the jury because it was inconsistent with and contradictory to the burden of proof as stated by the court in its closing instructions. See State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion."). Because the search for the truth instruction conflicted with the stated burden of proof beyond a reasonable doubt, it could only have confused and misled the jury. Additionally, "[w]here the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge." State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000). The unconstitutional remarks, when considered with the solicitor's opening statement and closing argument, increase the need to apply this presumption.

Given the gravity of this burden shifting instruction and the overwhelming prejudice to Petitioner, Petitioner respectfully requests this Court hold the trial court's "search for the truth" instruction is reversible error, reverse his convictions and sentence, and remand for a new trial.

**CONCLUSION**

Based on these additional arguments, Petitioner respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



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Lara M. Caudy  
Appellate Defender

Robert M. Dudek  
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 9th day of March, 2017.

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THE STATE,

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RYAN P. DELESTON,

PETITIONER

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Reply 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 Reply Brief of Petitioner has been served upon Ryan P. Deleston, #307106, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 9th day of March, 2017.

  
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Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 9th day of March, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: November 3, 2026.