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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Brian M. Gibbons, Circuit Court Judge

ROBERT L. MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000562

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation where the solicitor argued in closing the jury should convict Petitioner "for Mr. Hall's sake, for Spartanburg County's sake, for this community," where counsel's failure to object was not strategic, since a prosecutor may not urge the jury to convict for reasons wholly unrelated to guilt or innocence; and whether there was a reasonable probability the result of the trial would have been different absent counsel's error?

STATEMENT

On June 13, 2013, a Spartanburg County Grand Jury indicted Robert L. Moore, Petitioner, for attempted murder. App. 703 – 704. Petitioner was tried before the Honorable R. Keith Kelly and a jury, from July 21 – 23, 2014. Andrew Johnston represented Petitioner. Derrick Bulsa prosecuted the case. App. 1.

At approximately 2:10 p.m. on February 25, 2013, Travis Hall (Complainant), was shot in the head while seated in his Chevy Impala, which was parked outside the Taco Bell on Highway 29 in Spartanburg. App. 105, l. 21 – 106, l. 2; App. 110, ll. 2-24; App. 120, ll. 7-16. Bystanders saw a silver or white car with distinctive rims, either a Chrysler 300 or Dodge Magnum, speed away immediately afterwards. Bystanders went to help but the injuries appeared too severe for them to try. Complainant was hanging out of the Impala by his seatbelt when police arrived. App. 111, l. 7 – 116, l. 11; App. 126, l. 6 – 127, l. 1; App. 313, ll. 6-12.

When Deputy Hudson asked Complaint if he knew who shot him, Complainant could only make a croaking noise. App. 117, ll. 1-9. Complainant was grievously wounded. After several months in the hospital, he was left with a bullet still in his head, in a wheelchair. His mother said Complainant was still "able to talk a little, and that's about all," and needed to be carried to the restroom. App. 104, l. 10 – 105, l. 20. According to Complainant's mother, just before the shooting, Complainant had been at her house and had received several phone calls from the same person. App. 102, ll. 2-17.

Law enforcement recovered video surveillance footage from a gas station about a mile and a half away from the Taco Bell. The footage showed that two men in a white Chrysler 300 came in and bought food and cigarettes shortly after the shooting. The store clerk typed in one of the men's birthdays for the tobacco purchase, and the birthday matched Petitioner's birthday.

The footage showed that Petitioner was dressed in a red or orange shirt. The second man, who was determined to be Tevin Thomas, wore a dark shirt and toboggan hat. App. 214, l. 23 – 235, l. 2; App. 207, l. 1 – 212, l. 11; App. 355, ll. 14-23.

Several cellular telephones were retrieved from the Impala floorboard: one of them was traced to Petitioner, and it was shown to be the telephone used to call Complainant several times leading up to the shooting. However, fingerprints on the outside of the Impala, mostly on the passenger side, were matched to Tevin Thomas. Petitioner's fingerprints were not on the Impala. App. 137, l. 21 – 145, l. 10; App. 173, l. 1 – 182, l. 14; App. 190, l. 3 – 199, l. 20; App. 205, l. 20 – 206, l. 8.

The State called Tevin Thomas to testify at Petitioner's trial. Thomas had also been charged in the shooting. At the time of trial, Thomas was incarcerated for burglary and grand larceny offenses. Thomas had a prior criminal history that included receiving stolen goods and obtaining property under false pretenses. Thomas was recorded on the jail telephone telling someone: "[A]in't no mother f***ing way I can do that time. That's a long time. I'm not going to be able to do it." When questioned by law enforcement in this case, Thomas gave and signed two false statements about what happened, but claimed he was finally telling the truth at trial. App. 250, ll. 10-20; App. 266, l. 7 – 281, l. 15.

Thomas claimed that the day of the shooting, he had gotten a call from Reginald Sanders. According to Thomas, he went to Sanders's house, and Petitioner was there. Thomas claimed Sanders and Petitioner had already contacted Complainant about buying crack cocaine and were going to rob Complainant of the drugs. Thomas alleged Sanders was supposed to drive Petitioner to meet Complainant; Thomas said he agreed to go with them. However, according to Thomas,

Sanders did not go because he had to give his child's mother a ride elsewhere. Thomas claimed that Sanders gave Petitioner a gun as they were leaving. App. 251, l. 4 – 254, l. 21.

According to Thomas, he was in the passenger seat and Petitioner drove the Chrysler. When they arrived at Taco Bell, Thomas claimed Petitioner got in Complainant's Impala, closed the door, and pulled the gun on Complainant. Thomas alleged the two men started tussling, so Thomas got out of the Chrysler and tried to open the Impala's door. According to Thomas, the gun went off, and both he and Petitioner got back in the Chrysler and left. App. 255, l. 4 – 263, l. 18.

The State called two bystanders as witnesses: Tim Tullock was a commercial heating and air technician doing work nearby. Tullock was seated in his van. He heard popping sounds, and saw a Chrysler 300 squealing its tires while leaving the parking lot. Carla Hughes had just eaten lunch with her boyfriend and she was almost hit by a white Chrysler 300 leaving the parking lot. Neither witness saw the shooting. App. 123, l. 14 – 132, l. 13.

In contrast, the defense called Chris Barnes, an automotive employee who was in the Taco Bell drive-thru getting food on the way to pick up his child from daycare. Barnes actually witnessed the shooting, and provided his Taco Bell receipt to the Sheriff's Department. Barnes said while he was leaving the drive-thru, he saw a Chevy Impala rocking back and forth, heard a pop, and then saw somebody slumped over with something squirting "like a water pistol, and then somebody popped out of the passenger side of the car and jumped in another car and left . . ." Barnes stated he saw the man emerge from the passenger side of the Impala and get in the passenger side of a Dodge Magnum. Barnes said he was sure the man he saw emerge from the Impala was wearing a dark sweatshirt and dark toboggan, and he locked eyes with the man. App. 305, l. 12 – 330, l. 6.

In closing argument, defense counsel argued Thomas was the shooter, and noted that Thomas could have used Petitioner's telephone because Thomas did not have a telephone. App. 347, ll. 23-24; App. 343, ll. 3-21. The prosecutor argued in closing that Petitioner was the shooter. App. 356, ll. 19-20. The prosecutor made an improper comment in his closing argument, in which he appealed to the passions and prejudices of the jury and asked the jury to convict Petitioner on an improper basis. "I'm asking you to convict him for Mr. Hall's sake, for Spartanburg County's sake, for this community." App. 367, ll. 17-18.

Petitioner was convicted as indicted, and he was sentenced to thirty years' imprisonment. App. 388, l. 19 – 389, l. 6; App. 393, ll. 5-7; App. 705. Petitioner's conviction was affirmed on direct appeal. App. 573 – 594; *State v. Moore,* 429 S.C. 465, 839 S.E.2d 882 (2020). On April 9, 2020, Petitioner filed an application for post-conviction relief on April 9, 2020. App. 597 – 620. On April 4, 2021, the State filed a return and motion for a more definite statement. App. 621 – 638. On February 9, 2023, Petitioner filed an amended application. App. 639 – 641.

On February 15, 2023, a hearing was held on the matter before the Honorable Brian M. Gibbons. Susannah Ross represented Petitioner. Chelsey Marto represented the State. App. 642. PCR counsel argued trial counsel provided ineffective representation when he failed to "object to the State's comment in closing as to asking for a conviction for the community." App. 647, ll. 7-8. Trial counsel testified that, "In retrospect," "I think that one probably merited an objection." App. 664, l. 16 – 665, l. 1. "I don't think it was that egregious, but it probably merited an objection." App. 678, ll. 11-12.

On March 29, 2023, the PCR court issued an order of dismissal. App. 688 – 702. The order addressed Petitioner's claim that "Counsel was ineffective for failure to object to the State's closing." The PCR court found, "Counsel testified that he thought the comment was out

there and would have objected in retrospect, but that he did not think it altered the results of the proceedings. Accordingly, Applicant has not proven prejudice and relief is denied." App. 688; App. 694 – 695.

This petition for writ of certiorari follows.

ARGUMENT

The court erred in denying post-conviction relief where the solicitor argued in closing that the jury should convict Petitioner "for Mr. Hall's sake, for Spartanburg County's sake, for this community," where counsel's failure to object was not strategic, since a prosecutor may not urge the jury to convict for reasons wholly unrelated to guilt or innocence. There was a reasonable probability the result of the trial would have been different absent counsel's error.

The prosecutor argued to the jury it should convict Petitioner for reasons that were not evidentiary. His comments that the jury should convict out of sympathy for the complainant or out of public safety concerns were improper. Counsel admitted he should have objected to the improper comments. The PCR court incorrectly found there was no prejudice on the facts of this case.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

The solicitor's argument was improper and objectionable. "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Solicitors must "confine their comments to the facts presented and reasonable inferences from such facts." *Id.* at 326, 468 S.E.2d at 625.

In *State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 747 (Ct. App. 1999), the Court of Appeals found the trial court's refusal to grant a mistrial required reversal where the prosecutor's argument invited the jury to convict the defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs. The Court of Appeals explained, "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." *Id.*, 336 S.C. at 654, 521 S.E.2d at 747 (quoting *United States v. Monag*han, 741 F. 2d 1434, 1441 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985)). "Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." *Liberte*, 336 S.C. at 654, 521 S.E.2d at 747 (quoting *Monaghan*, *supra*).

See also State v. Parker, 391 S.C. 606, 614-15, 707 S.E.2d 799, 803 (2011) (defendant was goaded into seeking a mistrial based on improper conduct by solicitor which included encouraging jury to convict in order to protect the community); *State v. Hawkins*, 292 S.C. 418, 422, 357 S.E.2d 10, 13 (1987),[1] (solicitor's repeated use of the term "Mad Dog" infected the trial with unfairness by arousing passion and prejudice of jury and interjected arbitrary factor into jury's deliberations).

This case is like *Liberte*, *supra*, where the solicitor urged the jury to convict to keep the streets safe from drugs. It was an appeal to convict Petitioner for reasons wholly irrelevant to guilt or innocence. Counsel admitted his failure to object was not strategic, and that he should

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[1] overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

have objected. This was deficient performance. *Liberte*, 336 S.C. at 654, 521 S.E.2d at 747; *Strickland*, 466 U.S. at 687.

"To show prejudice, the applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]." *Id.* In determining whether an applicant has proven prejudice, the strength of the State's case is one significant factor to be considered, along with the specific impact of counsel's error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018).

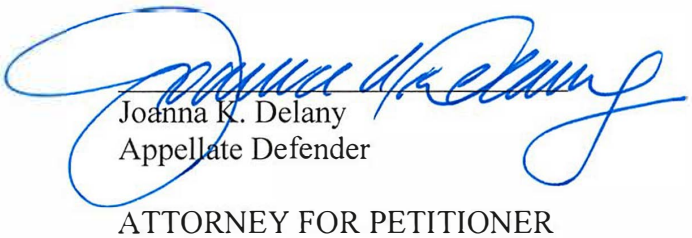
The case against Appellant relied in large part on the testimony of his codefendant, Tevin Thomas, who admittedly lied to the police multiple times about what happened. Thomas was a convicted criminal serving time for burglaries, with the charges from this case hanging over his head. It was Thomas's fingerprints that were on the complainant's car, not Appellant's. A disinterested witness, Chris Barnes, said a man wearing clothes that matched Thomas, not Petitioner, emerged from Complainant's Impala immediately after the shots were fired. Although Petitioner's telephone was found in the complainant's car, as defense counsel argued, it could have been Thomas who dropped the phone in the car since Thomas did not have a phone of his own. The impact of counsel's error was to allow the prosecutor to improperly draw the jury's attention away from Thomas's credibility problems, away from Chris Barnes's testimony that Thomas was the shooter, and away from the fingerprint evidence which implicated Thomas, and instead focus the jury on sympathy and community safety.

The facts in this case were an alleged robbery of a drug dealer which resulted in the complainant being shot in the head in broad daylight outside a Taco Bell. Decent people were

nearby working, getting lunch, and going to pick up their children. The complainant was permanently disabled from the shooting such that his mother has to carry him to the bathroom for the rest of his life. The solicitor's improper appeal to the passions and prejudices of the jury, that it should convict for the complainant's sake, for Spartanburg County, and for the community, would have irresistibly beckoned to the jurors on these facts. The PCR court erred by finding Petitioner was not prejudiced by counsel's deficient performance. Petitioner has demonstrated that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Strickland*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.



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This 22nd day of November, 2023.