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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
The Honorable Letitia H. Verdin, Trial Judge
The Honorable R. Lawton McIntosh, PCR Judge

STEVEN LEVON WILLIAMS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellant Case No. 2024-000248

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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II.

Whether the PCR court erred in failing to vacate Petitioner's sentence for possession of a weapon during the commission of a violent crime, where Petitioner received a life without parole sentence for the violent crime, since § l 6-23-490(A) prohibits the imposition of sentence for the weapon when the defendant has received life without parole for the underlying offense?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

I.

Whether the PCR Court properly rejected Petitioner's claim of ineffective assistance of counsel when he found that the solicitor did not present a golden rule argument to the jury; rather, the State's argument stayed based on the facts and inferences from the testimony given at trial, and did not ask the jury to place themselves in the victim's position in considering the evidence presented?

II.

Whether the PCR court erred in failing to *sue sponte* vacate the weapons charge where Petitioner received life without parole for the underlying armed robbery conviction when Petitioner has conceded that he did not raise the issue to the PCR court for consideration?

STATEMENT OF THE CASE

During its March of 2015 term, a Greenville County Grand Jury indicted Petitioner for armed robbery and possession of a weapon during the commission of a violent crime (2015-GS-23-00238 – Count 1 & 2), 1st degree assault and battery (2015-GS-23-00241), and possession of a firearm by a person convicted of a violent crime (2015-GS-23-00240). Petitioner was also indicted for attempted murder (2015-GS-23-0239).

On May 11-12, 2016, Petitioner's case was called to trial with the Honorable Letitia H. Verdin presiding. C. Carlyle Steele, Esq., represented Petitioner on the charges and L. Mark Moyer and Walker Miller of the 13th Circuit Solicitor's Office prosecuted the case.

During trial, Petitioner pleaded guilty only to possession of a firearm by a person convicted of a violent crime, and his sentencing was deferred until the conclusion of trial.[1] At the conclusion of trial, Petitioner was convicted as indicted of armed robbery and possession of a weapon during the commission of a violent crime, and 1st degree assault and battery. He was found not guilty of attempted murder.

Judge Verdin sentenced Petitioner to imprisonment for life for armed robbery and 5 years for the weapons charge, 10 years for 1st degree assault and battery, and 5 years for possession of a firearm by a person convicted of a violent crime, with all sentences running concurrently, and with credit for time served. On May 16, 2016, the solicitor, in his discretion, dismissed an additional charge of criminal conspiracy. Petitioner timely appealed.

Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Petitioner on appeal. Appellate counsel perfected the

[1] A stipulation was read to the jury that "the defendant Steven Levon Williams stipulated and admitted that he was in possession of the revolver in evidence in this case on June 6th, 2014." (App. 290-291).

appeal in the form of an Anders[2] brief. After the required review, the Court of Appeals dismissed the appeal by unpublished opinion. *State v. Williams*, Unpublished Opinion No. 18-UP-151 (S.C. Ct. App. filed April 11, 2018). The Court of Appeals issued the remittitur on April 30, 2018.

Petitioner filed a pro se application for post-conviction relief on February 1, 2019, and raised the following claims as paraphrased by Respondent:

> 1. An illegal search and seizure occurred in obtaining the gun [found in Applicant's car after arrest], and due process required the trial court suppress the gun as evidence;
>
> 2. Ineffective Assistance in failing to call witnesses favorable to the defense;
>
> 3. Ineffective Assistance of counsel for failing to disclose Rule 5 pictures;
>
> 4. Ineffective Assistance for failing to secure a plea deal before trial when defendant faced a life without parole sentence.

(App. 430-433).

On January 14, 2020, Petitioner filed an amended return, through counsel, alleging the following:

> 1. Golden rule Violation;
>
> 2. Prosecutorial Misconduct;
>
> 3. Trial Court error in which the Judge [included] a provision where she expressed her own opinion in the charge.

(App. 462).

An evidentiary hearing was held on September 13, 2021, at the Greenville County Courthouse with the Honorable R. Lawton McIntosh presiding. R. Mills Ariail, Jr., was present and represented Petitioner, who attended virtually. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office represented the State. At the beginning of the PCR

[2] *Anders v. California*, 386 U.S. 738 (1967).

evidentiary hearing, this Court reviewed the allegations to be presented with counsel, phrasing the claims as:

> There was alleged violation of the Golden Rule, there's prosecutorial misconduct, the judge [e]xpressed her personal opinion in the final charge, the judge should have suppressed the gun, [and] also ineffective assistance of counsel for failing to call a witness, failing to get proper Rule 5 pictures and failure to secure a plea.

(App. 470).

Counsel for the State objected and asserted he had received notice of only two issues that would be presented: the Golden Rule argument and the challenge to the trial court's instruction. (App. 471). This Court resolved that the issues as reviewed at the beginning of the hearing would be heard. (App. 471).

At the close of the evidentiary hearing and in a conditional Form 4 order on September 17, 2021, this Court found Petitioner had failed to carry his burden of proof; however, the Court determined that it would allow the record to remain open for a limited time for Petitioner to present potential evidence on plea offers, if any. The Court also directed counsel for Respondent to submit a proposed order based on its ruling but noted it would allow completion of the record to ensure all matters were addressed.

A subsequent hearing was held on March 29, 2023, by video and telephone. The Court received additional testimony regarding plea negotiations. At the conclusion of the hearing, this Court reaffirmed that it is denying relief on the prior addressed claims, and then denied the remaining claim "as to the failure to relate an offer." This Court directed counsel for the State to prepare an order addressing all claims as indicated in his rulings on the record. On February 21, 2024, the PCR court issued an Order of Dismissal denying Petitioner’s application.

Petitioner, through counsel, filed a notice of appeal from the denial of his PCR action on February 26, 2024. The Petition for Writ of Certiorari and Appendix were filed with this Court on July 31, 2024.

Respondent's Return to the Petition now follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436,440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443,448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de nov*o without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will only reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR Court properly found trial counsel was not ineffective in declining to object to the State's closing argument where the solicitor did not make an improper golden rule argument; rather, the State's argument stayed based on the facts and inferences from the testimony given at trial and did not ask the jury to place themselves in the victim's position in considering the evidence presented.

Following the familiar *Strickland*[3] test, the PCR court will analyze an ineffective assistance of counsel allegation under the established "two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant." *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989)). "Under the second prong, the PCR 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.'" *Vasquez*, 388 S.C. at 456, 698 S.E.2d at 565 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Vasquez*, 388 S.C. at 456, 698 S.E.2d at 565 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

At the PCR evidentiary hearing, Petitioner testified that the solicitor made a golden rule argument when he used "you" while addressing the jury. (App. 488-489). Petitioner referenced the State's arguments at the following trial transcript pages: 370, line 4; 371, line 15; 375, line 5; and 378, line 11. (App. 488-489).[4] The PCR court concluded that the referenced comments did not

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[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] Petitioner also identified a portion of the trial judge's instruction as supportive of a golden rule argument. (App. 490, citing Trial Tr. at App. 406). First, the judge's instructions to the jury are not argument. Second, the instruction is an ordinary instruction defining "express malice"

constitute that of a golden rule argument, finding that trial counsel was not ineffective for not objecting to the comments made.[5]

Upon review of the record, and the arguments and testimony presented at the evidentiary hearings, the PCR court properly concluded that the argument referenced reflected only that the solicitor used a neutral reference to "you" as describing an individual generically. (App. 555, referencing App. 370-371 and 375-378). The solicitor did not ask the jurors to put themselves in the victim's shoes, as such, the PCR court concluded that the argument did not constitute a golden rule argument.

Petitioner contends that the PCR court erred in failing to find that the following statements suggest that the jurors place themselves in the victim's shoes in violation of the golden rule argument:

> I've been-everybody's been in stressful situations. It can be difficult to remember the exact details every time in a stressful situation, especially when your focus is on something else.

(Petition at 7, *See* App. 373, lines 10-15).

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which does not ask the jurors to place themselves in the place of the victim. The PCR court found this portion of Petitioner's argument failed to show support for his ineffective assistance claim.

[5] Both the initial issue and the issue regarding the State's argument as presented at the hearing were a bit unclear as to precise basis for the complaint. (*See* App. 551-552). However, the questions posed to trial counsel at the evidentiary hearing indicated to the PCR court that Petitioner was attempting to raise an ineffective assistance of counsel claim based on a failure to object. Consequently, the PCR court evaluated the claim as one of ineffective assistance of counsel. (App. 555). In the petition, Petitioner also addresses the claim as an ineffective assistance of counsel claim, and Respondent continues to address the allegation as such. Respondent, however, notes that to further address any potential intent to raise a freestanding claim, the PCR court also provided, "To the extent that Petitioner would argue that he was not attempting to raise an ineffective assistance claim, but a freestanding claim of prosecutorial misconduct, Applicant's issue would be barred by the *Simmons* doctrine and S.C. Code § 17-27-20(b)." (App. 559). That particular ruling has not been challenged on appeal.

> Someone says give me your money…. then you point a gun in my face and you say give me your fucking money. You know it's serious. You know it's real. And it's two against one in that little space.

(Petition at 7, *See* App. 375, lines 5-11).

> If Juan has a guilty conscience or a guilty mind, why would you go find law enforcement?

(Petition at 8, *See* App. 384, lines 17-20).

Petitioner now argues that the State had not presented substantial evidence to support the referenced comments, and that Petitioner was prejudiced by the comments given that whether the victim was attacked by Petitioner was a determination that rested on Petitioner's credibility. (*See* Petition at 8).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566 (quoting *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166).

Trial counsel testified that he was aware of what constitutes a golden rule argument, essentially one that "ask[s] the jurors to put themselves in the place of the victims," but that he did not view the argument as such and if he had, he would have raised the issue. (App. 501-502, *see also* 505-506). Specifically, trial counsel testified that "most of the instances where the solicitor used the word you, he was talking about a perpetrator as an example rather than a victim." (App. 502).

A good guide to what constitutes a "golden rule" argument may be found in how our Supreme Court has defined the argument:

> Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially. A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.

State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added) (citations omitted). A "'Golden Rule' type argument" is one asking the jury "to 'speak for' the victim ... to set aside their impartiality and, instead consider the evidence from the subjective position of the ... victim." *Brown v. State*, 383 S.C. 506, 516-17, 680 S.E.2d 909, 915 (2009). In essence, though precise wording may differ, the concern remains whether the perspective is skewed by an argument such that emotion displaces impartiality. *See Von Dohlen v. State*, 360 S.C. 598, 610, 602 S.E.2d 738, 744 (2004) (acknowledging that an argument asking to view the evidence from the victim's position may not be labeled a "Golden Rule" argument, but if it appeals to emotion and affects impartiality, it is a "Golden Rule" argument and improper).

The PCR court, in light of the above guidance, reviewed the complained of portions[6] of the argument and found that counsel was not deficient in failing to raise an objection. The portions of the State's closing argument identified include:

> "I don't know if you noticed this picture .... you want to rob a place that has money. It doesn't necessarily have to be a lot of money but you want an easy target" and continues in the scenario with references to "you want" "you know" or "You had a gun."

(App. 370, lines 4-11).

> . . . I'm kind of trying to break this down in the simplest terms I can for you is that if you caused injury to another person during the

[6] To fairly assess the complained of portion, the argument must be considered in context, and not just the immediate context, but in context of the entire trial record. *Reese*, 370 S.C. at 38, 633 S.E.2d at 901. The PCR court considered such context when evaluating the portions cited by Petitioner.

> commission of a robbery, you have committed assault and battery in the first degree.

(App. 371, line 13-18).

> . . . Someone says give me your money. I'm not just going to hand over my money. But you pull out the stun gun, which you're not going to bring out, then you point a gun in my face and you say give me your fucking money. You know it's serious. You know its's real. And it's two against one in that little space.

(App. 375, lines 5-11).

> . . . After you just committed a robbery, you probably don't want to be on the main roads. It makes sense you want to take back roads, which they did towards Steven Williams' house.

(App. 378, lines 11-15).

Notably, as identified by the PCR court, these arguments in large measure do not involve the victim, but what the robbers likely thought. *See Von Dohlen* v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (defining a "golden rule argument" "in which jurors are urged to place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective."). The PCR court found that those arguments do not and could not constitute a golden rule argument as it references perspective on the robber's behalf, not the victim's.

The PCR court also analyzes the portion of the argument identified on App. 375 which refers to the victim not wanting to give up the money. The comment does not ask that the jury place themselves in the referenced position, but simply describes the scenario using a generic "you" based on the facts and inferences from the testimony, more specifically, the victim's testimony. Such a reference is not improper as it never veers from objective consideration of the evidence. *See Von Dohlen*, 360 S.C. at 612-613, 602 S.E.2d at 745-746 ("golden rule arguments urg[e] the jury to subjectively analyze a case solely or primarily from the victim's view point" and essentially encourage "jurors to abandon their impartiality"). Further, the argument is squarely based on the victim's testimony:

> Q: … you said he pulled the gun on you and said, give me the fucking money. What happened after that?
>
> A: After that, I tried to go back to the building because they tried to push me back. I was in the middle of the building. And I decided to give the money because he put the gun on me, in my face.

(App. 299).

Essentially, the argument goes to the credibility of the victim's testimony which supported that the money was given over to the robbers - a point that the solicitor is certainly entitled to make. *See State v. Busse*, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023) ("A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."); *see also Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."); *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (a solicitor's argument "should stay within the record and reasonable inferences to it"). Notably, this is a logical and limited response to the defense's argument in closing.

The defense had indicated to the jury in the opening statement that there was some sort of "beef" between Young and the victim. (*See* App. 124). In cross-examination of the victim, the defense had the victim acknowledge that he never called the police, and essentially challenged why the victim gave chase rather than calling the police. (*See* App. 321). The victim explained he did not have his cell phone, and he did not want the robbers to get away. (App. 321-322). In closing, the defense emphasized that the victim admittedly did not call the police and posited "if these events had occurred the way Mr. Cabrera said they occurred he wouldn't have done that" but would have called the police. (App. 359-360).

In response, the State argued: "Why would Juan not call 911? He was just robbed at gun point, beat on the head with a gun, hit with a stun gun, kicked in the back and he was in fear for his life, and he was mad." (App. 368). The solicitor continues to justify Juan's actions in response to the defense by reasoning that Juan had no information to give law enforcement other than that he was attacked by two black males in a black Mercedes, so he followed them hoping to see a tag number or a specific indicator to provide to law enforcement. (*See* App. 368-369). In other words, the State argued that the victim was logically and reasonably fearful and decided to give up his cash against his will even though he still gave late chase attempting to stop the two men. The State later made the neutral reference to "you" simply as underscoring the credibility of the testimony, again, merely arguing the facts of record and the logical reaction to the events as related in the testimony. The comments made by the solicitor did not manipulate or misstate the evidence and much of the State's alleged objectionable content was responsive to the opening and closing summation of the defense. *See United States v. Young*, 470 U.S. 1, 13, 105 S.Ct. 1038, 1045, 84 L.Ed.2d 1 (1985) ("the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole").

Petitioner argues apparent prejudice by concluding that the jury was skeptical of the victim's story considering he was found not guilty of attempted murder. However, Respondent submits the contrary is true. Jurors are presumed to have followed the law as instructed, and their verdict simply underscores the confidence in Petitioner's convictions. *See State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). The trial court instructed the jurors that their decision was to be made based on "only the testimony which has been presented from this witness stand, any exhibits which have been made part of the record in the case, and any stipulations of counsel." (App. 392, lines 6-9). The overwhelming eyewitness testimony, corroborating and

circumstantial evidence against Petitioner was heavy, and supported a finding of guilt on the charges which Petitioner was convicted, thus reducing the likelihood that the jury's decision was influenced by argument.

Critically though, for purposes of this analysis, a careful review of the argument, in context, does not lead to finding there was an appeal to emotion or any encouragement to abandon impartiality. Consequently, Petitioner has failed to show a golden rule argument at all; thus, there could be no ineffective assistance in not interposing an objection on the basis of an improper, golden rule argument. The PCR court properly determined that Petitioner has failed to carry his burden under *Strickland*. 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."). Certiorari review is not warranted.

II. The PCR court did not err in failing to *sue sponte* vacate the weapons charge where Petitioner received life without parole for the underlying armed robbery conviction when Petitioner has conceded that he did not raise the issue to the PCR court for consideration.

Petitioner contends that the PCR court erred by failing to vacate Petitioner's sentence for possession of a weapon during the commission of a violent crime when he was convicted and sentenced to life without parole for the underlying armed robbery charge. *See* S.C. Code Ann. § 16-23-490(A) (explaining that under this statute the "five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime"). However, Petitioner concedes this matter was not raised in his PCR action and the issue goes unaddressed by the PCR court. (*See* Petition at 10). Therefore, the issue is not only procedurally barred but also could only be without merit where the issue was never placed before the PCR judge for consideration.

Petitioner relies on the holding in *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023) in an effort to have this unpreserved issue heard. (Petition at 10). In *Plumer,* the Court extended the exception in prior precedent and announced that "when a trial court imposes what the State concedes is an illegal sentence, the appellate court may correct that sentence *on direct appeal or remand* the issue to the trial court even if the defendant did not object to the sentence at trial and even if there is no real threat of incarceration beyond the limits of a legal sentence." 439 S.C. at 351, 887 S.E.2d at 137 (emphasis added). The thought was to avoid "the inevitable *by requiring the appellant to file a post-conviction relief action* or petition for writ of habeas corpus." *Id* (emphasis added). *Plumer* references the issue as raised via direct appeal. There is no precedent addressing whether a petitioner raising the issue for the first time on appeal of the dismissal of his PCR action may fall under some exception. *See State v. Johnston*, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 ("identify[ing] two exceptional circumstances warranting consideration of an appellant's improper sentence for the first time on [direct] appeal.").[7] A petitioner seeking review of the sentence through a PCR appeal is in a substantially different position.

In the PCR appeal process, if certiorari is not granted, there will be no opportunity for an appellate court to rule on the issue. Indeed, finding the issue procedurally barred would be not only proper but plainly warranted under well-established procedural rules. *See, e.g., Plyler v. State*, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (finding issued raised for the first time in a petition for writ of

[7] "The *Johnston* court recognized that if it unyieldingly enforced PCR as the only avenue of relief, there was a real threat that appellant would remain incarcerated beyond the legal sentence due to the additional time it would take to pursue such a remedy." *State v. Vick*, 384 S.C. 189, 202 682 S.E.2d 275, 282 (Ct. App. 2009). "Accordingly, the court determined that exceptional circumstances warranted a remand for resentencing." *Id*.

certiorari was not available for review because "th[e] issue was neither raised at the PCR hearing nor ruled upon by the PCR court"); *Moses v. State*, 442 S.C. 263, 271, 898 S.E.2d 174, 178 (Ct. App. 2024) ("Softening preservation rules for Moses' claim would be tantamount to employing the plain error rule" which this jurisdiction does not follow"). However, because Petitioner has used his "one bite of the apple" in post-conviction relief, notably with the assistance of counsel and an evidentiary hearing to present his case, he now would face potential procedural bars in raising a successive application.[8] Therefore, Respondent does not assert a procedural bar or waiver; rather, Respondent submits that this Court could grant certiorari, dispense with further briefing and vacate the five-year sentence pursuant to S.C. Code § 16-23-490(A).[9]

[8] While the sentencing issue may be a valid in light of the statute, there is no prejudice to Petitioner at all – he is serving a life sentence. However, addressing the issue now prevents another action and additional resources from being expended. Notably, this issue is very narrow. Such an exception does not translate to any issue lest such action undermine all procedural preservations rules.

[9] Petitioner was also convicted and sentenced to five-years for possession of a firearm by a person convicted of a violent crime. (App. 584). No issue has been raised regarding that separate sentence and Respondent solely addresses the weapons charge as Count 2 of the armed robbery indictment under S.C. Code Ann. § 16-23-490 (A).

CONCLUSION

Based on the foregoing reasons, Respondent respectfully submits the Court should deny certiorari review on Question I, and grant on Question II, dispense with further briefing and vacate the five-year sentence pursuant to S.C. Code § 16-23-490(A).

Respectfully submitted,

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December 16, 2024

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