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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Honorable J. Derham Cole, Circuit Court Judge

KARLITA DESEAN PHILLIPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-001346

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred in holding that counsel was not ineffective for failing, on several occasions, to object to improper closing argument by the solicitor?

STATEMENT

Petitioner was indicted at the May 2014 term of the Abbeville County grand jury for using a minor to commit a felony and accessory before the fact to murder. App. 760-63. Her case was called for trial on July 20, 2015, before the Honorable Frank R. Addy, Jr., and a jury. App. 1. Patricia Bolen and Janna Nelson represented Petitioner. App. 1. Solicitor David Stumbo and Yates Brown represented the state. App. 1.

Trial Facts and Procedural History

On March 25, 2013, Tavarious Settles shot and killed Jamil Phillips, the son of Dale Phillips, Sr. and Martha Phillips, while Jamil was attempting to enter his home after returning from work. App. 251; 546-48. When police arrived, they found fresh cigarette butts left in a nearby wooded area near tire tracks. App. 200, l. 8 – 201, l. 7. Other witnesses told police they believed that a light-colored car was involved in the shooting. App. 345, ll. 16-23. Detective Nick Marshall learned through witnesses that Petitioner, Dale Phillips, Jr.'s wife, drove a similar looking vehicle to the one thought to be driving away from the scene. App. 240-43. Marshall was also made aware of some difficulties between Petitioner and Dale, Jr.

Marshall went to Petitioner's apartment with another investigator from SLED. App. 348. There, they saw Petitioner's car, a light-colored Toyota Camry, parked out front. App. 349, ll. 14-19. They noticed fresh mud on the wheels and side of the car. App. 349, ll. 24-25. The two eventually spoke with Petitioner, who, after waiving *Miranda*[1], prepared a written statement denying any involvement in the shooting, stating that she did not go to Abbeville that night, that she had no knowledge of the shooting, and that no one had borrowed her car that night. App. 353, l. 14 – 354, l. 7.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Tavarious Settles was arrested a few days later due to his involvement in a second, unrelated murder. App. 556, ll. 8- 24. The DNA taken from him after this arrest was matched to DNA found on the cigarette butts outside of the Phillips' home. During an interview with police, Settles denied killing Jamil but alleged that Petitioner offered him money to commit the murder. App. 557, ll. 7-21. He further told police that his friend committed the murder and framed him by planting his cigarette butts. App. 559, ll. 8-19.

Petitioner was arrested for using a minor to commit a felony. She again waived *Miranda* and gave a second interview to police. App. 467, ll. 15-22. There, she admitted that she knew Settles through her daughter and that she had told her daughter she wanted Dale, Jr. dead. App. 470, ll. 9-18. She also told police she allowed Settles to use her vehicle the night of the shooting. App. 470, ll. 19-25. She admitted that she had talked to someone about "jumping" Dale, Jr., and thought that her daughter may have asked Settles to commit the murder. App. 479, ll. 9-12.

The next day, she was interviewed again. In this interview, she told police that she had only let her car be driven to the store on the night of the murder and had never asked Settles to commit murder or go to Abbeville on that night. She also denied driving Settles to Abbeville or going there herself. However, she gave a written statement where she said she "took him to house" and "got the ball rolling." App. 473, l. 23 – 476, l. 16.

Three days later, Petitioner provided an additional written statement, where she said that she went to the store, gave her daughter a driving lesson, and washed her car on the night of the murder. App. 496, l. 17 – 499, l. 3. She insisted that both she and her car were in Abbeville the night of the murder. After writing that statement, and after the SLED agent interviewing her pointed out a number of inconsistencies, she prepared a fourth and final written statement. App. 502, l. 9 – 504, l. 17. In that statement, she said that Dale, Jr. had broken into her apartment, and

in response, she asked Settles to beat him up, gave him directions to Dale, Jr.'s house, and let Settles borrow her car. *Id.*

At trial, two of Settles's cousins and an ex-girlfriend alleged that Petitioner and Settles were engaged in a sexual relationship at the time of the murder. App. 435, ll. 6-14. Ashanti Polk, the ex-girlfriend, testified that Settles told her he was cheating with Petitioner and had shot Jamil after a friend drove him to the house. App. 444, ll. 4-25. There was also evidence presented that Petitioner, as Dale Jr.'s wife, was the beneficiary of two different life insurance policies on Dale Jr., one worth $500,000, and another worth $25,000. App. 512; 519. There was also evidence that Petitioner renewed the smaller life insurance police several months after she and Dale, Jr. separated, but other evidence suggested that she had done this every year. App. 519, ll. 11-17, 520, ll. 14-22.

Settles testified as a state's witness. App. 546. He admitted that he shot and killed Jamil, and that he was intending to kill Dale, Jr. App. 547, l. 19 – 548, l. 12. He said this crime was at Petitioner's request and that the two had been in a sexual relationship. App. 547, ll. 3-7. He further testified that Petitioner offered to pay him $13,000 for the murder. App. 548, ll. 17-18.

During closing arguments, the solicitor made several statements that drew no objections from trial counsel. These statements included:

- "the Judge is going to instruct you…that when you go back and you reason together as 12 people as the consciousness of this community in Abbeville County, you'll reason together and you will ultimately decide on a verdict in this case," App. 594, ll. 8-12.
- "…there is absolutely no question what the truth is in this case," App. 594, ll. 17-18.

- "I'm going to ask you to go back in that jury room and reason, 12 minds coming together as one, and come back with a verdict that speaks the truth that Karlita Phillips is guilty," App. 596, ll. 5-8.
- "Now, do you think that Ms. Martha Phillips would have been any less distraught if that had been Dale, Jr. laying on that porch?" App. 595, ll. 22-24.
- "It's a nightmare either way, folks. As I said before, we don't have the opportunity…to snap our fingers and wake up from this nightmare. But what we do have the opportunity to do here today is to at least have a dawn of a new day for this family where the court part of this is behind them and they can focus on healing and grieving the loss of Jamil." App. 595, l. 24 – 596, l. 5.

Petitioner was convicted of both offenses. App. 626. Judge Addy sentenced her to life imprisonment for accessory before the fact to murder and fifteen (15) years' imprisonment for using a minor to commit a felony. App. 639. On direct appeal, the Court of Appeals affirmed in an unpublished opinion.

Post-Conviction Relief Proceedings

Petitioner timely filed the present application for post-conviction relief (PCR). App. 643-49. After being appointed counsel, Petitioner twice amended the application to raise several other grounds. App. 669-88; 691. Among these amended allegations was ineffective assistance of counsel, based on, "Failure to object to the solicitor's references to 'truth,' to his comment about [Petitioner] seeking a life insurance policy on the victim, and to his reference to the 'community' of Abbeville County during closing argument." App. 682-85. An evidentiary hearing was held on

the application on August 19, 2024, before the Honorable J. Derham Cole.[2] Ashley A. McMahan represented Petitioner. Zachary W. Jones represented the state. App. 693.

At the hearing, trial counsel Patricia Boland was asked on cross-examination why she had not objected to several different statements made by the solicitor in closing arguments. App. 729-30. Boland testified that she had no memory of why she did or did not object, other than saying "I remember this being an issue in South Carolina case law, but I don't remember specifically why I didn't object, no." App. 730, ll. 6-8.

The PCR court denied relief and dismissed the application with prejudice. App. 735-58. The PCR court found the allegation that trial counsel should have objected to the solicitor's numerous mentions of "the truth" to be "meritless." App. 754. The PCR court reasoned that "immediately after using the phrase 'seek the truth,' the solicitor expressly acknowledges the reasonable doubt standard in the very next sentence." App. 753. It further found that isolated mentions of "the truth" are not harmful, and trial counsel was not ineffective for failing to object to them. App. 754.

The PCR court further found that trial counsel was not ineffective for failing to object to the solicitor's statements that the jury was the "consciousness of the community." App. 754. While it recognized that the "evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence," the PCR court, relying on *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), found that the solicitor's "brief, isolated reference to the 'community in Abbeville County' was plainly within the scope of such legitimate subjects of comment," and "not an attempt to play on the passions or prejudices of the jury." App. 754-55. This petition follows.

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[2] Petitioner believes the Honorable J. Derham Cole, *Jr.*, presided, however this is not clear from the transcript, the public index, or the signed order of dismissal.

ARGUMENT

The PCR court erred in finding that trial counsel was not ineffective for failing to object to several improper statements during the state's closing argument.

A reasonable attorney in trial counsel's position would have objected to the numerous improper closing arguments made by the solicitor.

To prevail on a PCR action for ineffective assistance of counsel, a petitioner must establish both that his trial counsel was deficient, and that deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 386 S.C. 562, 566, 698 S.E.2d 629, 631 (2010). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting *Strickland*, 466 U.S. at 695).

A closing argument is proper *only* if it is contained to the evidence presented at trial, or reasonable inferences that can be drawn from that evidence. *Washington v. State*, 440 S.C. 550, 564, 891 S.E.2d 668, 675 (Ct. App. 2023). A solicitor may argue their own version of the evidence and comment on how much weight the jury should give certain evidence but not to the extent that the argument overcomes a prosecutor's ultimate duty, "to see justice done, not to convict a defendant." *Id.* at 564, 891 S.E.2d at 676 (citing *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010)). "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices." *Id.* (quoting

Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). For this reason, it is "generally improper for the prosecutor to accuse defense counsel of fabricating a defense or to otherwise denigrate defense counsel." *State v. Parker*, 391 S.C. 606, 614 n.3, 707 S.E.2d 799, 803 n.3 (2011) (citation omitted)). And "it is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *United States v. Young*, 470 U.S. 1, 8 (1985) (quoting ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)).

Certain types of improper arguments are made frequently enough that they have been addressed by courts on numerous occasions. For example, "golden rule" arguments, or arguments that ask the jury to place themselves in the victim's position, have been universally condemned. *See generally, e.g., Van Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004); *State v. White*, 246 S.C. 502, 144 S.E.2d 481 (1965). Arguments where the solicitor invokes his status as a government attorney to win over credibility with the jury are also improper. *State v. Northcutt*, 372 S.C. 207, 222-23, 641 S.E.2d 873, 881 (2007) (solicitor's closing was improper and reversible when, *inter alia*, he told the jury that he "expects the death penalty"); *Fortune v. State*, 428 S.C. 545, 547, 837 S.E.2d 37, 38 (2019) ("My job is to present the truth," "if you look in the…Code of Laws…I have to say what the truth is"); *Young*, 470 U.S. at 18-19.

Likewise, "community conscience" arguments often encourage jurors to "send a message," and are improper. *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) ("community conscience" arguments can create an "us v. them" plea that "can have no appeal other than to prejudice by pitting 'the community' against" the defendant (quoting *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985)); *Bigner v. State*, 822 So.2d 342, 352 (Miss. Ct. App. 2002). The solicitor's closing must be "carefully tailored" to avoid the

biases of jurors. *See State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). While the solicitor "may strike hard blows," he may not "strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In this case, the solicitor made several arguments that trial counsel should have known were improper. Trial counsel objected to none. *First*, the solicitor told the jury, "the Judge is going to instruct you...that when you go back and you reason together as 12 people as the *consciousness of this community* in Abbeville County, you'll reason together and you will ultimately decide on a verdict in this case." "Community conscience" arguments are improper. *Strickland*, 142 F.3d at 359; *Westbrook*, 754 F.2d at 1238; *Binger*, 822 So.2d at 353. The point of such an argument is to place the jury and solicitor on the same team and pit them against the defendant on the other. The solicitor is telling the jury that they are *the conscience* of *their* community: Abbeville County. This evokes imagery of home and has the effect of telling the jury that the peace of their home has been disrupted by this defendant, and therefore, they should send a message to this outsider. Reading between the lines, it can also be seen how the solicitor is putting the jury on his side; the jury would be well aware that the solicitor represents Abbeville County, too. It is simply a more indirect way of saying 'you and I are on the same side, I want to keep your home safe, that defendant is a threat to your safety." The solicitor's argument was improper, and trial counsel should have objected to it.

The PCR court's reliance on *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), to reach the opposite conclusion was misplaced. In that case, this Court was asked to determine whether a trial court should have granted a mistrial resulting from a solicitor's improper argument. *Id.* The *Durden* Court, for some reason, did not have a full record of the solicitor's argument. *Id.* at 91-92, 212 S.E.2d at 590 ("It is difficult for this Court to delicately evaluate the

impact of the argument complained of, because we do not have before us the full argument or the evidence, and do not know in what overall context the argument was made"). All that was known to the *Durden* Court was the arguments made by the defense counsel at trial. The defense counsel's arguments were, "His argument to the effect that this jury is obligated to serve notice on others and what they do in this case will serve as a deterrent to others. And his argument that if they turn every man loose simply because you are afraid of convicting an innocent man, you're not doing your job." *Id.* at 91, 212 S.E.2d at 590.

The PCR court cited a block quote from *Durden* for the proposition that arguments regarding the "needs of the community" are not automatically improper. There are two problems with this approach. For one, the block quote pulled from *Durden* was not a holding of that Court, it was itself a block quote citation to 23A C.J.S. *Criminal Law* § 1107. *See Durden*, 264 S.C. at 92, 212 S.E.2d at 590 (quoting *id.*). The *Durden* Court's decision did not adopt this rule; rather, it simply held that the appellant had not met the "burden of proving that the appellant did not receive a fair trial." *Id.* at 93, 212 S.E.2d at 591. The Court did not say whether this was because of the C.J.S. "rule," because of some other un-cited rule, or because the Court was given a bare-bones record. *See generally, id.* Secondly, *Durden* was decided in 1975. Since then, numerous courts have come to hold that "community consciousness" arguments are improper. *Strickland*, 142 F.3d at 359; *Westbrook*, 754 F.2d at 1238; *Binger*, 822 So.2d at 353; *cf. also, Washington v. State*, 13 S.E. 131 (Ga. 1891); *Ferguson v. State*, 49 Ind. 33 (1874); *State v. Evans*, 183 N.C. 758, 111 S.E. 345 (1922). *Durden*, therefore, provides no support for the PCR court's decision.[3]

[3] Further, as one justice on the *Durden* Court pointed out, "There is abundant persuasive authority from other jurisdictions indicating that the latitude allowed a prosecutor in arguing before a jury is not nearly so broad as indicated by the text in 23A C.J.S. *Criminal Law* § 1107, quoted in the opinion of Mr. Justice Littlejohn, and there are numerous decisions holding arguments similar to that allegedly made by the prosecutor in this case to be improper." *Durden*,

Second, the solicitor made several references to "the truth," which also went unchallenged. The word "truth," when spoken to a jury in this context, has a special and insidious connotation. Telling the jury to seek "the truth," can have the effect of, in the jury's mind, reducing the state's burden of proof. *See State v. Beaty*, 423 S.C. 26, 46, 813 S.E.2d 502, 512 (2018) (instructing trial courts to abandon jury charges that instructed juries to find the truth). In one instance, the solicitor told the jury, "...there is absolutely no question what the truth is in this case." In another, he said, "I'm going to ask you to go back in that jury room and reason, 12 minds coming together as one, and come back with a verdict that speaks the truth that Karlita Phillips is guilty." By telling the jury that there was an objective "truth" to be found and that he was the one advancing it, the solicitor simultaneously "lessen[ed] the jury's sense of responsibility...," *cf. State v. Thomas*, 287 S.C. 411, 412, 339 S.E.2d 129, 129 (1986), and placed a heavy burden on the jury to reach the solicitor's preferred, "correct" verdict. These arguments were also improper, and trial counsel should have objected to them.

Third, the solicitor made frequent appeals to the jury's emotions by bringing up issues related to how Martha Phillips and family had been affected by the shooting, information that has absolutely no place in (the guilt phase, at least) of a criminal trial. For example, the solicitor, near the end of his closing, played a 9-1-1 call for the jury, and stated "Now, do you think that Ms. Martha Phillips would have been any less distraught if that had been Dale, Jr. laying on that

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264 S.C. at 93, 212 S.E.2d at 591 (Bussey, J., concurring; citing *Emerson v. State*, 90 Ga. App. 323, 82 S.E.2d 822 (1954), and *State v. Phifer*, 197 N.C. 729, 150 S.E. 353 (1929)). Rather, Justice Bussey believed the proper standard was that articulated in the ABA guidelines, which at the time read "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." *Id.* at 94, 212 S.E.2d at 591. This standard has since been adopted by the appellate courts of this state. *See, e.g., Washington*, 440 S.C. at 564, 891 S.E.2d at 675 ("A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices" (quoting *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166)).

porch?" He continued, "It's a nightmare either way, folks. As I said before, we don't have the opportunity...to snap our fingers and wake up from this nightmare. But what we do have the opportunity to do here today is to *at least have a dawn of a new day for this family where the court part of this is behind them and they can focus on healing and grieving the loss of Jamil.*" Respectfully, the Phillips' plight, while certainly sympathetic, is entirely without relevance to the jury's sworn task—determining whether the state had proven its case beyond a reasonable doubt. Repeatedly making these emotional appeals to the jury instead requests that they focus on things other than their oath. The solicitor is not asking the jury to view the evidence and reach a just verdict. He is asking them to ignore the evidence and give "a dawn of a new day" to the Phillips family, so that they can "focus on healing."[4]

In *Northcutt*, this Court vacated a death sentence because the solicitor, during his penalty-phase closing argument, had draped a large black shroud over the crib of a deceased infant. 372 S.C. at 223, 641 S.E.2d at 881. This Court found this action was prejudicial enough to warrant reversal, despite the "brutality of the crime and the fact that Appellant himself *asked for the death penalty.*" *Id.* at 223, 641 S.E.2d at 882 (emphasis added). It is further worth noting that this improper appeal to the emotions of jurors was during the *penalty* phase of a death penalty trial, where the state is permitted to make a host of arguments and present a host of evidence that is never admissible during the guilt-determining phase of criminal trials. *Id.*; *id.* at 220, 641 S.E.2d at 880 (permitting penalty phase admission of letter from defendant's wife stating she "ha[d] no

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[4] The implication here is that the jury should punish Petitioner, to give the Phillips family "a new day." References to punishment in this form are also improper for an entirely different reason. *See Phifer*, 197 N.C. 729, 150 S.E. at 354 ("The state ought not to rely upon a sacrificial alter for the observance or enforcement of its laws"). Any implication to the jury that they should punish a defendant for breaking the law runs the risk of turning an impartial jury into a "vigilance committee and mob." *Id.* (quoting *Ferguson*, 49 Ind. at 34).

sympathy for him"); *see also, e.g., Payne v. Tennessee*, 501 U.S. 808 (1991) (permitting victim impact evidence in the penalty phase of a death penalty trial).

Relatedly, in *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009), this Court found trial counsel ineffective for failing to object to a solicitor's closing argument, in which he said, *inter alia*, "...when you go back in that jury room, you speak up for [child victim]. We can never put her back to where she was before this abuse occurred. But we can make sure that the perpetrator is punished. So when you go back in that jury room...speak up for [child victim]." *Id.* at 512, 680 S.E.2d at 912 (alterations in original). This Court found that the solicitor's advocacy on the child victim's behalf "amounted to an impermissible 'Golden Rule' type argument." *Id.* at 516, 680 S.E.2d at 915.

Like the solicitor in *Brown*, the solicitor here used several appeals to emotion in an effort to have the jury feel the Phillips' pain, which amounts to a Golden Rule argument. The solicitor's arguments regarding the "nightmare" that the Phillips' were experiencing, and his request that the jury return a guilty verdict so that the Phillips' could "focus on healing" was improper. Trial counsel should have objected.

Trial counsel's failure to object to improper closing argument has been repeatedly held to constitute deficient performance. *See, e.g., Brown*, 383 S.C. at 516, 680 S.E.2d at 915; *Vasquez*, 388 S.C. 447, 698 S.E.2d 561. And, as this Court has held, "arguments of this kind can rarely be harmless." *Fortune*, 428 S.C. at 559, 837 S.E.2d at 45. That is especially true here, where the state's key piece of evidence was testimony from a convicted murderer who was, at the time of his testimony, facing an additional murder charge. The evidence in this case is not the sort of "overwhelming evidence" sufficient to overcome trial counsel's deficient performance. *See Brown*, 383 S.C. at 518, 680 S.E.2d at 916. If not for the solicitor's improper comments, there is

a "reasonable probability," *Strickland*, 466 U.S. at 695, that the jury, faced with a trial where the strongest piece of evidence is the self-serving word of a multi-time murderer, would not have convicted Petitioner.

Accordingly, trial counsel rendered ineffective assistance of counsel to Petitioner by failing to object to the solicitor's improper remarks. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to permit fuller briefing on the issues presented.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2026.