

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

W. CHANDLER NORVILLE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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QUESTION PRESENTED

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

ARGUMENT

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

A. Even if the “Golden Rule” argument issues are not preserved, this is a suitable case to excuse this relatively minor procedural default.

Respondent asserts that Petitioner’s challenge to the solicitor’s “Golden Rule” argument is unpreserved because it was not specifically presented to the PCR court. Return at 15; Petition for Writ of Certiorari at 11-12. Even if the state’s assertion is accurate, this Court has frequently recognized its ability and willingness to excuse minor procedural defaults in certain PCR cases. This case presents such a circumstance, and this Court should consider the merits of Petitioner’s arguments.

“[B]ecause the United States Constitution’s Sixth Amendment guarantee to a defendant’s right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party’s procedural shortcoming...to prevent this Court from remanding claims of ineffective assistance of counsel....” *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). The reason that this Court will sometimes excuse procedural defaults in PCR cases specifically is “the tension between the rights at stake in PCR proceedings and the application of traditional procedural requirements for the presentation and preservation of issues.” *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017); *see also McCullough v. State*, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995) (“Although the error was not raised to and ruled on by the PCR judge, we find it necessary to vacate the order and remand this matter to the circuit court to issue an order addressing its decision....”).

If Petitioner's arguments about the solicitor's use of "Golden Rule" arguments¹ in his closing argument are unpreserved, this is a suitable case for this Court to excuse that relatively minor procedural default. First, Petitioner presented several related arguments to the PCR court regarding the solicitor's closing argument. Therefore, Petitioner's instant "Golden Rule" arguments were not wholly unrelated to the arguments that Petitioner presented below. The PCR court already had to review the solicitor's closing arguments in full. Second, trial counsel had no independent recollection regarding her reasons for not objecting to any part of the solicitor's closing argument. App. 729, l. 4 – 730, l. 8. Therefore, it would have been wholly futile to question her further about every single improper line in the solicitor's closing. No other evidence would have been presented to the PCR court. It further follows that this is not a case where this Court would need to remand to the PCR court for the taking of new evidence. *Contra Mangal*, 421 S.C. at 101 n.10, 805 S.E.2d at 567 n.10 ("If we were to excuse the procedural default for failing to present this claim to the PCR court, it would be necessary to remand to the PCR court for a hearing because the PCR court was not given the opportunity to make factual findings as to the reasonableness of this strategy....").

Petitioner was sentenced to life imprisonment. This appeal is very likely her final opportunity to vindicate her right to effective counsel before losing the chance to do so forever. *Cf. generally, Coleman v. Thompson*, 501 U.S. 722 (1991) (federal *habeas* courts will not

¹ Petitioner's assertion that trial counsel was ineffective for failing to object to the solicitor's "community consciousness" argument is preserved, and Respondent does not contest this fact. Thus, it bears mentioning that "community consciousness" arguments and "Golden Rule" arguments are very similar. *See State v. Daniels*, 401 S.C. 251, 258 n.2, 737 S.E.2d 473, 476 n.2 (2012) (Toal, C.J., concurring in result) (for a majority of the Court) ("The trial court's instruction that the jury is 'acting for the community' is dangerous, and has all the earmarks of a "Golden Rule" argument."). The similarities between what Petitioner presented to the PCR court and what she argues now provides another reason that this Court should consider Petitioner's petition on the merits.

consider issues that state post-conviction relief courts did not consider on state law procedural grounds). Because trial counsel cannot provide a strategic reason for failing to object, and because the Appendix before this Court already provides a complete record of the solicitor's closing argument, this Court has "a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). For these reasons, even if Respondent is correct, and part of Petitioner's arguments to this Court are not preserved, this Court should consider their merits.

B. The solicitor's closing argument was improper.

Respondent asserts that trial counsel was not ineffective for failing to object to the solicitor's several references to "the truth," and his community consciousness arguments because both arguments were proper. This assertion is incorrect.

References to "the truth" are disfavored because "[t]hese phrases could 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 the jury believes best serves its perception of justice." *State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). The effect of telling the jury to search for the truth is that it "may diver the jury from its obligation...to determine whether the state has proven the defendant's guilt beyond a reasonable doubt." *Id.* "As an abstract concept, '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." *See United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994).

"Community conscience" arguments are also disfavored because they create an "us v. them" plea that "can have no appeal other than to prejudice by pitting 'the community' against"

the defendant. *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998). Telling the jury to “act for the community carries the same connotation and effect” as an improper “golden rule” argument. *Daniels*, 401 S.C. at 258 n.2, 737 S.E.2d at 476 n.2 (Toal, C.J.). Thus, telling the jury to act to protect their community is an “appeal to the personal biases of the jury” which constitutes improper argument. See *Van Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004).

Respondent asserts that the solicitor’s closing arguments were proper. First, the state insists that the solicitor’s reference to “the truth” was followed up by the solicitor’s correct statement of the reasonable doubt standard, and thus did not lessen the state’s burden of proof. Return at 17-18. Second, the state asserts that “the solicitor’s ‘brief, isolated reference’ to the jury as the consciousness of the community was permissible under *State v. Durden* [264 S.C. 86, 212 S.E.2d 587 (1975)].” Return at 18. Both assertions are erroneous.

First, the solicitor’s reference to the correct standard of beyond a reasonable doubt does not change the fact that he was, in essence, arguing to the jury that they should abandon their role—determining solely whether the state presented sufficient evidence to convince them beyond a reasonable doubt that Petitioner was guilty of the charged offenses—and instead solve the crime themselves. See *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506. It matters not whether or not the solicitor recited the proper standard; the solicitor suggested to the jury, on several occasions, that the objective truth was his, rather than Petitioner’s, narrative. Petition for Writ of Certiorari at 11.

Second, the solicitor’s references to the “consciousness of the community” are improper. For one, as stated in Petitioner’s petition, the state’s and PCR court’s reliance on *Durden* is misplaced. *Id.* at 9-10. The *Durden* Court did not even have a record of the solicitor’s arguments

before it. 264 S.C. at 91-92, 212 S.E.2d at 590. Further, numerous other courts have held such arguments improper. *See, e.g., Strickland*, 142 F.3d at 359; *Bigner v. State*, 822 So.2d 342, 352 (Miss. Ct. App. 2002); *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985). Respondent accuses Petitioner of relying on “a smattering of other jurisdictions” that are not binding on South Carolina courts, *see* Return at 18, but such community conscience arguments *have* been condemned by South Carolina courts; for example, by Chief Justice Toal, writing for a majority of this Court in *Daniels*. 401 S.C. at 258 n.2, 737 S.E.2d at 476 n.2. In fact, Chief Justice Toal stated that such arguments have “all the earmarks of a ‘Golden Rule’ argument.” *Id.* “Golden Rule” arguments are undoubtedly improper in South Carolina courts. *Van Dohlen*, 368 S.C. at 609, 602 S.E.2d at 744.

For these reasons, the arguments made by the solicitor in closing argument were improper. Trial counsel was deficient for failing to object thereto.

C. Petitioner has shown prejudice.

Finally, the state asserts that Petitioner cannot satisfy the prejudice prong of the ineffective assistance analysis because “the evidence against Petitioner was ‘overwhelming.’” Return at 18. However, this is not one of the “rare cases” where there is overwhelming evidence of guilt.

To establish prejudice, Petitioner must show that, “but for counsel’s errors, there is a reasonable probability the result would have been different.” *Martinez v. State*, 304 S.C. 39, 41, 403 S.E.2d 113, 114 (1991). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). “In *rare* cases, using ‘overwhelming evidence’ as a categorical bar to preclude a finding of prejudice is not error.” *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018) (emphasis

added). But, for evidence to be “overwhelming...the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability...the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Weldon v. State*, 436 S.C. 69, 82, 870 S.E.2d 183, 189 (Ct. App. 2021). “Additionally, the strength of the state’s evidence should be viewed in light of trial counsel’s errors such that there ‘is no reasonable probability [counsel’s errors] contributed in any way to [the applicant’s] convictions.” *Id.* (quoting *Martin v. State*, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (alterations in original)).

Respondent asserts that the evidence against Petitioner was overwhelming in the following ways: (1) witness Settles testified that he killed Phillips at Petitioner’s behest; (2) Settles’s testimony that Petitioner drove him to the crime scene was corroborated by his DNA being discovered on cigarette butts at the crime scene and partially corroborated by tire marks;² (3) there was mud on Petitioner’s car; (4) Petitioner and Dale Phillips, Sr., were going through a contentious divorce, and Petitioner was the beneficiary of two life insurance policies on Dale Phillips, Sr.; and (5) Petitioner gave several inconsistent statements to police, eventually admitting that she sent Phillips to beat Dale up. Return at 18-19. None of these pieces of evidence are the type of overwhelming evidence contemplated by the law.

To be “overwhelming...the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability...the factfinder

² As Respondent recognized, the SLED expert who testified at Petitioner’s trial could not conclusively determine whether Petitioner’s car left the tire marks found near the crime scene. Return at 3; App. 318.

would have had a reasonable doubt' cannot possibly be met." *Weldon*, 436 S.C. at 82, 870 S.E.2d at 189. None of the five pieces of evidence pointed to by the state meet this standard. For one, the only direct evidence that Petitioner asked Settles to *kill* anyone, rather than fight them, comes from Settles's testimony alone. Frankly, it is difficult to imagine a witness with greater credibility problems than Settles. *This was not even the first time Settles had murdered someone.* While there is certainly overwhelming evidence that Petitioner asked Settles to go *fight* Dale Phillips, Sr., the *only* evidence that she asked Settles to *kill* Dale—an essential element of accessory before the fact to murder—came from the testimony of a sixteen-year-old serial murderer. That is not "something conclusive." *Weldon*, 436 S.C. at 82, 870 S.E.2d at 189. Therefore, Petitioner has demonstrated prejudice.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for Writ of Certiorari, this Court should grant certiorari and reverse.



W. Chandler Norville
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of July, 2026.