

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County  
Court of Common Pleas  
L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2012-213665

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**RECEIVED**

MAR - 4 2014

**S.C. Supreme Court**

RANDY ELDERS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **ISSUES PRESENTED**

- I. Is there evidence of probative value in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for advising Petitioner to plead guilty to two charges and proceed to trial on the remaining four charges, where trial counsel articulated a valid and well-reasoned strategy, Petitioner admitted he wanted to plead guilty to the charges for which he had committed, and there is overwhelming evidence of Petitioner's guilt for all charges?
  
- II. Is there evidence of probative value in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for failing to object to the solicitor's closing argument, where trial counsels testified that the passages in question were not objectionable, the comments were indeed not objectionable, and there is overwhelming evidence of Petitioner's guilt?

## STATEMENT OF THE CASE

Petitioner was indicted during the June 2005 term of the Richland County Grand Jury for Carjacking, Armed Robbery, two counts of Kidnapping and two counts of Assault and Battery with Intent to Kill (2005-GS-40-3540 through -3546). He was represented by Stacey Rowell (formerly Owings), Esquire, and April Sampson, Esquire. On February 17, 2006, Petitioner proceeded to a jury trial before the Honorable James W. Johnson, Jr. After pre-trial motions, Petitioner elected to forgo a trial on two of his charges and entered guilty pleas to Carjacking and one count of Assault and Battery with Intent to Kill. Sentencing on these two indictments was deferred until the conclusion of the trial on Petitioner's four remaining charges. Following a jury trial on the remaining charges, Petitioner was convicted as indicted of both counts of Kidnapping and Armed Robbery, as well as the lesser included offense of Assault and Battery of A High and Aggravated Nature. Judge Johnson sentenced Petitioner to twenty years imprisonment for Carjacking, thirty years imprisonment for Armed Robbery, thirty years imprisonment for each count of Kidnapping, and ten years imprisonment for the lesser included Assault and Battery of a High and Aggravated Nature, all to run concurrently, with a consecutive fifteen year term of imprisonment for Assault and Battery with Intent to Kill.

A notice of appeal was filed and an appeal perfected on Petitioner's behalf, challenging the four charges on which he proceeded to trial. Petitioner was represented on appeal by Robert W. Mills, Esquire. Following the submission of briefs, the South Carolina Court of Appeals heard arguments on Petitioner's case on December 9, 2009. The Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion filed January 28, 2010. State v.

Elders, 386 S.C. 474, 688 S.E.2d 857(Ct. App. 2011). The Remittitur was issued February 17, 2011.

During the pendency of the appeal, Petitioner filed a timely application for post-conviction relief on August 23, 2006, challenging the two charges to which he had pled and did not appeal. In this application, Petitioner asserted that he was being held in custody unlawfully based on claims of ineffective assistance of counsel, violations of due process, and the right to appeal all cases. On February 5, 2007, Respondent filed a Return and Motion to Dismiss without Prejudice, citing Petitioner's pending direct appeal.

On December 17, 2010, Petitioner filed a second application for post-conviction relief challenging the four charges on which he had proceeded to trial and been convicted. In this application, Petitioner asserted the following grounds for relief:

1. Ineffective assistance of counsel
  - a. "Council [sic] failed to adequately inform the Applicant of the applicable law relating to all of his charges, Failure to investigate."

Respondent made its Return and Motion to Withdraw its proposed Order of Dismissal without Prejudice on January 30, 2012, requesting an evidentiary hearing be held. An evidentiary hearing was convened on May 24, 2012, at the Richland County Courthouse before the Honorable L. Casey Manning. Petitioner was present and represented by Tristian M. Shaffer, Esquire. Respondent was represented by Assistant Attorney General Robert D. Corney of the South Carolina Attorney General's Office. At the start of the hearing, Petitioner submitted a supplemental brief with fifteen additional allegations of which Respondent had no notice; Respondent objected to these amendments, citing a lack of notice, but proceeded forward with the hearing. Petitioner testified on his own behalf and presented testimony from trial counsels

Stacey Rowell and April Sampson. Judge Manning denied and dismissed Petitioner's application for post-conviction relief by written Order dated and filed November 19, 2012.

Petitioner filed a Petition for Writ of Certiorari on October 16, 2013. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “‘any evidence’ of probative value” exists to sustain the post-conviction relief court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). This Court will affirm if there is any evidence to support the post-conviction relief court’s ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, Id.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland; supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pled guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Hyman v. State, 397 S.C. 35, 49, 723 S.E.2d 375, 382 (2012).

## ARGUMENT

- I. There is evidence of probative value in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for advising Petitioner to plead guilty to two charges and proceed to trial on the remaining four charges, where trial counsel articulated a valid and well-reasoned strategy, Petitioner admitted he wanted to plead guilty to the charges for which he had committed, and there is overwhelming evidence of Petitioner's guilt for all charges.**

Petitioner asserts that the post-conviction relief court erred in determining that trial counsels were not ineffective for advising Petitioner to plead guilty to two offenses and proceed to trial on the remaining four offenses. However, the post-conviction relief court properly determined that trial counsels were not ineffective, as the trial strategy employed was well-reasoned and valid, Petitioner admitted he wanted plead guilty to the two charges, and there is overwhelming evidence of guilt. As there is evidence of probative value in the record to support its ruling, the post-conviction relief court should be affirmed.

- A. Trial counsels were not deficient in employing a valid and well-reasoned trial strategy after numerous consultations with Petitioner,**

Petitioner contends that trial counsels were deficient because "Petitioner essentially went to trial after having admitted all of the underlying facts of the incident" and "[i]t was unreasonable of Petitioner's trial counsel to expect a jury to not find him guilty on the remaining charges after Petitioner had admitted to the events underlying those charges." PWC p. 9. However, this argument is without merit, as trial counsels articulated valid trial strategy adopted after numerous discussions with Petitioner.

"There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. [W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be

deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.' The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Accordingly, we must be wary of second-guessing trial counsel's tactics." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (internal citations omitted).

In the present case, the post-conviction relief court found that "[trial counsels'] recommendation that [Petitioner] plead guilty to two of the charges while proceeding to trial on the remaining four charges was an objectively reasonable, valid and well-designed trial strategy." App. pp. 647. The post-conviction relief court elaborated that [trial counsels' were] able to credibly and clearly testify to a sound, well-designed trial strategy in advising [Petitioner] to plead guilty to two of the charges, while proceeding to trial on the remaining four charges. [Petitioner] was advised of that strategy and, according to the credible testimony, was 'on board' with it. He was fully aware of his ability to plead guilty to all six charges 'straight up' with no guarantee as to sentencing, or to otherwise proceed to trial on all six charges, but opted to follow counsel[s'] strategy knowing full well that the decision was ultimately his own to make." App. pp. 647.

The post-conviction relief court's findings are supported by probative evidence of value from the record. The record is replete with testimony from both trial counsels that the decision for Petitioner to plead to two charges and then proceed to trial on the remaining four charges was a well thought-out and carefully crafted trial strategy based on their extensive review of the case. See App. p. 524 ln. 11 – p. 525 ln. 21; p. 528 ln. 18- p. 529 ln. 7; p. 552 ln. 16- p. 554 ln. 5; p.

567 ln. 2 – p. 568 ln. 9; p. 570 ln. 20 – p. 571 ln. 12; pp. 591 lns. 7-17. Additionally, even the post-conviction relief court noted at the evidentiary hearing that this trial strategy was “an old workable theory that’s been used by a lot of people.” App. p. 525 ln. 22 – p. 526 ln. 3. Trial counsels testified that Petitioner readily admitted his involvement in the crimes for which he pled guilty and never denied his overall involvement in the incident. See pp. 544; pp. 566. Both testified that Petitioner was “on-board” and in agreement with the trial strategy following “a lot of discussion.” App. p. 589 lns. 1-8. Furthermore, trial counsels testified that there was no other viable defense to set forth at trial, as Petitioner was readily identifiable by all witnesses and left evidence directly linking him to the crime at the scene. See pp. 547 lns. 11-20. Trial counsels testified, and the record supports, that they were able to specifically draw the jury’s attention to the fact that he had pled only to the charges he had actually committed in the opening and closing arguments. See App. p. 90-93; p. 409-417. Based on the foregoing, trial counsels’ strategy of having Petitioner plead to the two offenses that he readily admitted to committing while proceeding to trial on the remaining four offenses is valid and objectionably reasonable. Therefore, the post-conviction relief court properly determined that Counsel was not deficient in regards to this allegation.

**B. Petitioner failed to establish any resulting prejudice from trial counsels’ purported deficiency.**

Petitioner argues that he was prejudiced by trial counsels’ alleged deficiency because the trial court imposed a harsher sentence than it would have if Applicant had pled guilty.

“To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, Petitioner must demonstrate that his attorney's errors had an effect on the judgment against him. A 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' In other words, he must show that 'the factfinder would have had a reasonable doubt respecting guilt.'" Edwards v. State, 392 S.C. 449, 458-59, 710 S.E.2d 60, 65-66 (2011) (internal citations omitted).

In the present case, trial counsels' credible testimony reveals that Petitioner always wanted to plead guilty to the crimes that he committed. See App. pp. 544; pp. 566. Furthermore, there is overwhelming evidence of Petitioner's guilt. In its opinion, the South Carolina Court of Appeals reviewed what it characterized as "overwhelming evidence of [Petitioner]'s guilt":

"[W]e find that the error was harmless in light of the overwhelming evidence of Elders' guilt. Both Mr. Riggs and Mrs. Riggs identified Elders as the person who put the knife to Mrs. Riggs' neck, who fought with Mr. Riggs, and who stole the Riggses' car and Mrs. Riggs' purse. Additionally, testimony by Hall corroborated the Riggses' testimony regarding Elders' involvement in the crimes. Moreover, Chris Smith and his mother, Dawn Smith, both testified that Elders confessed to stealing a car. In addition, the officer who arrested Elders a couple of days after the crimes occurred testified that he observed scratch marks on Elders' arms, hands and face, as well as a bandage on Elders' wrist, thus buttressing the testimony by Hall and the Riggses regarding the struggle between Elders and Mr. Riggs. Furthermore, a cigarette butt containing DNA that matched Elders' DNA was found in the Riggses' car, as was Elders' jacket."

Elders, 386 S.C. at 486-87, 688 S.E.2d at 864. Therefore, there is no way that the jury could have a "reasonable doubt respecting guilt" and Petitioner had failed to establish any prejudice from trial counsels' alleged deficiency. The post-conviction relief court properly determined that trial counsels were not ineffective.

**II. There is evidence of probative value in the record to support the post-conviction relief court's finding that trial counsels were not ineffective for not objecting during the State's closing argument.**

Petitioner asserts that the post-conviction relief court erred in determining that trial counsels were not ineffective for failing to object to portions of the State's closing arguments that "impermissibly appealed to the passions of the jurors, impugned defense counsel, and asserted that Petitioner was fabricating a defense and so infected the trial with unfairness as to make the resulting conviction a denial of due process." PWC p. 13. This argument is without merit, as the comments in question during the State's closing argument do not appeal to the passions of the jurors, impugn defense counsel, or infect the trial with unfairness.

**A. Trial counsels were not deficient in failing to object to the solicitor's comments during her closing argument, as the comments were not objectionable.**

Petitioner argues that trial counsels were deficient for failing to object to two passages of the solicitor's closing argument to the jury. Specifically, Petitioner alleges that the following two passages of the State's closing argument were improper:

"If this isn't smoke and mirrors, what is it? It's not an unusual offense. It's called the art of confessing error. Maybe the jury knows. They'll take responsibility just on a couple. They'll feel sorry for me. I submit, ladies and gentlemen, when he was trying to stab and kill that man and his wife, he was a monster. The art of – I'll admit to the couple so the jury will just feel sorry for me and wont totally respond for all my actions that day. App. p. 404 lns. 11-18.

"There is an old judge and it talks about a lawyer and a priest walking down the street. There is mud on one side. There is a puddle of water there and it's got this much water and the priest looked down and said, look, there is a sliver dollar. Get a stick and stir it up and the silt and mud rose up and mixed in. You couldn't see it any more. It just went muddy . . . App. p. 405 lns. 11-18.

However, this argument is without merit, as both passages are proper.

“A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744.

In its Order of Dismissal, the post-conviction relief court found the following:

First, counsel[s] w[ere] not objectively unreasonable for failing to pose an objection to any of the areas highlighted. Counsel[s] plainly testified she has a specific practice of not objecting to closing arguments unless the solicitor's comments reach a level of egregiousness or impropriety that threatens a defendant's right to fair trial. None of the statements set forth above reach close to that level; in fact, the majority of the statements complained of are not improper or otherwise objectionable as they are correct statements of the law.

App. p. 649-650. This ruling is supported by evidence of probative value in the record and should be affirmed.

At the evidentiary hearing, both trial counsels testified numerous times that these portions of the State's closing argument are not objectionable and do not rise to a level of fundamental unfairness to Petitioner. See App. p. 551 lns. 8 – 22; p. 557 ln. 9 – p. 559 ln. 4; p. 575 ln. 21 – p. 576 ln. 4; p. 594 ln. 4 – p. 595 ln. 6. Trial counsel testified that the comment regarding muddying the waters comes up in nearly every trial and that it is not objectionable. App. p. 551 lns. 8 – 22; p. 557 ln. 9 – p. 559 ln. 4. Additionally, the record shows that trial counsels anticipated these routine arguments from the State regarding “smoke and mirrors,” “muddying the waters,” and the defendant being a “monster,” as all were specifically mentioned and refuted

in Petitioner's opening argument to the jury. See App. p. 91 Ins. 4-11. Trial counsels also countered these comments during Petitioner's closing argument. See App. p. 414 ln. 25 – p. 415 ln. 8. Furthermore, the comments in which Petitioner takes issue with are proper, as they do not appeal to personal biases of the jury. Based on the foregoing, the post-conviction relief court properly determined that trial counsels were not deficient in regards to this allegation.

**B. Petitioner has failed to establish any resulting prejudice from trial counsels' alleged deficiency.**

This Court has held that reviewing courts must “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.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914-15 (2009) (internal citations omitted).

In Brown, this Court determined that “the solicitor's remarks imploring the jurors to ‘speak for’ the victim undeniably asked the jurors to set aside their impartiality and, instead, consider the evidence from the subjective position of the child victim” were impermissible and that trial counsel should have objected to such comments. Brown v. State, 383 S.C. 506, 516-17, 680 S.E.2d 909, 915 (2009). However, this Court determined that Brown did not satisfy his requisite burden of proving that there was a reasonable probability that but for counsel's deficient

performance the result of his trial would have been different.” Id. Specifically, this Court determined that no prejudice could be shown when the impermissible comments were limited in duration and there was overwhelming evidence of guilt. Id.

The present case is similar to Brown. In its Order of Dismissal, the post-conviction relief court found:

“[Petitioner] has failed to prove such a denial of due process resulted from any alleged “improper” commentary by the state in closing argument. Further, any alleged inappropriate statements were cured thereafter by the trial judge’s plain and unambiguous instruction on the law, including the fact that t[he] statements in closing argument are not evidence to be considered by the jury. Accordingly, [Petitioner] has failed to prove resulting prejudice.”

App. p. 650. The court went on to discuss the overwhelming evidence of guilt present in Petitioner’s case. App. p. 651-52. Based on this Court’s ruling in Brown, where the solicitor made a much more egregiously improper comment and this Court ruled that the petitioner had failed to prove prejudice, the post-conviction relief court’s ruling should be affirmed in the present case.

As there is evidence of probative value in the record to support its ruling, the post-conviction relief court should be affirmed.

**CONCLUSION**

For the foregoing reasons, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

MEGAN E. HARRIGAN  
SC Bar No. 100108  
Assistant Attorney General

By: *Megan E. Harrigan*  
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March 4<sup>th</sup>, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County  
The Honorable L. Casey Manning, Circuit Court Judge  
Case No. 2010-CP-40-8822  
Appellate Case No. 2012-213665

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RANDY ELDERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**

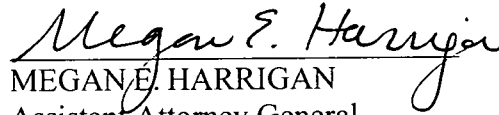
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I, Megan E. Harrigan, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of March, 2014.

  
MEGAN E. HARRIGAN  
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ALAN WILSON  
ATTORNEY GENERAL

March 4, 2014

**RECEIVED**

MAR - 4 2014

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Randy Elders v. State of South Carolina  
Appellate Case No. 2012-213665**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of Respondent's Return to Petition for Writ of Certiorari.

Sincerely,

Megan E. Harrigan  
Assistant Attorney General  
S.C. Bar No. 100108

MEH/ko  
Enclosures

cc: Carmen V. Ganjehsani, Esquire, Appellate Defense  
Trisha Allen, Victim's Services