ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

DOUGLAS L RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the solicitor's closing argument when the solicitor denied Petitioner a fair trial by directly commenting on Petitioner's constitutional right to remain silent?

STATEMENT

Indictment

On February 28, 2006, Petitioner Douglas Rice was indicted by the Anderson County Grand Jury for trafficking cocaine. App. 243 – 244.

Trial *in Absentia* and Sentencing Hearing

On December 13, 2006, Petitioner was tried *in absentia* before the Honorable Edward G. Welmaker and a jury. App. 1. Petitioner was represented by Charles Griffin, and the State was represented by Assistant Solicitor Rame Campbell. App. 1. The State advised the trial court that Petitioner had not appeared for roll call and a bench warrant had been issued on December 11, 2006. App 26, ll. 17-22 The State also advised the trial court that Petitioner had not been in contact with his attorney. App 26, ll. 23-24. Trial counsel confirmed that he had never met with his client and that he had no objection to the trial proceeding in his client's absence. App. 29, ll. 16-25. The jury found Petitioner guilty as charged. App. 152, ll. 13-16. The sentence was then sealed and filed with the clerk's office. App. 155, ll. 5-22; 245.

On January 16, 2007, Petitioner appeared before the Honorable Cordell Maddox, Jr , where Petitioner's sentence was unsealed. App. 158 – 162 Petitioner was then sentenced to twenty-five years imprisonment on the trafficking cocaine conviction. App. 245.

Direct Appeal

On June 23, 2008, Appellate Defender Kathrine H. Hudgins filed an *Anders* brief pursuant to *Anders v California*, 386 U.S. 738 (1967) on Petitioner's behalf. App. 163 – 174. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence *State v Rice*, Op No 2009-UP-454 (S.C. Ct App. filed October 8, 2009). App. 175 – 176.

PCR Application and Evidentiary Hearing

On July 27, 2010, Petitioner filed his application requesting post-conviction relief (PCR). App. 177 – 183. The Respondent filed the return on October 27, 2010. App. 185 – 188. An evidentiary hearing was held before the Honorable Cordell Maddox, Jr., on October 5, 2011. App. 189. Petitioner was represented by Hugh Welborn, and the Respondent was represented by Kaelon May. App. 189. Petitioner and trial counsel, Charles Griffin, testified at the evidentiary hearing.

Douglas Rice (Petitioner)

At the evidentiary hearing, PCR counsel asked Petitioner if trial counsel was "ineffective for failing to object to prosecutor misconduct in closing arguments because the prosecutor improperly commented on [Petitioner's] post-arrest silence?"[1] App. 208, ll. 1-4 Petitioner replied, "Upon your Fifth Amendment, you have a right to remain silent once your *Miranda* warning is given." App. 208, l 25 – 209, l. 1. Petitioner testified that he had been read his *Miranda* rights. App. 209, ll. 15-19. Petitioner acknowledged that the transcript is silent on whether he had been read his *Miranda* rights. App. 209, ll. 20-24.

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[1] The relevant portion of the closing argument follows:

> Did [Petitioner] know the stuff was there? Yes, [Petitioner] did. [Petitioner]'s in the passenger seat. As the officers testified, the dope came out of the passenger's side window. [Petitioner]'s sitting there. It's not like [Petitioner] didn't know it was there. . . . *If [Petitioner]'s innocent, Mr Griffin [trial counsel] is going to claim, then why didn't he just sit there and say man, I didn't know (sic) have nothing to do with this* You heard me ask Officer Scoggins well, did he say anything after you handcuffed him or he stopped and arrested him? The answer was no. He said absolutely nothing. *If you had been with someone and this much dope just came out the window, don't you think that you would have been hollering man, it wasn't me, I didn't do it. . .* [Petitioner] is a dope dealer . . . ."

App. 123, l. 18 – 124, l. 15 (emphasis added).

Charles Griffin (Trial Counsel)

Trial counsel maintained at the evidentiary hearing that "unless there's evidence in the record that the defendant had been Mirandized, then it is not improper to comment on post-arrest silence." App. 222, ll. 9-11 Trial counsel recalled that "there was no evidence that [Petitioner] had been Mirandized." App. 222, ll. 12-13 Trial counsel stated, "I was kind of hamstrung throughout the whole trial. . . . I didn't have his help in guiding me along as to what occurred during the - - prior to that." App. 222, ll. 14-17. Trial counsel claimed,

> If [I] had of objected to it, my objection would have fallen on deaf ears because that was not the law in South Carolina. That's not the law in the United States. I mean, they [the State] could comment on post-arrest silence if it was no in the record. If there was no evidence in the record that he'd been Mirandized, then the prosecution can comment on post-arrest silence. So any objection would have been futile.

App 224, ll 4-11.

Order of Dismissal

On January 5, 2012, Judge Maddox ruled in his Order of Dismissal that Petitioner failed to prove trial counsel provided ineffective assistance of counsel and denied Petitioner's PCR claim. App. 229 – 240. The PCR court found that Petitioner failed to prove trial counsel was "ineffective for failing to object to prosecutor misconduct in closing argument where prosecutor improperly commented on [Petitioner's] post-arrest silence." App. 238. The PCR court noted that "[t]he Constitution does not prohibit the use for ***impeachment purposes*** a defendant's silence prior to arrest or after arrest if no *Miranda* warnings were given" and cited *Doyle v Ohio*, 426 U.S. 610 (1976) and *Brecht v Abrahamson*, 507 U.S. 619 (1993) (emphasis added) App 238

Furthermore, the PCR court found "that the solicitor's closing argument must be viewed in the context of the entire record" and noted that Petitioner must prove "the Solicitor's comments so

infected the trial with unfairness as to make the resulting conviction a denial of due process." App. 238-39 (citation and internal quotation omitted). "After reviewing the entire record, [the PCR court did] not find that any comments by the solicitor so infected the trial that a new trial is warranted." App. 239. The PCR court noted that it "is not convinced that the solicitor's comments even reach the level of being improper, but certainly there is no evidence that [Petitioner] was prejudiced" because trial counsel "provided [a] rational explanation as to why he did not object and this Court accepts [trial counsel's] reasoning as to why he did not object." App. 239.

ARGUMENT

The PCR court err in finding that trial counsel provided effective assistance of counsel because trial counsel failed to object to the solicitor's closing argument when the solicitor denied Petitioner a fair trial by directly commenting on Petitioner's constitutional right to remain silent.

After the completion of the State's case, trial counsel rested without presenting any evidence to the jury App. 111, ll. 9-10; 116, ll. 13-20. In his closing argument to the jury, the solicitor stated:

> Did [Petitioner] know the stuff was there? Yes, [Petitioner] did. [Petitioner]'s in the passenger seat. As the officers testified, the dope came out of the passenger's side window. [Petitioner]'s sitting there. It's not like [Petitioner] didn't know it was there. *If [Petitioner]'s innocent, Mr Griffin [trial counsel] is going to claim, then why didn't he just sit there and say man, I didn't know (sic) have nothing to do with this* You heard me ask Officer Scoggins well, did he say anything after you handcuffed him or he stopped and arrested him? The answer was no. *He said absolutely nothing If you had been with someone and this much dope just came out the window, don't you think that you would have been hollering man, it wasn't me, I didn't do it.* . . . [Petitioner] is a dope dealer . . . ."

App 123, l. 18 – 124, l. 15 (emphasis added). Trial counsel subsequently failed to object to the solicitor's improper comment on Petitioner's constitutional right to remain silent. *See* U.S. Const. amend V (providing the right to remain silent); *see also Edmond v State*, 341 S.C. 340, 534 S.E.2d 682 (2000) (finding ineffective assistance of counsel for failing to object to the solicitor' s improper references to the invocation of the defendant's constitutional right to remain silent). Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 229 – 240; *See Strickland v Washington*, 466 U.S 668 (1984) (establishing the standard for ineffective assistance of counsel claims: a PCR applicant must show that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted) "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR 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." *Butler v State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S at 692).

Deficient Performance

In this case, trial counsel's performance was deficient, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Specifically, trial counsel failed to object to the solicitor's closing argument after the solicitor improperly commented on Petitioner's constitutional right to remain silent. App. 123, l. 18 – 124, l. 15; *See McFadden v State*, 342 S.C. 637, 643, 539 S.E.2d 391, 394 (2000) (finding ineffective assistance of counsel in a trial *in absentia* for "failing to object to the solicitor's reference to Petitioner's constitutional right to remain silent and failure to present a defense"). Trial counsel erroneously stated at the evidentiary hearing:

> If [I] had of objected to it, my objection would have fallen on deaf ears because that was not the law in South Carolina. That's not the law in the United States. I mean, they [the State] could comment on post-arrest silence if it was no in the record. If there was no evidence in the record that he'd been Mirandized, then the prosecution can comment on post-arrest silence. So any objection would have been futile.

App. 224, ll. 4-11; *Accord Griffin v California*, 380 U.S. 609, 85 S.Ct. 1229 (1965) (holding Fifth and Fourteenth Amendments forbids comment by the prosecution on the accused's silence); *State v Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987) (finding it is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right); *State v Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999) (finding the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense).

As this Court noted in *Edmond*, "[t]hese principles are rooted in due process and the belief that justice is best served when a trial fundamentally fair." *Edmond*, 341 S.C. at 346, 534 S.E.2d at 685 (citations omitted). The *Edmond* Court further noted, "The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged." *Id*

The PCR court erroneously relied on the exception presented in *Doyle v Ohio*, 426 U.S. 610 (1976) and *Abrahamson*, 507 U.S. 619, that "[t]he Constitution does not prohibit the use for ***impeachment purposes*** a defendant's silence prior to arrest or after arrest if no *Miranda* warnings were given."[2] App. 238 (emphasis added). This is because the solicitor's comments

[2] *Doyle*, 426 U.S. 610, is rooted in due process. Thus, the State cannot give *Miranda* warnings and then use a defendant's exercise of the *Miranda* rights as proof of guilt.

during closing argument were clearly not used "for impeachment purposes" since Petitioner was tried *in absentia* and trial counsel did not submit any evidence at trial. App. 116, ll. 13-20. 123, l. 18 – 124, l. 15.

Trial counsel's performance failure to object to the solicitor's closing argument when the solicitor directly commented on Petitioner's constitutional right to remain silent is not reasonable "under prevailing professional norms." *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Cf Mincey v. State*, 314 S.C. 355, 444 S E.2d 510 (1994) (finding ineffective assistance of counsel for failing to object to prosecutor's comments in closing argument). Accordingly, the PCR court erred in finding that the solicitor's comments were proper and that trial counsel "provided [a] rational explanation as to why he did not object" to the solicitor's closing argument. App 239 *See Strickland*, 466 U.S. at 687-88.

Prejudice

Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U S at 692). To prove prejudice, improper references to a defendant's silence are subject to the harmless-error analysis. *See Edmond*, 341 S.C. at 347, 534 S.E.2d at 686. In deciding whether counsel's error was harmless, the record must establish: "(1) the reference to the defendant's right to remain silent was a single reference, which was not repeated or alluded to, (2) the solicitor did not tie the defendant's silence directly to his exculpatory story; (3) the exculpatory story was totally implausible; and (4) the evidence of guilt was overwhelming " *McFadden*, 342 S.C. at 643, 539 S.E.2d at 394 (citing *State v Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996) (finding "where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the

conviction should not be reversed")).

In this case, Petitioner was prejudiced because the Solicitor's comments so infected Petitioner's trial with unfairness as to make the resulting conviction a denial of due process. App. 238; *See State v Huggins*, 325 S C 103, 107, 481 S.E.2d 114, 116 (1997) (finding the solicitor's reference to a statement not in evidence during closing argument was fundamentally unfair under the circumstances of the case where the defendant's guilt was based entirely on circumstantial evidence). The solicitor's improper comment during closing argument was not harmless for four reasons. First, the solicitor's comment was a direct and improper reference to the exercise of Petitioner's constitutional right to remain silent. App. 123, l. 18 – 124, l 15; *See Edmond*, 341 S.C. 340, 534 S.E.2d 682; *McFadden*, 342 S.C. at 643, 539 S.E.2d at 394. This is a classic example of burden shifting. *See State v Cockerham*, 294 S.C. 380, 365 S.E.2d 22 (1998) (finding reversible error where the solicitor's argument "was an indirect but unmistakenable reference to appellant's silence at trial").

Second, trial counsel committed an egregious error when he failed: (1) to object to the solicitor's improper comment; and (2) to request a curative instruction or mistrial. Consequently, the taint was not cured and this issue was not preserved for appellate review on direct appeal.

Third, the evidence of Petitioner's guilt was not overwhelming, as the State's case was based entirely on circumstantial evidence. This is evinced by the trial court's mere presence instruction to the jury and Petitioner's testimony at the evidentiary hearing. App. 145, ll. 3-12; 206, ll. 2-18; 213, ll. 1-24.

Fourth, there is a reasonable probability that the jurors used the solicitor's improper comments to insinuate that Petitioner was guilty simply because he exercised his constitutional right to remain silent. *See Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("[A]

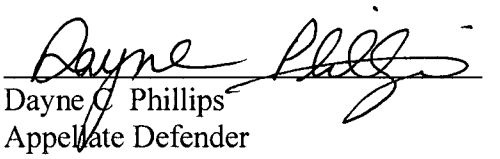
reasonable probability is a probability sufficient to undermine confidence in the outcome of trial").

Accordingly, the PCR court erred in finding trial counsel provided effective assistance of counsel because, "but for [trial] counsel's errors, there is a reasonable probability that the result at trial would have been different." App. 238-39; *Johnson*, 325 S.C. at 186, 480 S.E.2d at 735; *Strickland*, 466 U.S. at 692.

CONCLUSION

Based on the foregoing reasons, Petitioner Douglas Rice's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of June, 2012.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Kaelon E. May, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of June, 2012.

Dayne C Phillips
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of June, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013