

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable R. Knox McMahon, Trial Judge  
The Honorable Edgar W. Dickson, PCR Judge

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Appellate Case No. 2014-001868

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Richard Ratliff, ..... Petitioner,

v.

STATE OF SOUTH CAROLINA, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

QUESTION PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW .....3

ARGUMENT

    Certiorari is unwarranted where Petitioner failed to meet his burden to  
    prove counsel’s performance was ineffective in failing to object to  
    evidence. ....3

    Certiorari is unwarranted where Petitioner failed to meet his burden to  
    prove counsel’s performance was ineffective in failing to object to the  
    State’s closing argument.....8

CONCLUSION.....10

## QUESTIONS PRESENTED

1. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's strategic decision not to object to the entry of evidence thereby failing to preserve the issue for appellate review constituted deficient and ineffective performance?
2. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's strategic decision to refrain from objecting to the State's closing argument constituted deficient and ineffective performance?

## STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a Post-Conviction Relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

- 1. Certiorari is unwarranted to review whether trial counsel's performance was ineffective where probative evidence exists to support the PCR Judge's ruling that Petitioner failed to meet his burden to prove counsel's performance was ineffective in failing to object to probative and relevant evidence**

Petitioner asserts that the PCR Court erred in failing to find his trial counsel (hereinafter "Counsel") ineffective when Counsel did not object to the introduction of physical evidence found in Petitioner's bedroom, hotel room, and car under Rule 403, SCRE, and as improper character evidence introduced for the sole purpose of proving Petitioner had the propensity to commit the offenses for which he was on trial in violation of State v. Nelson. This argument is without merit.

In the order of dismissal, the PCR Judge addressed Applicant's allegation for "failure to object to improper character evidence and preserve the issue for appeal." App.p.812, Allegation (e). Pursuant to S.C. Code Ann. §17-27-80 (2003), the PCR Judge fully addressed the allegation in his "Findings of Fact and Conclusions of Law, Section (D)" as follows:

[t]his Court agrees and finds the evidence at issue corroborated the victims' stories and went directly to supporting their credibility. The personal effects here

were highly relevant to and probative of Applicant's guilt." App.p.823 (emphasis added).

### **Effective Assistance of Counsel**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance of under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "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. at 1 17-18, 386 S.E.2d T 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

### **Discussion**

Petitioner asserts that the PCR Judge erred in denying Petitioner's Application for Post-Conviction Relief (PCR) because

"Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to irrelevant and prejudicial physical evidence found in petitioner's bedroom, hotel room, and car as improper character evidence thereby failing to preserve the issue for appellate review since the state admitted the evidence for the sole purpose of proving Petitioner had the propensity to commit the offenses for which he was on trial." Petitioner's PWC, p.5.

Respondent submits that trial counsel acted competently and within the norms expected of counsel in a criminal case. Further, Respondent submits that the evidence in question is, in fact, highly relevant and probative as noted by the PCR Judge. The State introduced the evidence

not to prejudice Petitioner but to corroborate the testimony of multiple victims.

First, the State submits the evidence in question is admissible under Rule 403, SCRE, as the probative value substantially outweighs the danger of unfair prejudice. At every stage of review, the evidence in question has been found to be relevant, probative, and corroborating. At trial, Assistant Solicitor David Stumbo stated the evidence is “indeed prejudicial precisely because it’s so probative. It’s so probative because it goes to support [the victim’s] testimony as a whole.” App.p.420, ln.20-23. The Trial Judge agreed, stating that “[the evidence] is highly probative. The probative value substantially outweighs the danger of unfair prejudice . . . given the fact that there was testimony from one of the victims and three of the indictments charged.” App.p.425, ln.1-6. In its Order of Dismissal, the PCR Court found that the “personal effects here were highly relevant to and probative of [Petitioner’s] guilt, especially as they related to the solicitation charges.” App.p.823

Second, the State submits that the present case is distinguishable from Nelson as the evidence was not introduced to attack Petitioner’s character, but to corroborate the victim’s testimony and support victim’s credibility. While the opinion in Nelson does not suggest the victims even knew of the items in question, the victims in the present case provided detailed testimony regarding the items. Two victims testified that Petitioner showed them the items, while the third victim testified that Petitioner asked her to use one of the items. The trial judge correctly stated that testimony placed at issue by Petitioner’s trial counsel was “very different . . . than what was presented in Nelson.” App.p.424, ln.17-19. As noted by the PCR Judge, the evidence found in Petitioner’s bedroom, hotel room, and car are all also distinguishable from Nelson in that the evidence corroborates the stories of the victims and was introduced at trial with the purpose of strengthening the victim’s credibility. Evidence may be corroborating when

it is “supplementary to that already given and tending to strengthen or confirm it.” State v. Nelson, 331 S.C. 1, no.14, 501 S.E.2d 716 (1998). The PCR Judge correctly ruled that the evidence in question was relevant and introduced to supplement and strengthen the victim’s testimony. By citing Dyer, the Court in Nelson adopted Kentucky’s standard that “citizens . . . are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged.” Nelson at 8, 720 (quoting Dyer v. Com., 816 S.W.2d 647 (1991) (overruled on other grounds). The testimonies of the victims directly link the evidence in question to at least one crime charged.

Third, as the evidence in question is highly probative and corroborating, it was correctly admitted as a distinct part of the Res Gestae of the crime for which Petitioner was charged and convicted. Respondent also asserts, *arguendo*, that Petitioner cannot satisfy the second prong of the Strickland test because Petitioner was not prejudiced by Counsel’s performance. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001).

Accordingly, Petitioner has failed to meet his burden of proving counsel was ineffective for objecting on the grounds of relevance but not as prejudicial. As such, the petition for writ of certiorari must be denied.

**2. Certiorari is unwarranted where Petitioner failed to meet his burden to prove counsel’s performance was ineffective in failing to object to the State’s closing argument where the State’s comments were not harmful enough to affect the outcome of the trial.**

Petitioner also asserts that the PCR Court erred in failing to find his Counsel ineffective when Counsel did not object to comments made during the Solicitor’s closing argument. This argument is without merit.

In the order of dismissal, the PCR Judge addressed Applicant’s allegation for “failing to object to the solicitor’s alleged improper closing argument.” App.p.824, Allegation (f). Pursuant

to S.C. Code Ann. §17-27-80 (2003), the PCR Judge fully addressed the allegation in his “Findings of Fact and Conclusions of Law, Section (E)” as follows:

[t]his Court agrees finds the solicitor’s comments were reasonable inferences from the trial . . . [f]urthermore, this Court finds counsel offered valid trial strategy on not objecting to draw further attention to fact that sexual abuse leaves lasting scars on the victims in this particular case. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).” App.p.823 (Parenthetical information omitted).

### **Golden Rule Violations**

In a “golden rule argument,” 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. Von Dohlen v. State, 602 S.E.2d 738, 743 (S.C. 2004). In this jurisdiction, there is a longstanding framework for determining whether an improper argument warrants the reversal of a conviction:

On appeal, the solicitor’s argument will be reviewed in the context of the entire record. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). Once the trial judge has allowed the argument to stand, the accused has the burden of proving that the argument denied him a fair determination of guilt or innocence. Id. In order to constitute reversible error, it must be shown that the argument so infected the trial with unfairness as to make the resulting conviction a denial of due process.

State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901-02 (2006) overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (emphasis added).<sup>1</sup> This is a difficult standard for Petitioner to meet. “It is not enough that the remarks were undesirable or even universally condemned.” Darden v. Wainwright, 477 U.S. 168, 181 (1986). A prosecuting attorney generally has a healthy amount of leeway in making a closing argument, and

“so long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect.”

<sup>1</sup> See also Donnelly v. Christoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1975).

State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975).

### **Discussion**

Petitioner asserts that the PCR Judge erred in denying Petitioner's Application for Post-Conviction Relief (PCR) because:

“Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's improper comments during his closing argument since the comments were calculated to arouse the jurors' passions.” Petitioner's PWC, p.13.

While making his closing argument, Assistant Solicitor Stumbo instructed the jury to not only remember the faces of the three victims who offered testimony before them but also Petitioner's face. Counsel for Petitioner did not object.

Respondent submits that Counsel's decision not to object was strategic, competent, and within the norms expected of counsel in a criminal case. Further, Respondent submits that even if the Solicitor's comments constituted a “golden rule violation” then that violation was a harmless error because Petitioner cannot meet his significant burden to show the comments at issue denied him the due process right to a fair trial.

First, Counsel testified that “if I think [a comment] is bad enough to object to, I'll object to it.” App.p 784, ln.20-21. Counsel further testified that he did not believe objecting to the Solicitor's comments would “do anything more than cause a spotlight about paying attention to [the comments].” App.p 786, ln.1-2. Counsel's decision not to object to the comments was a decision strategically made to minimize the effect of the comments. In its Order of Dismissal, the PCR court took into account the “plethora of counsel's trial experience.” App.p 824. Unlike Van Dohlen, where the petitioner's counsel did not identify a strategic reason for not objecting,

Counsel for Petitioner in the present case chose not to object based on strategic reasoning.

Second, even improper comments are not sufficient enough to warrant unless the petitioner can prove prejudice. State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007) (overruled on other grounds by State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011)<sup>2</sup> (emphasis added). Thus even where a petitioner can satisfy the first prong of the Strickland test, the petitioner still bears the burden of proving that counsel's ineffective performance prejudiced the petitioner. Failure to satisfy both prongs of the test results in denial of PCR. In Von Dohlen, the court found "petitioner has shown error under the Strickland standard . . . Petitioner has not shown there is a reasonable probability that, but for counsel's error, the result of the trial's penalty phase would have been different." Von Dohlen at 598, 613, 602 S.E.2d at 746 (emphasis added).

Accordingly, Petitioner has also failed to meet his burden of proving counsel was ineffective for electing not to object to the Solicitor's closing argument. As such, the petition for writ of certiorari must be denied.

### CONCLUSION

Respondent submits this Court must deny the Petition for Writ of Certiorari. The allegation raised by Petitioner is not preserved for appellate review because it was not addressed in the PCR judge's order of dismissal and no post-trial motions were filed. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

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<sup>2</sup> The court in Byers held that "defendant adequately preserved for appellate review his motion to strike co-conspirator's hearsay testimony; overruling Rice only on that matter.

Respectfully submitted,

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By:   
ATTORNEYS FOR RESPONDENT

July 20<sup>th</sup>, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Lexington County  
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2014-001868

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RICHARD RATLIFF,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esquire  
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This 20<sup>th</sup> day of July, 2015.

  
ASHLEY HAWORTH  
LEGAL ASSISTANT