STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

MARK A. WATSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000620

PETITION FOR WRIT OF CERTIORARI

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II. The PCR judge erred by finding counsel provided effective representation where counsel failed to object to Officer Gilliam's testimony that "Junior Black" had been at the house on Norman Street on June 8, 2006, where people were smoking crack, since the State alleged that Petitioner was "Junior Black," Gilliam's testimony consisted of improper hearsay, and the drug activity on June 8th was a prior bad act which was inadmissible to prove Petitioner sold drugs on June 12, 2006. 11

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ISSUES PRESENTED

I. Did the PCR judge err by finding counsel provided effective representation where counsel failed to object to the solicitor's improper comments during closing argument that Petitioner was a "breeder" of evil and that the officers put their lives on the line to clean up the community from people like Petitioner, since the comments appealed to the personal biases of the jury and were calculate to arouse the jurors' passions and prejudices?

II. Did the PCR judge err by finding counsel provided effective representation where counsel failed to object to Officer Gilliam's testimony that "Junior Black" had been at the house on Norman Street on June 8, 2006, where people were smoking crack, since the State alleged that Petitioner was "Junior Black" and the drug activity on June 8th was a prior bad act which was inadmissible to prove Petitioner sold drugs on June 12, 2006?

STATEMENT OF FACTS

On December 12, 2007, the Richland County Grand Jury indicted Petitioner for distribution of crack cocaine, third offense. App. 363. On July 9, 2009, Petitioner's case proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. App. 1. Cameron Littlejohn represented Petitioner. Drelton J. Carson and Seth Rose represented the State. App. 1.

At trial, Officer Emmitt Gilliam, of the City of Columbia Police Department, stated that he was working undercover for the narcotics enforcement team in June of 2006 in Richland County. App. 81. Gilliam explained that on June 8, 2006, he was "doing undercover controlled buys for the City of Columbia on Norman Street." App. 81. He was fitted with video and audio equipment to record the drug buys. Gilliam claimed that when he arrived at the residence on Norman Street to conduct a drug transaction on that date, he noticed Petitioner on the front porch. App. 82, ll. 3 – 7. However, the officer purchased drugs from someone else at the house. App. 82, ll. 5 – 7. Gilliam admitted that the individual who sold him drugs that day was the focus of his undercover investigation, not Petitioner. App. 82 – 84.

Four days later, on June 12, 2006, Officer Gilliam returned to the residence on Norman Street to purchase more drugs from the same person. App. 84, ll. 1 – 14. Gilliam claimed that after the individual did not show up, an "unidentified female" inside the house told Gilliam that she could call "Junior Black" and he would sell him drugs. App. 84, ll. 1 – 14. The female allegedly told the officer that he had seen "Junior Black" at the residence "the other day." App. 84, ll. 1 – 14. Defense counsel did not object to the officer's testimony.

Officer Gilliam stated that Petitioner was the "Junior Black" who came over to the house to sell him drugs. After completing the transaction, Gilliam turned the drugs over to Officer Jackson Sheard. Gilliam wrote a description of the person who sold him the drugs that day. From Gilliam's

description, Officer Jackson compiled a six-person photographic line up. Officer Gilliam picked out Petitioner as "Junior Black," the person who sold him drugs. The drugs tested positive for crack cocaine and weighed 1.23 grams. App. 150, ll. 8 – 10.

During closing arguments, the Solicitor Carson contended:

> "Common sense tells you if you've got an officer in a hostile situation, you've got an officer in a hostile house, he's undercover. We want somebody to stick around? Lives are in jeopardy. Real lives are at stake. That officer needs to get out of that hostile house. He needs to get out that hostile area. Undercover buy, these guys are a part of this neighborhood. Officer safety first."

App. 164, ll. 1 – 9.

The solicitor continued:

> "The officers of the City of Columbia, they put their life on the line every day to protect us, to protect them, all of us. That's what they do. Gilliam did that. He put his life on the line to go make an undercover buy."

App. 165, ll. 20 – 24.

The solicitor further argued:

> "And we know what drugs do to our community. It breeds mischief and it breeds evil. It doesn't take a chemical analyst to tell you that. You know, you live in our communities. It breeds mischief. It breeds evil. And we've got a breeder in this courtroom today. It breeds mischief. It breeds evil. And I submit to you, here is the breeder."

App. 166, ll. 2 – 8.

Finally, the solicitor asserted:

> "I want you to consider, consider Agent Sheard putting his life on the line every day. Consider Agent Gilliam putting his life on the line to make our

> community safe, to clean it. Because we know what drugs do. That's what they do. They live to make out community better. Consider that. Remember what they did."

App. 166, l. 22 – App. 167, l. 3. Defense counsel made no objections to the Solicitor's closing argument.

Petitioner was found guilty and was sentenced to fifteen years' imprisonment. App. 199. Petitioner appealed his guilty plea and sentence.

A brief was filed on Petitioner's behalf pursuant to the procedure in Anders v. California, 386 U.S. 738 (1967). Petitioner was represented by Appellate Defender Kathrine H. Hudgins on appeal. After submission of the Anders brief, Applicant elected to voluntarily withdraw his appeal. App. 334. The South Carolina Court of Appeals dismissed Petitioner's appeal and the remittitur was sent on July 12, 2011. App. 334.

On February 23, 2012, Petitioner filed a PCR application. App. 201. Respondent filed its return on March 30, 2012 requesting an evidentiary hearing. App. 209. An evidentiary hearing was held before the Honorable L. Casey Manning on July 17, 2014. App. 216. Tommy A. Thomas represented Petitioner. Megan Harrigan Jameson represented the State. App. 216.

Petitioner testified at the evidentiary hearing. Petitioner explained that the solicitor made several improper comments during his closing argument about the police officers' safety in the community and the fact that the officers work to make the community. App. 230 – 231. Petitioner stated that the solicitor's comments were impermissible and prejudiced him at trial. App. 231. Petitioner also stated that defense counsel made no objections to any of the solicitor's improper comments. Because counsel did not object, the issue of whether the solicitor's comments were prejudicial and improper was not preserved for appeal. Consequently, Petitioner's appellate counsel could only file an Anders brief. App. 228, l. 7 – App. 229, l. 5.

Petitioner also explained that defense counsel failed to object to Officer Gilliam's testimony in which he stated that "Junior Black" was at the residence on Norman street on June 8th where everyone was using drugs. App. 236, l. 8 – App. 237, l. 20. Since Petitioner was arrested on June 12th and the officers thought Petitioner was "Junior Black," the testimony about Junior Black's drug activity on June 8th was an inadmissible prior bad act. App. 236, l. 8 – App. 237, l. 20. Further, defense counsel made no motion *in limine* to determine whether the evidence was admissible. Counsel, likewise, did not object to the officer's testimony about Junior Black. App. 237, ll. 2 – 20.

Defense counsel testified at the evidentiary hearing. Counsel acknowledged that Petitioner "denied that he was ever at the residence or sold crack to Officer Gilliam." App. 281, ll. 22 – 24. Petitioner wanted to go to trial because he was not "Junior Black." App. 294, ll. 14 – 19. Counsel stated that he "could have objected to" the solicitor's closing argument but chose not to. App. 285, ll. 4 – 15. Counsel thought that if he had objected to the solicitor's improper comments during closing, he did not think the trial judge would have sustained his objection. App. 299, ll. 18 – 19. Further, counsel did not consider the issue significant enough to preserve for appellate review. App. 299, l. 24 – App. 300, l. 1.

Counsel asserted that the officer's testimony about "Junior Black" being at the drug residence on June 8th and again on June 12th was not an overriding concern to the question of identity, which was Petitioner's defense at trial. App. 300, ll. 2 – 25. Further, counsel opined that he could not have kept the evidence out. App. 301, ll. 1 – 4.

Judge Manning denied Petitioner's PCR application. App. 352. The judge wrote that Petitioner had not established "any constitutional violations or deprivations that would" require [the] court to grant his application." App. 352. Further, the judge found that counsel's performance "did

not fall below the standard required and there was no resulting prejudice to Applicant from these alleged deficiencies." App. 342.

On October 10, 2014, Petitioner filed a "Motion to Alter or Amend the Judgement" pursuant to Rule 59 (e), SCRCP. App. 353. Petitioner filed "Supplement to Applicant's Motion to Alter or Amend Pursuant to Rule 59 (e)" on October 31, 2014. App. 356. Respondent filed its return on November 5, 2014. App. 365.

Judge Manning denied Petitioner's "Motion to Alter or Amend" on February 23, 2015. App. 362. The judge found "that there was no basis for altering or amending its prior ruling." App. 361. The judge wrote that the allegations were not properly before the court as they were not raised in Petitioner's PCR application or at the evidentiary hearing. App. 361.

Petitioner appealed the judge's order of dismissal. This petition for writ of certiorari follows.

ARGUMENTS

I. The PCR judge erred by finding counsel provided effective representation where counsel failed to object to the solicitor's improper comments during closing argument that Petitioner was a "breeder" of evil and that the officers put their lives on the line to clean up the community from people like Petitioner, since the comments appealed to the personal biases of the jury and were calculate to arouse the jurors' passions and prejudices, which unfairly prejudiced Petitioner.

Defense counsel should have objected to the solicitor's improper comments during closing argument that Petitioner was a "breeder" of evil and that the officers put their lives at risk to protect the community from people like Petitioner. The improper comments appealed to the personal biases of the jury and were clearly calculated to arouse the jurors' passions and prejudices.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument must not be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn there from. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> "A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a

> burden for the individual criminal defendant to bear. United States v. Monaghan, 741 F.2d 1434, 1441 (D.C.Cir.1984), cert. denied, 470U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); see also United States v. Hawkins, 595 F.2d 751, 754 (D.C.Cir. 1978) (Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), cert. denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir. 1977) ("[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community; United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.' "). Some internal citations omitted)."

An improper closing argument requires reversal when "the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on 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 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will

conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "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.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

Here, defense counsel should have objected to the solicitor's improper and unfairly prejudicial closing argument. The solicitor's closing argument appealed to the passions of the jury to find Petitioner guilty in order to protect the community. See Liberte, 336 S.C. at 654, 521 S.E.2d at 747. The solicitor's improper comments aroused sympathy for the officers' safety and prejudice against Petitioner as a dangerous member of society. Further, there was absolutely no evidence presented that the person who sold Officer Gilliam to drugs was armed or even posed a threat to the officer.

By failing to object, counsel allowed to jury to determine Petitioner's guilt based on feelings about the safety of the community and its police officers. Had counsel objected and requested a curative instruction, the jury would have been instructed by the judge to only consider the evidence presented against Petitioner at trial. Further, the issue of whether the solicitor's comments were, in fact, improper as to warrant reversal of Petitioner's conviction, would have been preserved to appellate review.

II. The PCR judge erred by finding counsel provided effective representation where counsel failed to object to Officer Gilliam's testimony that "Junior Black" had been at the house on Norman Street on June 8, 2006, where people were smoking crack, since the State alleged that Petitioner was "Junior Black," Gilliam's testimony consisted of improper hearsay, and the drug activity on June 8th was a prior bad act which was inadmissible to prove Petitioner sold drugs on June 12, 2006.

Defense counsel should have objected to Officer Gilliam's testimony that "Junior Black" had been at the drug house four days earlier and engaged in drug activity with other people at the house. The officer's improper testimony was inadmissible hearsay and prior bad act evidence, which unfairly prejudiced Petitioner at trial.

Hearsay evidence is inadmissible at trial to prove the truth of the matter asserted. Rule 802, SCRE. See Likewise, evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE. Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Rule 404(b), SCRE; see also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Where those acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Even if such evidence is clear and convincing and falls within a Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; see also State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) ("When . . . the previous alleged bad act is strikingly similar to the one for which [defendant] is being tried, the danger of unfair prejudice is enhanced.").

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on 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 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

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Here, defense counsel should have objected to Officer Gilliam's testimony that an unidentified woman told him "Junior Black" could come over to the house on Norman Street to sell him drugs. The unidentified woman was not present to testify at trial. Further, the State offered the improper hearsay evidence to show that Petitioner and "Junior Black" was the same person.

Officer Gilliam's testimony that "Junior Black" was at the house four days earlier, where people were smoking crack, was a prior bad act. The State offered the inadmissible prior bad act

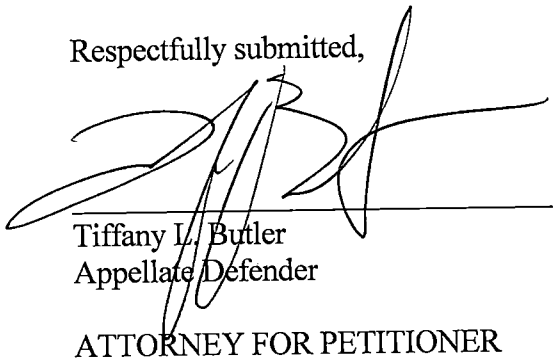
evidence to show that the "Junior Black," allegedly Petitioner, was engaged in drug activity. Because he was engaged in drug activity four days earlier, he was guilty of selling drugs on June 12th when the drug sale occurred.

Even if defense counsel had objected and the trial judge admitted the evidence, the issue of whether the evidence was proper and admissible would have been preserved for appellate review. Had counsel objected to the improper hearsay and prior bad act evidence, there is a reasonable probability that Petitioner would not have been found guilty of distributing crack cocaine.

CONCLUSION

For the reasons argued above, Petitioner Mark Watson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of January, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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L. Casey Manning, Circuit Court Judge

MARK A. WATSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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 Clay Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Mark A. Watson #306011, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 19th day of January, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of January, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.