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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Charleston County
Perry Gravely, Circuit Court Judge

Appellate Case 2016-00902

JEFFREY HERMANN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the PCR Court err in finding that Trial Counsel was not ineffective for failing to object to the Solicitor's argument that the jury should "live up to the promise of justice for all?"

STATEMENT

Ala Hassan Sarahan (hereinafter Ali) was a cocaine dealer in Charleston County who went missing in July of 2000. App. 280. For nearly eight years, the body of Ali sat in the trunk of a car covered with pluff mud on the bottom of a creek outside McClellanville. App. 280.

In 2008, Jason Cumbee (hereinafter Cumbee) was arrested on unrelated charges and ultimately confessed to knowing about Ali's murder. As the Solicitor stated, "[Cumbee] made multiple statements to the police trying to minimize his involvement." App. 286, ll. 18-21. The story Cumbee settled on only implicated himself as an accessory in Ali's Murder and instead claimed that Petitioner killed Ali. App. 464, ll. 15-18.

After speaking with Cumbee, Investigators with the Charleston County Sheriff's Office (CCSO), also spoke to two of Petitioner's ex-girlfriend, Shanna Cumbee and Melissa Hollander, and Petitioner's former roommate, Jason Hettick. These individuals indicated that Petitioner told them that he shot Ali. App. 359, l. 4—360, l. 5; App. 581, ll. 3-14; App. 639, ll. 1-15.

On November 9, 2009, Petitioner was indicted for murder by the Charleston County Grand Jury. App. 1364-1365. Petitioner was appointed counsel from the Charleston County Public Defender's Office. Rodney Davis (hereinafter Trial Counsel) was assigned to Petitioner's case. Cody Groeber also assisted Trial Counsel with the preparation and trial of the case.

Trial Counsel's strategy was to attack the credibility of the witness. App. 1312, ll. 11-14. Trial Counsel admitted that there was no physical evidence linking Petitioner to the crime. App. 1307, ll. 7-13. Trial Counsel later testified that it was a "swearing match" and the jury was "either going to believe the State's side of the story and their witnesses, or not." App. 1328, l.23—1329, l.11; App. 1333, ll. 11-14.

While awaiting trial, Petitioner was housed at the Charleston County Detention Center. Petitioner had a long-time diagnosis for Anxiety. App. 1338, ll. 15-20. While at the Charleston County Detention Center, Petitioner was prescribed 300mg of Thorazine. App. 1335, l. 19—1337, l. 1. Petitioner said that while on Thorazine he was like “a walking zombie.” App. 1335, l. 21. Several months before trial, Trial Counsel even noted that Petitioner was “heavily medicated.” App. 1311, ll. 5-7.

The case was called to trial before the Honorable Kristi L. Harrington and a jury. App. 1. Petitioner was represented by Trial Counsel and Codey Groeber and the State was represented by Benjamin Chad Simpson and Julie Cardillo. App. 1.

To counteract the side effects of the Thorazine and to be able to understand what was going on during the trial, Petitioner stopped taking the Thorazine right before his trial. App. 1097, ll. 1-6. Trial Counsel even brought this to the attention of the trial court. App. 1095, ll. 1-23.

At trial, the State also presented the testimony of a bi-polar jailhouse snitch, Bryan Korth. This snitch had an extensive criminal record that required more than three full pages of transcript to recite to the Court. App. 834, l.13—838, l. 3. The snitch told a story that Petitioner killed Ali and then stole drugs from him. App. 861, ll. 7-19. The snitch also claimed that Petitioner sought the snitch’s advice on various defenses. App. 853, ll. 9-16.

With no strong physical evidence, the State’s Closing argument consisted largely of the Solicitor repeatedly telling the jury that the State’s witnesses were telling the truth. App. 1156, ll. 4-11; App. 1159, ll. 7-11; App. 1164, 12-13; App. 1171, ll. 7-10; App. 1176, ll. 19-21; App. 1184, ll. 6-7. At the end of the closing argument, the Solicitor also argued the following:

Ladies and gentlemen, in the months myself and Julie have spent preparing for this trial a thought has come up time and time again. Perhaps

it's a little cheesy, but it's true. And that's that our country makes a promise. **Our country has an aspiration and it's a promise** a lot of us remember from saying the pledge of allegiance and **that's justice for all. It's a promise.** We, even the most basic knowledge of history knows that we have failed time and time again as a country to live up to that promise but yet people still flock to these shores because it's our aspiration and it's our goal. We're different because we shoot for that...So the State, **your government, asks you to live up to that promise** in maybe a small way but in a very real and a very important way. The remains of Ali Sarhan set in a trunk in the bottom of a river for eight and a half years. The last year and a half they've been in a cardboard box. **Live up to that promise. Live up to the promise of justice for all, even the lowest among us.** I hope this doesn't offend anyone, but certainly a disabled Iraqi immigrant lonely, living in an R.V. **deserves that promise. Live up to that promise, ladies and gentlemen. Find the defendant guilty of murder.**

App. 1196, l. 6—1199, l.17 (emphasis added).

The jury found Petition guilty of Murder. Petitioner was sentenced to forty-five years.

App. 1284.

Petitioner appealed his conviction and the South Carolina Court of Appeals affirmed in an unpublished opinion dated April 17, 2013. App. 1285-1286.

On August 26, 2013, Petitioner filed an Application for Post-Conviction Relief. App. 1287-1292. The State filed a Return dated February 6, 2014. App. 1293-1296.

An evidentiary hearing was convened on January 19, 2016, before the Honorable Perry H. Gravely. For this hearing, Petitioner was represented by Tristan Shaffer and the State was represented by Rutledge Johnson. App. 1298.

At the hearing, Petitioner raised three primary arguments: (1) Trial Counsel was ineffective for failing to object to the passion and prejudice argument at the end of the State's Closing argument; (2) that Trial Counsel was ineffective for failing to object to the Solicitor vouching for the credibility of the witness during its closing argument; and (3) whether Petitioner

was competent to make a decision not to testify. These issues were recognized by the PCR Court. App. 1350, ll. 11-20.

At the hearing, Trial Counsel testified that he had reviewed the State's closing argument. Trial Counsel testified that he did not believe the vouching was objectionable. App. 1317, l. 22—1322, l. 25. Trial Counsel also testified that he was not sure if the end of the State's closing argument was objectionable, but that he did not object to it at the time. App. 1324, l. 9—1325, l. 24.

Petitioner argued that the case was decided on credibility of the witnesses; therefore, the vouching for witnesses and the improper passion and prejudice argument may have prejudice Petitioner. App. 1340, l.15—1345, l. 16. Petitioner further argued since the case was solely based on credibility the Court could not find overwhelming evidence of guilty. App. 1341, ll. 3-8.

The PCR Court denied the PCR application in a ruling from the bench. App. 1350, l. 23—1352, l.19. The PCR Court also found overwhelming evidence of guilt. App. 1353.2-14. The Court, then, issued a formal order that was filed on March 30, 2016. App. 1355-1363. This appeal follows.

ARGUMENT

I. The PCR Court erred in finding that Trial Counsel was not ineffective for failing to object to the Solicitor's argument that the jury should "live up to the promise of justice for all."

Relevant Facts

The grand finale of the State's closing argument was the following appeal to the passion of the jury:

Ladies and gentlemen, in the months myself and Julie have spent preparing for this trial a thought has come up time and time again. Perhaps it's a little cheesy, but it's true. And that's that our country makes a promise. **Our country has an aspiration and it's a promise** a lot of us remember from saying the pledge of allegiance and that's **justice for all. It's a promise.** We, even the most basic knowledge of history knows that we have failed time and time again as a country to live up to that promise but yet people still flock to these shores because it's our aspiration and it's our goal. We're different because we shoot for that...So the State, **your government, asks you to live up to that promise** in maybe a small way but in a very real and a very important way. The remains of Ali Sarhan set in a trunk in the bottom of a river for eight and a half years. The last year and a half they've been in a cardboard box. **Live up to that promise. Live up to the promise of justice for all, even the lowest among us.** I hope this doesn't offend anyone, but certainly a disabled Iraqi immigrant lonely, living in an R.V. **deserves that promise. Live up to that promise, ladies and gentlemen. Find the defendant guilty of murder.**

App. 1196, l. 6—1199, l.17 (emphasis added).

During the PCR hearing, Trial Counsel paraphrased this section explaining to him the State was arguing the following:

That in this great country of America that we as citizens have a promise a goal and an ideal to live to, and as such even if the jury disliked the victim in this case, the deceased that they should stand up for him just as equally as they would stand up for anyone else: truth, justice, the American way, apple pie and mom. Rah-rah.

App. 1324, l. 22—1325, l. 8. While recognizing the nature of the argument, Trial Counsel testified that "at the time" he did not find this objectionable. App. 1325, ll. 22-24. Petitioner then asked Trial

Counsel about *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744, 747 (1999) . App. 1325, l. 25—1326, l. 2. Trial Counsel then stated “either it was that it wasn’t objectionable or it wasn’t worth the objection.” App. 1326, ll. 17-19.

In its ruling from the bench the PCR Court noted, “in reading the record, I don’t feel like [the argument] overstepped the boundaries of a prosecutor. I think even if it’s close, in light of the testimony and the discussions about confessions and the witnesses...I don’t believe that it rose to the level that would have changed the outcome.” App. 1352, ll. 8-17. Additionally, in its formal order the PCR Court stated, “Comments by the solicitor asking the jury to live up to the promise of justice for all did not rise to the level to overstep the boundaries and incite any improper passion or prejudice on the part of the jury.” App. 1362.

Discussion

A. The Solicitor’s closing argument on the “liv[ing] up to the promise of liberty and justice for all” was improper.

As artfully stated by Judge Malcolm Richard Wilkey of the United States Court of Appeals for the District of Columbia:

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, 239 U.S. App. D.C. 275, 741 F.2d 1434, 1441 (D.C. Cir. 1984) (cert. denied, 470 U.S. 1085, 85 L. Ed. 2d 146, 105 S. Ct. 1847 (1985)) (emphasis added).

In the present case, the Solicitor's argument told the jurors to convict Petitioner so that society could "[l]ive up to the promise of justice for all, even the lowest among us." The Solicitor's comment about the past failings of our society to live up to this promise is an improper warning to the jury of how society may view the case if they did not convict. This argument is asking the jury to consider the society's need to give justice to the "lowest among us." The implication from this argument is that society would be let down if the jurors did not convict. *See State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) ("jurors are simply not to consider the opinions of neighbors, officials or even other juries"). This argument is clearly improper. *See Liberte*, 336 S.C. at 653, 521 S.E.2d at 747. ("The argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs. Such an appeal is clearly improper.").

Additionally, by asking the jury to "live up to the promise", the argument went on to implied that the jury would in some way be violating a promise or pledge by not convicting Petitioner. *Cf. Stringer v. State*, 500 So.2d 928 (Miss. 1986) (reversing a death sentence after finding the prosecutor argued that the jury made promises based on answers to questions concerning mitigations made during *voir dire*). The Solicitor's closing argument improperly tells jurors that they are failing to live up to their word if they do not vote to convict. In essence, the Solicitor is guiltling the jurors into a conviction.

Moreover, the Solicitor improperly tied the jury's sense of patriotism and the protection of American values to a guilty verdict. *See State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P.3d 838, 844 (2006) (finding a closing arguments with appeals to patriotism "unquestionably improper."). Trial Counsel even equated this argument with one for "truth, justice, the American

way, apple pie and Mom. Rah-rah." App. 1325, ll. 6-8. This would lead a juror to feel it would be un-American to vote for an acquittal.

The State argued that the Solicitor was merely urging the jury to "do their full duty." App. 1351, 20-25. This holding seems to be based on an old treatise. See *State v. Durden*, 264 S.C. 86, 212 S.E.2d 86 (1975) (quoting 23A C.J.S. Criminal Law § 1107). However, such "full duty" argument may be violate a defendant's right to due process if, as here, the prosecutor is telling the jury that their duty is to find the defendant guilty. See *United States v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999) ("It is also improper for the prosecutor to state that the duty of the jury is to find the defendant guilty."); see also, *Wilks v. State*, 49 P.3d 975, 987 (Wy., 2002) (Finding a "do your duty" argument improper because when "it is clear the prosecutor was not telling the jury that fulfillment of its duty could be achieved only through a first-degree murder conviction.").

B. Trial Counsel was ineffective in failing to object to the Solicitor's closing argument.

To prove ineffective assistance of counsel, a PCR applicant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the applicant must demonstrate that trial counsel's performance was deficient; then the applicant must demonstrate that trial counsel's "deficient performance prejudiced the [applicant] 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.'" See *Tappeiner v. State*, 416 S.C. 239, 248, 785 S.E.2d 471, 476 (2016).

The PCR Court found that Trial Counsel was not deficient because the "State did not improperly appeal to the jury's passion and prejudice. App. 1362. However, the PCR Court also found that there was no prejudice. App. 1362. The PCR Court found that Trial Counsel did not

object because Trial Counsel did not think the arguments “rose to the level of objectionable, or they were not worth the objection.” App. 1359.

The PCR Court erred in finding the Trial Counsel was not ineffective for failing to object to the Solicitor’s closing argument. As stated above, the Solicitor’s closing argument was improper. Trial Counsel specifically stated that he was willing to object during the closing argument if necessary and actually did to an argument he believed was burden-shifting. App. 1316, l. 20—1317, l. 19. Clearly there was no strategy not to object during the closing argument.

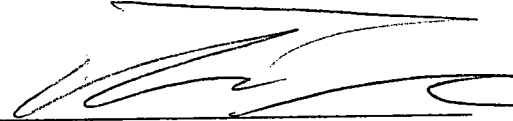
Additionally, Petitioner has been prejudiced by Trial Counsel’s failing to object. The present case was solely based on the credibility of the witnesses. App. 1333, ll. 11-14. There was no physical evidence. As Trial Counsel stated, “either going to believe the State’s side of the story and their witnesses, or not.” App. 1328, l.23—1329, l.11. Contrary to the PCR Court’s holding this is not a case of overwhelming evidence of guilt. This is a case that could have gone either way there is certainly a reasonable probability of a different result if the Solicitor had not made this improper closing argument.

In sum, Trial Counsel was deficient for not objecting, and Petitioner was prejudiced because in this case could have gone resulted in an acquittal but for the arguments made by the State.

CONCLUSION

Petitioner respectfully requests this Court grant Certiorari and consider this case.

Respectfully submitted,



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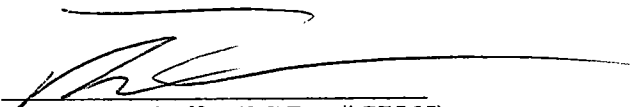
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CERTIFICATE OF SERVICE

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 Alicia Olive on the date below.



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