STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000902

JEFFREY HERRMANN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Summary of Procedural History

During its November 2009 term, the Charleston County Grand Jury indicted Petitioner Jeffrey Herrmann[1] ("Petitioner") for the murder of Ali Sarhan. Petitioner was represented by Rodney D. Davis, Esquire, and Cody Groeber, Esquire, both with the Ninth Judicial Circuit Public Defenders Office. The State was represented by Assistant Solicitors Benjamin Chad Simpson and Julie Cardillo, both of the Ninth Judicial Circuit. On January 4, 2010, Petitioner proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, Circuit Court Judge. On January 7, 2010, the jury convicted Petitioner of murder. Judge Harrington sentenced Petitioner to confinement for a period of forty-five years for the murder conviction. Thereafter, on January 15, 2010, Petitioner moved to amend his sentence. In an Order filed February 10, 2010, Judge Harrington denied the motion.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission of Indigent Defense—Office of Appellate Defense. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. <u>State v. Jeffrey Herrmann</u>, 2013-UP-159 (Ct. App. filed April 17 2013). The Remittitur was sent on May 13, 2013.[2]

[1] Petitioner's surname is spelled in a variety of different ways throughout his various proceedings, including numerous inconsistencies in the documents filed by his current counsel. <u>Compare</u> Petitioner's notice of appeal (spelling his surname "Herrman") <u>with</u> Petitioner's Petition for a Writ of Certiorari and Appendix (spelling his surname "Hermann"). Respondent's spelling of Petitioner's surname is consistent with the spelling on Petitioner's indictment and direct appeal records.

[2] Petitioner neglected to include any appellate documents in the Appendix other than the Court of Appeals' unpublished opinion.

Thereafter, on August 26, 2013, Petitioner filed an application for post-conviction relief, alleging he was being held in custody unlawfully based on claims of ineffective assistance of counsel. The State filed its Return on February 6, 2014. An evidentiary hearing into the matter was held on January 19, 2016, in Charleston County Court of Common Pleas before the Honorable Perry H. Gravely, Circuit Court Judge. Petitioner was present at the hearing and represented by counsel Tristan Shaffer, Esquire. Assistant Attorney General J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner proceeded forward on allegations that trial counsel was ineffective for failing to object to improper vouching by the State, failing to object to an improper closing argument by the State, and failing to ensure Petitioner was competent to decide whether to testify. Petitioner and trial counsel, Rodney Davis, both testified at the hearing. Following the hearing, Judge Gravely denied the application from the bench. Judge Gravely signed a formal order denying the application, which was filed with the Charleston County Clerk of Court on March 30, 2016. Petitioner filed a notice of appeal on April 29, 2016. Petitioner submitted his Petition for a Writ of Certiorari and Appendix on February 15, 2017.

Summary of Facts Adduced at Trial

In July 2000, Petitioner shot and killed the victim, Ala "Ali" Sarhan in Sarhan's car in Charleston County. The forensic pathologist determined Sarhan died as the result of homicidal violence, possibly including head trauma, chest trauma, and possibly drowning. (App. 1062). A forensic anthropologist concluded Sarhan was shot at or near his ear. (App. 999-1000).

The victim, Ala Sarhan, was an Iraqi national who was granted permission to enter the United States in 1992. (App. 295). Sarhan had lost his foot during the Iran/Iraq war in the late

1980s. (App. 297). He was granted permanent resident status. (App. 299). According to Theresa Freeman, one of Sarhan's friends in Charleston, Sarhan lived in an RV at a campground. (App. 303-04, 307-09).

Justin Hettich, a former friend of Petitioner's, testified that in 2000, he lived with Petitioner and Petitioner's then girlfriend, Shanna Cumbee ("Shanna"), for two to three months. (App. 339-41). Hettich testified he, Petitioner, and Shanna were all using cocaine and marijuana at that time. (App. 340, 345-46). Hettich indicated Petitioner got his drugs from Sarhan.[3] (App. 347-63). Hettich also testified about a conversation he had with Petitioner while he was living with Petitioner.[4] According to Hettich, Petitioner explained Sarhan had come to the house to get money Petitioner owed for an ounce of cocaine Sarhan had provided to Petitioner. (App. 353). Petitioner told Sarhan he had left the money at Jason Cumbee Jason Cumbee ("Jason")'s house, which was five to ten miles away. (App. 353). Petitioner and Sarhan went down the road towards Jason's house. During that drive, Petitioner shot Sarhan in the head. (App. 354, 357, 361-62). Petitioner subsequently put Sarhan's body in the trunk of the car. (App. 392). Hettich testified Petitioner stated he found Jason after he killed Sarhan. (App. 362). Petitioner told Hettich he drove the car to a boat ramp in the national forest, put the car in neutral, and let the car roll down the ramp into the water. (App. 363). Petitioner then got in the truck with Jason, and they left. (App. 363).

Jason testified he first met Petitioner nine to ten years before the trial. (App. 433-34). Jason indicated both he and Petitioner were using drugs at that time, and Jason learned Petitioner

[3] 1 Hettich testified he drove Petitioner to a meet with Sarhan for a cocaine purchase some time before the murder. (App. 348-52). Hettich was able to identify Sarhan in a photograph. (App. 352).

[4] During cross examination, Hettich indicated the conversation occurred sometime in September of 2000. (App. 368).

obtained his drugs from a man named Ali. (App. 434-36). Jason recalled that one afternoon, he saw Petitioner driving a black Chevrolet.[5] (App. 439-41). Jason had seen the car before on the day he met the victim. (App. 445, see App. 435-36). Jason noted at some point that afternoon, he followed Petitioner to Petitioner's home. (App. 444). Petitioner asked Jason to look in the trunk of the car, but Jason declined. (App. 444-45). Petitioner indicated he wanted to get rid of the car, and Jason suggested he put it in water. (App. 446). Jason testified he and Petitioner drove to a boat landing down a side road. Petitioner drove the Chevrolet, and Jason drove a red pickup truck. Jason testified he watched Petitioner drive the car down the ramp. Petitioner jumped out of the car halfway down the ramp. Petitioner then got into the truck with Jason, and they both drove away from the scene. (App. 447-55). Jason further testified he assisted Petitioner in getting a gun prior to that incident. (App. 456-78).

Jason acknowledged he did not tell law enforcement about the incident until eight years later. (App. 460). He offered the information after he was arrested for driving under suspension, third offense. (See App. 461-62). Also, Jason testified he provided law enforcement over seven different statements, and that not all of those statements were truthful. (App. 467-69). Jason further indicated he was not entirely truthful in his proffer statements or after them. (App. 470-72).

Shanna, Jason's sister and Petitioner's girlfriend at the time of the murder, testified Petitioner told her about the shooting sometime either at the end of 2000 or the beginning of 2001. (App. 565-67, 574-77). Petitioner told Shanna the victim came to their house one afternoon. (App. 575). The victim picked up Petitioner and made Petitioner drive the victim's

[5] Jason noted the photographs of the car in State's Exhibit 7 and 8 were consistent with the car he saw Petitioner driving that afternoon. (App. 442).

car. (App. 575). While Petitioner was driving, Sarhan reached behind his back. Petitioner pulled out his gun and shot Sarhan in the ear. (App. 575-76).

Jeremy Casselman, who worked with Petitioner in 2000, testified Petitioner had informed him about his purchase of a firearm. (App. 601-02, 604). According to Casselman, Petitioner obtained the gun because he owed someone money and the person to whom he owed the money was looking to collect. (App. 607-08).

Melissa Rose Hollander, Petitioner's girlfriend from September 2007 to end of July 2008, testified on July 21, 2008, Petitioner told her he shot and killed a man. (App. 626-28). Petitioner told Hollander he had owed the victim a lot of money, and he was not able to pay. (App. 633). Petitioner indicated it was a drug deal gone bad, and asserted he shot the victim in self-defense. (App. 633-34). Petitioner told Hollander he shot the man several times and he got rid of the evidence. (App. 634). Petitioner further indicated the body was put in a car and pushed into a creek. (App. 634). Hollander believed Petitioner stated the victim's body was put in the trunk of the car. (App. 634). Hollander also recalled Petitioner discussed going to a campground where the victim was staying, destroyed some evidence, and looked for money. (App. 636-37, 652-53, 656).

Bryan Korth, a former cell mate of Petitioner's, also testified Petitioner told him about the murder. (App. 843-48). Korth testified over the course of several months, Petitioner told him about the murder. (App. 843-48). Petitioner initiated the conversations by asking for assistance in determining how to place all blame for the incident on Jason Cumbee. (App. 843). Korth learned from Petitioner that he sold drugs, and his source for the drugs was Sarhan. (App. 844-45). Petitioner indicated people were saying he owed the victim money. (App. 848). Petitioner told

Korth that he did not owe Sarhan money, but he did not want to deal with Sarhan anymore. (App. 848). Petitioner told Korth he shot Sarhan in the head. (App. 848). Korth testified Petitioner told him:

> [Petitioner] called from the pay phone across from his house, the gas station I think on seventeen and forty-five. Ali got there with his car. Picked him up. I think he said he was heading towards, that they were both heading towards Jason's house. That he told Ali, Jeff told Ali that he was going to get something from Jason's house. And as they were driving down the road he said it was a bumpy road, he pulled a gun out, shot him in the head. He said, quotes, verbatim, whatever you want to say it, imagine driving down a bumpy road and shooting someone directly through their ear and not even making a mess. Only the window broke.

(App. 849 l. 9- 850 l. 4). Petitioner told Korth he stripped Sarhan's body and placed the body in the trunk of the car. (App. 850). Petitioner then enlisted the assistance of Jason, and Petitioner took the car to a boat landing. (App. 851-52). Korth indicated Petitioner pushed the car into the water. (App. 852). Afterwards, Petitioner and Jason went to Sarhan's camper to retrieve any evidence of a link between Petitioner and Sarhan. (App. 854-56). Korth also noted Petitioner told him about purchasing a firearm before the shooting. (App. 853-54).

Freeman had filed a missing person's report on or around July 19, 2000. (App. 311-12, see App. 330). When Jason was arrested for a driving under suspension, third offense warrant, he informed the officers that arrested him he had information about an open missing person's case. (App. 459-62, see App. 682-88, 696). Based upon the information provided by Jason, law enforcement searched for a vehicle in various waterways. (App. 715-38). They discovered a car with a North Carolina plate in a creek. (App. 738-42). The tag number indicated the vehicle belonged to Sarhan, who at the time of the search was listed as a missing person. (App. 741-42).

Law enforcement personnel retrieved the vehicle from the creek. (App. 742-54). A body was found in the trunk of the car. (App. 766-67, 940-41). That body fit the general description of the victim in regards to the height of the victim and the missing lower leg. (See App. 986-87). There was evidence of an entrance wound near the victim's ear. (App. 996-1000).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant etitioner alleges ineffective assistance of counsel as a ground for relief, he or she 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, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining

counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

There is evidence of probative value to support the post-conviction relief court's finding Petitioner failed to establish trial counsel was ineffective for failing to object to the State's closing argument.

Petitioner asserts the post-conviction relief court erred in refusing to hold trial counsel ineffective for failing to object to what he alleges was an improper closing argument by the State. See App. 1192 ln. 6 – 1194 ln. 17. Petitioner argues this portion of the State's closing argument amounted to an improper warning to the jury that it would be judged by society if it did not convict Petitioner of murder. Petitioner also asserts this argument improperly conveyed to the jury it would be violating a promise or a pledge if it were to acquit Petitioner. Finally, Petitioner asserts this argument improperly tied the jury's sense of patriotism and protection of American values to a guilty verdict. However, these arguments are without merit, as the State's closing argument was proper. Accordingly, counsel responded appropriately in not voicing an objection to the State's argument. This Court should deny certiorari, as the post-conviction relief court's denial of this allegation was proper.

In its Order of Dismissal, the post-conviction relief court rejected Petitioner's allegation, finding:

> This Court also finds that the State did not improperly appeal to the jury's passion and prejudice. To the contrary, the State's closing argument was confined to the evidence in the record and the reasonable inferences drawn therefrom. 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. (Trial Tr. pp. 1192-94). Petitioner presented no credible evidence that the Solicitor's comments infected the trial and fairness as to make the resulting conviction a denial of due process.

(App. 1362). This ruling is supported by ample evidence in the record and is not controlled by an incorrect statement of the law.

Closing arguments are a basic element of the adversarial fact-finding process in a criminal trial. Herring v. New York, 422 U.S. 853, 858 (1975). Such arguments serve "to sharpen and clarify the issues for resolution by the trier of fact in a criminal case" and provide both the prosecution and the defense with an opportunity to advocate for their respective positions, to argue for certain inferences to be drawn from the evidence and testimony presented, and to identify the weaknesses in their opponents' positions. Id. at 862. As a result, closing arguments are crucial towards achieving the ultimate objective of the adversarial system of justice in the United States, which is for the correct verdict to be reached in each case. Id.; see also Gardner v. Florida, 403 U.S. 349, 360 (1977) ("[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]").

In presenting a closing argument to the jury, a solicitor—and any other party—must confine the argument to the evidence in the record and the inferences to be drawn from that evidence. State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). However, the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (" '[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)).

Additionally, the statements of a solicitor at trial "must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing Von Dohlen v. State, 360 S.C. 598, 609 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. A prosecutor may not urge jurors to convict a defendant in order to protect community values, preserve order, or deter future law breaking. State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999) (internal citations omitted).

In considering the propriety of a closing argument, "[i]t is sometimes difficult to draw the line between proper and improper argument, but counsel's remarks must be confined within the record." State v. Edgeworth, 239 S.C. 10, 14, 121 S.E.2d 248, 250 (1961). "However, some latitude must necessarily be allowed and it must, to a large extent, be left to the wide discretion of the Circuit Judge." Id. As a result, trial courts have broad discretion in regard to both the range and scope of closing arguments. State v. Raffaldt, 318 S.C. 110, 114-115, 456 S.E.2d 390, 393 (1995); see State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument.").

When a challenge is raised to the propriety of a closing argument, the burden rests upon the party raising the challenge to establish that the allegedly improper argument rendered the trial fundamentally unfair. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). On appeal, appellate courts will review the alleged impropriety in the context of the entire record and must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of the defendant's due process rights. State v. Rudd, 355 S.C. 543,

550, 586 S.E.2d 153, 157 (Ct. App. 2003); see Patterson, 324 S.C. at 17, 482 S.E.2d at 766 ("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."). In making that determination, " 'it is not enough that the [challenged] remarks were undesirable or even universally condemned.' " Darden v. Wainwright, 477 U.S. 168, 181 (1999) (citation omitted). Critically, absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court's ruling in regard to a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("Ordinarily, a trial court's rulings on closing arguments will not be disturbed.").

In the present case, the prosecuting assistant solicitor made the following remarks during his closing argument:

> 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.
>
> Ali Sarhan was no angel. We haven't tried to hide that fact from you. Ali Sarhan came to this country and went about the pursuit of happiness in illegal ways. And it's not hard to imagine a situation where Ali Sarhan would be sitting right there and we would prosecuting him for a drug crime, and maybe he would deserve to be sitting right there. But what Ali Sarhan did not deserve was a bullet to the air at the hands of that man, Jeffrey Herrmann.
>
> 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 murderer[sic].

(App. 1192 ln. 6 – 1194 ln. 17).

The challenged portion of the assistant solicitor's remarks, amounting to approximately two and a half pages of argument, only consisted of a small portion of a closing argument that spanned fifty-five pages and was otherwise properly focused on the testimony and evidence establishing Petitioner's guilt. When considered as a whole, the State's closing argument remarks did not render Petitioner's trial fundamentally unfair. See Darden, 477 U.S. at 181 ("The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." (internal citations omitted)). See also State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984) ("[A]ppellants complain of rhetorical flourishes engaged in by the Solicitor in his summation . . . . An inelegant turn of phrase or momentary lapse of good taste will rarely constitute prejudicial error, nor does robust language necessarily inject an arbitrary factor into a trial such as this one."); cf. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."). Accordingly, the State's closing argument was not fundamentally unfair and did not deprive Petitioner of his right to a fair trial. See State v.

Greene, 255 S.C. 548, 558, 180 S.E.2d 178, 184 (1971) ("[The appellant] was not entitled to a perfect trial, only a fair one.").

Despite the propriety of the State's closing argument, particularly when reviewed in the context of the entire record as required, Petitioner argues the assistant solicitor's comments urging the jury to look past the victim's shortcomings and convict Petitioner constituted an improper argument intended to appeal to the passions of the jury. In support of this argument, Petitioner relies upon Liberte. In Liberte, the solicitor made the following remarking during his closing argument:

> Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?

Liberte, 336 S.C. at 652, 521 S.E.2d at 746. In Liberte, the solicitor urged the jury to ignore the trial court's instructions and the burden of proof carried by the State in favor of a conviction for the betterment of the community.

There simply is no comparison between the solicitor's remarks in Liberte and the comments of the solicitor in the instant case. Here, the assistant solicitor's argument urges the jury to avoid prejudices or preconceived notions against the victim because of his involvement with illegal drugs. In Liberte, the solicitor calls upon the jury to ignore any reasonable doubt they may hold, thereby shifting the burden of proof from the State to the defendant. In contrast, the assistant solicitor's argument in this case draws attention to the State's burden of proof. (App. 1185, 1187).The solicitor in Liberte invites the jury to disregard the charge given by the trial

court, whereas the solicitor in the present case urges the jury repeatedly to listen to the trial court's instructions. Petitioner's case in not analogous to Liberte.

As the prosecuting solicitor's comments were not improper, trial counsel performed reasonably by not objecting. The post-conviction relief court properly rejected Petitioner's allegation that trial counsel was deficient for failing to object.

Moreover, the post-conviction relief court also properly determined Petitioner failed to establish any prejudice stemming from this alleged deficiency. Initially, even if the State's closing argument was improper, any error is subject to a harmless error analysis and only warrants reversal if it results in actual prejudice. See Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) ("On appeal, the appellate court will 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."). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (citing State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. Id. "A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'" Byers, 392 S.C. at 448, 710 S.E.2d at 60 (citing State v. Reeves, 301 S.C. 191, 193–94,

391 S.E.2d 241, 243 (1990)). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

On appeal, courts must examine the closing arguments in conjunction with the entire record, including any curative instructions given by the trial court, and whether there is overwhelming evidence of guilt against the Petitioner such that any improper closing argument cannot be reasonably construed as having denied the petitioner due process of law. Brown, 383 S.C. at 516, 680 S.E.2d at 914-915. The relevant question before the post-conviction relief court was "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . 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." Brown, 383 S.C. at 516, 680 S.E.2d at 915 (2009). As the post-conviction relief court properly found, Petitioner cannot establish any possible prejudice from these allegedly improper comments based on overwhelming evidence establishing Petitioner's guilt.

In State v. Webb, the Court of Appeals held prejudicial remarks to a jury by a solicitor do not deprive a defendant of a fair trial so long as there is strong evidence of a defendant's guilt and any prejudicial statements are limited in its duration. 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010). In Webb, during the State's opening statement, the solicitor referred to the defendant and the case as being like "a hyena, a dog-like creature, wild, feral, a scavenger, a predator. Not terribly bright, not king of the jungle but its vicious, malevolent, and it hops on weak, easy prey,

a mean little thing. And I asked you that question because that's what this case reminds me of." Id., at 179, 697 S.E.2d at 665. During the State's closing argument, the solicitor again referred to the case and the defendant with the hyena analogy, and implored the jury to ". . . do your job and you cage this wild animal. Put him away for what he did." Id., at 180, 697 S.E.2d at 665. Defense counsel objected and the trial court overruled his objection. Id. On appeal, this court held that the solicitor's statements did not deny the Petitioner his due process rights. The Webb court held that prejudicial statements are limited in effect when the record reflects strong evidence of the defendant's guilt and such statements are limited in their use.

In the present case, the State presented overwhelming evidence of Petitioner's guilt. Several witnesses all testified Petitioner told them he killed the victim. All testified to similar versions of the sequence of events provided to them by Petitioner. Additionally, the testimony was corroborated by the physical evidence, including that the victim was shot in the ear and his vehicle was found submerged in a creek with his body in the trunk. Given such overwhelming evidence, any brief and fleeting comments by the assistant solicitor cannot be reasonably construed as having so infected the trial with unfairness as to make Petitioner's conviction a denial of due process. The post-conviction relief court properly determined Petitioner failed to establish any prejudice from trial counsel's alleged deficiency in failing to object to the closing argument, as there is no reasonable likelihood the result of the proceeding would have been different—that he would have been acquitted. As Petitioner failed to meet his burden of proof as to both deficiency of trial counsel and prejudice, the post-conviction relief court properly denied and dismissed this allegation.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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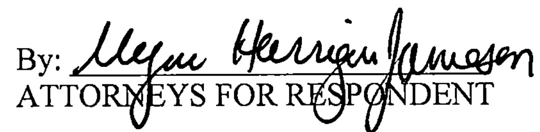
By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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Columbia, South Carolina 29211
(803) 734-3737

June 16, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUN 16 2017
S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-000902

JEFFREY HERRMANN, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

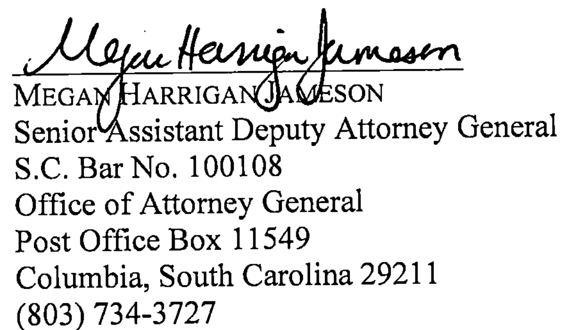
PROOF OF SERVICE

I, Megan Harrigan Jameson, 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:

Tristian M. Shaffer, Esquire
225 Columbia Avenue
Chapin, South Carolina 29036

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

This 16th day of June, 2017.



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