STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Colleton County

Honorable Michael G. Nettles, Circuit Court Judge



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GEORGE LAGRANDE BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002579

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

1.

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the trial judge's preliminary remarks to the jury that an " actual trial was a search for the truth in an effort to make sure that justice was done " which was improper and prejudicial to Petitioner Brown because it had the effect of unconstitutionally shifting the burden of proof to Petitioner Brown and which prejudice was enhanced by trial counsel himself in his opening remarks when counsel told the jury their job was to find the truth?

2.

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the admission of Co-defendant Clemmons' statement during the trial when the co-defendant did not testify which was a violation of Petitioner Brown's Sixth Amendment right to confront and cross-examine witnesses pursuant to Bruton v. United States, 391 U.S. 123 (1968)?

3.

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the Golden Rule statements made by the solicitor in his closing argument which were prejudicial to Petitioner Brown and denied him a fair trial because the statements asked the jurors to put themselves in the victim's place which destroyed the sense of impartiality of the jurors?

## STATEMENT

On November 27, 2010, Sanquenetta Blocker was working the third shift-the night shift-at the Kangaroo Station in Jacksonboro. She had just started working there in October 2010. App. 91, ll. 1 – 24; App. 99, ll. 21 – App. 101, ll. 25. Ms. Blocker was talking with Devron Brown who was one of the employees at the Church's food station in the Kangaroo store. Suddenly a man came to the register with his hands behind his back and a bandanna on his face. He told Ms. Blocker to give him the money. She believed that he had a gun. She told him she did not have any money. App. 102, ll. 1 – App. 105, ll. 23.

Ms. Blocker just wanted to leave so she and Devron Brown proceeded to the front door where another man was blocking the door. That man did not wear a mask. When they told him to let them out, the man said no. She and Devron returned to the deli area and stood there. The man with the bandanna went behind the counter and started "grabbing" cigarettes. App. 105, ll. 1 – 25; App. 124, ll. 3 – 25. The two men then left the store. There was a video from the store that captured the incident. App. 106, ll. 1 – App. 107, ll. 24.

Jeffrey Sellers was traveling with his mother and another lady that night to their home in Hanahan. They had stopped at the Kangaroo for gas. The two women went in to pay for gas and get a drink. When the gas pump never came on, Sellers looked in the store and saw something strange was going on. He saw the man with the bandanna, and saw the other man standing at the door. Sellers believed that the man at the door was part of the robbery. App. 129, ll. 1 – App. 133, ll. 13.

When the two men left the store, Sellers started following them. Then Sellers saw a Colleton County Sheriff's car approaching. At that point, Sellers began running towards the men

and grabbed both of them around the neck and threw them to the ground. App.133, ll. 23 – App. 134, ll. 23.

Sergeant Kurt Wallace was patrolling the Jacksonboro area on the night of November 27, 2010. He drove by the Kangaroo about 11:30 and saw a "lot of commotion." Someone was flagging him down so he stopped in the parking lot. App. 159, ll. 1 – App. 161, ll. 15. He saw two men leave the store and saw a "civilian" tackle them. He determined that the two men were the ones that needed to be detained because one of them looked suspicious. He detained them although he did not know any facts at that point. He read the two men their Miranda rights. App. 162, ll. 1 - App. 164, ll. 23.

After learning more of the incident, Sergeant Wallace looked for a weapon but found none. App. 165, l. 1 – App. 166, ll. 21. He then spoke with the Co-defendant Wesley Clemons individually in the back seat of a patrol vehicle. The Sergeant was wearing a body microphone that transmitted audio and video into the L-3 system. The L-3 system transmitted the interview to headquarters and the officer could download what was recorded when he returned to headquarters. Sergeant Wallace turned on the system and his microphone when he arrived at the Kangaroo. App. 171, ll. 10 – App. 173, ll. 18.

Sergeant Wallace recorded his interview with Co-defendant Clemons who said that Petitioner Brown was the "one that sent him into the Kangaroo." App. 173, ll. 19 - App. 180, ll. 20. Sergeant Wallace interviewed Petitioner Brown at the scene also and recorded his interview. App. 174, ll. 21 – 24. When Sergeant Wallace asked Brown if he had anything to do with the robbery, at first Brown allegedly told him no. Following more conversations, Brown allegedly told the Sergeant that he did have something to do with the incident but did not go into specifics. App. 186, ll. 1 – App. 187, ll. 25.

Sergeant Wallace charged both men with strong arm robbery because a weapon was not involved. App. 178, ll. 3 – 19.

On January 24, 2011, the Colleton County indicted Petitioner Brown on kidnapping and armed robbery. App. 413 – App. 423. On January 25 – 27, 2011, Brown proceeded to trial before the Honorable Perry Buckner and a jury. Brown was represented by Harris Beach, and the state was represented by Ben Shelton. App. 1.

In his preliminary remarks to the jury before they were sworn, the trial judge stated:

> It's not like C.S.I. and Cold Case and those shows that you watch on television where people walk out and go in a big fancy lab with white coats and they run a test and they say: Ah, that's the person who did it. It doesn't work like that, ladies and gentlemen. That's for entertainment. And this---an actual trial is not for entertainment. It's a search for the truth in an effort to make sure that justice is done between the parties before the court.

App. 63, ll. 22 – App. 64, ll. 5.

The following day after the jury was sworn, the judge gave his preliminary charge to the jury. App. 71, ll. 14 – App. 72, ll. 13. During this preliminary charge, the judge told the jury:

> Now, ladies and gentlemen, while all those things may be true at times, an actual trial, unlike a television show, unlike C.S.I. or Cold Case, an actual trial is not for entertainment. An actual trial is a fundamental part of our democracy. It is a search for the truth in an effort to make sure that justice is done between the parties that are before the court. Searching for the truth and making sure that justice is done is often slow.

App. 74, ll. 1 – 24.

Defense counsel made no objection. App. 74, ll. 23 – App. 75, ll. 2. Shortly after, in his opening statement to the jury, defense counsel stated:

> You've got a hard task in front of you today. You have to, as the judge said, find the truth. That's what verdict means. It means to speak the truth.

App. 96, ll. 13 – 22.

During the testimony of Sergeant Kurt Wallace, he testified about his interview with the Co-defendant Clemons. The recording of the interview taken at the scene with the Sergeant's microphone and the L-3 system was marked as State's Exhibit 2. When the solicitor began to question Sergeant Wallace about Clemons' statement, defense counsel said that he would object "to this." Counsel began to say: "The testimony is ---." The trial judge stopped counsel and told the attorneys to approach. A bench conference was held off the record. The solicitor then proceeded to ask about the audio and video of Brown's interview. Sergeant Wallace stated that he had viewed the audio and video of Brown's interview and the audio of the interview with Co-defendant Clemons, and the recordings were a "fair and accurate depiction of what was said and what transpired." State's Exhibit 2 was then moved into evidence without objection. App. 171, ll. 19 – App. 175, ll. 8.

The judge asked defense counsel if there was an objection to state's Exhibit Number 2. Counsel said: "No, Your Honor." App. 175, ll. 1 – 19. A short while later before the recording as State's Exhibit 2 was published to the jury, the solicitor said that he wanted to 'go back to the interview with Wesley Clemons." He asked the sergeant again about his interview with Clemons. He asked if the sergeant had been abrasive or forceful to which the sergeant said that Clemons was cooperative. State's Exhibit 2 was then published to the jury without an objection by defense counsel.[1] App. 178, ll. 20 – App. 179, ll. 24.

At one point, the solicitor stopped the recording and asked Sergeant Wallace who Clemons was referring to in his statement. Sergeant said Clemons was referring to George Brown. There was no objection by defense counsel. More of the recording was played. Again,

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[1] The Court reporter did not transcribe the statements of Brown and Co-defendant Clemons into the record. App. 379, ll. 22 – 25.

the solicitor stopped the tape and asked again who Clemons was referring to when he said: "You're supposed to be covering with a shirt." The sergeant said Clemons was referring to George Brown. No objection was made by counsel. Finally, a third time after more of the recording was played, the solicitor asked Sergeant Wallace who Clemons was referring to when Clemons said that "he was the one that sent me in there." Sergeant Wallace testified that Clemons was referring to George Brown. There was no objection by defense counsel. App. 179, ll. 23 – App. 181, ll. 3. The co-defendant Wesley Clemons did not testify at trial. App. 2.

During his closing argument to the jury, the solicitor said:

> But what you didn't see—you weren't able to be eye-to-eye with him this close. You weren't a single woman in that store at eleven-thirty at night and the only other employee in that store an eighteen year old young man. Think of the fear that gripped her. What does he represent? That he has a gun.

There was no objection. App. 252, l. 9 – App. 253, ll. 19.

Again, later during his closing argument, the solicitor told the jury:

> Again, we see it through the prism of the video. We weren't there. We don't know the fear. They testified to the fear.

No objection by defense counsel. App. 255, ll. 2 – 4.

Again the solicitor told the jury:

> Do not be swayed by the officer's initial charge. He didn't know what was going on. All that matters is what happened in that store. Lucky for you, every one of you, you know that. You know that. Not just by seeing it—by experiencing it through what the victims felt.

NO objection. App. 261, ll. 19 – 23.

In his charges to the jury, the trial judge again told the jurors that it was their duty to determine the "truth of the evidence." He said:

> As jurors, it is your duty---just as it's been mine to preside over the trial and rule on the evidence and charge you the law, it is your duty when it comes to the facts to determine the effect, to determine from the evidence the value, to determine from the evidence the weight and ultimately the truth of the evidence that's been presented during the trial of this case which is why I told you at the outset that it's so important that you listen, that you observe, that you pay close attention to the evidence presented.

App. 277, ll. 7 – 17.

The judge told the jury again at the close of his charge:

> Now, Madam Foreperson, ladies and gentlemen of the jury, I have now charged you on the law in order to help guide you to a fair and a just result in this case.

App. 294, ll. 1 – 3.

The jury returned a verdict of guilty on both charges as indicted. App. 302, ll. 2 – 19. The judge sentenced Petitioner Brown to twenty years on each of the charges with both to run concurrent to each other. App. 320, ll. 18 – App. 321, ll. 14.

Brown's attorney filed a timely notice of appeal. His appeal was perfected by the Division of Appellate Defense with the filing of a brief pursuant to Anders v. California, 388 U.S. 924 (1967). The Court of Appeals affirmed Brown's convictions and sentences. State v. Brown, No. 2012-UP-640 (Ct. App. filed December 5, 2012).

On June 25, 2013, Petitioner Brown filed an application for post-conviction relief (PCR). The state filed a return on May 30, 2014. An evidentiary hearing was held on October 18, 2016 before the Honorable Michael G. Nettles. App. 343. Petitioner Brown was represented by James K. Falk, and the state was represented by Ruston Neely. App. 344.

At the PCR hearing, the state informed the judge that trial counsel for Petitioner Brown was now deceased. The state's attorney stated that the procedure when an attorney was not

present was to "infer trial strategy from the transcript" and that was what the state was going to do. App. 346, ll. 1 – 14.

The state told the judge that the issues being raised by Petitioner Brown were trial counsel was ineffective for : (1) failing to object to burden-shifting language in the trial court's preliminary charge to the jury and burden-shifting language by trial counsel in his opening statement; (2) trial counsel failed to object to the introduction and publication of State's Exhibit 2 which was the audio/video of Co-defendant Wesley Clemons' statement; (3) and trial counsel was ineffective for not objecting to "Golden Rule" references in the solicitor's closing statement. App. 346, ll. 15 – App. 347, ll. 5.

PCR counsel cited the case of State v. Daniels, 401 S.C. 251, &373 S.E.2d 473 (2012) that the language used by the trial judge in his initial charge to the jury and in his charge at closing was burden shifting, and that trial counsel also used burden shifting language in his opening statement. The second issue was that the co-defendant's statement, which implicated Brown, was allowed to come in un-redacted which was a violation of Brown's confrontation rights. It was a Bruton[2] issue as the jury heard the investigating officer's testimony and also heard the actual statement. Trial counsel was ineffective for not objecting to these two issues. The third issue was trial counsel was ineffective for not objecting to the "Golden Rule" argument that was allowed to come in during the closing argument. App. 347, ll 10 – App. 349, ll. 2.

PCR counsel pointed out that Brown went to trial only 58 days following his arrest. The charges he went to trial on were indicted just prior to trial. PCR counsel then cited page 64 from the trial transcript where the judge told the jury that a trial was a search for the truth to make sure that justice was done between the parties. The trial judge used the same language on page 74 in

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[2] Bruton v. United States, 391 U.S. 123 (1968).

his preliminary charge to the jury. This language for the truth was magnified by defense counsel when he used the same language in his opening remarks to the jury on page 96 of the trial transcript. App. 349, ll. 14 – App. 352, ll 24.

PCR counsel argued that the language "to seek the truth" used by the trial judge was almost the same language used in the Daniels case which the Supreme Court said was improper. Counsel argued that language was burden shifting, and was a due process issue. App. 353, ll. 1 – App. 355, ll. 17; App. 359, ll. 1 – App. 360, ll. 25.

PCR counsel then argued the Bruton issue. Counsel did not have a copy of State's Exhibit 2 which was the recording. He sought one form the Clerk's Office and from the Public Defenders' Office for trial counsel's file but he could not find the exhibit. However, counsel told the court: "If you read the transcript pages, it's clear that this was an incriminating statement made by the co-defendant who was not available for cross examination." The PCR judge said that he assumed the transcript made reference to the substance of the statement. App. 361, ll 6 – 25.

PCR counsel then cited the trial transcript page 173 where Kurt Wallace testified about his interview with the Co-defendant Clemons. Then counsel went to transcript page 179 where the co-defendant said that Brown was the one that sent him into the store. The PCR judge said it was clear from the transcript that the co-defendant's statement was played for the jury and that the co-defendant made a statement about Brown, and that the co-defendant Clemons did not testify. App. 364, ll.1 – App. 369, ll. 23.

The state then told the PCR judge the facts of the case. Brown was holding the door and did not wear a mask. The co-defendant wore a bandana over his face and went to the cash register. There were videos from the store of the outside and inside the store showing Brown and

the co-defendant during the incident. The state said that Brown admitted to law enforcement that he was at the store with the man and told him to get the cigarettes. Neither of the men had a gun. App. 369, ll. 21 – App. 373, ll. 25.

The state admitted that trial counsel could have objected to the statement as it "was objectionable hearsay." However, the state argued that trial counsel wanted the co-defendant's statement to come in so that he could cross examine and talk about the co-defendant's statement without having the co-defendant testify." State's counsel argued that the co-defendant did not directly confess and did not directly implicate Brown as part of a conspiracy to rob. App. 374, ll. 1 – 24.

The PCR judge summarized the state's argument:

> So, your position, obviously, they could have objected pursuant to Bruton. A co-defendant inculpating a co-defendant without him testifying clearly that's objectionable and precluded by Bruton. But you maintain that you can infer from the fact that they went up to discuss that at the bench , there was a discussion about the Bruton issue, and Beach(trial counsel) decided to go ahead and let it in because it would help his defense.

App. 376, ll. 1 – 9.

Then the PCR judge said that it did not help to object to the statement because there was the video showing Brown in the store doing exactly what the state said he was doing so the statement was "merely a duplication." App. 376, ll 10 – 17.

PCR counsel argued that it was a "lot to presume" what the trial strategy was or that trial counsel Beach was aware of the Bruton issue. Counsel said it appeared that trial counsel Beach was more concerned with authenticating the statement and a proper foundation being laid. Trial counsel's next questions were about the foundation such as was the recording device on; did the officer download it; did the officer listen to the Exhibit 2. PCR counsel offered to hold the

record open and let him try to obtain the actual statements. The PCR judge said that was not necessary because "we know what was put up before the jury by the transcript." PCR counsel reported that the court reporter did not transcribe the statement into the record although it was published to the jury. App. 378, ll. 3 – App. 379, ll. 25.

The PCR judge said that the co-defendant's statement was merely a duplication of what Brown had already admitted to. App. 381, ll. 4 – 6.

PCR counsel then argued the "Golden Rule" issue that the solicitor's statements in his closing argument were trying to inflame the jury's concern for what the cashier in the store was feeling. App. 383, ll.21 – App. 384, ll. 14; App. 381, ll. 7 – 25. PCR counsel gave the examples from the solicitor's closing argument from trial transcript pages 253, 255, 256, 260 and 261. (See excerpts above from trial.)

Petitioner Brown testified at the PCR hearing. He said that trial counsel Beach told him he had a plea offer from the state for common-law robbery for fifteen years but it was too early for Brown to accept. Then trial counsel told him they were going to trial on strong-armed robbery. When they got to court that afternoon, he learned he had just been indicted on the armed robbery and kidnapping which were the trial charges. App. 390, ll. 13 – App. 391, ll. 17.

Brown testified that his Co-defendant Clemons wrote a statement while they were in jail which said that Brown had nothing to do with the Kangaroo robbery. The nurse at the jail got it and gave copies to Brown and his attorney. His attorney said that he would try to get that written statement in if he could. Brown knew nothing about Co-Defendant Clemons having a conversation with Kurt Wallace. PCR counsel clarified that there were two statements by the co-defendant. One was the handwritten statement and the other was the recorded conversation

with Kurt Wallace. Brown said it was the handwritten statement that his attorney wanted to get in. App. 393, ll. 1 – App. 397, ll. 20.

The PCR judge issued an order on December 30, 2016 denying Brown's PCR application and dismissing it with prejudice. App. 401- App. 410. The judge wrote that since trial counsel was deceased, the PCR court "strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." "When trial counsel cannot be present to defend his strategy, all articulable arguments which can be inferred from the transcript as trial strategy, could be argued in favor of competence." App. 406-App. 407.

The judge wrote that the court began with a strong presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. Petitioner Brown had not overcome this presumption. App. 403.

On burden shifting, the PCR judge found that Petitioner's argument based on State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012) and State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) that Brown was prejudiced by the trial judge's preliminary remarks to "seek the truth" was cured by the trial judge's "adequately complete" charge at the close of trial on the state's burden of proof and reasonable doubt and circumstantial evidence. The judge found that Brown's case was distinguished from Daniels as the issue in Daniels was not preserved for review. The consenting opinion affirmed the conviction under a harmless error analysis. App. 405-App. 406.

The judge found that Brown was not prejudiced by trial counsel's remarks to "seek the truth"

because trial counsel's argument during the trial was that Brown's story was the truth. The judge then found that the evidence of guilt of Brown was overwhelming which "negated any claim that counsel's performance could have affected the result of the trial." App. 406.

On the issue of a Bruton violation by the admission of the co-defendant's statement, the PCR judge found that although trial counsel could have objected to the statement of Co-defendant Clemons being admitted, the record as a whole made it clear that it was justifiable trial strategy to let the statement in. The judge found that the statement was duplicative of the video played at trial that put Brown participating in the robbery at the scene. And the co-defendant's statement was duplicative. App. 407.

On the "Golden Rule" issue, the judge cited State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) that "a Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." The judge found that none of the cited statements and arguments made during the state's closing argument violated the Golden Rule. The judge wrote that the way the jury experienced the victim's fear was through the victim's testimony. App. 408 – App. 409.

Brown's counsel filed a notice of appeal. This petition follows.

## ARGUMENT

### 1.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial judge's preliminary remarks to the jury that an "actual trial was a search for the truth in an effort to make sure that justice was done" which was improper and prejudicial to Petitioner Brown because it had the effect of unconstitutionally shifting the burden of proof to Petitioner Brown and which prejudice was enhanced by trial counsel himself in his opening remarks when counsel told the jury their job was to find the truth.

In State v. Needs, 333 S.C. 134, 155-156, 508 S.E.2d 857, 867-868 (1998), this Court urged trial judges to avoid using any "seek" language. This Court emphasized that such "seek the truth" language was unnecessary, and ran the risk of unconstitutionally shifting the burden of proof to the defendant. Id.

In Brown's case, the judge using the "search for truth in order to make sure that justice is done between the parties" language in his preliminary charge at the beginning of trial, reinforced in the jurors' minds that it was their duty to "seek the truth" and render a "just verdict," rather than do what the Constitution requires, which is to determine if the state met its burden beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

In State v. Aleksey, 343 S.C. 20, 26-29, 538 S.E.2d 248, 251-253 (2000), the Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, this Court in Aleksey noted the "seek" language was used in that case as an instruction on witness credibility. Id. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. The Court in Aleksey therefore found there

was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id.

This Court in State v. Daniels, 401 S.C. 251, 255-256, 737 S.E. 473, 475 (2012) considered a similar jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, this Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id.

In Brown's case, the instruction on the jury's duty being to "search for the truth" became the focus of the judge's instruction to the jury on the purpose of a criminal trial. App. 63, ll. 22- App. 64, ll. 5; App. 74, ll. 1 – 24. The jury's function is not to search for the truth, and the truth represents justice. However, the jury's role of seeking proof is fundamentally different from truth and justice. The jury's function is to determine whether the state has proved the defendant's guilt beyond a reasonable doubt. Although Daniels was published after Brown's trial, Brown's trial judge had the benefit of the ruling in Aleskey and Needs which put the judge on notice that using the "seek the truth" language should be avoided. Which was confirmed in Daniels.

In State v. Beaty, Op. No. 27693 (S.C. Sup. Ct. filed December 29, 2016 rehearing granted March 24, 2017), the Supreme Court **again** held the trial judge's remarks that a trial is "a search for the truth in an effort to make sure that justice is done" and that the jury's role is to "search for the truth, or to find the true facts or to render a just verdict" were error. Id. The Court explained: "These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone

render the verdict it believes best serves the jury's perception of justice." Id. Moreover, this Court repeated its caution to trial judges that they should "avoid . . . any [terms] that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt." Id.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Brown's case, the trial judge's initial instructions to the jury regarding the jury's function were burden shifting because the remarks were not said in conjunction with an instruction on the duty of the jury to find the defendant guilty beyond a reasonable doubt. The emphasis that a criminal trial was a "search for the truth" and that "justice was done" gave the jurors the mindset to have throughout the trial. It told them to focus on the truth as they heard the evidence instead of focusing on whether the state proved the charges beyond a reasonable doubt.

Nothing could be more prejudicial to Petitioner. It was more prejudicial being given in the preliminary remarks than at closing because it set the jurors' minds on the wrong purpose for them to have throughout the trial. The trial judge emphasized again in closing that he gave them the law in order to help guide them to a fair and a just result in this case. App. 294, ll. 1 – 3. Trial counsel was ineffective for not objecting to this language. Counsel was also ineffective for using this same language himself in his opening and reinforcing the trial judge's erroneous language.

## ARGUMENT

**2.**

The PCR court erred in failing to find trial counsel ineffective for not objecting to the admission of Co-defendant Clemmons' statement during the trial when the co-defendant did not testify which was a violation of Petitioner Brown's Sixth Amendment right to confront and cross-examine witnesses pursuant to Bruton v. United States, 391 U.S. 123 (1968).

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. Richardson v. Marsh, 481 U.S. 200 (1987). In Bruton, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In Richardson, 481 U.S. at 207-8, the Court held that the rule announced in Bruton does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "Bruton can be complied with by redaction." Id.

In State v. Henson, 754 S.E.2d 508, (2014), the Supreme Court reversed the case for a new trial because the admission of the co-defendant's redacted confession during the joint trial violated the defendant's rights under the Confrontation Clause. The co-defendant's confession identified three individuals by name as committing the crime and acknowledged that another male participated and fired the fatal shots, but left that person unnamed but used a neutral pronoun. The solicitor had stated in his opening that four individuals committed the crime.

Though violations of the Confrontation Clause are subject to a harmless error analysis, State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), the error in Brown's s case was not harmless. The

Supreme Court held in Henson that before an error can be held harmless beyond a reasonable doubt, the court must determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. In Arizona v. Fulminante, 499 U.S. 279 ( 1991) the United States Supreme Court held that constitutional violations were trial errors subject to a harmless error analysis. In Brecht v. Abrahamson, 507 U.S. 619 (1993), The Supreme Court held that the Court, in reviewing claims of constitutional error, consistently applied the standard described in Chapman v. California, 386 U.S. 18 (1967) that the error must be harmless beyond a reasonable doubt.

In State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015), where McDonald was on trial for murder along with two other defendants, the Supreme Court held that the admission of a non-testifying co-defendant's statement using the phrase "another person" to refer to two other male crime participants violated McDonald's rights under the Confrontation Clause as the right to confront witnesses against a defendant includes the right to cross-examine those witnesses. However, the Court found that this error was harmless in light of the evidence.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Trial counsel was ineffective for not objecting to the statement of Co-defendant Clemons being admitted when Clemons put the primary blame on Brown as though the entire incident was Brown's idea making him the more culpable one. The statement was prejudicial to Brown and was not harmless error as there was a high and reasonable likelihood that it affected the outcome of the trial.

The PCR judge made his decision on Brown's PCR application without hearing the statement nor seeing the video from the store as these were not admitted into evidence at the PCR hearing. The judge relied solely on the record.

The judge also made an error in his order in reference to the admission of Co-defendant's statement. The order provided that Petitioner Brown testified that he and his trial counsel wanted the co-defendant's statement to come in to make the co-defendant more culpable. However, the statement Brown was referring to at the PCR hearing was the written statement of the co-defendant where he allegedly took responsibility as Brown said he did not know about the recorded statement made with Sergeant Kurt Wallace. It was the written statement that trial counsel wanted to come in—not the recorded statement. App. 393, ll. 2 – App. 396, ll. 1. The PCR judge's order did not clarify that there were two statements—one written that did not come in and the recorded one that did. It was the recorded one that was prejudicial to Brown.

## ARGUMENT

### 3.

The PCR court erred in failing to find trial counsel ineffective for not objecting to the Golden Rule statements made by the solicitor in his closing argument which were prejudicial to Petitioner Brown and denied him a fair trial because the statements asked the jurors to put themselves in the victim's place which destroyed the sense of impartiality of the jurors.

During his closing argument to the jury, the solicitor said:

> But what you didn't see—you weren't able to be eye-to-eye with him this close. You weren't a single woman in that store at eleven-thirty at night and the only other employee in that store an eighteen year old young man. Think of the fear that gripped her. What does he represent? That he has a gun.

There was no objection. App. 252, l. 9 – App. 253, ll. 19.

Again, later during his closing argument, the solicitor told the jury:

> Again, we see it through the prism of the video. We weren't there. We don't know the fear. They testified to the fear.

No objection by defense counsel. App. 255, ll. 2 – 4.

Again the solicitor told the jury:

> Do not be swayed by the officer's initial charge. He didn't know what was going on. All that matters is what happened in that store. Lucky for you, every one of you, you know that. You know that. Not just by seeing it—by experiencing it through what the victims felt.

No objection. App. 261, ll. 19 – 23

In State v. McDaniel,320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995), the Court of Appeals held that the prosecutor's use of "you" some 45 times in closing argument, asking the jury to put themselves in the place of the victim, constituted reversible error. The case was remanded for a new trial.

In State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009), the Court of Appeals defined the "Golden Rule "Argument as one that suggests to jurors they put themselves in the shoes of one of the parties; in criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place. The "Golden Rule" Argument tends to destroy all sense of impartiality of jurors, and its effect is to arouse passion and prejudice, thereby encouraging jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.

The Supreme Court found trial counsel ineffective in the PCR case of Herman Henry "Bud" Von Dohlen, by counsel failing to object to the solicitor's closing argument at the penalty phase of this capital murder trial, asking jurors to "put yourselves in victim's shoes, size six"; the argument asked jurors to abandon their impartiality and view the evidence and potential sentence from the victim's viewpoint. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004). [3] While the Court found Von Dohlen did not show he was prejudiced by trial counsel's error, it stated it strongly disapproved of such arguments. Id. at 360 S.C. 613. The Court wrote that a solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury, and it 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.

In Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009), a criminal sexual conduct with a minor case, this Court found that that the solicitor improperly appealed to the jurors' emotions during closing argument when he told them to "speak up" for the child victim and make sure that the perpetrator was punished. This Court found that the solicitor's remarks were a Golden Rule

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[3] The PCR was reversed on other grounds for a new sentencing hearing.

argument and that trial counsel was ineffective for not objecting. However, the Court determined that Brown was not prejudiced by the comments.

The Supreme Court in Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016), found that trial counsel was ineffective for not objecting to the solicitor's remarks during his closing argument as to whether the jurors would want Tappeiner babysitting their children because it appealed to the jurors' emotions. Tappeiner was convicted of criminal sexual conduct with a thirteen year old neighbor boy for whom she was babysitting. The Court reversed and remanded the case for a new trial.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

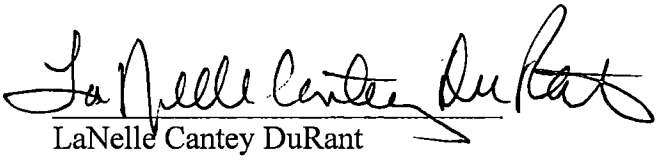
A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Trial counsel was ineffective for not objecting to these Golden Rule arguments by the solicitor. The solicitor's comment to the jurors to "experience the fear through what the victims felt"

was telling the jurors to put themselves in the shoes of the victims. This destroyed the impartiality of the jurors which rendered the result of the trial unfair and prejudicial to Brown.

## CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Colleton County

Honorable Michael G. Nettles, Circuit Court Judge

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GEORGE LAGRANDE BROWN,

PETITIONER

V.

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 the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ruston Neely, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on George Lagrande Brown, #301460, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th day of July, 2017.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.