

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO ALLENDALE COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger L. Couch, Circuit Court Judge

Marquis Breeland.....Petitioner,

v.

State of South Carolina,.....Respondent.

Appellate Case No. 2016-002430

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Is there any probative evidence in the record to support the post-conviction relief court's finding the solicitor's comments did not prejudice Petitioner such that there was a reasonable probability the result of the trial would have been different had Counsel objected?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted at the March 2010 term of the Allendale County Grand Jury for murder (2009-GS-03-0056) and possession of a weapon during the commission of a violent crime (2009-GS-03-0057). App. 381-384. Petitioner was represented by Stephen T. Plexico, Esquire (Counsel). App. 1. The State was represented by Tameaka A. Legette, Esquire, (the solicitor.) App. 1. Petitioner proceeded to a jury trial on August 8, 2011 before the Honorable William H. Seals, Jr. App. 1-268. On August 10, 2011, the jury convicted Petitioner as indicted, and Judge Seals sentenced Petitioner to confinement for consecutive sentences of life without parole for murder and five years for possession of a weapon during the commission of a violent crime. App. 258-268.

Petitioner filed a timely notice of appeal. His appeal was perfected by Elizabeth Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense Division of Appellate Defense. Susan B. Hackett, Esquire, of the same office, filed Petitioner's final brief. App. 269-279. On February 13, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Breeland, No. 2013-UP-073 (S.C. Ct. App. February 13, 2013). The Remittitur was issued on March 7, 2013.

Petitioner filed an application for post-conviction relief (PCR) on April 10, 2013. App. 300-306. In his application Petitioner alleged:

1. Ineffective Assistance of Trial Counsel
 - a. Trial Counsel failed to object to Solicitor misconduct and critical Brady Violation.
2. Trial Court judge erred by denying motion for directed verdict when evidence did not rise above mere suspicion that Breeland was guilty of murdering the victim.

On October 8, 2015, Petitioner's PCR counsel filed an Amended Application for Post-Conviction Relief. App. 312-319. Petitioner made the following allegations:

1. Trial counsel failed to object to solicitor misconduct, critical Brady violation.
2. Trial counsel failed to use an available pre-emptory strike on juror Ora Cave, sister to key witness Willie James Elmore.
3. Trial counsel failed to object to the solicitor's closing argument wherein Breeland was prejudicially and improperly referred to as "the face of evil," "evil," and "wicked," along with a reference to a faux "robe of righteousness," among other improper comments.
4. Trial Court Judge erred by denying Motion for Directed Verdict when evidence did not rise above mere suspicion that Breeland was guilty of murdering the victim.

Respondent made its Return on September 22, 2014. App. 307-311. On October 20, 2015, Petitioner filed a PCR Hearing Brief, briefing in detail the allegations regarding trial counsel's failure to object to the solicitor's alleged prejudicial comments during closing argument and trial counsel's failure to use a pre-emptory strike on a certain juror. App. 320-333. An evidentiary hearing into the matter was convened on October 21, 2015, at the Beaufort County Courthouse. Evan K. Bromley, Esquire, represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

In an Order of Dismissal dated January 28, 2016, Judge Couch found the solicitor's comments during closing argument constituted improper vouching regarding the credibility of Marcus Witherspoon and Counsel's failure to object to the comments was deficient performance. App. 369-378. However, the Court ruled despite Counsel's deficient performance, Petitioner was not prejudiced because the State's case did not rely on Marcus Witherspoon's testimony.

Petitioner filed a Motion to Alter or Amend Judge Couch's Order of Dismissal on February 16, 2016. App. 377-378. Petitioner asserted the Order did not include language as to the resolution of the two other claims that were resolved with finality by the Court during the PCR hearing. These claims included the Brady violation claim which the Court struck with

consent of Petitioner, as well as Petitioner's trial court allegation, which the Court dismissed for not being a cognizable claim for a PCR Proceeding. In a Consent Order dated November 2, 2016, Judge Couch amended his Order of Dismissal to reflect the finality of his rulings made during the PCR hearing. App. 379-380.

On June 19, 2017, Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense, filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on Petitioner's behalf.

Statement of Facts

On July 22, 2007, Petitioner shot and killed Laurice Garvin while he crawled away from his vehicle. Marlene Love testified that on July 22, 2007, she was in her mother's home when she heard multiple gunshots. App. 67, ll. 11-19. In response, she looked out the window and saw a car's headlights shining on a body lying in the road. App. 67. She went outside and called 911. An additional witness, Daphne Conner, also reported hearing gunshots in the area. App 67.

John Lawson, a paramedic, responded to the scene and treated the victim, who had suffered multiple gunshot wounds, including a wound to the head and collarbone area. App. 71, ll. 3-12. The victim was not breathing, had no pulse, and had visible brain matter from the head wound. App. 71. The victim was pronounced dead on arrival. App. 72.

John Sullivan, Chief of Allendale Police Department, arrived at the scene shortly after the 911 call and contacted SLED to further investigate the crime. App. 75, ll.12-22. Agent Karl Kenley, of SLED, testified he collected, documented, photographed evidence, and created a sketch of the crime scene. App. 82, ll.1-14. Through his investigation, Agent Kenley determined the shooter was most likely standing outside the driver's side window when shooting into the vehicle. App. 94, ll.5-7. Agent Kenley also testified the victim was able to get out of the vehicle

while it was still moving and was shot at least three more times after leaving the vehicle. App. 96, ll. 3-12.

Willie Elmore testified Petitioner informed him, earlier that July, he was going to kill the victim. App. 122, ll. 14-19.

Marcus Witherspoon testified he had been Petitioner's friend for some time and, on the evening of July 22, 2007, he spoke with Petitioner after Laurice Garvin was killed. App. 150, ll. 8-11. Witherspoon testified Petitioner came to his house that night and informed Witherspoon he was the one who killed Laurice Garvin. App. 150, ll. 16-22. Witherspoon testified he believed Petitioner told him in order to gain recognition or respect, as Petitioner thought highly of him. App. 151, ll. 7-13.

Based on the investigation, Petitioner was arrested for the charges of murder and possession of a weapon during the commission of a violent crime. Petitioner proceeded to trial and was found guilty as indicted. App. 260-263. Judge Seals sentenced Petitioner to consecutive sentences of life without parole for murder and five years for possession of a weapon during the commission of a violent crime. App. 263.

Relevant Facts from Post-Conviction Relief Hearing

At Petitioner's evidentiary hearing, Counsel testified Marcus Witherspoon's testimony, with that of Willie Elmore, was key to the State's case. App. 347, l. 23-24. Counsel reiterated this was due to Petitioner, shortly after the crime, relaying to Witherspoon that he shot Laurice Glover. App. 345, ll. 11-16. Furthermore, Counsel testified he did not see the solicitor's explanation to the jury, regarding why she felt Witherspoon was testifying, as improper. Witherspoon was facing life imprisonment on unrelated charges and had an incentive to tell the truth and be of substantial help to the State in order for a potentially lighter sentence. App. 351, l. 21- 352, l. 2. However, Counsel testified the solicitor improperly vouched for Witherspoon's

credibility by explaining how Witherspoon's truthful testimony allowed for justice to catch up to Petitioner, so Petitioner would have to answer for his crimes.

Counsel testified in hindsight, he should have objected to the solicitor's conduct and behavior during closing. App. 349, ll. 11-13. However, Counsel conceded he took no issue with the solicitor's language during closing argument at the time. App. 349, ll. 14-17. Counsel also testified the trial judge did instruct the jury on circumstantial evidence, which was extremely important in this particular case. App. 354, ll. 16-20. Further, Counsel argued vehemently in his closing there was no physical evidence tying Petitioner to the crime. App. 356, ll. 16-20.

At the PCR hearing, the State emphasized the Court should remove any distortion in judgment resting primarily on hindsight, which is key to evaluating if Counsel rendered ineffective assistance, and if so, if Petitioner suffered prejudice stemming from that performance. App. 256, ll. 4-6.

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 in a post-conviction relief action is whether “*any* evidence of probative value” exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

“Applicant bears the burden of proving the allegations in his application.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. 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.” Id. “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 v. Washington, 466 U.S. 668, 670 (1985).

ARGUMENT

There is probative evidence in the record to support the post-conviction relief court's finding the solicitor's comments did not prejudice Petitioner such that there was a reasonable probability the result of the trial would have been different had Counsel objected.

This Court should deny Petitioner's writ of certiorari because there is probative evidence to support the PCR court's finding Petitioner failed to prove Counsel's deficiency was prejudicial under Strickland. Petitioner asserts the solicitor's comments in her closing argument were prejudicial because "Marcus Witherspoon was the only way the jury could convict Petitioner." However, the PCR court relied on the other evidence presented in the State's case to determine Counsel's failure to object during closing was not so prejudicial that it created a reasonable probability the result of the trial would have been different had Counsel objected. App. 373. The PCR court cited the witnesses who placed Petitioner at the scene and the witness who testified to Petitioner's statement of intent to kill the victim. App. 116-118; 120-122; 129. The cited testimony is probative evidence the PCR court relied on to find Petitioner failed to prove there was a reasonable probability the result of the trial would have been different if Counsel had objected to the State's improper vouching. Based on this probative evidence, this Court should deny Petitioner's writ of certiorari.

During the State's closing argument, the solicitor argued:

Imagine the cost to Marcus Witherspoon. Imagine that cost. He hung his head low when he walked in and he hung his head low when he walked out, even though what he faced. He didn't come here to perform. He came here to tell the truth. He told you what Marquis said. Marquis Breeland told him he killed Laurice Garvin. And, ladies and gentlemen, I surmise that the reason Marcus came in here, that the mark is wide and the mark of the universe is long but it bends towards justice. And what I mean by that is Marcus sat it on a long time but that justice finally caught up with him and justice brought him in here to tell what he knew. Simple as that.

App. 222, ll. 16-24.

For the most part, the solicitor's statement merely highlights Witherspoon's responses to Counsel's cross-examination regarding his credibility, which is a permissible comment on the weight of the evidence and argument in the record. Counsel cross-examined Witherspoon extensively regarding his plea agreement with the State and his motivations for testifying against Petitioner. App. 152-161. One of the conditions for Witherspoon's plea deal was he testify at Petitioner's trial. App. 158. The plea deal Witherspoon received was a sentencing range of 10 years to life imprisonment with no guarantee on how much time he would receive. App. 159. In response to Counsel's questions, Witherspoon asserted he was not lying:

Q: You'd do anything not to spend life in federal prison; wouldn't you?

A: Well, I would tell the truth. I wouldn't just tell lies to get out of a life sentence.

...

Q: You wouldn't tell a lie on somebody to get out of a life sentence; would you?

A: No sir. I wouldn't try to send somebody to prison for the rest of their life just to get out of it myself.

App. 160, ll. 4-7; 15-18.

On direct appeal, the standard for improper vouching is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). However, in a PCR proceeding, the standard for finding prejudice is whether there is a reasonable probability the

result of the trial would have been different if Counsel's performance had not been deficient. Here, if Counsel had objected the Court would likely have instructed the jury the credibility of the witnesses was for them to determine. "[T]he trial court's curative instructions during and immediately following [witness]'s testimony sufficiently cured any prejudice to [defendant] flowing from the improper vouching." State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000).

During his jury instructions, the trial court gave these instructions to the jury:

I want you to further understand what the lawyers tell you is not evidence. They are spokespersons. They are advocates for their clients. They fight for their clients. Evidence again, very simple, two things; witnesses that testify, and any matters admitted into the record.

App. 54, ll. 11-16.

You are the sole judges of the credibility of a witness and you are not to give more weight to a police officer's testimony solely because he is a police officer. Rather, you should judge an officer's testimony by the same standards that you apply to all other witnesses. Please understand that you have a right to believe a small portion of a witness's testimony and disregard the larger portion or vice versa. You may believe all of a witness's testimony or none. You may believe the testimony of a single witness against that of many or the other way around.

App. 250, ll. 8-19.

These instructions would have been the remedy if Counsel had objected during the solicitor's closing argument. "[T]he trial judge charged the jury that '[y]ou must not consider as evidence any statement of counsel made during the trial,' and instructed the jury members regarding their duty to 'pass upon the credibility or believability of the witnesses.'" These instructions were sufficient to cure any possible prejudice caused by the solicitor's comments. Therefore, we do not believe there was a reasonable probability that the result of the trial would have been different had trial counsel objected on due process grounds." Smith v. State, 375 S.C. 507, 524, 654 S.E.2d 523, 532 (2007). Here, as in Smith, there is no reasonable

probability Counsel's failure to object changed the result of the trial because the jury heard the instructions Counsel's objection would have elicited.

In her closing arguments, the solicitor's comments were largely based on Witherspoon's demeanor and the cost to his reputation as a State witness. "[A] Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999). "The solicitor has the right to give his version of the testimony and to comment on the weight to be given to the testimony of the defense witnesses. Therefore, although the State cannot 'pit' witnesses during questioning, it may comment on the credibility of the witnesses in argument. Here, the solicitor's argument is supported by the evidence presented at trial." State v. Raffaldt, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995) (cites omitted). See also State v. New, 338 S.C. 313, 320, 526 S.E.2d 237, 240 (Ct. App. 1999). "Here, the Solicitor responded to [defendant]'s objection by indicating her comments were not outside the record, but instead were based on common knowledge: 'It's a common known, it's a well-known fact.... He has testified against someone, he will be considered-[a rat].' We agree and find the Solicitor's comments regarding Bibb's credibility were reasonable inferences from the evidence in the record." "A solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990) (reversed on other grounds State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013)).

Petitioner relies heavily on Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). However, Gilchrist is clearly distinguishable from this case. In Gilchrist, the only direct evidence against the defendant was the testimony of the witness for whom the State vouched. Id. Here, as noted by the PCR court, the State had substantive additional witnesses other than Witherspoon.

The State also called Willie Elmore, who testified Petitioner told him that he was going to kill the victim before the victim was shot. App. 122. The State also called witnesses who testified Petitioner was seen running down the street after shots were fired. App. 118, 120-122, 129.

Further, in Gilchrist, the PCR court found the solicitor's comments were not improper because the decision not to object was a trial strategy decision. The Gilchrist Court found there was no probative evidence to support this assertion because there was no evidence of a valid strategy for failing to object. Here, the PCR court found Counsel's failure to object deficient and undertook a full prejudice analysis. App. 373. The PCR court relied on the entirety of the State's case to determine Witherspoon's testimony was not the sole basis for conviction. App. 373. The PCR court cited witnesses who placed Petitioner at the scene and testified Petitioner said he was going to kill the victim. App. 116-118; 120-122; 129. This testimony was probative evidence the PCR court relied on to find Petitioner failed to prove there was a reasonable probability the result of the trial would have been different but for Counsel's deficient performance. Based on this probative evidence, this Court should deny Petitioner's writ of certiorari.

Respondent notes Petitioner argues portions of the solicitor's closing argument, unrelated to Witherspoon, were also improper. This issue was not ruled on by the lower court nor is it addressed in Petitioner's Issue Presented. Respondent submits this issue is neither preserved for review nor currently before this Court. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

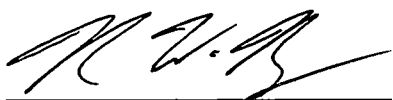
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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In The Supreme Court

CERTIORARI TO ALLENDALE COUNTY
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The Honorable Roger L. Couch, Circuit Court Judge

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MARQUIS BREELAND,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

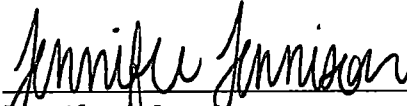
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 6th day of November, 2017.


Jennifer A. Jennison
Legal Assistant for Petitioner



ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

November 6, 2017

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S.C. SUPREME COURT

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Marquis Breeland v. State of South Carolina
Circuit Court Case No: 2013-CP-03-0061
Appellate Case No.: 2016-002430**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to the Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this return today.

Sincerely,

Ruston W. Neely
Assistant Attorney General

RWN/jaj
Enclosures

cc: Lara M. Caudy, Esquire (w/enclosure)