STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

George Lagrande Brown.....Petitioner,

v.

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

Appellate Case No. 2016-002579

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT ISSUES PRESENTED

I. Is there probative evidence to support the PCR court's finding the State's evidence against Petitioner was overwhelming and, thus, Petitioner is unable to prove he was prejudiced by any alleged deficiencies under Strickland?

II. Is there probative evidence to support the PCR court's finding Petitioner was not prejudiced by the trial judge's preliminary remarks under Strickland because the remarks were merely preliminary, cured by the trial judge's final instructions to the jury, and used by Counsel to bolster Petitioner's defense. Also, was Counsel's lack of objection deficient performance when the trial court's remarks were not harmful to Petitioner's defense?

III. Is there probative evidence to support the PCR court's finding Counsel was not deficient because the codefendant's statements were used by Counsel in Petitioner's defense as part of his trial strategy and Petitioner did not prove he was prejudiced by the codefendant's statements under Strickland?

IV. Is there probative evidence to support the PCR court's finding Counsel was not deficient nor was Petitioner prejudiced under Strickland because the solicitor's closing argument did not violate the 'golden rule?'

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).

STATEMENT OF FACTS

Procedural History

Petitioner was indicted at the January 2011 term of the Colleton County Grand Jury for armed robbery (2011-GS-15-0029) and kidnapping (2011-GS-15-0118). Applicant was represented at trial by Harris Beach, Esquire (Counsel).

On January 26, 2011, Petitioner proceeded to trial and was convicted as indicted. Petitioner was sentenced by the Honorable Perry M. Buckner, III to confinement for a period of twenty years for both kidnapping and armed robbery. The sentences were ordered to be served concurrently.

Petitioner filed a timely Notice of Appeal. His appeal was perfected by Breen Stevens, Esquire, of Appellate Defense, who filed an *Anders* brief on Petitioner's behalf. Petitioner's convictions and sentences were affirmed by the Court of Appeals. State v. Brown, No. 2012-UP-640 (S.C. Ct. App. December 5, 2012). The Remittitur was issued on February 4, 2013.

Petitioner filed a post-conviction relief (PCR) application on January 25, 2013. Respondent filed its return on May 29, 2014. Petitioner was represented by James Falk, Esquire. Petitioner, through counsel, filed an amended PCR application on May 4, 2016. An evidentiary hearing was convened into the matter on October 18, 2016, at the Beaufort County Courthouse. The Honorable Michael G. Nettles dismissed Petitioner's PCR application by an order of dismissal signed December 20, 2016.

Statement of Facts

On November 27, 2010, Sanquenetta Blocker (Blocker) was working the third shift-the night-shift at a Kangaroo Station in Jacksonboro, South Carolina. App. 91. Wesley Clemons, Petitioner's codefendant (the codefendant), came to the register with his hands behind his back and a bandanna on his face. App. 112. The codefendant told Blocker to give him the money.

App. 112. Blocker believed he had a gun. App. 112. She told him she did not have any money. App. 102. Blocker testified she just wanted to leave, but did not believe she could because of Petitioner's presence. App. 106. Blocker and Devron Brown (Brown), a friend of Blocker's who was in the store at the time of the robbery, went to the front door where Petitioner was blocking the door. App. 105. Petitioner was not wearing a mask. App. 122. Brown asked Petitioner to let them out, he said no. App. 105. Petitioner also told the codefendant to open the register before the codefendant started stealing cigarettes. App. 203. Blocker and Brown returned to the deli area and stood there. App. 105. The codefendant went behind the counter and started grabbing cigarettes. App. 105; 124. The two men then left the store together. App. 106.

That night, Jeffrey Sellers (Sellers) was traveling with his mother and another woman and had stopped at the Kangaroo for gas. App. 130 - 131. The two women went in to pay for gas and get a drink. App. 131. When the gas pump never came on, Sellers looked in the store and saw what he believed to be a robbery. App. 131. He saw the codefendant, with a bandanna on his face, at the register and Petitioner standing at the door. App. 132. Sellers had no doubt the man at the door was part of the robbery. App. 129 - 133. When the two men left the store, Sellers started following them. App. 134. When Sellers saw a Colleton County Sheriffs car approaching, Sellers ran towards the men and grabbed both of them around the neck and threw them to the ground. App. 133 - 134. There was video footage from the store that captured this entire incident, from Petitioner and the codefendant entering the gas station to their arrest, on tape. App. 106 - 107.

Sergeant Kurt Wallace (Sgt. Wallace) was patrolling the area that night. App. 160. Sgt. Wallace drove by the Kangaroo about 11:30 and saw a "lot of commotion." App. 161, l, 1. People exiting the store flagged him down so he stopped in the parking lot. App. 161. He saw Petitioner and the codefendant leave the store and watched Sellers tackle them. App. 162. Sgt.

Wallace detained Petitioner and the codefendant and read the two men their Miranda rights. App. 162 - 164.

Sgt. Wallace searched for a weapon but was unable to find one. App. 165 - 166. He then spoke with the codefendant in the back seat of a patrol vehicle. App. 178. Sgt. Wallace was wearing a body microphone that recorded his conversation with the codefendant. App. 172. Sgt. Wallace turned on the system and his microphone when he arrived at the Kangaroo. App. 171 - 173. Sgt. Wallace also had a conversation with Petitioner at the scene and recorded his interview as well. App. 174. When Sgt. Wallace asked Petitioner if he had anything to do with the robbery, Petitioner initially told Sgt. Wallace had has absolutely nothing to do with it. App. 187. However, during continuing conversation, Petitioner admitted he had a part in the robbery and Sgt. Wallace could charge him with it. App. 186 - 187.

ARGUMENT

In a PCR action, an applicant has the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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). 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. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). 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 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. 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.

I. There is probative evidence to support the PCR court's finding the State's evidence against Petitioner was overwhelming and, thus, Petitioner is unable to prove he was prejudiced by any alleged deficiencies under Strickland.

This Court should deny Petitioner's petition for writ of certiorari because the State presented overwhelming evidence of Petitioner's guilt including: video evidence, multiple testifying eye-witnesses, Petitioner and the codefendant were apprehended at the site of the incident mere seconds after committing the robbery, and Petitioner admitted he was involved in the robbery. These facts were probative evidence utilized by the PCR court to find the State's evidence of Petitioner's guilt was overwhelming. App. 406. "The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial." Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114, 122 S.Ct. 2332 (2002); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). "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. at 668.

The video evidence and witness testimony proved Petitioner and the codefendant entered and exited the store together. App. 110; 179. After the codefendant began robbing the store,

Sanquenetta Blocker testified she wanted to leave, but did not believe she could because of Petitioner's position by the door. App. 106. Despite this belief, Blocker and Devron Brown, a friend of Blocker's who was in the store, went to the front door and attempted to leave. App. 105. Petitioner was at the door and not wearing a mask. App. 122. Petitioner was identified in court by Blocker and Brown at trial and could be seen in the video footage. App. 122; 211. Brown asked Petitioner to let them leave; Petitioner said no. App. 105. The codefendant, who had a bandanna over his face, went behind the counter and started grabbing cigarettes. App. 105; 124. The two men then left the store together. App. 106. Sellers saw the codefendant, with a bandanna on his face, at the register and Petitioner standing at the door. App. 132. Sellers had no doubt the man at the door was part of the robbery. App. 129 - 133. When Petitioner and the codefendant left the store, Sellers started following them. App. 134. When Sellers saw a Colleton County Sheriff's vehicle approaching, Sellers ran at the two men, grabbed both of them around the neck, and threw them to the ground. App. 133 - 134. The law enforcement officer, Sgt. Wallace, pulled over and detained Petitioner and the codefendant. Sgt. Wallace asked Petitioner if he had anything to do with the robber. Petitioner initially told Sgt. Wallace he had absolutely nothing to do with the robbery. App. 187. However, Petitioner eventually admitted he had a part in the robbery and Sgt. Wallace could charge him with the robbery. App. 186 - 187.

As shown by the above facts, there was overwhelming evidence of Petitioner's guilt in this case. Therefore, this Court should dismiss Petitioner's petition because there is probative evidence to support the PCR court's finding there was overwhelming evidence of Petitioner's guilt.

II. **There is probative evidence to support the PCR court's finding Petitioner was not prejudiced by the trial judge's preliminary remarks under Strickland because the remarks were merely preliminary, cured by the trial judge's final instructions to the jury, and used by Counsel to bolster Petitioner's defense. Also, Counsel's decision not to object was not deficient performance because the trial court's remarks were not harmful to Petitioner's defense.**

Petitioner asserts the trial court's preliminary remarks were prejudicial and Counsel's failure to object was deficient. However, the trial court's remarks were not prejudicial to Petitioner; nor should Counsel's failure to object to the remarks be considered deficient performance. The trial court's remarks were as follows:

> 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. 64, ll. 2 – 5.

> 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.

App. 74, ll. 19 - 22.

A. The trial court's remark did not prejudice Petitioner.

The Supreme Court has cautioned trial judges to avoid using language, in their jury instructions, that the jury is to 'seek the truth.' The Court reasoned such language could potentially shift the burden of proof to the defendant in an unconstitutional manner. See State v. Aleksey, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000). Additionally, the Supreme Court has advised trial judges not to instruct jurors that their verdicts "would represent truth and justice for the parties" due to the risk that such language could distract the jury from its core functions. State v. Daniels, 401 S.C. 251, 258, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring for the majority). However, our Supreme Court specifically declined to hold any mention of 'the truth' in jury charges is unconstitutional. See Aleksey, 343 S.C. at 28, n. 2, 538 S.E.2d at 252

("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."); see also State v. Hoffman, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included "in seeking the truth" language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant.)

Here, the trial judge's remarks were preliminary and occurred before the jury was even sworn.

> 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. 1 – 5.

> The trial court then made the same remark before the presentation of any evidence.
>
> 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. 19 – 24.

The trial judge's jury instructions at the close of evidence rendered any potential prejudice from the preliminary remarks negligible. At the conclusion of the trial, the trial court instructed the jury as follows regarding the State's burden:

> Now, to the indictments, ladies and gentlemen, the Defendant has pled not guilty. And that plea puts the burden on the State of South Carolina to prove the Defendant guilty beyond a reasonable doubt. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you, ladies and gentlemen, that it is an important rule of the law that the Defendant in a criminal trial in South Carolina, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which

> the indictment was issued, unless guilt has been proven by evidence satisfying you, the jury, of that guilt beyond a reasonable doubt. This presumption of innocence, ladies and gentlemen, does not end when you begin your deliberations, but it accompanies each and every Defendant throughout the trial until you, the jury, reach a verdict of guilty based on evidence satisfying you of that guilt beyond a reasonable doubt.
>
> The presumption of innocence is not a mere legal theory. It's not just a legal phrase. It is a substantial right to which every Defendant in this court is entitled unless you, the jury, are satisfied from the evidence of- the Defendant's guilt beyond a reasonable doubt. Now, what is a reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving the Defendant guilty beyond a reasonable doubt.
>
> ...
>
> Now, proof beyond a reasonable doubt, ladies and gentlemen, is proof that leaves you, as a juror, firmly convinced of the Defendant's guilt. There are very few things in this world that any of us know with absolute certainty. And in a criminal case, the law does not require proof that overcomes every possible doubt. If, based on your consideration of all the evidence in this case, you are firmly convinced that the Defendant is guilty of the crimes charged, you must find the Defendant guilty. On the other hand, if you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find the Defendant not guilty.

App. 273, ll. 7 - 25 – 274, ll. 1 – 11; 274, ll. 22 – 25 – 275, ll. 1 – 9.

The trial court's preliminary remarks concerning a 'search for the truth' merely imparted the gravity of the jurors' responsibility to ensure justice is done and citizens' rights are protected. The comments did not create any real danger the jurors would not follow the trial courts' extensive pre-deliberation instructions on the State's burden of proving the charges beyond a reasonable doubt. See State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) ("Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error.")

Here, Counsel argued Petitioner's story was the truth. In fact, Counsel used the Court's 'seek the truth' language in his opening statement, bolstering Petitioner's assertion of actual innocence. App. 96. Counsel's use of the trial judge's language further shows the language was

not prejudicial to Petitioner and was, instead, used by Counsel to assert Petitioner's innocence. Therefore, there is probative evidence to support the PCR court's finding Petitioner was not prejudiced by the trial judge's opening remarks. Further, as argued above, Petitioner was convicted on the basis of overwhelming evidence. Therefore, any prejudice by an alleged deficiency was negated. "The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial." Franklin, 346 S.C. at 570, 552 S.E.2d at 722.

B. Counsel's performance was not deficient.

As noted in the case law cited in the above argument, appellate courts have disfavored 'seek the truth' type language in a trial judge's jury instructions. Here, the trial court's remarks were not part of the jury instructions, but merely preliminary remarks. Counsel presented Petitioner's defense as the truth of the case. Counsel's decision not to object to the trial court's preliminary remarks regarding the 'seek the truth' language did not fall below the bar of reasonableness under professional norms. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88 (2011).

The trial court's preliminary remarks were not harmful to Petitioner's defense and an objection could have decayed Counsel's credibility with a jury. Trial counsel must be aware of the potential negative impression an objection can have on a jury. If Counsel objected to the trial court's statement, the jury could have believed Counsel was objecting to the jury attempting to find the truth. Further, Counsel was arguing Petitioner's story was the truth, an objection would not have made sense with this defense in mind. The trial court's remarks did not prejudice

Petitioner, but an objection by Counsel could have. Therefore, Petitioner has failed to prove Counsel's failure to object to the trial court's preliminary remarks was deficient performance.

III. There is probative evidence to support the PCR court's finding Counsel was not deficient because the codefendant's statements were used by Counsel in Petitioner's defense as part of his trial strategy and Petitioner did not prove he was prejudiced by the codefendant's statements under Strickland.

Counsel was not deficient for allowing the codefendant's statement into evidence because Counsel used the codefendant's statement as part of his trial strategy to support Petitioner's story and assert the codefendant's culpability. Counsel is deceased and, therefore, was unable to elucidate the trial strategy behind his decisions at trial. However, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Strickland, 466, U.S. at 668. Here, Counsel was faced with the difficult prospect of defending a client on whom the State's evidence included video of the crime, multiple eye-witnesses, and being caught at the scene with the stolen goods. Counsel used the codefendant's statement to cross-examine Sgt. Wallace regarding the fact the codefendant's statement supported Petitioner's claims.

> Q: Now, there was a statement in here that Mr. Brown sent Clemons in to get the cigarettes. Is that your understanding?
> A: That Mr. Brown's statement sent Clemons to get the cigarettes?
> Q: Yes.
> A: That's my understanding in speaking with Mr. Clemons.
> Q: All right. Now, is there anything to indicate that Mr. Brown forced Mr. Clemons to go in and do anything?
> A: No.

App. 182, ll. 12 – 22.

Throughout the trial, Counsel emphasized the codefendant's culpability and asserted Petitioner did nothing to assist in the robbery or kidnapping. This strategy is evidenced in Counsel's closing argument:

> And then what happens? Here comes the masked man. He jumps in front of Mr. Brown who has no mask. He has nothing to protect his identity...Does [Petitioner] go up and start grabbing stuff or start trying to get in to the register or try to do anything that would indicate that he is part of any type of robbery, either armed robbery or common law robbery? No. He backs up. He gets out of there. He backs up back to the door. He's ready to go.

App. 264, ll. 11-21.

At the PCR hearing, Petitioner testified Counsel wanted the codefendant's statement to come into evidence as part of his trial strategy.

> Q: So, there was no discussion about trying to use Mr. Clemons' statement to your advantage?
> A: Well, he told me he would try to get it in, if - if they allowed him to.

App. 394, ll. 15-16.

> Q: Just very quickly. You just said that Beach said he was going to try to get that statement in.
> A: It was the handwritten statement that the codefendant wrote. He said that he would try. He didn't know if he could get it in, but he would try to.

App. 395, ll. 17-19.

Counsel wanted to use the codefendant's statement to support Petitioner's version of events. Without the codefendant's statement, there is no corroboration for Petitioner's mere presence defense. Counsel's trial strategy, testified to by Petitioner, is probative evidence on which the PCR court based its determination Counsel was not deficient. A strategic or tactical decision does not have to be articulated by counsel. A court may infer from the record that Counsel's actions reflect strategic decisions and, thus, should not be disturbed under Strickland. See Wood v. Allen, 558 U.S. 290 (2010). "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a

reasonable miscalculation." Harrington, 131 S. Ct. at 791. Counsel's use of the codefendant's statement to point out consistencies with Petitioner's story and the lack of assistance Petitioner offered codefendant was a proper trial strategy. Therefore, this Court should deny the petition for writ of certiorari because Counsel's reasonable trial strategy was probative evidence used by the PCR court to deny Petitioner's application. Further, the State possessed overwhelming evidence against Petitioner. Franklin, 346 S.C. at 570, 552 S.E.2d at 722.

IV. There is probative evidence to support the PCR court's finding Counsel was not deficient nor was Petitioner prejudiced under Strickland because the solicitor's closing argument did not violate the 'golden rule.'

The solicitor's closing argument did not violate the 'golden rule' because the solicitor was merely explaining how the victims' fear of a firearm lead to the kidnapping and armed robbery charges instead of a charge for strong-armed robbery. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. 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... 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." Brown v. State, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009) (internal cites omitted).

The statements challenged by Petitioner are:

> The Co-defendant in this case walked up to her this close with a mask over his face with his hands in his pockets. You saw that. But what you didn't see — you weren't able to be on the ground level. You weren't able to be eye-to-eye with him. 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 [the codefendant] represent? That he has a gun. You don't have take the State's word for it. Every witness who was there, even the ones outside, believed he had a gun.

App. 253, ll. 8 – 19.

> 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.
> ...
> By means of violence or by putting the person in fear of violence -- Blocker was in fear -- while armed with a pistol, dirk, sling shot, metal knuckles, blah, blah, blah, or a deadly weapon. A pistol would be the case here. Or allegedly either by actions or words he was armed using a representation of a deadly weapon. A representation by actions. A representation. This close. Armed with a deadly weapon or while alleging close either by actions or words he was armed while using the representation of a deadly weapon. Armed robbery. You don't have to have a weapon.
> You don't have to find a weapon. The reason the law is the way it is because when you think that someone has a weapon, you're just as scared. When you reasonably believe they have a weapon, you are just as scared as if that weapon is pointed at you. Was Ms. Blocker to wait until she had a bullet in her head to find out whether he had a weapon?

App. 255, ll. 2 – 4; App. 255 ll. 14 – 25; – 256, ll. 1 – 5.

> 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.

App. 261, ll. 19 – 23.

Here, the State's argument was not appealing to the personal bias or fear of the jury. The State was arguing the actions of Petitioner and his codefendant caused the victims' reasonable fear of a deadly weapon and the belief they could not leave the location. The statements should be viewed within the contextual framework of this case. In this case, the armed robbery and kidnapping charges were inextricably linked to the victims' fear and belief that Petitioner and his codefendant were armed, despite the fact no firearms were found. The solicitor's closing argument emphasized the victim's fear, not to arouse the jury's passion and prejudice, but to demonstrate Petitioner committed the elements of crimes for which he was at trial. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the United States Supreme Court dealt with the question of whether remarks made by the prosecutor during closing argument, in the context of the entire

trial, were sufficiently prejudicial to violate the respondent's due process rights. In upholding the respondent's conviction, the Court emphasized, "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. at 647.

Here, Petitioner attempts to take the solicitor's remarks out of context and construe them as a violation of the 'golden rule.' The context clearly shows the solicitor argued from the facts and testimony presented in order to show how the victims' fear met the requisite bar for the armed robbery and kidnapping charges. Therefore, this Court should deny Petitioner's petition because Counsel's decision was based on a reasonable trial strategy. Further, the State possessed overwhelming evidence against Petitioner. Franklin, 346 S.C. at 570, 552 S.E.2d at 722.

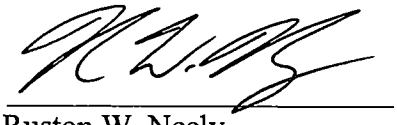
CONCLUSION

For all of the foregoing reasons, the State respectfully requests 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,

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General

BY: 
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December 4, 2017
Columbia, South Carolina

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Circuit Court Case No: 2013-CP-15-0059
Appellate Case No.: 2016-002579

GEORGE BROWN, 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:

LaNelle C. DuRant, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 4th day of December, 2017.

Jennifer Jennison
Legal Assistant for Petitioner