

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO HORRY COUNTY
Court of Common Pleas
J. Cordell Maddox, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002100

Timmy Rogers,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR court properly find Counsel was not ineffective where he did not object to the State's opening statements that Petitioner's "testimony" would tell the jury that Petitioner strangled the victim, where the co-defendant testified to inculpatory statements made by Petitioner, and where the jury was properly instructed to not consider Petitioner's decision to not testify?

- II. Did the PCR court properly find Counsel was not ineffective where he did not object to the State's closing argument that witness Kimberly Maluda saw Petitioner, where the testimony at trial established Maluda saw Petitioner's truck?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the July 2008 term of the Horry County Grand Jury for murder (2008-GS-26-2450). Kia T. Wilson, Esq., and James C. Galmore, Esq., represented Petitioner at trial. Jimmy A. Richardson, II, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 11, 2010, Petitioner proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Petitioner guilty as indicted on October 14, 2010. Judge Hyman sentenced Petitioner to imprisonment for a term of 35 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Breen Richard Stevens, Esq., who raised the following issue:

Whether the trial court erred by refusing to direct a verdict of acquittal based upon a lack of direct or substantial circumstantial evidence that the Appellant committed this murder?

The parties proceeded to oral arguments on June 5, 2013. Petitioner was represented by David Alexander, Esq. The State was represented by Alphonso Simon, Jr., Esq. By opinion decided September 4, 2013, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Rogers, 405 S.C. 554, 748 S.E.2d 265 (Ct. App. 2013). The Remittitur was issued on September 20, 2013.

Petitioner filed his application for post-conviction relief on October 8, 2014 (2014-CP-26-06589). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
 - a. "There was a footprint found at the scene that was never tested or reviewed by counsel, and was not introduced at the trial, there was some minor testimony regarding the collection of that evidence that came out before the jury which resulted in a jury question during deliberation;

however because it was not introduced by either party it could not be considered.

- b. “Additionally despite substance issues and mental health history no evaluation or assessment was conducted.”
- c. “Inappropriate statement made by the Solicitor in closing argument were not objected to by counsel”

Respondent made its return and motion to dismiss on March 25, 2015, arguing the application was not timely filed. The Honorable Steven H. John issued a Conditional Order of Dismissal filed April 9, 2015, to which Petitioner responded by filing on May 15, 2015. After further filings by both parties, a hearing on the motion to dismiss was convened on August 11, 2015, before the Honorable G. Thomas Cooper, Jr. By written order filed September 23, 2015, Judge Cooper granted Respondent’s motion and dismissed the application as untimely filed.

Petitioner filed a motion to reconsider on December 18, 2015, arguing the untimeliness of the filing was the fault of PCR counsel, not Petitioner, and as such enforcement of the statute of limitations would be unconscionable. Respondent filed its return on January 7, 2016. By written order filed February 4, 2016, Judge Cooper granted Petitioner’s motion to reconsider and ordered a full evidentiary hearing on the merits.

An evidentiary hearing into the matter was convened on August 9, 2016, before the Honorable J. Cordell Maddox, Jr. Petitioner was present at the hearing and represented by Donna K. Taylor, Esq., and D. Lynn Bowley, Esq. Patrick L. Schmeckpeper, Esq., and Caitlin B. Hastings, Esq., of the South Carolina Attorney General’s Office, represented Respondent. By written order dated September 8, 2017, and filed September 11, 2017, Judge Maddox denied and dismissed the application.

This appeal follows.

STATEMENT OF THE FACTS

On the night of April 21, 2008, Frederick Engel (“Victim”) was strangled to death by Petitioner. The forensic pathologist testified that Victim had been strangled. (Appx. 481, ll. 3-5). Victim perished from asphyxia where a shoe lace ligature was pulled tightly around his neck, enough that it cut off all blood flow. (Appx. 481-82).

a. The affair

Petitioner was in an intimate relationship with Sherry Engel (“Engel”), Victim’s wife. Engel first met Petitioner in May 2007 at a storage building in Kentucky. (Appx. 270-71). Engel further testified that she started having an affair with Petitioner shortly thereafter. (Appx. 271, ll. 14-19). She indicated that she would see Petitioner when she would return home to Kentucky for medical appointments and when she would check on her family. (Appx. 271-74).

At one point in time, Engel moved back to Kentucky temporarily to assist with the care of her sister-in-law, who had suffered a debilitating stroke. (Appx. 275-80). Engel noted that she would talk with Petitioner fifteen to twenty times a day while she was in Kentucky. (Appx. 280-81). She decided to move back to Myrtle Beach to be with her husband in early October 2007, but continued her relationship with Petitioner, who expressed his fear he would never see her again. (Appx. 281, ll. 8-21). Engel testified that Petitioner had discussed getting rid of Victim as far back as the summer of 2007. Petitioner wanted to hire his sister’s brother, who was a sharpshooter, but the brother lived in Germany. Engel indicated that she told Petitioner not to hire the brother, and that she and Petitioner argued over the plan. Petitioner approached the brother anyway, who said no to Petitioner’s proposal. (Appx. 289, ll. 6-24).

b. The plan

Engel testified that Petitioner started discussing getting rid of the victim again in March. She stated that she became more compliant with Petitioner's wishes in April. They talked about it every day. She further asserted Petitioner kept stating he wanted the victim out of the way because he felt like the victim was going to take Engel away from Petitioner. (Appx. 289-91).

Engel testified that the plan was for her to call Petitioner when Victim left the house. (Appx. 291, ll. 8-11). Petitioner told her that he would be at the mailbox. Id. Petitioner said that he would park over by the parking area. (Appx. 291, ll. 16-21). Engel never saw Petitioner's truck in that area. (Appx. 291-92). Engel testified that Petitioner told her he was going to shoot Victim with a gun he purchased for \$40. (Appx. 292, ll. 9-14). Engel never saw the gun, but she indicated that guns that were taken from her house belonged to Petitioner. (Appx. 292-93). Engel testified that Petitioner stated he was going to shoot Victim by waiting to ambush him from behind tall bushes near the mailbox. (Appx. 293, ll. 7-17).

c. The evidence of Petitioner's presence

Karla Green, an employee at the Value Place Inn in Myrtle Beach, testified Petitioner had reserved a room at the hotel from April 8 until May 5, 2008. (Appx. 199-201). Green stated that Engel was with Petitioner when he checked in April 8, and Engel paid for the stay in cash. (Appx. 202-06). Green also testified that Petitioner had left the hotel by April 30. (Appx. 209-10). Green testified that Petitioner drove a red 1993 Chevrolet S-10 pickup truck. (Appx. 211, ll. 19-25). Green also testified Petitioner had stayed at the hotel for a two week period the preceding March. (Appx. 206-09).

Michael Graham of the Horry Telephone Cooperative testified about calls and text messages placed and received by a phone number ending in -4731, identified separately as

Petitioner's cell phone number. (Appx. 514, ll. 10-25). Graham testified at 9:06 P.M. on April 21, 2008, a call was placed from a phone number ending -6563, separately identified as Engel's number, to Petitioner's phone. (Appx. 524, ll. 9-22). The call was received off a tower that was within the vicinity of the Value Place Inn where Petitioner was staying. (Appx. 524-25). The next call, placed at 9:27 P.M., was placed within the vicinity of the tower that covered the Carolina Forest community, where Victim and his wife lived. (Appx. 525-26). A call was placed from Petitioner's phone to Engel's phone at 9:42 P.M. It was placed off a water tank site that was in the general area of the Carolina Forest community. (Appx. 527-31). A flurry of four calls exchanged between Petitioner's phone and Engel's phone in the span of a minute, all of which registered at 9:43 P.M. (Appx. 531-33). Silence followed for just under an hour. (Appx. 534, ll. 1-4).

Graham testified that a call was later placed from Engel's phone to Petitioner's phone around 10:35 P.M. (Appx. 534, ll. 5-20). Another call was placed from Engel's phone to Petitioner's phone at 11:05 P.M. (Appx. 534-35). At 11:42 P.M., Petitioner's phone called Engel's phone. (Appx. 535, ll. 6-19). Another brief call followed at 11:49 P.M. (Appx. 535, ll. 20-24). At 12:03 A.M. on April 22, another call was placed from Engel's phone to Petitioner's phone. (Appx. 536, ll. 5-10). There were two more calls later in the day between the two numbers; one was at 5:12 P.M. and the other at 10:08 P.M. (Appx. 536, ll. 11-24).

Kimberly Maluda, a resident in Victim's neighborhood, testified that on April 21, 2008, she passed a burgundy-red Chevrolet S-10 pickup truck on her way home. (Appx. 172-73). She saw the truck again that evening when it parked in a parking pad across from where she parked. (Appx. 173-75). Maluda noted the pickup truck was not at the parking pad the next morning. (Appx. 177, ll. 4-7). She also did not see the tag on the truck, could not see the driver, and she

could not identify what state it was from. (Appx. 179-80). Maluda further testified that she could not move her car the next morning because it was within the crime scene tape. (Appx. 176, ll. 6-17). Maluda reported the suspicious truck to law enforcement that morning. (Appx. 176-77).

d. The murder

Engel testified that, as she went to bed, she asked Victim to go check the mail the night of April 21, 2008. (Appx. 294, ll. 10-22). When Engel heard the garage door opening, she called Petitioner and informed him that Victim was going out to check the mail. (Appx. 294-95). Petitioner called back later and informed Engel “It’s done.” (Appx. 295, ll. 7-13). Engel could tell he was in the woods from “the way he was stomping and everything.” (Appx. 295, ll. 15-16). However, she could not understand what he was saying because he was out of breath and still running. (Appx. 295, ll. 16-18). Engel testified they hung up after about ten minutes. (Appx. 295, ll. 18-19).

e. The aftermath

Engel called Petitioner back, at which time Petitioner told her he was back at the motel “getting the blood off of his hands and everything and getting his coveralls and everything off.” (Appx. 295-96). After confirming Petitioner’s flight from the scene, Engel went to the Rickersons’ home and told them she could not find Victim. (Appx. 296-97).

Thomas Rickerson testified that on the night of April 21, 2008, Engel knocked on his door between 11:30 and 11:45 P.M. (Appx. 185, ll. 11-21). Engel told the Rickersons that she could not find Victim. (Appx. 185-86). Rickerson went to the Engels’ home and searched for Victim. (Appx. 186, ll. 3-11). After he found nothing at the residence, Rickerson drove around the neighborhood searching for Victim. (Appx. 186, ll. 12-16; Appx. 297, ll. 10-13). When

Rickerson returned home, his wife reported Engel stated Victim had his mailbox keys, and that Victim may be at the mailbox; Engel then told Rickerson the same. (Appx. 186, ll. 16-23; Appx. 297, ll. 13-18). Rickerson took Engel to the mailbox, where the two discovered a pair of glasses on the ground and blood in front of the mailboxes. (Appx. 186-87; Appx. 297, ll. 20-22; Appx. 298, ll. 6-8). Rickerson told Engel to get back in the car, and the two returned to the Rickersons' home to call 911. (Appx. 187, ll. 5-15; Appx. 297, ll. 22-24). Rickerson testified that he could see where a scuffle and possible dragging occurred. (Appx. 187, ll. 18-20). He recalled that police went into the woods and did not see anything, but nonetheless taped off the area after they emerged. (Appx. 187, ll. 21-22). Victim's body was found in the woods approximately thirty feet from the mailboxes. (Appx. 188, ll. 5-10; Appx. 235, ll. 2-12; Appx. 242, ll. 5-9). Brummett testified that it appeared the Victim had been dragged face down by his left arm. (Appx. 242, ll. 16-25; Appx. 245-46; Appx. 249, ll. 12-20). A white shoestring was found around Victim's neck. (Appx. 249-50). Law enforcement testified they collected nineteen items at the murder scene. (Appx. 239, line 5).

None of the DNA swabs taken at the scene contained Petitioner's DNA. (Appx. 248-50). A fingerprint found at the scene was deemed unusable for comparison due to insufficient ridge detail. (Appx. 248-50). Law enforcement was similarly unable to determine anything from casts of footwear impressions found at the scene. (Appx. 244-45; Appx. 253, ll. 12-23).

Engel did not initially tell law enforcement about Petitioner's involvement in the murder, but instead deleted call records from her phone and attempted to set them upon a goose chase. (Appx. 298-99). She noted that she had minimal contact with Petitioner for the week after the murder. (Appx. 300-01). During one conversation, Petitioner asked Engel what she wanted him to do with Victim's watch and keys---Engel replied "[d]on't you bring nothing to me." (Appx.

301, ll. 2-5). Engel testified that Petitioner never discussed beating the victim before the murder. (Appx. 301-02). She did note that Petitioner mentioned something about strangling the victim, but not until after the funeral. (Appx. 302, ll. 4-11). Engel testified that when she talked with Petitioner about the murder in Kentucky, he maintained that he shot the victim. (Appx. 302-03). She recalled, “[h]e had said something about a rope, but never did tell me that he had choked Fred, no. But he had talked about a rope before, but he never did say what he was going to do or anything.” (Appx. 303-04).

Engel also testified that Petitioner had recolored his truck white or gray by the time of Victim’s funeral in Kentucky. (Appx. 304-05). According to Engel, Petitioner informed her that he had washed the steering wheel down with bleach because it had blood on it, but forgot to bleach the shifter. (Appx. 306, ll. 5-22). Petitioner also told her he was wearing a pair of camouflage coveralls and boots when he killed Victim. (Appx. 306-07). Engel admitted to purchasing the boots for Petitioner, and that she had seen the coveralls before. Engel never saw the clothes again after April 21, 2008. Petitioner indicated to Engel that he had disposed of everything: the keys, the watch, the coveralls, and the boots. (Appx. 307, ll. 3-14).

Chris Carman, Engel’s nephew, testified he saw Petitioner four days before Victim’s funeral. (Appx. 459, ll. 8-23). Carman indicated Petitioner’s truck had changed color. (Appx. 459-60). Before it was primered, the truck had been red. (Appx. 460, ll. 2-6).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; 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 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "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). The applicant must overcome this presumption to receive relief. Cherry v. State, 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 that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. 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 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 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT PROPERLY FOUND COUNSEL WAS NOT INEFFECTIVE WHERE COUNSEL DID NOT OBJECT TO THE STATE'S OPENING PREDICTION OF PETITIONER'S "TESTIMONY" BECAUSE THE JURY WAS PROPERLY INSTRUCTED NOT TO CONSIDER PETITIONER'S DECISION NOT TO TESTIFY, AND BECAUSE THE STATE'S INARTICULATE VERBIAGE COULD HAVE ONLY REFLECTED POORLY UPON AND HURT THE STATE'S CREDIBILITY BEFORE THE JURY.

The PCR court properly denied post-conviction relief because the State's opening misstatement could have only reflected poorly on the State, not Petitioner, and because any conceivable prejudice was cured by the trial court's jury instructions. It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). "However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Johnson, 325 S.C. at 187, 480 S.E.2d at 735 (citations omitted). For example, this Court has found no prejudice where the State merely suggested in its opening remarks that the defense would introduce witnesses and testimony. State v. Dawkins, 297 S.C. 386, 391-93, 377 S.E.2d 298, 301-02 (1989).

When analyzing whether an inappropriate comment by the prosecution is prejudicial, the Fourth Circuit Court of Appeals developed six factors to fully analyze whether the defendant was deprived of a fair trial:

- (1) The degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused;
- (2) Whether the remarks were isolated or extensive;
- (3) Absent the remarks, the strength of the competent proof introduced to establish the guilt of the accused;

- (4) Whether the comments were deliberately placed before the jury to divert attention to extraneous matters;
- (5) Whether the prosecutor's remarks were invited by improper conduct of defense counsel; and
- (6) Whether curative instructions were given to the jury.

United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998); see also Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (favorably citing Wilson for proposition the appellate court must view alleged impropriety of argument in context of the entire record). "These factors are examined in the context of the entire trial, and no one factor is dispositive." Wilson, 135 F.3d at 299; see also Simmons, 331 S.C. at 338, 503 S.E.2d at 166 ("On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record[.]"). "Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999) (citing State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996)); see also Johnson, 325 S.C. at 188, 480 S.E.2d at 735-36 (finding thorough jury instructions as to the right to remain silent and not consider the absence of defendant's testimony adequate to cure any prejudice from closing argument that observed the defendant did not testify).

The State, in opening, explained that the jury would hear from Engel, would probably not like Engel, and explained the State's intentions in what was offered in opening:

And I'll promise you at this point that you're not going to like Sherry Engel because Sherry Engel has as much to do with [Victim's] death as Timmy Rogers. Sherry Engel never strangled him to death, but this isn't about – this isn't about assigning a percentage of blame. It's not 60/40 or 50/50. This cases is 100 percent, 100 percent. If Sherry hadn't sent her husband to his death he would be alive today.

If Timmy Rogers wasn't laying in wait in that wood line with that string and choked him to death he would be alive today. Or they would have found

some other time to do it, but it's 100 percent, 100 percent. Don't worry about assigning fault. I'll tell you now you're not going to like Sherry. But there is enough blame to go around, and it certainly covers Timmy. *Timmy Rogers' testimony will tell you that he strangled Fred Engel at that the mailbox at Carolina Forest.*

Now, I'm going to bring in a series of witnesses, and the purpose of an open opening statement is to give you [a] thumbnail account of what this whole case is about. I'm not going to sit here and tell you in specificity what each person is going to say. You will hear that from the stand, and if they tell you something different than what I tell you that's your evidence up there.

But I want you to at least be able to say that he told me about that lady and he told me about that guy, and this is where they fit into the puzzle.

(Appx. 159-60) (emphasis added). The prosecution thereafter walked through each witness it intended to call. (Appx. 160-65). The State again referred to Petitioner's side of the case in an effort to impress upon the jury its duty of rational impartiality:

But just because it only takes two or three days this is a murder. This means an awful lot to Timmy Rogers. It's the date he's waited for. He pled not guilty, and I would ask you to listen to all the evidence and don't jump to any conclusion and say, 'I'm mad at Timmy Rogers. I'm mad at Sherry Engel. Let's find a tree and hang this crowd.' That's not how our system is set up. I want you to listen to all the evidence, and give him every benefit of the doubt. *Listen to him.* There is more than enough evidence here.

(Appx. 165-66) (emphasis added).¹ Counsel did not object to any portion of the opening statement. At the end of the case, the trial court expressed its desire to emphasize Petitioner's right to remain silent in its charge, and thereafter firmly instructed the jury:

I instruct you and emphasize: [t]he fact that the Defendant did not testify is not a factor to be considered by you in any way in your deliberations and in your

¹ This second portion of the opening statement was challenged at the PCR hearing, but does not appear to be of concern to Petitioner in the petition for writ of certiorari, as it is neither mentioned in the statement of the issues, nor quoted or cited in the body text of the petition. Nonetheless, Respondent quotes it here in order to establish a more complete context for analysis under the Wilson factors.

consideration on the question of guilt or innocence of the Defendant. It must not be considered by you in your deliberation.

I repeat: [u]nder your oath, you are not to draw any conclusions whatsoever from the fact that the Defendant in this case did not testify. The fact that this Defendant did not testify would – should not even be discussed in the jury room.

The burden of proof, as I have stated to you, is on the State. The Defendant is not required to prove his innocence.

(Appx. 597-98; Appx. 678-79) (formatting adjusted).

Counsel, confronted with the remark and lack of objection, indicated her belief the remark didn't hurt Petitioner because he didn't testify, such that it was simply an untrue statement by the State, and there was ample opportunity to cure any problems the remark may have created. (Appx. 872-73).

The Order of Dismissal is well supported considering the remark under the Wilson factors and in the context of the cure. To whatever extent the jury was misled by the State's slip of the tongue, it was ultimately disabused of any notion that Petitioner might testify when he in fact did not, and when the trial court firmly instructed them he had no duty to do so. The remarks were isolated to two instances of inarticulate efforts in opening to describe how Petitioner's own words to Engel would support his conviction, and to impress upon the jury the importance of considering both sides of the case. Petitioner's guilt was proven by highly compelling, competent evidence from the detailed testimony of his co-conspirator, cell phone records to place Petitioner at the scene at the time of Victim's murder, testimony placing a truck matching the description of his own truck at the scene, testimony to show Petitioner's effort to change the color of his truck after the murder, and testimony to corroborate the motive provided by Engel: the affair. Read in the context of the opening statement as a whole, there is nothing to show the remarks were made for the purpose of diverting the jury's attention to extraneous

matters. Finally, the trial court's instructions to the jury to not even discuss Petitioner's decision to not testify was unequivocal and powerful, and cured any conceivable prejudice.

Petitioner's distinction of State v. Dawkins, 297 S.C. 386, 391-93, 377 S.E.2d 298, 301-02 (1989), is hardly a distinction at all. The hearts and minds of an impartial jury are not converted from the cause of justice to some unshakeable presumption of guilt by the mention of the defendant's name. Petitioner's argument that he did not admit to killing Victim is without merit. Petitioner did admit to killing Victim, repeatedly, to Engel, who testified to that effect at great length. As evidenced by the second excerpt of the State's opening, the prosecution planted no seeds of presumptive guilt, but impressed upon the jury its duties while nonetheless setting forth a compelling outline of the State's case for Petitioner's guilt.

For all of these reasons, Petitioner's first issue raised in the petition for writ of certiorari is without merit and the petition should be denied.

II. THE PCR COURT PROPERLY FOUND COUNSEL WAS NOT INEFFECTIVE WHERE COUNSEL DID NOT OBJECT TO THE STATE'S CLOSING ARGUMENT THAT A WITNESS SAW PETITIONER NEAR THE SCENE BECAUSE THE ARGUMENT OFFERED WAS A REASONABLE INFERENCE FROM THE WITNESS' TESTIMONY THAT SHE SAW PETITIONER'S TRUCK ON THE NIGHT OF THE MURDER.

The PCR court also properly found Counsel was not ineffective where Counsel did not object during closing arguments to the State's valid inference that Maluda, who saw a truck matching the description of Petitioner's truck, in fact saw Petitioner. "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (citing State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975)). "Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." Id. (citations omitted).

As previously set forth above, witness Maluda testified to seeing a burgundy-red Chevrolet S-10 pickup truck near the crime scene on the evening of the murder. Other testimony established Petitioner drove a burgundy-red Chevrolet S-10 pickup truck, at least until he applied a layer of new primer to change its color after the murder. In closing arguments, the prosecution argued the intended inference: that Maluda saw Petitioner at the scene on the night of the murder. (Appx. 641-42; Appx. 645, ll. 16-19).

The State's argument was an appropriate inference from the evidence in the record. Any weaknesses or holes in the evidence to support the inference are not so substantial as to deny the State the opportunity to argue the inference at all, but rather are themselves potential grounds for closing argument.

Petitioner's comparison to State v. Huggins, 325 S.C. 103, 107-08, 481 S.E.2d 114, 116-17 (1997) is misplaced. In Huggins, the State explicitly referred to evidence not put into the record. Id. Here, the State argued an appropriate inference from evidence unequivocally put into the record.

For all of these reasons, Petitioner's second issue raised in the petition for writ of certiorari is without merit and the petition should be denied.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

24 Oct., 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

OCT 24 2018

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
J. Cordell Maddox, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002100

TIMMY ROGERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

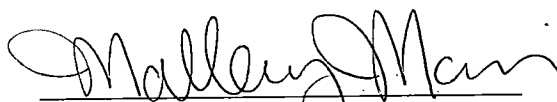
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. DuRant, Esquire
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201

This 24th day of October, 2018.


MALLORY MORRIS
Legal Assistant for Respondent



RECEIVED

OCT 24 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 24, 2018

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

RE: Timmy Rogers v. State of South Carolina
Appellate Case No. 2017-002100
Lower Court Case No. 2014-CP-26-6589

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: LaNelle C. DuRant, Esquire