

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Roger M. Young, Circuit Court Judge

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MARVIN BOWENS-GREEN,

**ORIGINAL**  
**RECEIVED**  
JUN 27 2019  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001755

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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### **ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where trial counsel admitted he should have objected to an emotional plea to the jury by the solicitor during closing arguments in an armed robbery trial, where the remarks also suggested that the trial was a search for the truth and bolstered the credibility of eyewitnesses, and where Petitioner received a life sentence without the possibility of parole?

## STATEMENT

Petitioner was indicted by a Charleston County grand jury on April 4, 2011, for the charges of armed robbery and possession of a firearm during the commission of a violent crime. App. 899 – 902. He proceeded to trial before the Honorable Kristi L. Harrington and a jury on June 11, 2012. App. 1. D. Bruce Durant and Rutledge Durant prosecuted the charges, and Petitioner was represented by Andrew Grimes and Cody Groeber. The state served a notice of intention to seek a sentence of life without parole. App. 270 l. 25 – App. 271 l. 12. After a four-day trial, Petitioner was found guilty as indicted. App. 771 l. 20 – App. 772 l. 7. Judge Harrington sentenced Petitioner to five years' incarceration on the weapon charge and life without the possibility of parole on the armed robbery charge. App. 779 ll. 15 – 23.

Petitioner's convictions were affirmed. State v. Green, 412 S.C. 65, 770 S.E.2d 424 (Ct. App. 2015). He then filed a timely application for post-conviction relief, on or about December 18, 2015. App. 763. His application contained allegations of ineffective assistance of counsel, including failure to object to the solicitor's comments as prejudicial and vouching for the credibility of the state's witnesses. App. 790 – 792. In response, on or about September 7, 2016, the state filed a return and motion to dismiss based upon the belief that Petitioner's PCR application was successive. App. 793 - 797. The PCR court entered a conditional order of dismissal on October 4, 2016.

Petitioner filed a *pro se* response to the conditional order of dismissal noting that his application did not refer to different armed robbery charges from the same county; therefore the application was not successive. App. 804 – 806. On or about January 24, 2017, the state filed an amended return and motion to vacate the conditional order of dismissal. App. 807 – 812. An

Order vacating the conditional order of dismissal was filed on February 3, 2017. App. 814 – 816.

An evidentiary hearing was held on May 21, 2018, before the Honorable Roger M. Young, Sr. App. 817. Christopher Murphy represented Petitioner, and Kelly Oppenheimer appeared on behalf of the state. Petitioner and one member of his defense team testified at the hearing.<sup>1</sup>

At the conclusion of the hearing, the PCR court agreed to hold the record open for thirty days so that PCR counsel could provide the court with information regarding Petitioner's contention that he was ordered to wear an ankle monitor prior to the time of the robbery which would have proven he was not at the scene of the crime. App. 861 l. 8 – App. 862 l. 12. The PCR court issued its Order of Dismissal on or about August 23, 2018. App. 872 – 897: It contained the PCR judge's findings that Petitioner failed to meet his burden on each of the three allegations which were pursued during the hearing: failure to object to the solicitor's comments in closing argument, failure to object to perjured testimony, and ineffective assistance of counsel for advising Petitioner not to testify.

This petition follows.

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<sup>1</sup> Counsel Groeber testified at the hearing. Counsel Grimes had passed away at the time of the hearing. App. 822 ll. 2 – 15.

## ARGUMENT

**The PCR court erred in denying relief, where trial counsel admitted he should have objected to an emotional plea to the jury by the solicitor during closing arguments in an armed robbery trial, where the remarks also suggested that the trial was a search for the truth and bolstered the credibility of eyewitnesses, and where Petitioner received a life sentence without the possibility of parole.**

### Relevant facts

At approximately 7:45 a.m. on the morning of December 24, 2010, a man wearing sunglasses, a red hat, a black jacket, and khaki pants entered the Quick Stop convenience store and gas station on Savannah Highway in Ravenel with a gun. App. 288 l. 10 – App. 289 l. 20. Through an interpreter, Natubhai Patel, the owner of the store, testified that he was able to see the man's face. App. 289 ll. 21 – 23. Patel indicated that he had seen the man before. App. 289 l. 24 – App. 291 l. 3. According to Patel, this man would routinely come into the store to purchase cigarettes and lottery tickets; the two allegedly joked about an ID with President Obama's signature on it. Id.

Patel testified that the man took sixty dollars and Newport cigarettes from him. App. 291 ll. 7 – 16. Patel called 911. App. 291 ll. 17 – 22. Law enforcement viewed the surveillance video from the incident; the video was shown at Petitioner's trial. App. 291 l. 23 – App. 294 l. 11. Patel did not know the man's name but supposedly recognized him as a regular customer. App. 294 ll. 14 – 23.

Patel identified Petitioner pre-trial and at trial. App. 291 ll. 1 – 3; App. 296 l. 5 – App. 299 l. 1. Patel's identification notwithstanding, none of the eight latent prints taken from the convenience store matched Petitioner's prints. App. 467 l. 18 – App. 468 l. 1.

At the evidentiary hearing, Petitioner indicated that he had only spoken with trial counsel Groeber three times. App. 823 ll. 2 – 19. They did not exchange any written correspondence. App. 823 l. 24 – App. 824 l. 2. Although he had previously been sentenced to twenty years on a different charge and was offered a concurrent plea deal for this matter, he declined the offer because he was not guilty. App. 824 l. 3 – App. 825 l. 20.

Regarding the bolstering issue, Petitioner offered multiple examples of objectionable comments made by the solicitor during closing argument. App. 833 l. 24 – App. 839 l. 9. In particular, Petitioner suggested that counsel should have objected when the solicitor made the following remarks:

But maybe the thinking was who would believe this immigrant anyway. Who would believe this man who couldn't even come into this courtroom and couldn't speak English. I don't know if that's what was thought but if that was he is dead wrong.

App. 725 ll. 8 – 12. Similar objectionable remarks were littered throughout the closing argument:

Before I show [the surveillance video] to you though I don't think all of you are going to be able to identify this man, obviously. I don't think that can be done, and that is just what Dr. Beaudry was telling you about. Strangers have a lower level of being able to identify somebody. So just because all of you can't, and some of you may, does not mean you have reasonable doubt. This case is based on the witnesses who knew him, not on your ability to look at this video and determine if it is him.

App. 729 l. 20 – App. 730 l. 3. Similarly, the solicitor urged the jury to seek the truth. App. 730 ll. 18 – 22. The solicitor continued to vouch for the credibility of the state's witnesses throughout closing argument:

You judge their credibility and you determine if they are lying to you, and they are not. Why would they? Why would they go through a lie to frame somebody and say things they don't know? This isn't about their credibility. They are just telling you the truth.

App. 734 ll. 10 – 14. Patel’s wife who worked at the store with him also testified and had her credibility bolstered by the state:

So you have three people, and that case made its way to my office. Three people who knew him. But you heard from a fourth person. You heard from Mrs. Patel, and you’ll decide to believe her or not. There’s every reason in the world to believe her.

She told you she was certain. We know that. She told you she was sure. We know that. She told you why she knew him. ... She came in and she told you that that.

...

You decide for yourself what happened. Does she know or is she lying? She is not.

It is the search for truth. She came in here and she was positive. She came in here and I pointed at this man. I wanted to know absolutely sure if she could look at you and say this with as much meaning and conviction as she could. Could she tell you that? Could she look at you and say that? And that’s important. And she did.

...

You can believe all those witnesses and you can believe the truth in this case.

App. 738 l. 6 – App. 739 l. 4.

Notably, trial counsel admitted “there were a couple of places where [he] probably should have objected.” App. 858 ll. 13 – 24. Counsel provided two examples:

I think that the two that come to mind, for me, is one was the comment about the victim being an immigrant, and I think that arguably could be inflammatory and should have been objected to, and then there was at least one point where the prosecutor said they’re telling the truth, and so that was another part where I felt like, looking back, I should have objected.

App. 858 ll. 13 – 24. Counsel was unsure how to respond when asked if the objections would have been successful. App. 859 ll. 3 – 6.

## Discussion

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). “Second, the applicant must demonstrate he was prejudiced by counsel’s performance in such a manner that, but for counsel’s error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Generally, “[t]he assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)) (stating that a

solicitor improperly vouches for a witness's credibility “by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony”); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In keeping their closing arguments within the record, solicitors additionally must tailor their remarks “so as not to appeal to the personal biases of the jury” or “arouse the jurors' passions or prejudices.” Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004).

In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine “whether the solicitor's comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” Vaughn, 362 S.C. at 169–70, 607 S.E.2d at 75 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); Von Dohlen, 360 S.C. at 609, 602 S.E.2d at 744.

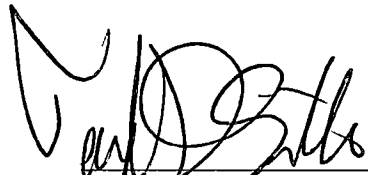
Because the issue is whether the solicitor's improper argument prevented the jury from fairly considering the witnesses' credibility, any allegations of overwhelming evidence of Petitioner's guilt do not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument. See Simmons v. State, 331 S.C. 333, 340, 503 S.E.2d 164, 167 (1998).

As admitted by PCR counsel at the evidentiary hearing, at least two of the remarks by the solicitor to the jury during closing argument were objectionable. The state repeatedly bolstered the credibility of its own witnesses without objection. Had counsel objected, as was the case throughout trial, the trial judge would have sustained the objection and advised the jury to disregard the objectionable remarks. A curative instruction could have been offered, or, had the remarks

continued after an objection was sustained, a mistrial could have been requested. Counsel's failure to object during closing prejudiced Petitioner and allowed the state to sway the jury through improper means. Petitioner is thus entitled to a new trial.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charge against him, and remand the case for a new trial.



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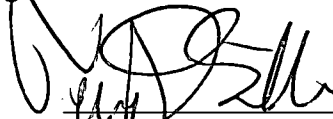
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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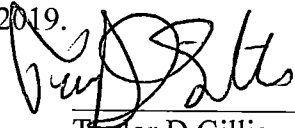
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Benjamin Limbaugh, 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 Marvin Bowens-Green, #346650, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of June, 2019.



\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of June, 2019.

Marcy Allgood (L.S)

Notary Public for South Carolina  
My Commission Expires: May 12, 2027