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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
Hon. Brian M. Gibbons, Circuit Court Judge
Hon. Donald B. Hocker, Trial Court Judge

Common Pleas Case No. 2017-CP-36-00509

ROBERT ANTWON WRIGHT
RESPONDENT,

v.

STATE OF SOUTH CAROLINA
PETITIONER.

Appellate Case No. 2019-001220

RETURN TO THE STATE'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Whether the post-conviction relief court correctly held that defense counsel was ineffective for failing to object to the solicitor's multiple improper closing arguments, including references to the defendant's alleged future dangerousness; allusions to excluded evidence of drug activity; incorrect assertions about the State's burden of proof; and personal opinions about the defendant's alleged guilt.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The State has petitioned for certiorari without even attempting to demonstrate that this case is worthy of the Court's discretionary review. It merely seeks error correction of a highly fact-bound ruling on the effectiveness of trial counsel. And there was no error: The post-conviction relief court correctly held that defense counsel was ineffective because—for reasons of courtesy, not strategy—she failed to object a single time to the State's numerous improper closing arguments at trial.

On April 30, 2014, Tarakus Coleman and Lorenzo Jones admittedly entered the home of Cedrick and Precious Mayers, held them at gunpoint, and robbed them. They were arrested and, at the suggestion of investigators, claimed that Respondent Robert Antwon Wright had helped them arrange the robbery—after initially providing an account that did not implicate Wright at all. Wright was indicted on charges of accessory before the fact to a felony and criminal conspiracy. He was acquitted of the conspiracy charge but convicted of the accessory charges.

At trial, the State made multiple improper closing arguments designed to paper over the gaping flaws in its case. The solicitor claimed that Wright would pose a future danger to the community if he were acquitted—which courts have long deemed inappropriate at a *guilt* phase of trial. The solicitor told the jury that he knew facts *outside* the record—namely, *excluded* evidence of drug activity—that supplied Wright with a motive. The solicitor encouraged the jury to place the burden of proof on the defense. And the solicitor expressed his own personal opinions about Wright's guilt—even going so far as to insist that the *jurors* were "firmly convinced"

of those views. Each of these comments tainted the jury's deliberations on its own. And collectively, they amounted to a staggering display of prosecutorial misconduct.

Defense counsel, however, failed to offer any objection to these arguments. When asked about this decision after trial, she did not claim that it was grounded in trial strategy. She declined to object, she said, out of "courtesy," and admitted that this "was an error in judgment." It was indeed, because there was no legitimate strategic reason for allowing the State to get away with such extensive misbehavior.

Wright moved for post-conviction relief ("PCR"). After examining the trial record and conducting its own fact-finding proceedings, the PCR court held that Wright was denied his constitutional right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The court found that the solicitor's closing arguments were improper, that defense counsel's failure to object was not based on any strategy, and that—particularly in light of the vulnerabilities in the State's case—Wright had been unfairly prejudiced by the solicitor's remarks.

The State petitioned this Court for certiorari. It does not contend that any aspect of the PCR court's decision raises novel, important, or recurring issues. Nor does it claim that there is any split in authority requiring this Court's attention. Instead, the State simply disagrees with the PCR court's application of *Strickland*, and attacks the *factual* findings underlying that analysis. That is not a proper basis for certiorari, and the State's arguments are meritless. The petition should be denied.

COUNTER-STATEMENT OF THE CASE

A. Pre-Trial Proceedings And Trial Evidence

In August 2014, Wright was indicted by a Newberry County grand jury for two counts of accessory before the fact to a felony (burglary in the first degree and armed robbery), and one count of criminal conspiracy. The case was assigned for trial to the Honorable Donald B. Hocker.

Before trial, defense counsel moved to exclude any reference to Wright "as a drug dealer," as well as any suggestion that he was involved in "any selling of drugs," arguing that this would be an impermissible reference to Wright's alleged "prior bad acts." App. 32. The trial court granted this motion with the consent of the State. *Id.*

The State alleged at trial that in 2014, Coleman and Jones broke into the Mayers' home and robbed them of cash and drugs at gunpoint, and that Wright had helped arrange the robbery. *See* App. 52. The State relied heavily on testimony from Coleman and Jones, both of whom changed their accounts multiple times.

Coleman testified that he first told investigators that he "didn't have anything to do with" the robbery. App. 110-11. He later told them that Jones "asked" him to commit the robbery and that he "said no." App. 111. He then admitted involvement but did *not* implicate Wright or anyone other than Jones. App. 111-12. And finally, in "February of 2015"—nearly a year after the robbery—he "said that Mr. Wright was involved" in the planning. App. 115. Coleman also testified that he was facing nine pending criminal charges and that he was "here today because [he was] hoping that

the State is gonna show [him] some favor on those charges"; that, he said, was "why [he was] telling the story . . . about Robert Wright being involved." App. 117.

Jones similarly admitted that he "gave law enforcement a couple of different stories." App. 151. He first denied involvement. *Id.* He then implicated two people other than Wright and Coleman. App. 152. And he only implicated Wright after "[i]nvestigators came to [him] and said tell us how [Wright] was involved." App. 153.

The State also introduced phone records showing that Wright called Jones around the time of the robbery. App. 33. Jones testified that Wright told him that he had "somebody for [Jones] to rob... [b]ecause he was getting in [Wright's] way." App. 134. He also testified that when he and Coleman arrived at the victims' homes, he called Wright and asked if they should proceed with the robbery, and Wright said to "go ahead and kick the door in." App. 139; *see also* App. 93-101. But when Jones testified that Wright wanted to "get [the Mayers] out of the way as competition," the trial court sustained defense counsel's objection (App. 127), cautioning the solicitor that the "line of testimony pointing towards [Wright] being a drug dealer"—information that had been excluded—was "treading on thin ice" and "getting far afield" (App. 131-32). As discussed below, the solicitor did not heed that admonition.

B. The State's Closing Argument

During the State's summation, the solicitor made multiple arguments that the PCR court later deemed improper, none of which elicited a defense objection.

First, the solicitor suggested that Wright would pose a danger to the community if acquitted. He asked: "Do you ever wonder if somebody has the gall to

[rob] a neighbor what they could be capable of?" App. 203. He later said: "There's nothing that justifies kicking in a door in the middle of the night and holding a gun on somebody. If you do that to your neighbor, where does it stop?" App. 212-13.

Second, the solicitor alluded to a theory with no support in the admissible evidence: that Wright had a motive to arrange the robbery because he wanted to remove the victims as competition for his drug business. The solicitor asserted: "I've got my idea of why this happened. I think it's . . . a very shallow burial, just under the layers, of the intent of Mr. Wright, *why he needed him out of the way.*" App. 212 (emphasis added). Then, referencing the testimony to which a defense objection had been sustained, the solicitor added: "Y'all heard Lorenzo Jones' testimony yesterday, didn't you? *I think the inference is there, but we won't talk about it, but I think we understand why he needed them out of the way.*" *Id.* (emphasis added).

Third, the solicitor commented on the burden of proof. He correctly stated that "[m]y standard is beyond a reasonable doubt. . . . It's got to be beyond a reasonable doubt." App. 213. But he quickly followed with this series of rhetorical questions:

> Do any of you have a reasonable doubt that Robert Wright is *not* guilty of what I'm telling you he's guilty of? Do any of you have a reasonable doubt that it *didn't* happen this way? Do any of you have a reasonable doubt that your mind and your eyes are fooling you when you look at those phone records? No. . . . Are you not firmly convinced that Robert Wright *didn't* have a role in this?

Id. (emphases added).

Finally, the solicitor encouraged the jury to disregard the evidence in the case by expressing his own personal opinion about Wright's guilt and speculating about

the jurors' own views. He suggested that the jurors need not deliberate thoroughly because "there's not really a whole lot in my mind to argue about"; "I think it's pretty crystal clear." App. 207. The solicitor then surmised: "I think *y'all are firmly convinced* and I think there is only one verdict. And I think there ought to be twelve united voices here speaking together." App. 213 (emphasis added). He also called upon the jury to deliver "justice" to the victims of the robbery and, referencing Coleman and Jones, told the jury: "Justice is coming for those two. But why not hold them all accountable? ... [M]ake it three for three[.]" App. 201.

C. Verdict and Sentencing

The jury found Wright guilty of accessory before the fact to armed robbery and burglary. It found Wright not guilty of conspiracy. App. 285-87. Wright was sentenced to 16 years' imprisonment. App. 279.

D. Post-Trial Proceedings

Wright filed timely post-trial motions challenging his conviction. Judge Hocker denied the motions. App. 312-15.[1] Through new counsel, Wright timely filed an application for PCR with the Court of Common Pleas, arguing that his lawyer was ineffective because she failed to object to the solicitor's improper closing arguments. App. 368-82. The application was assigned to the Honorable Brian M. Gibbons.

Judge Gibbons conducted an evidentiary hearing, and heard testimony from Wright and the lawyers who tried his case. App. 399-473. Wright's trial counsel was

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1 Wright noticed an appeal of that decision, which he voluntarily withdrew.

questioned about her failure to object during the State's closing argument. At a prior hearing on the post-trial motions, she had described that decision as "an error in judgment on [her] part," and said that as "a common courtesy," she would "usually stay in [her] seat during closing arguments." App. 297-98. At the PCR hearing, she elaborated that she "feel[s] like juries have an idea of how trials should go and that closing argument is that lawyer's time," and explained that she had "probably only objected during a closing . . . a time or two" during her whole career. App. 453.

On May 14, 2019, Judge Gibbons granted Wright's PCR application, reversed his convictions, and ordered a new trial. App. 495-506. As detailed below, the court found that the State's closing arguments were improper in a variety of respects. *See, e.g.*, App. 499-502. And it found that defense counsel's failure to object was not based on any trial strategy: "counsel apparently recognized at least some of the solicitor's comments as objectionable," and "characterized her practice of staying in her seat . . . as a common courtesy rather than being part of any defense strategy." App. 503. The court concluded that counsel's failure to object qualified as deficient performance under *Strickland*, and that because the "evidence of [Wright's] guilt is not overwhelming"—the "case could go either way if tried again"—he had been prejudiced. App. 504-05. Indeed, "the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." App. 504.

The PCR court denied the State's motion to amend the judgment. App. 522. The State then filed a petition for writ of certiorari to review the grant of PCR ("Pet.").

STANDARD OF REVIEW

When reviewing a ruling on post-conviction relief, "[t]his Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them." *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*. *Id.*

ARGUMENT

I. THE STATE PRESENTS NO ISSUE THAT WARRANTS CERTIORARI.

The State does not argue that this case presents an issue worthy of certiorari. Its petition seeks only error correction, and should be denied on this basis alone.

A decision on PCR is not subject to an appeal as of right. Under this State's Uniform Post-Conviction Procedure Act, "[a] final judgment entered under this chapter may be reviewed by a writ of certiorari as provided by the South Carolina Appellate Court Rules."." S.C. Code § 17-27-100. "This section clearly makes appellate review under the Act discretionary with this Court." *Knight v. State*, 284 S.C. 138, 140, 325 S.E.2d 535, 537 (1985).

A "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." SCACR 242(b). This Court has not specifically identified the factors warranting a grant of certiorari in the context of a PCR decision. But this Court's rules generally provide that certiorari is appropriate in several limited circumstances: (1) "[w]here there are novel questions of law"; (2) "[w]here there is a dissent in the decision of the Court of Appeals"; (3) "[w]here the decision [below] is in conflict with a prior decision of the

Supreme Court"; (4) "[w]here substantial constitutional issues are directly involved"; and (5) "[w]here a federal question is included and the decision [below] conflicts with a decision of the United States Supreme Court." *Id.*

The State does not invoke any of these or similar circumstances. It does not claim that this case presents a novel legal question—nor could it, because it seeks review of a straightforward application of the *Strickland* test. The State does not claim that review is appropriate to address a conflict with this Court's precedents or those of any Court of Appeals. Although the case involves a constitutional issue, the State does not contend that the issue is "substantial"—it arises out of the unique set of facts presented by this case. Nor does the State claim that the PCR court applied the wrong legal standard, or misunderstood any of the cases it applied.

In short, the only reason to grant certiorari would be to correct an error in *this* case alone, to set aside the PCR court's *factual* findings, and to re-litigate the case-specific arguments that court rejected. This Court should decline to do so.

II. THE DECISION BELOW WAS CORRECT.

It would be futile to grant the State's petition because the decision below was correct. Wright received ineffective assistance of counsel because his trial lawyer failed to object to the solicitor's multiple improper closing arguments.

To establish ineffective assistance of counsel, a defendant "must satisfy the *Strickland* test." *Stone v. State*, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017). This test "has two components: . . . that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Sellner*, 416 S.C. at 610-11, 787 S.E.2d at 527.

The first *Strickland* prong is satisfied if counsel's performance "fell below an objective standard of reasonableness," and the second is satisfied if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 669, 687-88, 694. Both prongs are satisfied.

A. The PCR Court Correctly Held That Defense Counsel's Performance Was Deficient Because She Failed To Object To The State's Improper Closing Arguments.

This Court has routinely held that a defense lawyer provides "deficient" assistance by "failing to object" to improper arguments by a solicitor. *Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 471, 477 (2016). To be sure, where "counsel articulates *valid* reasons for employing [this] *strategy*, such conduct will not be deemed ineffective assistance." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (emphases added). That is not the case here for two reasons: (1) counsel's failure to object was *not* strategic; and (2) no strategy *would* have justified this decision because the solicitor's comments were "inherently prejudicial." *Id.*

1. Counsel's Failure To Object Was Admittedly Not Strategic.

The first inquiry under *Strickland* is often a complicated exercise. Because attorneys are given "wide latitude" to make "*tactical* decisions," *Strickland* often requires a difficult examination into whether a strategic decision by counsel, in hindsight, was so detached from "prevailing professional norms" that the defendant was effectively deprived of a lawyer by virtue of that strategy. 466 U.S. at 688-90 (emphasis added). This case, by contrast, is straightforward: The PCR court properly found that trial counsel's failure to object was not the result of *any* strategy.

During post-trial proceedings, Wright's counsel admitted that her failure to object "was an error in judgment on [her] part." App. 297. "As a *common courtesy*," she explained, "I usually stay in my seat during closing argument." App. 297-98 (emphasis added). Indeed, throughout her career, she had "probably only objected during a closing . . . a time or two." App. 453. As the PCR court found, counsel's failure to object was "a common courtesy rather than being part of any defense strategy," and "courtesy" is not a legitimate reason for that decision. App. 503.

The State resists this finding, arguing that counsel's failure to object *was* "part of her trial strategy because, in her reading of the jury, she did not believe the jurors were being persuaded by the solicitor." Pet. 11. Counsel said nothing of the sort. As the State points out, she did testify at the PCR hearing that jurors often "get annoyed by lawyers," and believe that "closing argument is that lawyer's time." *Id.* (quoting App. 453). But counsel was not suggesting that an objection would have harmed Wright's chances; she was explaining the basis for her "courtesy" policy. In any event, at most, the State has offered an interpretation of counsel's testimony that differs from the PCR court's. The State does not even contend that there is no "evidence of probative value to support" the PCR court's "factual findings" on this issue, as the standard of review requires. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

The State also argues that "[c]ounsel's hindsight evaluation of her performance . . . is not the proper analysis with which to assess deficiency." Pet. 12. But the PCR court did not rely solely on counsel's own "evaluation." Although it recognized counsel's notable admission that her failure to object had been an error of

judgment, it ultimately found based on its own review that there was no strategy behind counsel's choice. App. 503. The Court should defer to that finding.

2. Counsel's Failure To Object Was Objectively Unreasonable Because The State's Closing Arguments Were Improper.

Even if counsel's failure to object had been based on trial strategy, the decision was objectively unreasonable under *Strickland*. This Court has held that "counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews*, 350 S.C. at 276, 565 S.E.2d at 768; *see also Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("[A]lthough we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to [the solicitor's closing arguments], this 'strategy' cannot be construed as a valid one given the evident impropriety of the solicitor's remarks."). Because the solicitor's remarks were manifestly improper and a violation of due process, no "strategy" could justify a failure to object to them.

a. The Solicitor Improperly Suggested That Wright Would Be A Danger In The Future.

The U.S. Supreme Court has explained that "[a]rguments relating to a defendant's future dangerousness ordinarily [are] inappropriate at the guilt phase of a trial, as the jury is not free to convict a defendant" on that basis. *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994); *compare id.* ("[W]here the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground," including "future dangerousness"). It is "improper[]" for a solicitor to "allude[] to [a defendant's] future

dangerousness, which is irrelevant to his guilt of the charged offenses, in an attempt to appeal to the jurors' sense of fear." *State v. Smith*, 425 S.C. 20, 38, 819 S.E.2d 187, 196 (Ct. App. 2018), *reh'g denied* (Oct. 19, 2018), *cert. granted* (July 1, 2019).

The solicitor did just that here. He asked the jury what Wright "could be capable of" if he "ha[d] the gall" to arrange the robbery of "a neighbor"; "[i]f you do that to your neighbor, where does it stop?" App. 203, 213. The PCR court correctly found that these arguments "improperly called upon the jury to ponder [Wright's] potential to commit future crimes" and "arouse [its] passions." App. 501-02.

The State responds by citing this Court's opinion in *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007). *See* Pet. 19. There, the Court reversed a defendant's death sentence based on the solicitor's improper closing arguments, while noting that certain comments—such as telling the jury that "it will be on your heads if [the defendant] kills someone else"—were permissible. 372 S.C. at 222-23, 641 S.E.2d at 881. *Northcutt*, however, only underscores our point. That case addressed the *sentencing* phase of trial, where "future dangerousness" often comes "into the foreground." *Simmons*, 512 U.S. at 163. Wright's supposed future dangerousness was a pure distraction at his trial; the jury was asked only whether he was guilty.

b. The Solicitor Improperly Alluded To Evidence That The Trial Court Had Excluded.

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). And it is particularly inappropriate

for a prosecutor to reference "evidence . . . *excluded* by the trial judge." *Rivers v. Indus. Life & Health Ins. Co.*, 176 S.C. 175, 179 S.E. 793-94 (1935) (emphasis added); *see also United States v. Wilson*, 135 F.3d 291, 298 (4th Cir. 1998) ("It is well settled that a prosecutor cannot argue facts that were excluded from evidence by the trial judge."); *United States v. Small*, 74 F.3d 1276, 1282 (D.C. Cir. 1996) (same). The solicitor repeatedly violated these principles at Wright's trial.

As discussed above (pp. 3-4 *supra*), the trial court excluded any reference to Wright's alleged drug activities as a motive for the robbery. App. 32. And during trial, the court sustained a defense objection when the State elicited testimony from Jones that Wright referred to the victims as "competition," admonishing the solicitor that he was "treading on thin ice" and "getting far afield." App. 127-32.

Nonetheless, during closings, the solicitor highlighted that same testimony. He said, "I've got my idea of why [the robbery] happened," and why Wright "needed [the victims] out of his way." App. 212. He reminded the jury about "Jones' testimony yesterday"—the testimony to which defense counsel's objection was sustained. *Id.* He then urged the jury to look "under the layers" of that testimony to discern the "intent of Mr. Wright": "[W]e won't talk about it"—the very thing he was talking about—"but I think we understand why he needed them out of the way." *Id.*

As the PCR court found, these arguments "impl[ied] that, although he couldn't outright say it, [the solicitor] personally knew important incriminating information not presented to the jury": "that [Wright] was a drug dealer and wanted the victims robbed because they were his competition." App. 500. Not only was this "clearly an

improper reference to evidence that had been . . . excluded by the court"; it "also improperly indicated to the jury that the solicitor had personal knowledge of facts proving [Wright's] guilt that were not presented" at trial. App. 501.

The State argues in its petition that the solicitor's comments referred to "inferences that could be drawn from" different testimony by Jones that had been "properly elicited": Wright's alleged statement that the victims were "getting in his way." Pet. 17 (quoting App. 134). This is yet another *factual* disagreement with the PCR court's reading of the record. And it is not the most reasonable one. The solicitor did not just say that Wright believed the victims were "getting in his way"; he invited the jury to ask "*why* [Wright] needed [them] out of the way." App. 212 (emphasis added). That could only have been a reference to the "competition" theory.

The State also argues that the trial court solved any problem by eventually "instruct[ing] the jury to disregard 'any evidence ordered stricken from the record,'" and "'to consider only the testimony which has been presented from the witness stand, any exhibits which have been made a part of the record in this case and any stipulations o[f] counsel.'" Pet. 17 (quoting App. 225-26). But a curative instruction is insufficient where "it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997). And the instruction here was not even curative: It was given 13 transcript pages after the solicitor made the argument, and it did not *specifically address* that argument.

c. The Solicitor Improperly Placed The Burden Of Proof On Wright.

In a criminal prosecution, the State has the burden of proving the defendant's guilt beyond a reasonable doubt. *See McNight v. State*, 378 S.C. 33, 50, 661 S.E.2d 354, 362 (2008). It is "inappropriate and highly prejudicial" for a solicitor to attempt to undermine that burden. *State v. Osborne*, 289 S.C. 142, 146, 345 S.E.2d 256, 258 (Ct. App. 1986), *aff'd as modified,* 291 S.C. 265, 353 S.E.2d 276 (1987).

Here, the solicitor asked four rhetorical questions that urged the jury to shift the burden. He first asked whether the jurors "have a reasonable doubt that Robert Wright is *not* guilty." App. 213 (emphasis added). He inquired whether the jury had "a reasonable doubt that it *didn't* happen this way"—that is, in the manner alleged by the State. *Id.* (emphasis added). "Do any of you have a reasonable doubt," he asked "that your mind and eyes are *fooling you* when you look at th[e] phone records?" *Id.* (emphasis added). And the solicitor concluded by asking: "Are you not firmly convinced that Robert Wright *didn't* have a role in this?" *Id.* (emphasis added).

The question implicit in each comment was whether *Wright* had carried a (non-existent) burden to show reasonable doubt about whether the *State's* version of the events was correct. As the PCR court explained, the State "reversed the burden of proof by asking the jury if [it] had a reasonable doubt that Robert Wright is not guilty of what [the solicitor] was telling them [he] was guilty of." App. 500. "These comments could only be interpreted by the jury as allowing them to convict if the evidence failed to prove beyond a reasonable doubt that [Wright] was not guilty." *Id.*

The State does not attempt to defend these comments. It instead offers two responses. First, it quotes the preceding sentences in the solicitor's closing where he *correctly* described the burden of proof. Pet. 16 ("My standard is beyond a reasonable doubt. Everybody from California to New York that's ever been convicted by a jury has to be proven guilty beyond a reasonable doubt." (quoting App. 213)). The State did the same thing in the *Osborne* case cited above: It first correctly noted that "there is a presumption of innocence," but then went on to attack that presumption by stating that "it wasn't created for this trial" and that "beyond a reasonable doubt" simply "means . . . you've got to use your reasoning ability." 289 S.C. at 146, 345 S.E.2d at 258-59. As *Osborne* confirmed, the fact that a solicitor initially pays lip service to his burden of proof does not give him license to repeatedly misstate it.

Second, the State argues that "the trial judge properly instructed the jury on the State's burden of proof during his jury charge and reiterated the burden was on the State at least ten times during his charge." Pet. 16 (citing App. 230-36). The PCR court acknowledged as much, but correctly held that this subsequent instruction was deficient because "no curative instructions were requested or given to correct any confusion or misdirection arising from the solicitor's comments." App. 500. Courts in this State have "refuse[d] to hold that improper jury argument can be cured by a general instruction in the court's charge to the jury where an immediate curative instruction was needed." *State v. Sweet*, 342 S.C. 342, 351, 536 S.E.2d 91, 96 (Ct. App. 2000); *see also State v. Pickens*, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996). And again, no such instruction was given because defense counsel did not ask for one.

d. The Solicitor Improperly Encouraged The Jurors To Disregard The Evidence By Expressing Personal Opinions About Wright's Alleged Guilt And Calling On The Jury To Deliver Justice For The Victims.

The solicitor urged the jury to disregard the evidence at trial using two improper tactics: (1) by expressing his own personal opinions about Wright's alleged guilt; and (2) calling on the jury to deliver justice for the victims of the alleged robbery.

In *United States v. Young*, 470 U.S. 1 (1985), the U.S. Supreme Court lamented that "[p]rosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." *Id.* at 7. "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *Id.* at 8 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 3-5.8(b) (2d ed. 1980)). These arguments typically "pose two dangers":

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

Id. at 18-19. Consistent with *Young*, this Court has repeatedly "condemned the 'solicitor's personal opinion [being] explicitly injected into the jury's deliberations.'" *Fortune v. State*, Op. No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019) (Shearouse Adv. Sh. No. 47 at 14) (quoting *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981)).

The solicitor violated this rule several times. He told the jury that he would not need the full time allotted to him for summation because "there's not really a

whole lot in my mind to argue about"; "I think it's pretty crystal clear." App. 207. He urged the jury to find Wright "guilty of what *I'm telling you* he's guilty of." App. 213 (emphasis added). Then, purporting to read the jurors' minds, he said: "I think *y'all are firmly convinced* and there is only one verdict"; "I think there ought to be twelve united voices here speaking together." *Id.* (emphasis added). Thus, as the PCR court explained, "the solicitor not only expressed his personal opinion as to guilt, he clearly stated that he was telling them that [Wright] was guilty, and that he believed that the jury 'ought' to agree with him and find [Wright] guilty." App. 499-500.

The State responds that "the solicitor is unquestionably permitted in a closing argument to state and discuss the State's version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters that the jury should and should not consider in arriving at a verdict." Pet. 14. That is nonresponsive. The solicitor did not merely discuss the evidence and the weight it should be given. He told the jurors what *he* thought about Wright's guilt and—even more remarkably—what he believed *they* unanimously thought about Wright's guilt.

The State also argues that *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), supports its position (*see* Pet. 15), but flatly mischaracterizes that case. The State provides a block quote from *Bell*, and argues that the Court deemed the *quoted* argument "proper." *Id.* It did not. The quote is from this Court's decision in *Woomer*—which *Bell distinguished* as a case where the solicitor *did* "inject[] his personal opinion into the jury's deliberation." *Bell*, 302 S.C. at 33, 393 S.E.2d at 372-73. The solicitor in *Woomer* told the jury: "I had to make up my mind in regards

to this and under the law, if there is any question about it[.] . . . I have to make the first decision as to whether or not a person is going to be tried for the electric chair." 277 S.C. at 175, 284 S.E.2d at 359. The Court found that this argument "attempted to minimize the jurors' own sense of responsibility for [the defendant's] fate by stressing that [the solicitor] himself already made the same decision that he was now asking them to make." *Id.* The solicitor's arguments here are worse than those in *Woomer*, because the solicitor not only told the jurors his personal view; he speculated about *their* personal views.[2]

Finally, the PCR court found that the solicitor "improperly called on the jury to bring about justice for the victims." App. 502. He asked, "[s]o where's the justice for the [victims]?" before adding shortly after, "[s]o how about a little justice for the [victims]?" App. 200-01. He even suggested that, in delivering such "justice," the jury should align Wright's fate with the fate of Jones and Campbell: "Justice is coming for those two. But why not hold them all accountable? . . . [M]ake it three for three[.]" App. 201. These arguments, too, were impermissible under this Court's decision in *Brown*, which held that it was improper for the solicitor to "implor[e] the jurors to

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2 Although the State does not rely on the actual holding of *Bell*, we note that the solicitor there argued that if "this [wasn't] a case in which a jury should impose the death penalty, . . . then there is none," and "implored the jury 'to do what's right.'" 302 S.C. at 33, 393 S.E.2d at 372. The Court found that this argument "did not inject [the solicitor's] personal opinion concerning the death penalty into the proceedings," or "diminish the role of the jury to decide Bell's fate." *Id.* at 34, 393 S.E.2d at 373.

'speak for' the victim." 383 S.C. at 516-17, 680 S.E.2d at 915. The State does not substantively address the "victims" argument or attempt to distinguish *Brown*.

Because Wright's trial counsel failed to object to numerous improper closing arguments, she provided ineffective assistance under *Strickland*'s first prong.

B. Wright Was Prejudiced By Counsel's Ineffective Assistance.

The second *Strickland* prong—prejudice—requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice," it "must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard . . . cannot possibly be met." *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). Wright has more than satisfied this prong, and the State offers no basis to disturb the PCR court's findings in this respect.

The PCR court agreed with Wright's trial counsel that "the case could go either way if tried again." App. 504. "[T]he State's case was made largely on the testimony of two co-defendants that had entered plea agreements to cooperate." *Id.* One co-defendant, Jones, "admitted that he had given multiple versions of the events and that he initially implicated two other individuals, not [Wright], as having participated in the burglary and robbery of the victims." *Id.* Jones "didn't name [Wright] as being involved until investigators specifically mentioned [Wright] and

asked Jones how [Wright] was involved." App. 504-05 (citing App. 153); *see also* p. 4 *supra*. The other co-defendant, Coleman, "stated that he was testifying against [Wright] hoping that some of his nine charges 'would go away." App. 504 (quoting App. 117). He, too, changed his story multiple times. *See* pp. 3-4 *supra*. The jury could easily have disbelieved the cooperators' testimony and adopted Wright's view of the evidence. *Cf. Tappeiner*, 416 S.C. at 253, 785 S.E.2d at 478 (closing arguments prejudicial where a "case was entirely dependent on a credibility determination between the prosecution's witnesses and the defense's witness").

The PCR court acknowledged that the State introduced phone records indicating that Wright and Jones were in contact at the time of the robbery. *See* App. 505; p. 4 *supra*. But the court found that "the records themselves did rule out . . . exculpatory explanations as to their meaning." App. 505. At most, they showed that Wright was *aware* that the robbery was happening, not that he arranged it or encouraged it. Indeed, "[a]t the PCR hearing, [Wright] testified that he *was* aware of the plan of Jones and Coleman, but that he had no part in it and actually attempted to discourage them." *Id.* (emphasis added); *see* App. 418-19. The State had to rely on the flawed testimony of Jones and Coleman to argue otherwise. *See id.* ("The cell phone records and text messages are not inconsistent with [Wright's] testimony at the PCR hearing. The bulk of any incriminating content of the calls or text messages came by way of the testimony of Jones and Coleman."). In short, as the PCR court found, the "evidence of [Wright's] guilt is not overwhelming," and the verdict may very well have been influenced by the solicitor's improper closing arguments. *Id.*

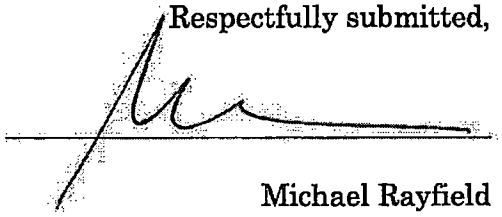
The State devotes a mere page of its petition to the subject of prejudice. Pet. 20-21. Importantly, it says *nothing* about the PCR court's findings on the relative weight of the evidence. The State instead argues that "[t]he record shows the jury was not so swayed by the State's closing argument that [it] rushed to a verdict in [Wright's] case," because "[d]uring deliberations, the jury asked for [Wright's] phone records." *Id.* But whether the jurors "rushed to a verdict" has nothing to do with the *Strickland* test. If anything, the fact that the jurors asked for the phone records indicates that they believed the case was *close*—exactly the circumstance in which a solicitor's improper closing arguments can move the needle.

The State also argues that "the jury returned a verdict that found [Wright] not guilty of one of his charges, which, had they been so swayed by the State's closing argument, would not have been the result." Pet. 21. Again, this argument is precisely backwards. As the PCR court explained, it is "noteworthy that the jury found [Wright] not guilty of the criminal conspiracy charge" because it suggests that the evidence against Wright was "*not overwhelming*." App. 505 (emphasis added). And it was certainly was not "so strong that the *Strickland* standard"—"reasonable probability"—"cannot possibly be met." *Smalls*, 422 S.C. at 191, 810 S.E.2d at 845.

CONCLUSION

The State has offered no reason for the Court to exercise its discretionary review in this unique, fact-specific case. Nor has it demonstrated that the PCR court's decision was error, much less that there was *no* evidence of probative value to support its detailed factual findings. The Court should deny the petition for writ of certiorari.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 10 2020
S.C. SUPREME COURT

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
Hon. Brian M. Gibbons, Circuit Court Judge
Hon. Donald B. Hocker, Trial Court Judge

Case No. 2017-CP-36-00509

ROBERT ANTWON WRIGHT

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

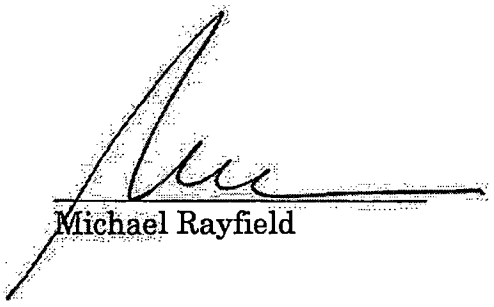
Appellate Case No. 2019-001220

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Return to the State's Petition for Writ of Certiorari has been served on counsel for the Petitioner by depositing a copy thereof in the United States Mail, postage prepaid, addressed to:

Janell H. Gregory
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

On this, the 7th of January, 2020.



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