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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

Court of Common Pleas

Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2018-000145

Ricky Bowman Petitioner,

vs.

The State of South Carolina Respondent.

PETITION FOR WRIT OF CERTIORARI

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Table of Authorities

Cases:	Page:
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	15
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	3, 5
<i>Dawkins v. State</i> , 346 S.C. 151, 551 S.E.2d 260 (2001)	5
<i>Ex parte Hearst-Argyle Television, Inc.</i> , 369 S.C. 69, 631 S.E.2d 86 (2006)	16
<i>Ingle v. State</i> , 348 S.C. 467, 560 S.E.2d 401 (2002)	6
<i>People v. Tolentino</i> , 90 N.Y.2d 867, 684 N.E.2d 23 (1997)	17
<i>Press-Enter. Co. v. Superior Court of California, Riverside Cty.</i> , 464 U.S. 501 (1984)	16
<i>Sanchez v. State</i> , 351 S.C. 270, 569 S.E.2d 363 (2002)	6
<i>Smith v. State</i> , 386 S.C. 562, 689 S.E.2d 629 (2010)	6
<i>State v. Jennings</i> , 394 S.C. 473, 716 S.E.2d 91 (2011)	7
<i>State v. Paumier</i> , 176 Wash. 2d 29, 288 P.3d 1126 (2012)	18
<i>State v. Schmit</i> , 273 Minn. 78, 139 N.W.2d 800 (1966)	17
<i>Thompson v. State</i> , 423 S.C. 235, 814 S.E.2d 487 (2018)	5, 10
<i>Vail v. State</i> , 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013)	4, 6
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	11, 14
<i>Watson v. State</i> , 370 S.C. 68, 634 S.E.2d 642 (2006)	6
<i>Weaver v. Massachusetts</i> , 137 S.Ct. 1899 (2017)	14, 15, 18
 Constitutional Provisions:	
Article I, § 14 of the Constitution of the State of South Carolina	15

Index

Page:

Table of Authorities ii

Statement of Issues on Appeal 1

Argument:

 Question I: Did the Post Conviction Relief Judge err in failing to grant the Application of Ricky Bowman when the facts below established that trial counsel was ineffective and Ricky Bowman was prejudiced when trial counsel failed to object the hearsay testimony of Officer William Pagram when Officer Pagram testified before the jury that Torrell Johnson told him Ricky Bowman and others had committed the crime? 1, 3

 Question II: Did the Post Conviction Relief judge err in ruling that trial counsel was not ineffective in that Ricky Bowman was not prejudiced by the failure of trial counsel to properly preserve for appellate review the decision of the trial judge to close the courtroom during parts of the testimony of certain witnesses? 1, 11

Conclusion: 19

Table of Authorities

Cases:	Page:
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	15
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	3, 5
<i>Dawkins v. State</i> , 346 S.C. 151, 551 S.E.2d 260 (2001)	5
<i>Ex parte Hearst-Argyle Television, Inc.</i> , 369 S.C. 69, 631 S.E.2d 86 (2006)	16
<i>Ingle v. State</i> , 348 S.C. 467, 560 S.E.2d 401 (2002)	6
<i>People v. Tolentino</i> , 90 N.Y.2d 867, 684 N.E.2d 23 (1997)	17
<i>Press-Enter. Co. v. Superior Court of California, Riverside Cty.</i> , 464 U.S. 501 (1984)	16
<i>Sanchez v. State</i> , 351 S.C. 270, 569 S.E.2d 363 (2002)	6
<i>Smith v. State</i> , 386 S.C. 562, 689 S.E.2d 629 (2010)	6
<i>State v. Jennings</i> , 394 S.C. 473, 716 S.E.2d 91 (2011)	7
<i>State v. Paumier</i> , 176 Wash. 2d 29, 288 P.3d 1126 (2012)	18
<i>State v. Schmit</i> , 273 Minn. 78, 139 N.W.2d 800 (1966)	17
<i>Thompson v. State</i> , 423 S.C. 235, 814 S.E.2d 487 (2018)	5, 10
<i>Vail v. State</i> , 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013)	4, 6
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	11, 14
<i>Watson v. State</i> , 370 S.C. 68, 634 S.E.2d 642 (2006)	6
<i>Weaver v. Massachusetts</i> , 137 S.Ct. 1899 (2017)	14, 15, 18
 Constitutional Provisions:	
Article I, § 14 of the Constitution of the State of South Carolina	15

Article I, § 9 of the Constitution of the State of South Carolina 15

Sixth Amendment to the Constitution of the United States of America 3, 15

Other Authorities:

Jocelyn Simonson, *The Criminal Court Audience in a Post Trial World*. 127 HARVARD LAW REVIEW 2174 (2014) 16

Statement of Issues Presented

Question I: Did the Post Conviction Relief Judge err in failing to grant the Application of Ricky Bowman when the facts below established that trial counsel was ineffective and Ricky Bowman was prejudiced when trial counsel failed to object the hearsay testimony of Officer William Pagram when Officer Pagram testified before the jury that Torrell Johnson told him Ricky Bowman and others had committed the crime?

Question II: Did the Post Conviction Relief judge err in ruling that trial counsel was not ineffective in that Ricky Bowman was not prejudiced by the failure of trial counsel to properly preserve for appellate review the decision of the trial judge to close the courtroom during parts of the testimony of certain witnesses?

Statement of the Case

Procedural History

Ricky Bowman was tried before a jury and the Honorable G. Thomas Cooper on November 7-9, 2011. He was convicted of possession of a weapon during a violent crime, assault and battery of a high and aggravated nature, armed robbery, burglary and kidnaping. He was sentenced to five years of the possession of a weapon during a violent crime, 10 years for assault and battery of a high and aggravated nature, and 20 years for armed robbery, burglary and kidnaping. All the sentences were to run concurrent.

Mr. Bowman timely filed his Notice of Appeal to the South Carolina Court of Appeals. The Court of Appeals denied his appeal in an unpublished opinion on April 2, 2014. Mr. Bowman filed a Petition for Rehearing on April 16, 2014 which was denied on June 2, 2014. A Petition for Writ of Certiorari to the South Carolina Supreme Court was filed on July 2, 2014. This Petition was denied on January 15, 2015.

Mr. Bowman filed his initial Post Conviction Relief Petition on March 17, 2015. An amended Petition was filed on September 21, 2015. The Post Conviction Relief hearing was held on January 30, 2017. The Application was denied by Order of the Honorable Jocelyn Newman on January 30, 2018. Mr Bowman filed a Notice of Appeal from that Order on February 1, 2018.

Argument

Question I

Did the Post Conviction Relief Judge err in failing to grant the Application of Ricky Bowman when the facts below established that trial counsel was ineffective, and Ricky Bowman was prejudiced when trial counsel failed to object the hearsay testimony of Officer William Pagram when Officer Pagram testified before the jury that Torrell Johnson told him Ricky Bowman and others had committed the crime?

Trial Counsel was Ineffective in Failing to Object to the Hearsay Testimony

At the trial of this case, Officer William Pagram was part of the investigation of the November 28, 2008 incident, having been assigned the case on December 4, 2008. App. at 398, ll 10-12. In testifying for the State, he made repeated comments to his interview with Torrell Johnson. App. at 405, l 4 to 407, l 25. The officer further referred to Mr. Johnson telling him he would not give a written statement because “He didn’t want his name on a statement where he is basically ratting out people that he hangs out with.” App. at 407, 10 - 12. These interviews were pursuant to a law enforcement investigation and, therefore, violated *Crawford v. Washington*, 541 U.S. 36 (2004). To compound the error, trial counsel on cross examination continued to elicit responses that violate the Sixth Amendment to the Constitution of the United States. App. at 433, ll 9 - 14; App. at 431, l 16 to 432, l 2; App. at 406, ll 8 - 12.

In ruling against Mr. Bowman on this issue, the Post Conviction Relief Judge said:

Applicant contends that trial counsel should have objected to any mention of Johnson during the State’s opening and in the State’s examination of police investigator, as trial counsel knew before trial began that Johnson would not testify. Trial counsel - who this court finds to be credible - denies this, stating that he was unaware

that Johnson would not testify in trial; therefore, he had no reason to lodge such objections. Trial counsel testified that Johnson's failure to testify during the trial was a "curveball" and that, strategically, he knows of no better way to have handled the situation. App. at 46 ll 15-18

The simple answer, to continue the baseball analogy, is that if you cannot anticipate a curve ball, you should not be batting. Even if trial counsel anticipated Mr. Johnson would testify, the statements by Officer Pegram would still be hearsay and not admissible. Trial counsel never gave a satisfactory explanation as to why he did not object. In fact, contrary to the finding by the Post Conviction Relief judge, trial counsel stated as to the issue of an objection to the hearsay statement "I thought I did. Apparently I didn't." App. at 59, l 21. This statement hardly supports the finding of the Post Conviction Relief judge that no objection was raised because he thought Mr. Johnson was going to testify. This statement shows trial counsel intended to object but failed to raise the objection. In addition, not objecting to hearsay because one thinks the witness might testify is hardly an objective trial strategy. The Post Conviction Relief judge also ruled "Finally, trial counsel explained that his trial strategy was to "poke holes in the State's case." App. at 686 (Order at 9). Not objecting to hearsay testimony does not "poke holes" in the case of the State. It achieves the exact opposite - it permitted the State to fill holes in its case. No facts support the finding by the Post Conviction Relief judge that trial counsel failed to object solely because he thought Mr. Johnson was not going to testify. He thought he objected but admitted he did not. Nor does the record below support a finding by the Court below that failing to object to hearsay testimony was in keeping with a valid trial strategy. As in this case, "[T]rial counsel's failure to object to Murray's and John R.'s testimonies does not fit within the purpose of his stated trial strategies." *Vail v. State*, 402 S.C. 77, 90, 738 S.E.2d 503, 510 (Ct. App. 2013).

This case is controlled by *Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018). In *Thompson*, the trial lawyer failed to object to the testimony of two witness who stated to the jury that the victim had identified Mr. Thompson as the individual who sexually assaulted her. The victim testified in the *Thompson* case, but this Court still found prejudice in failing to object to the hearsay testimony. Even though the State conceded error as to the deficient performance of trial counsel, this Court conducted an independent analysis of the deficient performance. This Court concluded, “The foregoing testimony from Ms. Elfering and Dr. Benedetto was clearly inadmissible hearsay. These accounts of their conversations with Victim meet the definition of hearsay under Rule 801(c), and these accounts provided information outside the time and place restriction set forth in Rule 801(d)(1)(D)” *Id.* at 241, 814 S.E.2d at 490.

The same is true in this case. Counsel was deficient in failing to object to the hearsay testimony given by Officer Pegram. The Officer testified that Mr. Johnson told him that Mr. Bowman and Mr. Toran committed the robbery. App. at 405, ll 14 - 19; 431, l 20 to 432, l 2. Not only does the testimony constitute hearsay under Rule 801(c) but also violates the principles of *Crawford v. Washington*, 541 U.S. 36 (2004). As Mr. Johnson did not testify, the hearsay testimony in this case is more prejudicial than the testimony in *Thompson*. “Since the testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness.” *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 263 (2001).

As noted above, the lower court did find the failure to object was due to a trial strategy, but the lower court did not explain how the failure to object was in keeping with a trial strategy. This Court has held that a valid trial strategy is a valid reason not to object to hearsay testimony.

“Counsel did not fail to object because of the cumulative effect of the corroborative testimony, but instead decided that objections to the corroborative testimony might lead to the more damaging introduction of the victim's videotape. Accordingly, we hold that counsel articulated a valid reason for failing to object to the hearsay testimony, and the PCR court erred in finding that counsel was ineffective in failing to prevent the introduction of the hearsay.” *Watson v. State*, 370 S.C. 68, 73, 634 S.E.2d 642, 644 (2006). When trial counsel “believed” he had in fact objected, obviously the failure to object is not part of any trial strategy.

The facts of this case and the law do not support the conclusion of the Post Conviction Relief judge that trial counsel had anticipated the witness testifying and therefore the failure to object was justified. As the South Carolina Court of Appeals has said “[W]e note trial counsel’s statement that some of the hearsay from witnesses was also introduced through Victim's testimony is not a valid reason for failing to object to it.” *Vail* at 89, 738 S.E.2d at 510. If failure to object to hearsay when the person making the hearsay statement eventually testifies is ineffective, then trial counsel is obviously ineffective when the witness does not testify. *See also Sanchez v. State*, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) (“Since mother’s and father’s testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness.”); *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (“The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was no trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony.”); *Ingle v. State*, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (“While counsel asserted at the PCR hearing that he wanted Dr. Baker's testimony in because it was merely an allegation, it is our opinion that hearsay regarding

a victim's identification of the defendant as the perpetrator of a sexual assault could always be characterized as an 'allegation.' Therefore, we find counsel's articulated strategy for eliciting this testimony was objectively unreasonable." These cases clearly establish that trial counsel was ineffective in failing to object to the hearsay testimony.

Mr. Bowman recognizes that over the years this Court has apparently revised its holdings on whether there is a bright line rule that hearsay is prejudicial. *See State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). Regardless of whether *Jennings* eliminated a "bright line" on whether hearsay is pre se prejudicial, *Jennings* did not change the standard of whether failure to object is in fact ineffective assistance of counsel. The cases cited above are still the law as to whether trial counsel was ineffective in his failing to object to the hearsay testimony given by Officer Pegram. No facts in this record support the finding of the Post Conviction Relief judge that trial counsel was effective in his failing to object to the hearsay testimony given by Officer Pegram.

Ricky Bowman was Prejudiced by the Failure to Object to the Hearsay Testimony

In addition to trial counsel being ineffective as established above, Mr. Bowman was prejudiced by trial counsel's failure to object. This case was a credibility case. Sean Torran, who admitted to being involved in the robbery, testified Mr. Bowman was involved, after he wrote an affidavit saying he was not involved. App. at 372, 1 14 to 373, 1 7. Mr. Toran denied that he had any plea deal with the State concerning his testimony.¹

¹ Mr. Bowman has no evidence that Mr. Toran in fact had a plea deal. Mr. Toran, after the trial of Mr. Bowman, was sentenced to 10 years on the charges that arose out of this incident. See, <https://publicindex.sccourts.org/Richland/PublicIndex/PISearch.aspx> (visited September 11, (2018)

The other important witnesses against Mr. Bowman were Shamael Coit and Delores Dennis. Ms. Coit testified she recognized Mr. Bowman “because I knew the eyes.” App. at 297, l 10. She further testified “I’m not going to forget those eyes.” App. at 298, l 12. She did not remember anything special about his eyes. App. at 304, ll 2-6. She testified that they all had bandannas, hoodies and dark clothes. App. at 284, ll 19 - 24. Ms. Dennis testified she only saw three men, although her earlier statement was she saw four men in the apartment. App. at 337, l 20 to 338, l 7. Ms. Dennis testified that she identified Mr. Bowman based solely on the eyes. App. at 341, ll 14 -17. She admitted there was nothing unique about the eyes. App. at 341, ll 23-24. At no place in her statement did she tell the law enforcement that she could recognize the eyes. App. at 346, l 21 to 347, l 5. Officer Pegram stated neither woman told him they could recognize the person in the apartment because of the eyes. App. at 439, l 18 to 442, l 4. No fingerprints or DNA analysis connected Mr. Bowman to the crime. No stolen property was found in the possession of Mr. Bowman.

The hearsay testimony was the other evidence that connected Mr. Bowman to the crime. Officer Pegram was able to testify that Mr. Johnson identified Mr. Bowman as the man who hit the woman over the head. App. at 405, ll 17-18. He was permitted to testify the Mr. Johnson had been told by Sean Toran and Ricky Bowman about the incident including stealing the credit cards and cell phones. App. at 406, ll 8 - 20. Officer Pegram testified that he compiled the photo lineup based upon information Mr. Johnson had given him. App. at 407, ll 22-25. There was also no objection to bolstering testimony when the solicitor asked Officer Pegram “Why did you believe Torrell Johnson?” App. at 405, l 22.

Trial counsel testified that the failure of the State to call Mr. Johnson as a witness was a “curve ball.” He stated that “It was certainly represented to, to me from the state that he was going to testify the entire time.” App. at 46, ll 16 - 18. This testimony is not supported by the trial transcript. At the pre-trial hearing the State did call Mr. Johnson as a witness. Mr. Johnson at that hearing stated:

Q. (By Ms. Sampson) And who did you say did it in the written statement?²

A. (By Mr. Johnson) Shawn Toran

Q. Did you tell him about Ricky Bowman?

A. I told him I didn't know who he was.

App. at 118, ll 12 - 16

With this testimony, trial counsel should have expected that the State would not be calling Mr. Johnson to testify. He added nothing to the State's case. A reasonably competent trial counsel would have expected that the State would not call Mr. Johnson to testify. In fact, this testimony helped the defense and completely contradicted the testimony of Officer Pegram as to the identity of Mr. Bowman by Mr. Johnson and as to the existence of a written statement.

Without the hearsay testimony of Mr. Johnson, this case involves a questionable identification that was made only from the eyes and a co-defendant testifying against him. With no fingerprints, DNA nor any stolen good being found in Mr. Bowman's possession, the case depended exclusively upon the credibility of the co-defendant and the ability of the two witnesses to make an identification through the eyes. The hearsay testimony of Torrell Johnson enhanced the case the State had against Mr. Bowman. The opening statement of the assistant solicitor increased this enhancement when she told the jury what Torrell Johnson told Officer Pegram.

² Officer Pegram testified that Mr. Johnson refused to give a written statement. App. at 122, ll 17 - 23; 407, ll 2 - 13.

App. at 241, ll 2 - 12.

As to prejudice in Post Convictions Relief hearings involving the failure to object to improper hearsay, this Court has said “Similarly, in a PCR case, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. As part of the prejudice analysis, the PCR court and the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object.” *Thompson*, at 246, 814 S.E.2d at 492–93.

Mr. Bowman was further prejudiced when the assistant solicitor in her closing argument made reference to Mr. Johnson as if he had testified. She said, “Shameal Coit would have to be wrong; Delores Dennis would have to be wrong; Investigator Pegram would have to be wrong; Torrell Johnson would have to be wrong.” App. at 525, l 9 - 12. Most importantly, she vouched for the credibility of Torrell Johnson when she said “Don’t you think if Torrell Johnson was going to come in here and tell you he didn’t say that to investigator Pegram, he would have called him?” App. at 525, l 13 - 16.³

In making credibility determinations, this Court has held that an appellate Court should defer to credibility determinations only as to witness who testified at the Post Conviction Relief hearing. “Again, while we defer to a PCR court’s credibility findings as to witnesses who testified at the PCR hearing, our standard of review does not dictate that we defer to credibility findings as to witnesses the PCR court did not directly observe.” *Id.* at 247, 814 S.E.2d at 493.

The inadmissible hearsay in this case gave credibility to the weak eye identification and

³ At this point in the trial, the solicitor was well aware that Mr. Johnson had pre-trial testified under oath about Mr. Bowman “I told him [Officer Pegram] I did not know who he was.” App. at 118, l 16.

the questionable testimony of a co-defendant. As this Court has said, “As a whole, the properly admitted evidence of Petitioner’s guilt was not strong enough to overcome trial counsel’s failure to object to the inadmissible hearsay testimony of Ms. Elfering and Dr. Benedetto.” *Id.* at 249, 814 S.E.2d at 494. The same is true in this case.

This Court should grant this petition for writ of certiorari and reversed the decision of the lower court and remand for a new trial.

Question II

Did the Post Conviction Relief judge err in ruling that trial counsel was not ineffective in that Ricky Bowman was not prejudiced by the failure of trial counsel to properly preserve for appellate review the decision of the trial judge to close the courtroom during parts of the testimony of certain witnesses?

Twice during the trial, the trial judge, at the request of the solicitor, closed the trial to the public. The trial was closed during a pre-trial hearing as to the identification of Mr. Bowman through a lineup and again when the same witnesses testified during the trial. Closing a courtroom without just cause is a structural error necessitating a reversal of the conviction. *Waller v. Georgia*, 467 U.S. 39 (1984).

When the initial request to close the Courtroom was made, the State offered scant evidence to support its position. The State argued, without citing any specific facts or producing documents:

MS. SAMPSON: The Neil vs. Biggers hearing, we would ask that there be no one in the courtroom but neither [sic] personal nor the defendant.

My victims have gotten some contact from Mr. Bowman’s family members, and specifically, Mr. Toran received threats all

weekend.

Mr. Victims, Regina - - excuse me, Delores Dennis and Corey Coit have received e-mails from the victim's - - the defendant's sister, Joanna Washington, if I remember the name correctly, offering money for them not to testify, contact about, "Don't send my brother to jail," that kind of thing.

Due to that, my victims are in fear of seeing him, so I would ask that the court be cleared just while they testify.
App. at 105, 125 to 106, 12.

In opposition to the motion, trial counsel argued:

MR. SCHNEE: Judge, I would object to any clearing of the court. While there have been some allegations, my client and his family maintain they have not done anything of the sort.

There is no proof that I've seen, no evidence of e-mails. I certainly haven't been provided copies of any. I believe it's unfair to clear the courtroom particularly in front of the jury.
App. at 106, 113 - 10.

The trial judge then tried to equate the closing of the courtroom to "normal sequestration." App. at 106, 1120 -22. Trial counsel argued his client had family members present who are not witnesses and therefore would not be subject to sequestration order. Without taking any further argument, the trial Court simply ruled "I don't know who is making all of these alleged threats, but I'll grant the State's motion." App. at 107, 113 - 4.

Right before the testimony of Regina Dennis and immediately after the opening statements of both counsel, the trial judge, based upon an earlier request from the State, excused the jury saying he needed to discuss a matter with the attorneys. App. at 247, 111 - 3. At that point, the State again said:

MS. SAMPSON: Your Honor. The only other issue is my first witness will be Regina Dennis, so it goes back to the clearing. Are - - can we agree to excuse the jury after opening so we can clear the courtroom so they're not here when the court gets cleared. App. at 221, 115 - 9.

The State then submitted Court's exhibits 1 and 2 which are affidavits of Shamael Coit and Regina Dennis. Neither affidavit contained any specific threats of violence against either person. App. at 222, ll 3-23. The trial court agreed to clear the courtroom. App. at 222, ll 8 - 9. Trial counsel then noted, as stated above, that neither affidavit contained a basis for saying they feared for their safety. App. at 222, l 18 - 23. After opening statements, trial counsel asked for a mistrial arguing:

MR. SCHNEE: . . .She has brought in the fact that there is an alleged fear of retaliation, including for a witness who is now so scared to even show up, and there's not going to be any testimony about that.

At this point, if Your Honor clears the courtroom, all that is doing is validating the arguments to the jury that my client and his family are somehow a threat. I think the prejudicial value of that is now incredibly enhanced based on those arguments in the opening statement.

I would move that he need to pick a new jury as a result and move for a mistrial.

App. at 248, ll 14 - 25.

The State in response argued, "[I]t's opening argument, and I think there will be testimony." App. at 249, ll 2 - 3. The trial judge overruled the motion for a mistrial. Regina Dennis did testify she was scared to contact the police to discuss this matter. App. at 265, l 21 to 266, l 5. Shamael Coit also testified she had to be subpoenaed for court and did not want to be there. App. at 310, l 19 to 270, l 1. The testimony from both these witnesses supported the opening comments by the assistant solicitor. The closing of the courtroom while they testified simply reinforced their testimony about being scared. The message sent to the jury was the defendant is so dangerous that the courtroom had to be cleared in order for the witnesses to testify. In closing the assistant solicitor further said. "It is scary to sit up here in [sic] talk to a

courtroom full of strangers and a courtroom full of people.” App. at 516

The United State Supreme Court has held that when a closing of a courtroom is raised in a post conviction proceeding, the defendant is required to prove prejudice. *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017). In *Weaver*, the courtroom was closed during jury selection when there was not room for the public and the jury pool. The Court held that as no objection was raised by trial counsel, to grant relief the defendant had to establish prejudice. The Court explained:

When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation. The costs and uncertainties of a new trial are also greater because more time will have elapsed in most cases. And the finality interest is more at risk. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or in an ineffective-assistance.

Id. at 1912

The facts of this case are very different. First, the error was not in a pretrial proceeding where the proving prejudice is in fact difficult. The error here was in the actual trial. For approximately 95 of the 245 pages of testimony, the jury was excluded. This was slightly over 1/3 of the trial testimony. As to the purpose of a public trial, the United States Supreme Court has said, “In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.” *Waller* at 46. When the public is excluded from a third of the testimony, and the Supreme Court has recognized that one of the purposes of a public trial is to ensure a trial free of perjury, then prejudiced should be assumed the burden should be on the State to prove it was harmless.

Chapman v. California, 386 U.S. 18 (1967).

The second reason this case is different is that an objection was in fact raised. The Court of Appeals held the objection was not based on constitutional grounds and therefore the issue was not preserved. As the Court said, “Constitutional issues, like most others, must be raised to and ruled on by the [circuit] court to be preserved for appeal.” App. at _____. As an objection was in fact made, the concerns of the Court in *Weaver* are not present here. As the Court in *Weaver* said, “When a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed, but when a defendant first raises the closure in an ineffective-assistance claim, the trial court has no chance to cure the violation.” *Weaver* at 1904. Because the defendant at the trial raised the issue of closing the courtroom, the trial judge had the opportunity to put on the record the reason for closing the courtroom. The trial judge did in fact put some reasons on the record, but none of them were adequate. There is no reason to believe that the trial judge would have been more precise in the reasons for the closing if the trial lawyer had further said he was objecting on the ground of the Sixth Amendment to the Constitution of the United States of America. Nor would the trial judge have ruled differently if trial counsel had said closing the courtroom violated Article I, § 9 of the Constitution of the State of South Carolina which provides “all courts shall be public” or Article I, § 14 of the Constitution of the State of South Carolina which gives the defendant the “right to a speedy and public trial” Trial counsel objected to the closing of the courtroom and the State marshaled what evidence it had to justify such closing.

The closure in this case was not justified. “But when a judge is presiding over a criminal courtroom proceeding at which the defendant is present, there is an initial presumption of

openness and any closure must be justified.” Jocelyn Simonson, *The Criminal Court Audience in a Post Trial World*. 127 HARVARD LAW REVIEW 2174, 2219 (2014). The United States

Supreme Court has said:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. We now turn to whether the presumption of openness has been rebutted in this case.” *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510 (1984).

In the present case when the trial judge was given the opportunity to explain the reasons for closing the courtroom, the explanation were woefully inadequate. When the State was asked to put their reasons on the record they were also woefully inadequate. Surely trial counsel was entitled to assume the trial judge knew the law that required him to put the explanations on the record when a defendant objects to closing the courtroom.

This Court has held:

In South Carolina, however, our Constitution contains a particular provision that has no parallel at the federal level. Specifically, our Constitution provides “[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.” S.C. Const. art. I, § 9. While federal case law was still in considerable flux, our jurisprudence recognized article I, § 9’s independent constitutional guarantee of open courts and held ‘[e]xclusion of the press and public from judicial proceedings is a drastic measure calling for a careful weighing of interests affected.’ As both federal and state law evolved, we clarified that a judge’s decision to close any proceeding must be supported by specific findings explaining the balancing of the interests at stake and the need for closure.” *Ex parte Hearst-Argyle Television, Inc.*, 369 S.C. 69, 75–76, 631 S.E.2d 86, 89–90 (2006)(internal citations omitted)

In *People v. Tolentino*, 90 N.Y.2d 867, 684 N.E.2d 23 (1997) the Court held error in closing the courtroom during the testimony of an undercover agent. In so holding the Court said, “The trial court, however, failed to question the undercover officer personally or to make any further inquiry of the prosecutor. The court also failed to articulate any factual findings to support its closure order. On these facts, the court’s reliance on the prosecutor’s representations, without further exploration of the undercover officer’s ongoing operations and concerns, constituted an abuse of discretion.” *Id.* at 869, 684 N.E.2d at 25 (1997). The same is true in this case. Trial counsel objected to closing the courtroom. The Court failed to articulate any factual finding as to why the courtroom should be closed. The Court accepted two very vague affidavits at face value, neither of which should be sufficient to establish a reason for closing the courtroom. The trial judge never questioned the two witnesses as to any alleged fears they may have had. Simply put, the record does not establish a reason for closing the courtroom.

The Minnesota Supreme Court, in interpreting their state constitution which also contains language identical to our constitution, said, “Based upon consideration of the history and development of the concept as one rooted in the common law, the right to a public trial, whether guaranteed by constitutional or statutory provision, is universally regarded by state and Federal courts as basic and substantial and the language declaring it as mandatory.” *State v. Schmit*, 273 Minn. 78, 81, 139 N.W.2d 800, 803 (1966).

In the present case, trial counsel was ineffective not in failing to object, but in failing to object properly. Had trial counsel said he objected on constitutional grounds, the issue would have been preserved. The Court of Appeals in fact recognized this when they affirmed the conviction. App at _____. The Court said “Constitutional issues, like most others, must be raised

and ruled on by the [circuit] court to be preserved for appeal.” App. at _____. The improper closing of the courtroom is a structural error requiring reversal. *Weaver* at 1909 (“So one other factor leading to the classification of structural error is that the public-trial right furthers interests other than protecting the defendant against unjust conviction”); *State v. Paumier*, 176 Wash. 2d 29, 37, 288 P.3d 1126, 1130 (2012)([W]e do not require a defendant to prove prejudice when his right to a public trial has been violated.”). If the issue had been properly preserved, the reversal of this case at the initial appeal would have been required.

In this case, as an objection was in fact raised at the trial, this Court should treat this as a structural error and reverse the conviction of Mr. Bowman. This is the correct result as the record establishing the basis for the objection would have been no different had the objection been on proper constitutional grounds. This Court is not left to guess as to what evidence the State would have produced to justify the closing of the courtroom nor what facts the trial judge would put on the record to justify the closing. This Court should, therefore, hold that trial counsel was ineffective in failing to properly object, on constitutional grounds, to the closing of the courtroom. This was a structural error that would have required reversal on direct appeal. The State is not prejudiced by treating this as structural error and reversing the conviction of Mr. Bowman. In the alternative, this Court should find that trial counsel was ineffective in failing to properly object to the closing of the courtroom, the record establishes that Mr. Bowman was prejudiced due to the opening comments of the assistant solicitor when combined with excluding members of Mr. Bowman’s family during the testimony of two witnesses. This act unfairly sent a message that his family did not care enough to attend the entire trial. This was prejudicial to Mr. Bowman.

a message that his family did not care enough to attend the entire trial. This was prejudicial to Mr. Bowman.

CONCLUSION

For the forgoing reasons, this Court should grant the Petition for Writ of Certiorari filed by Ricky Bowman and reverse the decision of the lower court and Order that he be granted a new trial.

October 5, 2018



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Attorney for Ricky Bowman

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 10 2018

CERTIORARI TO RICHLAND COUNTY S.C. SUPREME COURT
Court of Common Pleas
Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2018-000145

Ricky Bowman Petitioner,

vs.

The State of South Carolina Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on October 5, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Lindsey A. McCallister, Assistant Attorney General, Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 5th day

of October, 2018

[Signature] (L.S.)

Notary Public for South Carolina

My Commission expires: 12/3/2019

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October 5, 2018

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

OCT 10 2018

Re: Ricky Bowman v. State, Case No. 2018-000145

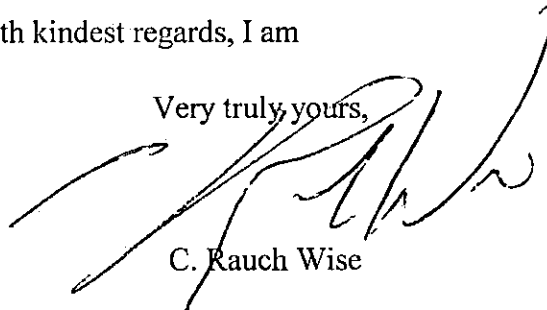
S.C. SUPREME COURT

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petition Writ of Certiorari and the original unbound and one bounded copy of the Appendix together with the original Affidavit of Service regarding the above matter. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt
Enclosure

cc Lindsey Ann McCallister