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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to Chesterfield County

Honorable Brooks P. Goldsmith, Post-Conviction Relief Judge

Honorable Paul M. Burch, General Sessions Judge

JULIUS CALVIN CURRY, SR.,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2019-002004

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM H. RAY
Assistant Attorney General
P.O. Box 104476
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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ISSUE PRESENTED FOR CERTIORARI

Petitioner's Issue Presented

Whether trial counsel's failure to object to the solicitor's improper opening statement, which told the jury that petitioner's charges for a fight with a police officer should be regarded "as a slap against all of us" and that "this is our chance to protect them and thank them for protecting us," deprived petitioner of the effective assistance of counsel guaranteed by the Sixth Amendment?

Respondent's Counter-Statement of Issue Presented

Did the PCR court properly find that Petitioner was not prejudiced by the solicitor's comments about the jury having a chance to thank police by convicting Petitioner of attempting to murder an officer, where the statements were rendered harmless by their limited use and the judge's curative jury instructions?

STATEMENT OF THE CASE

On August 30, 2013, after a day of drinking and using drugs, Petitioner Julius Curry got in an argument with his girlfriend and beat her in front of her daughter. (App. 61, 1 – App. 62, 6; App. 90, 8-13). When her daughter protested, Petitioner choked and hit her in the head. (App. 61, 23-25; App. 63, 6-8; App. 90, 14-19). Petitioner brandished a knife and the daughter escaped to a neighbor's home where she called the police. (App 66, 8-14; App. 91 4-23). When police arrived, Petitioner had locked himself and his girlfriend in a bedroom and was still wielding the knife. (App. 71, 4-13; App. 85, 24 – App. 86, 3). Police kicked in the bedroom door and a struggle ensued, resulting in Petitioner being tazed and arrested. (App. 70, 25 – App. 71, 1; App. 94, 9 – App. 96, 16). Petitioner attempted to stab a police officer during the struggle. (App. 115, 10-15).

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted at the January 2014 term of the Chesterfield County Grand Jury for criminal domestic violence of a high and aggravated nature (2013 GS-13-0697), assault and battery, second degree (2013-GS-13-0699), resisting arrest with a deadly weapon, first offense (2013-GS-13-0699) and attempted murder (2013-GS-13-0700). Matthew Swilley, Esquire, represented Petitioner. Deputy Solicitor Kernard Redmond and Assistant Solicitor Adam Foard, of the Fourth Circuit Solicitor's Office, prosecuted the case. Petitioner proceeded to a jury trial before the Honorable Paul M. Burch on March 3, 2014. The jury acquitted Petitioner of criminal domestic violence of a high and aggravated nature and attempted murder but found Petitioner guilty of assault and battery, second degree and resisting arrest with a deadly weapon, first offense, and the lesser included offense of assault and battery in the first degree (2013-GS-13-0698; 2013 GS-13-0699; 2013 GS-13-0700). Judge Burch sentenced Petitioner to imprisonment for consecutive terms totaling twenty one and one-half years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Katherine H. Hudgins, Esquire. By opinion decided June 1, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Curry*, Op. No. 2016-UP-224 (S.C. Ct. App. Filed June 1, 2016). The Remittitur was issued on July 21, 2016.

Petitioner filed an application for post-conviction relief on August 31, 2016. In his application, Petitioner alleged he was being held in custody unlawfully due to:

1. Ineffective Assistance of Counsel
    a. "Counsel did not provide adequate information or time to prepare for trial."
2. "Jury was Stacked"
    a. "Six of the members of my jury was related to or acquainted with two of the plaintiffs.

As requested relief, Petitioner states he is seeking retrial.

Respondent filed its Return to Petitioner's application on June 8, 2017, requesting a hearing on the allegations of ineffective assistance of counsel. An evidentiary hearing on Petitioner's application was conducted on August 21, 2019, before the Honorable Brooks P. Goldsmith. Sherill Alford, Esquire, represented Petitioner. Assistant Attorney General Jacob A. Isenberg, Esquire, represented the State of South Carolina. Petitioner argued in part that the post-conviction relief court erred in denying him relief because he received ineffective assistance of counsel. Specifically, Petitioner alleges that his trial counsel's failure to object to solicitor's opening statement prejudiced the jurors against him. (App. 330, 1-14; 331, 1-11). The relevant portions of the solicitor's statement were as follows:

> Let me just say this: We rely on law enforcement to protect and serve. There's a problem, we feel threatened, we call 911 and law enforcement arrives. We rely on them. But we also owe them, and by that I mean that in a situation like this when you have a defendant that endeavors to take the life of a law enforcement officer we all should regard that as a slap against all of us. As a strike against all of us because we have asked them to serve and protect us. And then we find ourselves faced in a courtroom today because this defendant, rather than respecting the

> authority and submitting to an arrest, that was lawful decided to in essence take—try to take the life of Sergeant Coombs.
>
> So this is our chance to protect them and thank them for protecting us.

(App. 51, 1 – App. 52, 8).

Petitioner stated on cross-examination at the PCR hearing that this opening statement did not prejudice him. (App. 336, 6).[1] Petitioner's trial counsel stated that he did not know why he failed to object to the opening statement, but would have if he "could do it all over again." (App. 341, 18-224). He stated that it was his trial strategy at the time to object to anything improper that warranted an objection. (App. 347, 22 – App. 348, 6). Trial counsel further testified that he could not ever recall objecting to an opening statement in General Sessions court. (App. 346, 22 – App. 347, 3).

On October 21, 2019, Judge Goldsmith entered an order of dismissal denying Petitioner's application and dismissing it with prejudice. The court's decision was based upon Petitioner's credible testimony that he was not prejudiced by the opening statement, the acquittal on the charge of attempted murder of Sergeant Coombs, and there being no reasonable probability of the remarks undermining the outcome of the trial. Petitioner was remanded to the custody of the South Carolina Department of Corrections.

[1] Petitioner gave conflicting testimony at the PCR hearing on whether he believed the solicitor's statements were prejudicial. (See App. 330, 23-24; App. 336, 6; App. 336, 21-23). It is unclear if he was making a concession or was confused by the line of questioning. Respondent asserts that Petitioner used the term "prejudice" on direct examination without being prompted, and it is unlikely that he was incapable of understanding and coherently answering questions about the prejudicial effect of the solicitor's statements. In any event, Petitioner's assertion that his testimony was "twisted" is without merit, and cannot justify setting aside the PCR court's findings nor viewing them "skeptically."

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts give "great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-181, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly denied Petitioner's ineffective assistance of counsel claim arising from trial counsel's failure to object to the prosecutor's opening statement because Petitioner cannot establish that the result of the trial would have been different but for counsel's purported omission in light of the limited use of the statements and the jury instructions given by the court

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813,

814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* 466 U.S at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation" but instead only demands "a reasonably competent attorney." *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105.

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied carefully, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. 466 U.S. at 691-92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d 624, 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." *Id.* at 687 (emphasis added).

These standards, however, do not establish mechanical rules; the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed. *Id.* 466 U.S. at 696-97, 104 S.Ct. at 2069.

A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors. *State v. Copeland*, 321 S.C. 318, 324 468 S.E.2d 620,624 (1996);

State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (2003). Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. *Rudd*, 355 S.C. at 549, 586 S.E.2d at 156. A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Such statements must be viewed in the context of the entire record. *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007).

To find whether a prosecutor's comments in closing arguments violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper arguments so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). The Applicant has the burden of proving he did not receive a fair trial because of the alleged inappropriate comments. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). The relevant question is whether those comments so infected the proceedings with unfairness so as to make the result a denial of due process. *Id.* Improper comments do not require reversal if they are not prejudicial. *Id.*

Petitioner argues that his counsel's failure to object to the solicitor's "Golden Rule" argument rendered his counsel's assistance ineffective. A "Golden Rule" argument is one that asks "the jurors to place themselves in the victim's shoes" and tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice. *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006); *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Any argument that asks the jurors to abandon impartiality and view the evidence from a party's viewpoint is improper, regardless of the nomenclature. *Reese*, 370 S.C. at 39, 633 S.E.2d, at 902 See also *Johnson v. State*, 263 Ga.App. 443, 587 S.E.2d 775 (2003). This Court has held that

asking a jury to "speak for" a victim in a closing statement is such an improper argument. *Reese*, 370 S.C. at 37-39, 633 S.E.2d at 901-02.

"[T]he commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. *Washington v. Recuenco*, 548 U.S. 212 (2006). Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). This finding is not governed by definite rules of law; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *Id.*

Petitioner argues the solicitor's opening statement violated the "Golden Rule" by asking the jurors to place themselves in the victim's shoes and make a decision based on passion and bias, rather than law and evidence, by telling them it was their chance to thank law enforcement with a conviction. The PCR court determined that the remarks were not prejudicial, finding it "reasonable to infer the jury concluded [Petitioner] did not try to take the life of Sergeant Combs" based upon its verdict. Furthermore, the PCR court found that there was no reasonable probability the alleged inappropriate remarks undermined the outcome of the trial.

Petitioner argues that trial counsel's failure to object to this statement was prejudicial because it imposed an "extraneous duty" upon the jurors, beyond their role as the finder of fact. See *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000) (finding that a prosecutor telling jurors to literally call and explain an acquittal created an "extra-legal burden of accountability to the State prejudicial to the rights of the accused."). Petitioner continues, stating that the solicitor's comments were prejudicial because they were not isolated, but instead covered "approximately two pages of the [274 page] transcript." See *Von Dohlen v. State*, 360 S.C. 598, 613, 602 S.E.2d 738, 746 ("The

solicitor's single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.")

The statement Petitioner takes issue with says, "we owe [the police], and by that I mean that in a situation like this when you have a defendant that endeavors to take the life of a law enforcement officer we all should regard that as a slap against all of us." (App. 51, 22-25).[2] The solicitor continued, "we find ourselves faced in courtroom today because this defendant, rather than respecting the authority and submitting to an arrest, that was lawful decided to in essence take—try to take the life of Sergeant Coombs." (App. 52, 2-6).

The solicitor also made sure to tell the jury that "anything that I may say that contradicts what His Honor says you follow the law as His Honor instructs you." (App. 222, 25 – App. 223, 3). The prosecution's use of this sentiment was so limited as to render it harmless. The prosecution did not seek to impose any extrajudicial duties upon the members jury by saying they had an opportunity to "thank" police officers. The main thrust of the comments were not to insinuate that the jurors had to actually do anything other than assess the facts in relation to the law and render a verdict. Rather, the focus was to identify the parties, contextualize the evidence, and emphasize the importance of rendering a guilty verdict.

To this end, the jury was properly instructed on all counts by the court. After informing the jury about the reasonable doubt standard and its obligation to render a verdict based solely upon the evidence, the trial judge explained the charge for attempted murder and the lesser included offense of assault and battery in the first degree. (App. 252, 11 – App. 254, 13). The jury instruction

[2] The solicitor's comments are clearly in reference to the attempted murder of Officer Coombs. Petitioner presents the novel claim that these comments created sufficient prejudice to render the entire proceeding unfair, despite the fact that the jury acquitted him of attempted murder. Instead, the jury convicted him of a lesser included offense.

included explanations on what may constitute malice, whether it may be expressed or implied, how the jury may reach their conclusion, and what type of evidence may properly lead the jury to such a conclusion. *Id.* The judge made clear to point out that the members of the jury were "not partisans or advocates for the State of South Carolina" because "such a perverted system of justice would be intolerable." (App. 255, 4-8). This instruction sufficiently cured any prejudice that may have existed from the solicitor's comments and trial counsel's failure to object.

Probative evidence exists to support the PCR court's findings that Petitioner was not prejudiced by trial counsel's performance. The comments were limited, the court specifically instructed the jury not to act as partisans for the state, the jury did not convict Petitioner of the charge referenced, and Petitioner gave conflicting testimony at the PCR hearing about the fairness of the proceedings. For this reason, Petitioner has failed to meet his burden of demonstrating prejudice from his trial counsel's performance. Therefore, Petitioner's claims are without merit and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR Court's findings that Petitioner received effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

[Signature page follows]

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM H. RAY
Assistant Attorney General

/s/ William H. Ray
William H. Ray
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

This 3rd day of November, 2020