STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Greenwood County
Brian M. Gibbons, Post-Conviction Relief Judge
Donald B. Hocker, Trial Court Judge

Appellate Case No. 2019-001220

ROBERT A. WRIGHT,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court err in finding Counsel was ineffective for failing to object to the State's closing argument because the State's closing argument, when properly viewed in the context of the entire record, was not objectionable and Respondent failed to show any resulting prejudice from this alleged deficiency?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Newberry County Clerk of Court. Respondent was indicted at the August 2014 term of the Newberry County Grand Jury for accessory after the fact to a felony (burglary, first degree) (2014-GS-36-0528), accessory after the fact to a felony (armed robbery) (2014-GS-36-0528), and conspiracy (2014-GS-36-0530). Mindy Zimmerman, Esquire, (Counsel) represented him. Deputy Solicitor Christopher Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office prosecuted the case. On January 4-7, 2016, Respondent proceeded to a jury trial before the Honorable Donald Hocker after which he was found guilty of accessory after the fact to a felony (burglary and armed robbery) but not guilty of conspiracy. He was sentenced to imprisonment for sixteen years on each charge. Both sentences were to run concurrently.

On January 15, 2016, Respondent filed a motion for a new trial alleging the trial court lacked subject matter jurisdiction in violation of S.C. Code § 16-1-50 because Respondent was tried and convicted of accessory after the fact when he was not tried with the principal felon, nor was his trial after the principal's conviction. Respondent moved to renew and reconsider the denial of Respondent's motion for a directed verdict, or in the alternative, for a new trial based upon a lack of competent evidence. Finally, Respondent moved for a new trial based on the assistant solicitor's comments during his closing argument on Respondent's right to remain silent.

A hearing was held on March 3, 2016, before Judge Hocker. Respondent was present and represented by his trial counsel. On May 6, 2016, Judge Hocker denied and dismissed Respondent's post-trial motions. Judge Hocker dismissed Respondent's subject matter

jurisdiction claim, citing State vs. Blakely, which held "[t]oday, the accessory's culpability no longer shadows that of the principal. Accordingly, an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted." State v. Blakely, 402 S.C. 650, 656, 742 S.E.2d 29, 32 (Ct. App. 2013). The court dismissed Respondent's motion for new trial based on lack of evidence and Respondent's renewal of directed verdict motion based on the oral rulings made on the record at trial. The court dismissed Respondent's motion for new trial based on the solicitor's closing argument finding no prejudice resulted when the court gave the jury the standard charge for it not to consider Respondent's failure to testify. The court also found the solicitor's argument was, in part, based upon the evidence in the case. The court further found the solicitor's closing did not shift the burden of proof to the defendant.

Respondent filed a notice of appeal and was represented by Counsel. Respondent asserted grounds similar to his post-trial motion. Respondent and Petitioner submitted briefs. On November 7, 2016, Respondent submitted a consent order signed by himself, Counsel, and Respondent that indicated an agreed dismissal of Respondent's direct appeal. The Court of Appeals dismissed the appeal by an order filed November 9, 2016. The remittitur was sent November 29, 2016.

Respondent filed a timely application for post-conviction relief alleging:

1. Ineffective Assistance of Trial Counsel
    a. "Trial counsel failed to properly investigate the case and prepare an adequate defense based on the evidence in the case;
    b. Trial counsel failed to request a continuance in order to allow her to properly investigate the case and prepare an adequate defense;
    c. Trial counsel failed to move for the suppression of statements and evidence;
    d. Trial counsel failed to make necessary objections during the trial or otherwise properly raise and/or preserve issues for appeal;

e. Trial counsel failed to effectively cross-examine the State's witnesses during the trial;

f. Trial counsel failed to introduce relevant evidence in the defense case in chief, or proffer evidence when necessary;

g. Trial counsel failed to state and/or argue relevant facts and law to the jury in his statements and arguments to the jury;

h. Trial attorney failed to properly explain, convey, and advise client on plea offer;

i. Failed to properly convey, review and advise as to the charges, potential sentences and the evidence."

j. "Trial Counsel ineffective for failing to move for pretrial quashing, or post-trial motion for arrest of judgment, of the Conspiracy and Accessory Before the Fact indictments on the grounds the indictments fail to sufficiently allege the critical elements of the offenses..."

k. "Trial counsel ineffective for failing to move for pretrial quashing, or post-trial motion for arrest of judgment, of the Conspiracy and Accessory Before the Fact indictments on the grounds the indictments are unconstitutionally overbroad and vague..."

2. Ineffective Assistance of Appellate Counsel

   a. "Appellate counsel failed to properly raise and argue viable issues on appeal."

3. "Failure of the State to adequately comply with the rules of discovery"

   a. "The State failed to provide discovery materials that were in its possession or which were known or should have been known to the State or its agents."

A post-conviction relief hearing was convened on February 26, 2019, at the Greenwood County Courthouse where applicant proceeded on four issues: 1) ineffective assistance of counsel for failing to adequately cross-examine the state's witness; 2) ineffective assistance of counsel for failing to object to references that the Respondent was a drug dealer; 3) ineffective assistance of counsel for failing to object to prejudicial comments made by the solicitor during closing argument, and; 4) ineffective assistance of counsel for failing to adequately advise Respondent as to plea offers.

On May 14, 2019, the post-conviction relief court signed Respondent's proposed order

granting Respondent relief as to allegation number three and denying and dismissing relief as to the remaining allegations. This order was filed by the Greenwood Clerk of Court on May 17, 2019. Petitioner was not served with a copy of the signed and clocked order, but discovered the filed order on May 28, 2019. On June 6, 2018, Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. The post-conviction relief court denied Petitioner's motion on June 24, 2016. Thereafter, on July 25, 2019, Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

STATEMENT OF FACTS

Cedric Mayers (Cedric) and his wife were at their home in Little Mountain when two men burst through their front door and held them at gun point. (App. 68.) The men began demanding to know "Where the shit at?" and when the victims responded they did not have anything, the men began rummaging through the house. (App. 68-69.) The two men eventually absconded with some marijuana, less than a hundred dollars, and both of their phones. (App. 70.) The victims then ran to a neighbor's house to call 911. (App.74.)

The initial responders turned the investigation over to Investigator Garrett Lominack (Lominack). (App. 160.) The morning following the burglary, Cedric informed Lominack that his FindMyiPhone app was indicating his cell phone was at an address in Newberry. (App. 162.) Lominack tracked the phone and found it in the trash outside the home of Precious Bates (Bates). (App. 163.) Bates informed the officers that Lorenzo Jones (Jones) had been at her home the evening prior and had discarded some items in her trash. (App. 165.)

After returning the phones to the victims, Lominack located Jones, who had returned to Bates' home. (App. 166.) Jones voluntarily accompanied the officers to the police station and eventually implicated Respondent and Tarakus Coleman (Coleman) as his accomplices to the crimes. Respondent was arrested and indicted for accessory before the fact of robbery/burglary. Prior to trial, Respondent stipulated the phone records the State planned to offer would show he contacted Jones during the time surrounding the crime. (App. 33.) At trial, Jones testified Respondent called him and said he "had somebody for [Jones] to rob [b]ecause he was getting in [Respondent's] way." (App. 134.) Jones explained he called Coleman to assist him in the robbery, and the two went to Little Mountain together. (App. 136.) Jones stated they arrived at the specified location and waited for about an hour, eventually asking Respondent if they should

go ahead with the robbery. (App. 137.) Once Respondent told him to "go ahead and kick in the door," Jones and Coleman proceeded. (App. 139.) Jones explained all they took was a little bit of crack, a bag of marijuana, thirty or forty dollars, and two cell phones. (App. 140-41.)

Coleman testified that Jones called him about robbing a trailer for $8,000 and some crack. (App. 93.) Coleman explained Jones had received the information from his partner, Respondent, who Coleman did not know at the time. (App. 95-96.) However, Coleman stated Jones called Respondent on speakerphone prior to the crime to discuss the details of who would be in the home and how they should proceed. (App. 101.) Although Respondent did not specify the location of the money and drugs purported to be inside, Coleman testified Respondent said to just go in the house and it should be there. (App. 101.)

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). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. 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). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. 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. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court erred in finding Counsel was ineffective for failing to object to the State's closing argument because the State's closing argument, especially when properly viewed in the context of the entire record, was not objectionable and Respondent failed to show any resulting prejudice from this alleged deficiency.

The post-conviction relief court erred in finding Respondent was entitled to a new trial due to Counsel's failure to object to the State's closing argument. In its order of dismissal, the post-conviction relief court isolated several statements made by the State during their closing argument that the post-conviction relief court believed illustrated the State improperly shifting the burden of proof, improperly expressing the solicitor's personal opinion, improperly referencing evidence, and inflaming the passions of the jury. However, the State unquestionably has the ability to argue their version of the testimony and evidence presented during the trial to the jury in closing arguments. The statements highlighted by the post-conviction relief court do not amount to the kind of egregious conduct this Court has found improper in previous cases; nor are they statements this Court has found substantiates a finding of deficiency of counsel for failing to object. Further, Counsel filed a post-trial motion regarding the State's closing argument, which, after a hearing, the trial court found were not improper, which shows a contemporaneous objection by Counsel would not have been reasonably likely to have changed the outcome of Respondent's trial.

Finally, Respondent failed to prove any resulting prejudice from Counsel's alleged deficiency. The jury asked for additional evidence during their deliberations, which shows the jury was not so swayed by the State's closing that they disregarded their duty and failed to properly deliberate and evaluate the evidence in Respondent's case. The jury returned a verdict finding Respondent not guilty as to criminal conspiracy, which also shows the jury was not so swayed by the State's closing as to blindly impose a guilty verdict on Respondent without proper

deliberations. As such, the post-conviction relief court erred in finding Respondent met his burden as set forth in Strickland and this Court should grant certiorari and reverse the decision of the post-conviction relief court.

The post-conviction relief court erred in finding Counsel was deficient.

The post-conviction relief court erred in finding Counsel was deficient for failing to object to the State's closing argument. Counsel testified she did not object to the State's closing argument as part of her trial strategy because, in her reading of the jury, she did not believe the jurors were being persuaded by the solicitor. Counsel testified,

> I feel like a lot of the times juries get annoyed by lawyers. I feel like juries have an idea of how trials should go and that closing argument is that lawyer's time. And so unless I hear something that is just really egregious or unless I see something in the jury that really appears to be reacting, I feel like me standing up and objecting is going to be. . . what I don't what is to do anything that sign to cause the jury to be frustrated with our side, . . . it's a delicate balance.

(App. 453.) At the time of the State's closing argument, Counsel clearly did not hear any egregious comments from the State, nor did she see the jury reacting to the State in such a way that she felt required to interject and object to the State's closing. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such

conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Although the post-conviction relief court order states, ". . . trial counsel agreed that a timely objection to the solicitor's repeated remarks would not have harmed the defense strategy in Respondent's case," Counsel did not state this in her testimony. (Order 9.) Rather Counsel testified she did not know if objecting during the State's closing would have changed anything and testified "it's easy to sit here now and say that I should have stood up and objected." (App. 453.) Counsel's hindsight evaluation of her performance during the State's closing is not the proper analysis with which to assess deficiency under Strickland. "A fair assessment of attorney performance requires that 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." Strickland, 466 U.S. at 689. As Counsel testified, she did not evaluate the State's closing to be "crazy egregious," nor did she observe the jury reacting to the State in a manner that negatively affected Respondent. Her assessment of the State's closing at the time of trial was that she did not hear any objectionable comments and therefore did not object.

Additionally, Counsel was able to provide the last closing argument where she pointed out the State only presented the phone records of Respondent's co-defendants, and never obtained the phone records of Respondent, which Counsel implied showed only one side of the story. During deliberations, the jury sent out a note requesting all of the phone records. Although Respondent believes the jury was asking Respondent to explain his phone records the State never produced, Counsel testified she believed the jury was asking for the records Counsel pointed out in her closing were missing from the State's case. (App. 456.) This is a reasonable

interpretation of that question given the jury found Respondent not guilty of the criminal conspiracy where the phone records were used by the State to substantiate that charge.

As such, Respondent failed to show any deficiency on behalf of Counsel as she articulated a valid strategy in not objecting during the State's closing as she did not find the comments egregious at the time, nor did she observe the jury responding positively to the solicitor. Counsel was also able to provide the last closing, where she was able to point out shortcomings in the State's case, which reasonably could have led to the jury requesting all of the phone records. The post-conviction relief court erred in finding Counsel deficient and this Court should grant certiorari and reverse the decision of the post-conviction relief court.

State's closing argument was not objectionable and did not warrant the granting of post-conviction relief

In addition, counsel cannot be deficient for failing to object to the State's closing argument where the solicitor did not say anything objectionable. See, e.g., Werts v. Vaughn, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); see also Almon v. United States, 302 F. Supp. 2d 575, 586 (D.S.C. 2004) (citing United States v. Mikalajunas, 186 F.3d 490, 493 (4th Cir. 1999); United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994)) ("There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable.").

An appellate court will review the alleged impropriety of a solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)).

"Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Here, the post-conviction relief court found the following statements by the State to be improper expressions of the solicitor's personal opinion regarding Respondent's guilt.

> You know, the Court allowed me two hours to stand up here and argue. I'm not gonna do that, and I know y'all are thankful for that, but there's not really a whole lot in my mind to argue about. I think its pretty crystal clear. (App. 207.)
>
> Do any of you have a reasonable doubt that [Respondent] 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 records? No. The answer is no. (App. 213.)
>
> I'm gonna sit down. 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 and I think y'all ought to go back there and deliberate and consider everything and I think y'all ought to come up with the only reasonable conclusion, and that is to find the third person involved with this accountable. Hold him accountable. Find him guilty. (App. 213.)

The post-conviction relief court cited United States v. Young, 470 U.S. 1 (1985), in its order finding the above statements improper. However, 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. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166

(2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("'[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.' " (citations omitted)).

In State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), the petitioner claimed the solicitor injected his personal opinion into the closing arguments. Specifically, the solicitor said:

> You know, the initial burden in this case is not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I did the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair.

Id. at 33, 393 S.E.2d at 372. This Court held, ". . . the Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus we hold that the argument was proper." Id. at 34, 393 S.E.2d at 373. Here, the solicitor embraced the role of the jury and told the jury to "deliberate" and "consider everything." The solicitor's comments that he believes he has left the jury firmly convinced of Respondent's guilt is not an improper insertion of his personal opinion, rather it is acknowledging his burden of having to prove the case beyond a reasonable doubt and believing he satisfied that burden, which is a permissible comment on the evidence he has presented to the jury. Additionally, much like the Supreme Court found in Young, there is no evidence in the record that the jury abandoned their duty based on the alleged improper comments from the solicitor. In fact, the jury requested additional phone records during deliberations and returned a verdict that found Respondent not guilty of one of his charges.

The post-conviction relief court also found the solicitor reversed the burden of proof by asking the jury whether they had reasonable doubt that Respondent was not guilty of what he

was telling them Respondent was guilty of, which this Court says put the burden of proof on Respondent. (Order 6.) However, the solicitor's comments throughout the closing argument reiterated that the State had the burden of proof and even explained, "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." (App. 213.) Additionally, 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. (App. 230 - 236)

The post-conviction relief court additionally found the State made improper reference to evidence that had been excluded by the trial court. The State said:

> I've got my idea of why this happened. I think it's very shallowly – or a very shallow burial, just under the layers, of the intent of Mr. Wright, why he needed him out of the way, why he needed his neighbor out of the way. I'm gonna respect you guys in coming up with that on your own. Y'all heard Lorenzo Jones' testimony yesterday, didn't you? I think the inference is there, but we don't talk about it, but I think we understand why he needed them out of the way.[1] (App. 212.)

Although Counsel was successful in getting some comments from the State's witness stricken from the record, the State was still able to properly elicit the following testimony from Lorenzo Jones, one of Respondent's co-defendants:

> State: All right, Lorenzo, let me ask you – I want to know what Robert Wright said to you, okay? Not what you, you know, kind of assumed he meant, but what he said to you. What did he tell you about [the victims]?
>
> Jones: That's somebody for you to rob.
>
> State: Say again.

[1] The post-conviction relief court does not accurately quote this comment from the trial transcript. The Order adds, "I have my own idea" to the beginning of the quotation, which is not in the trial transcript.

Jones: I've got somebody for you to rob.

State: Okay. And why did he tell you to rob them?

Jones: Because he's getting in his way.

(App. 134.) The State's comment during closing was properly referring to the inferences that could be drawn from the properly elicited testimony of Jones during the State's direct examination. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). Further, the trial court properly instructed the jury to disregard "any testimony ordered stricken from the record. . . You are 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 or counsel." (App. 225-226.) Respondent cannot show the jury disregarded the instructions of the trial court and improperly considered stricken testimony during their deliberations, especially since the isolated comment identified by the post-conviction relief court is properly referring to the inference that could be drawn from properly admitted testimony.

Lastly, the post-conviction relief court found the State improperly appealed to the passions and prejudices of the jury and isolated the following statements:

> Do you ever wonder if somebody has the gall to do this to a neighbor what they could be capable of? (App. 202.)
>
> But let me tell you because I was talking about justice is blind. Nothing justifies that crime. 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.)
>
> So how about a little justice for the [victims]? (App. 201.)

The post-conviction relief court cites to Tappiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016), in supporting its finding that the State's comments aroused the jurors' passions or prejudices. In Tappeiner, the petitioner argued the solicitor's closing "vouched for the victim's credibility by implying the police and rape crisis counselors believed Victim, and not Tappeiner." Id. at 250, 785 S.E.2d at 476. During his closing, the solicitor asked the jurors if they would want Tappeiner – who was on trial for criminal sexual conduct with a minor – to babysit their children. Id. at 253, 785 S.E.2d at 478. The Court found the solicitor's vouching for the victim's credibility "incredibly prejudicial" because there was "no other evidence beyond Victim's testimony of the events that allegedly occurred that August evening." Id. at 254785 S.E.2d at 479. Here, the post-conviction relief court found "the solicitor's comments of what else the applicant was capable of clearly intended to arouse the juror's passions and thus improper." (Order 8.) However, these two isolated statements are far from the egregious conduct that has led to reversal by the South Carolina Supreme Court. Additionally, the State was able to present more evidence against Respondent during his trial than the State was able to present against Tappeiner during her trial, which further distinguishes the two cases.

In the cases this Court has found reversal warranted based on closing arguments, the conduct of the solicitor in those cases is highly distinguishable from that of the solicitor in this case. In State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), this Court found the solicitor's closing argument warranted reversal of the petitioner's conviction. This Court highlighted three different examples of egregious conduct by the solicitor, none of which are present in Respondent's case. In their argument, the petitioner outlined the following issues with the solicitor's closing:

> [T]he solicitor violated this well-established rule[2] by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies"; (6) telling the jury he "expects" the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby's crib.

Id. at 223, 641 S.E.2d at 882. This Court found *only three* of the solicitor's arguments outlined by the appellant required reversal. First, the solicitor's comment declaring an "open season on babies;" second, the solicitor's comment that he "expects" the death penalty; and third, the solicitor's production of a baby carriage covered in a large black shroud during a staged funeral procession in the courtroom. Id. at 223, 641 S.E.2d at 881. The court found, "Any one of these three miscues requires reversal of Appellant's sentence" because the solicitor was "overly zealous in his argument." Id. at 223, 641 S.E.2d at 881-882. If the South Carolina Supreme Court did not believe telling the jury "we will kick the baby some more" if a life sentence was awarded; dehumanizing the defendant; or telling the jury it is on their heads if the defendant kills someone else during his life sentence was sufficiently prejudicial or improper to warrant reversal in Northcutt it is unreasonable to believe the State's isolated comments about justice for the victims or questioning what else Respondent and his co-defendants are capable of would warrant reversal. Here, the solicitor's conduct is *far* from the conduct displayed by the solicitor in Northcutt; and when the closing is properly viewed in light of the entire record, it is clear the solicitor's comments would not warrant reversal on appeal.

As noted above, the State's closing argument should be reviewed in context of the entire record. State v. Rudd, 355 S.C. 543, 586 S.E.2d 153 (2003). Improper comments do not

[2] S.C. Code Ann. §16-3-25(C)(1) (2003).

automatically require reversal if they are not prejudicial to the defendant, and the petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (citing DeChristoforo, 416 U.S. at 643). Here, taking the State's closing argument in context of the entire record, it should be noted that Respondent had the last closing argument prior to jury deliberations and during deliberations the jury requested Respondent's phone records, which was an issue Counsel raised during her closing argument. (App. 222-223.) Counsel also echoed some of the State's allegedly improper comments during her own closing telling the jury, "The [victims] deserve justice, my client deserves justice." (App. 222.)

Respondent's segmented evaluation of the State's closing is not the proper way to conduct an analysis of a closing argument. When the State's closing is viewed properly within the context of the entire record, the State's closing did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The allegedly objectionable statements made by the State are far from the type of conduct this Court has found to warrant reversal in other cases. As such, Respondent failed to meet the first prong in Strickland and this application should have been denied and dismissed. This Court should grant certiorari and reverse the decision of the post-conviction relief court.

Respondent failed to show any resulting prejudice from Counsel's alleged deficiency

The record shows the jury was not so swayed by the State's closing argument that they rushed to a verdict in Respondent's case. During deliberations, the jury asked for Respondent's

phone records, which was most likely provoked by Counsel's closing argument regarding the lack of investigation by law enforcement into Respondent's case. Additionally, the jury returned a verdict that found Respondent 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.

The post-conviction relief court also found Respondent was prejudiced because Counsel raised the issue regarding the State's closing argument in a post-trial motion. However, the trial judge's ruling on the post-trial motion indicated he did not see any issue with the State's closing argument, which would reasonably indicate a contemporaneous objection on Counsel's part during the closing argument would not have been sustained and would not have led to any change in the solicitor's closing. Absent a clear abuse of discretion, appellate courts will ordinarily not disturb the trial court's ruling in regard to a closing argument. Rudd, 355 S.C. at 548, 586 S.E.2d at 156; see State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000) ("Ordinarily, a trial court's rulings on closing arguments will not be disturbed."). Respondent has failed to show how the outcome of his trial would have been different had Counsel objected to the State's closing argument. As such, the post-conviction relief court erred in granting Respondent relief. This Court should grant certiorari and reverse the decision of the post-conviction relief court.

CONCLUSION

For all the foregoing reasons, the State requests this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's decision finding Counsel ineffective and granting relief.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR PETITIONER

December 4, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Greenwood County
Brian M. Gibbons, Post-Conviction Relief Judge
Donald B. Hocker, Trial Court Judge

Appellate Case No. 2019-001220

ROBERT A. WRIGHT,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix** has been served upon the applicant by placing one copy in the United States Mail, addressed to:

Michael Rayfield, Esquire
1221 Avenue of the Americas
NY, NY 10020

J. Falkner Wilkes, Esquire
114 Whitsett Street
Greenville, South Carolina 29601

This 4th day of December, 2019.

John Grzymalski
Legal Assistant for Petitioner

ALAN WILSON
ATTORNEY GENERAL

December 4, 2019

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

RE: Robert Antwon Wright v. State of South Carolina
Appellate Case No.: 2019-001220

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for Writ of Certiorari the original and one copy of the Appendix in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Janell H. Gregory
Assistant Attorney General
S.C. Bar # 103176

JHG/jpg
Enclosures

cc: Michael Rayfield, Esquire
J. Falkner Wilkes, Esquire
Victim Advocacy Division (without enclosures)