

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Paul M. Burch, Circuit Court Judge

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JUN - 3 2013

S.C. Supreme Court

WILLIAM ALLEN OWENS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213147

PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to object to the solicitor's closing remark suggesting that the deceased, who had been a church minister, was bowed down in prayer before he was shot when there was no evidence in the record supporting this assertion because this comment surely inflamed the passions of the jury by injecting religious prejudice into the trial.

STATEMENT

Petitioner William Allen Owens was convicted of murder and possession of a weapon during the commission of a violent crime during the December 2008 term of the Barnwell County General Sessions Court before Judge Doyet A. Early, III. App. 1-726. Petitioner was sentenced to imprisonment for a period of life on the murder conviction and five years, consecutive, on the weapon conviction. App. 727-728. E.T. Moore represented petitioner at trial.

Petitioner appealed his convictions and sentences in the case. The Court of Appeals dismissed the appeal on June 28, 2011. See State v. Owens, Op. No. 2011-UP-339 (S.C. Ct. App. filed June 28, 2010). Petitioner was represented on appeal by Robert M. Dudek. App. 741.

On September 16, 2011, petitioner filed a PCR application with the Barnwell County Office of the Clerk of Court. App. 730-740. The respondent filed a return requesting that a hearing be held in response to petitioner's PCR action. App. 741-744. A hearing was convened on July 10, 2012, at the Aiken County Courthouse before Judge Paul M. Burch. Petitioner was present at the hearing and represented by John E. Chambers. App. 746-812.

On August 19, 2002, Judge Burch issued an order of dismissal denying petitioner's allegations of ineffective assistance of trial counsel in the case. App. 813-820. Petitioner appealed Judge Burch's order of dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to object to the solicitor's closing remark suggesting that the deceased, who had been a church minister, was bowed down in prayer before he was shot when there was no evidence in the record supporting this assertion because this comment surely inflamed the passions of the jury by injecting religious prejudice into the trial.

At trial, Annie J. McCreary testified that on the afternoon of July 6, 2007, her husband Phillip McCreary, left their Springfield home in Barnwell County to go fishing at the Edisto River, and that when her husband had not returned home by 10:30 p.m. on that date she drove down to the river to find him, but did not see him there. App. 191, l. 6 – p. 209, l. 10. Thereafter, when McCreary asked neighbor Don Fenlayson to assist her in the search for her husband, Fenlayson went to the river and found Phillip McCreary's dead body there at the river's edge. App. 214, l.20 – p.223, l. 16. McCreary died of a laceration to the brain due to a gunshot wound to the back of his head. App. 516, lines 7-9; App. 524, lines 16-18.

Barnwell County Police Officer M. Edward Carroll went to the crime scene on July 7, 2007, and began meeting with the case investigators. Officer Carroll stated also that petitioner became a suspect after he received two telephone calls from a man and a woman, respectively, on July 11, 2007, and July 12, 2007, respectively, informing him that petitioner was the one they "needed to look for" in connection with McCreary's death. App. 225, l. 1 – p.231, l. 24.

SLED Agent Richard Johnson testified that he was present during the execution of a search warrant of petitioner's home wherein a pail of Caltapa worms¹ and McCreary's jewelry² were found.

¹ Apparently, Robert Williams was fishing at the river at the same time McCreary was fishing and upon leaving, he gave McCreary the remainder of his Caltapa worms. Williams stated that as he was leaving, he saw a white male who had driven up in a dark Avalanche truck, and noted that this male had no fishing gear. App. 152.

² SLED Agent Johnson also searched Jeannie Sweat's house (next door) and found a pink box containing a gold bracelet and a gold necklace with a cross on it. App. 560, l. 3-p. 561, l. 15. Sweat stated that she had received a pink box and other things from McKinney's house to store for her until she (McKinney) was released on bond. Anne McCreary recognized the jewelry from the pink box as the belongs of her deceased's husband. App. 209, l. 4-10; App. 630, l. 2 – 631, l. 8.

App. 531, l. 18 – p. 541, l. 20. Thereafter, petitioner was arrested and charged him with murder. Next, Agent Johnson went to Maryland to interview Renee McKinney, who was also arrested and subsequently charged with murder. McKinney’s murder charge was later reduced to accessory after the fact. App. 541, l. 23 – p. 544, l. 20; App. l.15-19.

Renee McKinney testified that she and her two sons lived in Williston, South Carolina, with petitioner at his house during the year 2007. McKinney testified that her relationship with petitioner was not a healthy one and that they fought during the week of July 4, 2007. McKinney stated on the night of Friday, July 6, 2007, she was cleaning up shattered glass from their fight earlier when petitioner came home with Caltapa worms and announced that he had killed a black man. App. 301, l.16 - p. 319, l. 22. McKinney stated that she and her two sons moved to Maryland with her parents immediately after petitioner told her what he had done. McKinney stated that when SLED official arrived at her parents home in Maryland, she finally told them of petitioner’s confession to her regarding the deceased’s death. App. 350, lines 5 – p. 19.

Petitioner’s cousin Susan Cacado testified that on night in question, petitioner told her that he had killed a man and thrown him in the river. App 609, l 2 -p. 618, l. 5.

During closing arguments, the solicitor commented on this issue as follows:

Solicitor: You see, Reverend McCreary is trying to tell you look at me. Look at me and listen to what they can tell you how I died. Look at me and let me tell you how I died...because the distance between the weapon and his head was 3 to 6 inches, and it was straight through his head, and it was with a high velocity weapon that took out his brain stem and brain pons and half the front of his face. That is execution. And what is he trying to tell you? He [is] trying to tell you, I am not sitting on the fishing bucket. That’s too far, but I could have been on my knees. I was bent where it didn’t get in my lap. I was bent, and I fell right there. I dare say that Defendant executed Reverend McCreary. He was on his knees and I dare say Reverend McCreary was praying... App. 667, lines 2-23.

Note that the pathologist testified at trial that based on his autopsy results, the deceased would have “been in some sort of sitting position or kneeling position” at the time he was shot. App. 524, lines 3-9.

Petitioner did not testify at trial and did not present any witnesses in his defense.

During the PCR hearing, petitioner's PCR attorney questioned trial counsel about why he failed to object to the solicitor's inflammatory closing comment suggesting that petitioner's shot the deceased, who was a minister,³ in the back of the head while he was praying for his life. App. 446, lines 1-9.

Trial counsel's explanation as to why he did not object to the argument in question follows:

Trial Counsel: Reverend McCreary was shot in the back of the head, whether he was kneeling, sitting on the bucket, it didn't make any difference. You know the fact is he was shot in the back of the head. It is reasonable to assume that the person who's about to be shot in the back of the head would be praying. So I didn't think it was necessary or important to call that to the jury's attention. Sometimes you just don't want to get into things, you know, that could inflame the jury, you know, even more. Sometimes you just don't want to emphasize things by having it repeated.

App. 776, l. 24-p. 777, l. 8.

As a rule, a solicitor's closing argument must not appeal to the jurors' personal biases or arouse their passions or prejudices, and its content should stay within the record and reasonable inferences of the evidence presented. Humphries v. State, 351 SC 362, 570 S.E.2d 160 92002). Solicitors are bound to the rules of fairness in their closing arguments. State v. Linder, 276 S.C. 304, 278 S.E. 2d 335 (1981). A reversal is required if the solicitor's comments infect the trial with enough unfairness as to make the resulting conviction a denial of due process. Donnelley v. DeChristoforo, 416 U.S. 637. Compare Vasquez v. State, 388 S.C. 447, 698 S.E. 2d 561 (2010), where the Court held that trial counsel's failure to object to the solicitor's improper comments characterizing the defendant, who was a Muslim, as a domestic terrorist and to the remarks drawing a comparison between the way the alleged murder was committed to the events of September 11th, because such comments improperly evoked religious prejudice and inflamed the passions and prejudices of the jury enough to infect the trial with sufficient unfairness to have denied the defendant a fair trial. Also compare the depiction of the defendants in

³ The deceased had been a minister and Sunday School Bible School teacher at Macedonia Baptist Church in Blackville, South Carolina. App. 192, lines 9-13.

posters identifying them with Japanese people during closing arguments in Toyota of Florence, Inc. v. Lynch, 314 S.C 257, 442 S.E.3d 611 (1994), where the Court reversed upon finding that the same was vicious and inflammatory and served only to invoke racial prejudice. Compare further the case of State v. Northcutt, 372 S.C. 207, 641 S.E. 2d 873 (2007), where the Court reversed in part (there were other reversible comments) because the solicitor's comment that it's "open season on babies in Lexington if the death penalty is not [returned]" was interpreted as a statement calculated to inflame the jury. The defendant in Northcutt was convicted of killing his infant daughter and sentenced to death. Clearly, the better practice maybe to prohibit arguments referencing religion or God. State v. Patterson, 324 S.C. 5 482 S.E. 2d 760 (1997) and State v. Longworth, 438 S.E.2d 219 (1993).

In the case at bar, the solicitor exceeded the bounds of the record by concluding that since the deceased was a reverend, then he was bent over in prayer at the time of the killing when to the contrary, the deceased's bent posture had more to do with a position associated with the act of fishing rather than kneeling in prayer. Therefore, to inject the speculative notion of a prayerful man who was shot despite his prayers to spare his life introduced an improper religious factor into the case that was clearly inflammatory. The thought that the shooter would pull the trigger and ignore one's prayer to God to spare life portrayed the shooter as a cold, heartless, and ruthless person. Undoubtedly, this inflammatory argument was so prejudicial to petitioner's case that he could not have received a fair trial regardless of the weight of state's evidence presented, and had counsel objected to this, then the outcome of the trial would have been different. Note that in Vasquez, the Court held that "the overwhelming evidence of [Vasquez's] guilt did not eliminate the reasonable probability that the result of the trial would have different had trial counsel objected to [the improper] portions of the solicitor's closing argument."

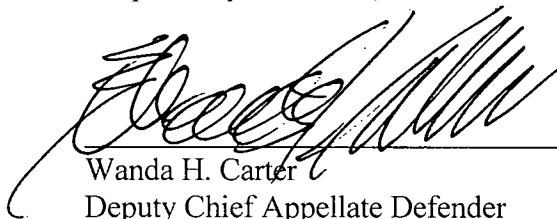
Trial counsel erred in failing to object to the solicitor's improper argument in this case. Counsel's failure to object to this aspect of the solicitor's closing argument in question constituted deficient legal representation that violated petitioner's Sixth Amendment right to competent trial counsel at trial,

particularly since the error was sufficiently prejudicial to warrant a reversal of his convictions. See also Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing argument, petitioner requests that the Court grant the petition and allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line. The signature is stylized and cursive.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of June, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Barnwell County
Paul M. Burch, Circuit Court Judge

WILLIAM ALLEN OWENS,

PETITIONER,

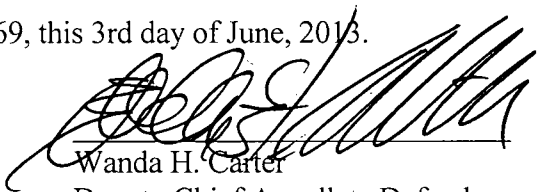
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and William Allen Owens, #332121, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 3rd day of June, 2013.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of June, 2013.


(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.