STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY

G. THOMAS COOPER, CIRCUIT COURT JUDGE

JHUNE HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001349

JOHNSON PETITION FOR WRIT OF CERTIORARI

APPELLANT PRO-SE REPLY BRIEF

JHUNE HARRIS, APPELLANT PRO-SE
BRCI-MONTICELLO #
4460 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29210

I N D E X

ISSUES PRESENTED:

Issue A: Was defense counsel ineffective in failing to request the lesser-included offense of ABHAN?

Issue B: Was defense counsel ineffective in failing to place an Objection to the State's opening argument?

Issue C: Was defense counsel ineffective in failing to place an Objection to the State's final summation?

STATEMENT OF THE CASE:

The Richland County Grand Jury indicted the applicant for murder and assault and battery with intent to kill. (Indictments,2003-GS-40-5275 and 5276). He proceeded to trial on November 7-10,2005,represented by Jack B. Swerling,Esq.,before the Honorable Reginald I. Lloyd. The State was represented by Solicitors' John P. Meadors and Erin S. Gaddy. On November 10,2005,the jury found applicant guilty as charged,and the sentencing was deferred due to a (LWOP) issue. Note: The trial was recorded by Court Reporter,Virginia Roland.

On November 21,2005,a sentence hearing was held,and Judge Lloyd sentenced applicant to a forty (40) year term on the murder offense and a concurrent twenty (20) year term on the (ABWIK) offense. Note: The sentence hearing was recorded by Court Reporter,Stacy L. Sheppard. (Nov. 21st,2005,Tr.pp.4 lines 5-17;p.18,lines 13-18). A timely Notice of Appeal was filed,and the Appeal was perfected by Robert M. Dudek of the Columbia Appellate Defense.

On _____ the South Carolina Court of Appeals affirmed the conviction and sentence._____

_____.

ISSUE A: ARGUMENT:

Issue A: Was defense counsel ineffective in failing to request the lesser-included offense of ABHAN?

Factual Basis:

The applicant in this case was charged in indictment number 2003-GS-40-5276,with assault and battery with intent to kill. His defense theory at trial was Law Accident and Self-defense. (Tr.p.80,lines 19-23).

At trial the applicant testified,"I did not see her as I was backing up. I couldn't think and I panicked. My hand was out with the pistol in my hand. I tripped on the binding of the Linoleum and it caught the heel of my shoe. I did not intentionally pull the trigger,but the pistol fired when I tripped." See: (Tr.pp.553,line 17-555,line 23;p.578,line 18-p.584,line 25).

Forest Ivey; the victim,Angela Gilmore's son testified,"I'm not sure he pointed a gun at my Mama." (Tr.p.253,lines 9-18).

Officer David Collins testified,"Additional examination of the firearm revealed there was several problems with it as it was submitted." (Tr.pp.463,line 21-p.465,line 9;p.484,lines 1-9;p.484,line 20-p.490,line 11;p.490,line 17-p.491,line 9).

Mr. Boney testified,"When the applicant called him,he was disoriented,highly emotional,crying,and thought he had shot Angela." (Tr.pp.411,line 18-p.413,line 17;p.420,line 16-p.421,line 23).

In short,the evidence presented at trial did well support the lesser-included offense of ABHAN. Under the totality of the circumstances involved,as well as the facts presented by the State;the applicant was entitled to the lesser-included offense of ABHAN. Here,the applicant was entitled to an ABHAN charge as evidence was susceptible of an inference that he was guilty of only that offense. State v. Funches, 267 S.C. 427,229 S.E.2d 331(1976);State v. Rucker, 319 S.C. 95,459 S.E.2d 858 (Ct.App.1995). See: for

ISSUE A: CONTINUED:

example;State v. Jones, 133 S.C. 167,130 S.E.2d 747 (1925),and State v. Mitchum, 158 S.C. 52,187 S.E.2d 240 (1972).

The applicant was entitled to the lesser-included offense charge of ABHAN,and counsel was ineffective in his failure to request the charge. Counsel's failure was an error that resulted in prejudice,because it denied the applicant of the opportunity for the jury to find in his favor upon the lesser-included offense. Cherry v. State, 300 S.C. at 117,118,386 S.E.2d at 625;Strickland,supra. 466 U.S. at 694,104 S.Ct. at 2064 (1984).

Counsel was indeed,ineffective in his failure to request the lesser-included offense of ABHAN. Marzullo v. Maryland, 561 F.2d 540 (4th Cir.1977).

The Applicant is entitled to a reversal in this particular case.

ISSUE A: CONTINUED:

One of our South Carolina Court's primary functions in the interpreting of a Statute is to ascertain the direct intention of the Legislative intent and apply the Statute according to its literal meaning. In construing such a Statute,the words or its language must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the Statute's operation. Statutes 241(1). The literal meaning and legislative intent of our common law Statute,Sect. 17-19-30(1976) is quite clear cut by its language. The common law requirements in South Carolina remain the same in every particular,as they stood at common law of olden times. State v. Judge, 208 S.C. 497,38 S.E.2d 715,719 (1946),and its progeny. The legislative intent is clearly written into the language of Statute,Sect. 17-19-30(1976),and (1985). For an accused to be lawfully convicted of murder within the State of South Carolina,not only must the time and place of the death of the deceased be proved at trial;it must be alleged in the bill of indictment returned against him by the Grand Jury,in accordance to the clear and well established constitutional rights of the accused. S.C. Const. Art. 1,Sect. 11; U.S. Const. Amend. Five,S.C. Statute,Sects. 17-19-30 and 17-19-20(1985). To do otherwise,would violate the Due Process Clause. U.S. Const. Amend. Fourteen and The Bill of Rights.

It is absolutely necessary in the State of South Carolina,that "both" the time and place of the assault of the victim,"and" the time and place of the death of the deceased be alleged in a murder indictment returned by the Grand Jury,"before" an accused can be lawfully convicted for the offense of murder in this State. "Both" these essential elements must be passed upon by the Grand Jury as provided by the Grand Jury Clause. Citing;State v. Rector, 158 S.C. 212,155 S.E. 383 (1930);State v. Platt, 154 S.C 1,151 S.E. 206 (1930);State v. Blakeney, 33 S.C. 111,11 S.E. 637 (1890). General reference to the Statute is insufficient. U.S. v. Hooker, 841 F.2d 1225,1228(4th Cir.1988),quoting,Hale v. U.S., 89 F.2d 578-79(4th Cir.1937).

The indictment in question here,is fatally defective and such an indictment cannot be cured by amendment. As held by the Court in,State v. Gentry, 363 S.C. 93,610 S.E.2d 494 (2005),the "sufficiency" of an indictment and the

ISSUE A: CONTINUED:

"subject matter jurisdiction" of the Circuit Court are "two separate matters."

Further as stated in, U.S. v. Cotton, 122 S.Ct. 1781(2002), "the subject matter jurisdiction of a Circuit Court is both mandatory and jurisdictional, and it is fundamental. Citing, State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (S.C.App.2003); Mathis v. State, 335 S.C. 87, 584 S.E.2d 366(2003); U.S. v. Daniels, 973 F.2d 272, 274(4th Cir.1992). When an indictment does not contain essential elements of the offense charged, the indictment is invalid, and a Circuit Court, then has no subject matter jurisdiction over the criminal matter, in which to enter a conviction or impose a sentence upon such an indictment, as they are void. Carter v. State, 495 S.E.2d 773(1998); Brown v. State, 540 S.E.2d 846(2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Riley, 64 S.E. at 127.

As stated in, State v. Smalls, 364 S.C. 343, 613 S.E.2d 754(2005), "Although, an indictment does not confer subject matter jurisdiction, Due Process requires that a criminal defendant be properly served with a valid indictment. State v. Coleman, 17 S.C. 473, 1882 WL5606(1882).

The indictment in question here, was not valid and the Circuit Court lacked subject matter jurisdiction in this particular case. State v. Perry, 70 S.E. 304(1911).

The Appellant is entitled to a vacation of the conviction and sentence as a matter of pure law and justice in this instant case. State v. Smalls, 613 S.E.2d 754 (2005), State v. Rugh, 129 S.C. 43, 164 S.E. at 777.

The Appellant's conviction and sentence in this particular case should be vacated.

ISSUE B: ARGUMENT:

Issue B: Was defense counsel ineffective in failing to place an Objection to the State's opening argument?

Factual Basis:

The Solicitor during opening argument not only bolstered,but vouched for the credibility of the State's four child witnesses before they even testified to any alleged facts.

The Solicitor stated,"Eugene,Ashley,Forest,and Marcus are going to be the first four witnesses. They saw the Defendant shoot and kill Leopold Pierre with a .32 Revolver and then chase their mother Angela in the house and shoot her while she held her son Marcus." (Tr.pp.62,line 21-p.63,line 5). We must note,that at the time of the trial these children's ages ranged from six to thirteen years old. The Solicitor's remarks not only bolstered these children's testimonies at trial;the remarks automatically drew sympathy and passion from the jurors for the victim Angela and her four children. The Soliciter's remarks were tailored to intentionally accomplish that very effect upon the jurors from the first instance.

The Solicitor further stated,"There is nothing more spiteful than what y'all going to hear." (Tr.p.66,lines 19-20).

The Solicitor's comments in opening accomplished two other intentional purposes also. The comments completely destroyed any defense theory at all;and it destroyed any reasonable doubts or lack of malice the jurors might otherwise have found;right from the very on-start of the trial. The State's opening argument wash highly inflammatory and inherently prejudicial;denying the applicant a fair trial,before the actually trial ever began. U.S. Const. Amends. Six and Fourteen. Such an opening argument is constitutionally forbidden. U.S. Const. Amend. Fourteen;Rule 407,SCACR.

ISSUE B: CONTINUED:

Law Analysis:

Such improper arguments are extremely inflammatory as they draw sympathy,passion,and prejudice towards a defendant prior to the jury hearing the case facts at trial. State v. Alexander, 401 S.E.2d 146 (1991);Rule 401,SCRE. Failure to object to such an opening by the State must be construed as ineffective assistance of counsel. Butler v. State, 334 S.E.2d at 813,106 S.Ct. at 869;Strickland v. Washington, 466 U.S. at 694,104 S.Ct. at 2064 (1984).

Furthermore,the Solicitor's opening argument constituted comments on the case facts prior to the jury hearing those facts. Such an argument is constitutionally forbidden,and counsel's failure to object to such an argument constitutes ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510,123 S.Ct. 2527,2529,156 L.Ed.2d 471 (2003).

Such opening arguments have many times been held as inherently prejudicial. See: U.S. v. Hawkins, 76 F.3d 545 (4th Cir.1996);and,U.S. v. Loayza, 107 F.3d 257 (4th Cir.1997). Such arguments deny the defendant a fair trial. U.S. Const. Amends. Six and Fourteen. Counsel's failure to object was indeed,ineffective assistance of counsel. See: Strickland v. Washington, 466 U.S. 668 at 694,104 S.Ct. 2052 at 2064,2065,2066 (1984). The applicant was prejudiced by counsel's deficient performance and error. The error is indeed,not harmless beyond a reasonable doubt. Cherry v. State, 300 S.C. at 117,118,386 S.E.2d at 625;U.S. Const. Amend. Six.

The applicant is entitled to a reversal in this instant case.

ISSUE C: ARGUMENT:

Issue C: Was defense counsel ineffective in failing to place an Objection to the State's final summation?

Factual Basis:

See: (Entire Summation on;Tr.pp.648,line 1 -p.661,line 8).
See: (Specific reference to;Tr.pp.414,line 15-p.416,line 18;p.417,line 16-p.418,line 1;p.425,lines 2-15).

Solicitor Meadors stated further,"These four children and Angela Gilmore have no axe to grind. The Defendant. A different story."

Voluntary manslaughter,that test was all over the map."

"Little did Leopold Pierre know that "he was a dead man sweeping."

"Defense is a smoke screen,"You all are what makes the system work. There are no reasonable doubts here." "Self-defense,"He is the fault that brought on the controversy. He was the fault. He was the one looking for trouble." "It's almost like he wanted to act big in front of Angie and her kids. When he finally comes down,he didn't want that. What he wanted was to get him outside where he could shoot him."

"Yesterday,Y'all,he said he didn't even know if he'd shot him."

"Credibility and believability,that's,that same credibility which is incredible and he's not telling the truth. There is no self-defense. Self-defense is a smoke screen."
"This case is about Leopold Pierre. This case is about Angie. It's their day in Court. Leopold's,Angie's,these children's day in Court. It is directly about them. That's a smoke screen. This case is about credibility and believeability. (Tr.pp.648,line 17-p.661,line 8).

ISSUE C: CONTINUED:

Law Analysis:

We must first note,"the effects involved here,in this final summation by the State." The final summation encouraged the jurors to "abandon their impartiality," as the jury deliberated only eleven (11) minutes after the trial Court's final charge;of many,to the jury. That very final argument was aimed at placing the jurors "in the victim's shoes and such an argument tends to completely destroy all sense of impartiality of the jurors and its effect is to arouse passion and prejudice." "It is not,and can never be harmless error,because it deprives the jurors of their focus on the evidence involved,allowing a decision based upon emotions,biases,and prejudices,not fact. It deprives the defendant of the juror's independent ability to evaluate and analyze credibility,believability,and fact;which in turn,denies the defendant a fair trial proceeding,as well as due process. State v. Jones, 466 S.E.2d 773,774 (Ct.App.1996);State v. Brisbon, 474 S.E.2d 433,438 (1996);quoting;State v. Reese,supra. (Ct.App.April 29,2001); Rule 22,SCCrimP. and Rule 407,SCACR;U.S. Const. Amends. Five,Six,and Fourteen.

Such statements as these made here,in final argument presuppose the defendant's guilt and they are the sort of foul blows that have long been held improper. The Solicitor here used the bully pulpit method of closing argument to inflame the passions of the jurors,their emotions,and their sympathy for the victims and the children;and it insinuated to the jurors that the Solicitor was in possession of personal knowledge of facts not offered at trial. Such arguments have long been held improper. Berger v. U.S., 295 U.S. 78 (1935);State v. Gathers, 369 S.E.2d 140 (1988).

A defendant is entitled to a good faith theory of defense if it is supported by sufficient evidence;as in this case,for a jury to find in his favor. A defendant is constitutionally guaranteed the opportunity to advance his "theory of the case" from the defense perspective;but,the defendant here

ISSUE C: CONTINUED:

was denied that opportunity by the State's final summations;which counsel stood by placing no objection in that regard. It is well known that even good defense attorneys sometimes make mistakes,as defense counsel did here.

Further,improper vouching for credibility of the State's own witnesses taints the trial's fundamentally fairness;and defense counsels should place objections to such arguments;if for no other reason than to preserve the issue for appellate review. See: U.S. v. Loayza, 107 F.3d 257 (4th Cir.1997);and State v. Rudd, 355 S.C. 543,586 S.E.2d 153 (S.C.App.2003). A Solicitor should refrain from stating his personal opinions during argument and misleading the jury about the law,specifically in regard to a defendant's defense theory. See: Boyd v. French, 147 F.3d 319 (4th Cir.1998).

For these reasons it is clear that a defense attorney should place objection to such inherently prejudicial final summations. State v. Shuler, 545 S.E.2d 805 (2001);State v. Kelly, 540 S.E.2d 851 (2001).

There is a known principle of law;that incompetent summation can be construed as ineffective assistance of counsel;and for that same reason;the failure to object to an inherently prejudicial final summation must also be construed as ineffective assistance of counsel. Even;Mr. Swerling would have to agree upon this principle when such a mistake is made by an attorney,even if made by himself;as in this present case.

Such a mistake renders effective assistance well below that required by professional attorneys representing a criminal case;especially a murder and ABWIK case;because it undermines the proper functioning of the adversarial trial process. Butler v. State, 286 S.C. 441,442,334 S.E.2d 813,814 (1985);Strickland v. Washington, 466 U.S. 668,686,at 694,104 S.Ct. 2052 at 2064 (1984). Such an error by counsel constitutes deficient performance because it is not an exercise of "professional reasonable judgment."

ISSUE C: CONTINUED:

Here; the final summation destroyed the complete defense theory counsel had based the case at trial upon,and the failure to place an objection to it was crucial error by counsel. Cherry v. State, 300 S.C. at 117,118,386 S.E.2d at 625;Strickland,supra.,466 U.S. at 688,694,104 S.Ct. at 2064,2065,2066 (1984).

Even,such a fine attorney,as Mr. Swerling would have to agree. Counsel's error was ineffective assistance of counsel;the applicant was prejudiced by the error,and the error is not harmless beyond a reasonable doubt.

The applicant is entitled to a reversal.

2-17,p.355,line 17-p.356,line 3;p.359,line 15-p.360,line 3).

The Solicitor tried to impeach his [redacted] witness,Ms. Gilmore as to her statement to police being consistent with her trial testimony when it was inconsistent. Defense objected based upon the fact that he had ask only one specific question about an omission,and the State could not go back into the whole statement to show prior inconsistency,as he did not impeach the witness on inconsistency of her statement. The State argued they could. The Court sustain the objection. See: (Tr.pp.374,lines 5-375,line 23).

The Solicitor then ask the witness,"You gave this statement and put everything in here that happened,to the investigator on July 17th?" Witness: "Yes." (Tr.p.376,lines 4-8). The Solicitor presented the statement as consistent when it was indeed,very inconsistent. (SEE) State v Haylot.

See: State v. Blalock, 357 S.C. 74,591 S.E.2d 632 (S.C.App.2003);State v. Foster, 354 S.C. 614,582 S.E.2d 426(2003); Rules 613(b)and 801(d)(1)(b),SCRE. The appellant was inherently prejudiced by that State action. U.S. v. Hawkins, 76 F.3d 545(4th Cir.1996).

The Prosecutorial misconduct in this case is crystal clear. See: (Tr.pp.414,line 15-p.416,line 18;p.417,line 16-p.418,line 1;p.425,lines 2-15).

Now let us review the final summation.

"This case is about Leopold Pierre. This case is about Angie. It's their day in Court.Leopold's,Angie's,these children's day in Court. It is directly about them. That's a smoke screen. This case is about credibility and believability. See: (Tr.pp.648,line 17-p.661,line 8). This was the Solicitor's final remarks in final summation to the jury. The defense stated,"Judge,I'm just going to note something on the record at this point regarding the last comment. We can talk about it later. (Tr.pp.657,lines 19-23;p.661,lines 3-4). Let us now note,the Solicitor's final summation prior to those comments.

ISSUE I: CONTINUED:

"These four children and Angela Gilmore have no axe to grind." "The defendant. A different story." "Voluntary manslaughter,that test was all over the map."

"Little did Leoplod Pierre know that he was a dead man sweeping."

"Defense is a smoke screen,"You all are what makes the system work. There are no reasonable doubts here."

"Self-defense," "He is the fault that brought on the controversy. He was the fault. He was the one looking for trouble." "It's almost like he wants to act big in front of Angie and her kids. When he finally comes down,he didn't want that. What he wanted was to get him outside where he could shoot him."

"Yesterday,Y'all,he said he didn't even know if he'd shot him."

"Credibility and believability,that's,that same credibility which is incredible and he's not telling the truth." "There is no self-defense. Self-defense is a smoke screen."

The State's entire final summation is highly inflammatory;extremely and inherently prejudicial. U.S. v. Loayza, 107 F.3d 257 (4th Cir.1997); Rule 407,SCACR.

The final summation encouraged the jurors to "abandon their impartiality," as the jury deliberated for only eleven minutes after the trial Court's final charge. The argument was aimed at placing the jurors "in the victim's shoes and such an argument tends to completely destroy all sense of impartiality of the jurors and its effect is to arouse passion and prejudice." The error was not harmless,because it deprived the jurors of their focus on the evidence,allowing a decision based upon emotions,biases and prejudices,not

ISSUE I: CONTINUED:

fact. It deprived the defendant of jurors who then had independent ability to evaluate and analyze credibility,believability and fact,which resulted in denying the appellant due process of law and a fundamentally fair trial. U.S. Const. Amends. Six and Fourteen. State v. Jones, 466 S.E.2d 733-34(Ct.App.1996); State v. Reese, _____ S.C. _____,_____ S.E.2d (Ct.App.April 29,2001); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983).

The Appellant's conviction and sentence should be vacated. U.S. v. Golding, 168 F.3d 700,702(4th Cir.1999).

At the least,a reversal is required.

ISSUE I: ARGUMENT:

Issue I: Was prosecutorial misconduct performed by the Solicitor?

Factual Basis:

In opening argument,the Solicitor bolsters the testimonies of the State's four child witnesses from the first instance. The Solicitor states to the jury,"Eugene,Ashley,Forest,and Marcus are going to be the first four witnesses. They saw the defendant shoot and kill Leopold Pierre with a .32 Revolver and then chase their mother Angela in the house and shoot her while she held her son Marcus." (Tr.pp.62,line 21-p.63,line 5). We must note that,at the time of trial these children's ages ranged from six to thirteen years old. The Solicitor's remarks not only bolstered these children's testimonies at trial,they drew sympathy and passion from the jurors for the victim Angela and her four children. Furthermore;the Solicitor's remarks were past the scope of opening argument,as they were comments upon the case facts not before the jury,as no one had testified to them at that time.

The Solicitor further stated,"There is nothing more spiteful than what y'all going to hear." (Tr.p.66,lines 19-20).

The Solicitor's comments in opening accomplished two intentional purposes. Those comments completely destroyed any defense theory or accident or self-defense;and they destroyed any reasonable doubt or lack of malice that the jury might have otherwise found from the very on-start of the trial.

The State's opening was highly inflammatory and inherently prejudicial;which denied the appellant a fair trial from the first instance. U.S. Const. Amends. Six and Fourteen.

This trial was not at all fair due to the prosecutorial misconduct involved.

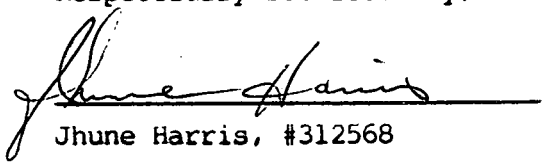
The State elicited the witness,Anegla Gilmore to editorialize beyond the scope of the question asked on several occasions. See: (Tr.pp.353,lines

CONCLUSION:

For the legal reasons and principles cited in this Post-Conviction Relief Application, with an Initial Brief,the conviction and sentence should be vacated,reversed for new trial,or a judgment of acquittal entered.

Wherefore, Applicant does forever pray.

Respectfully submitted by,



Jhune Harris, #312568
B.R.C.I. MONTICELLO #
4460 Broad River Rd.
Columbia, S.C. 29210

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I MAILED THE FOLLOWING APPELLANT PRO-SE BRIEF TO THE PERSON LISTED BELOW.

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THE SUPREME COURT OF SOUTH CAROLINA
P.O. BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

S/ Jhune Harris

JHUNE HARRIS, APPELLLANT PRO-SE
BRCI-MONTICELLO #
4460 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29210

SWORN TO AND BEFORE ME THIS
6 DAY OF Dec 2013

Eugene Kent (L.S.)
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: Apr. 4, 2016

MR. JHUNE HARRIS, SCDC#312568
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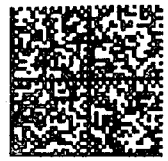

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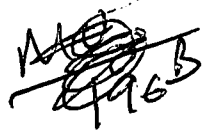

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