

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lee County  
R. Ferrell Cothran, Jr., Circuit Court Judge

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**S.C. Supreme Court**

EFRAIN THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000591

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PETITION FOR WRIT OF CERTIORARI

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LARA M. CAUDY  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's improper comment on Petitioner's lack of remorse during closing arguments since the solicitor's comments were unduly prejudicial and denied Petitioner a fair trial?

## STATEMENT

A Lee County Grand Jury indicted Petitioner at the November 22, 2005 term of General Sessions for murder and possession of a firearm during the commission of a violent crime. App. 848-849. Petitioner's case was called to trial on April 4, 2006 before the Honorable Clifton Newman, and a jury. Petitioner was tried jointly with his co-defendants, Eunice McCall and Chad James. App. 1. Assistant Solicitor James P. Saverance, Jr. appeared on behalf of the prosecution, and William W. Wheeler, III represented Petitioner. App. 1. On April 6, 2006, the jury found Petitioner guilty of both charges. App. 721, l. 15 – 722, l. 2. He was sentenced by Judge Newman to thirty years for murder and five years concurrent for the weapons charge. App. 740, ll. 2-9.

The South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Thomas, Op. No. 2009-UP-059 (S.C. Ct. App. Filed January 22, 2009); App. 742.

On September 11, 2009, Petitioner filed an application for post-conviction relief (PCR). App. 743-749. The state filed a return to this application dated January 11, 2010. App. 750-754. The matter proceeded to an evidentiary hearing on December 12, 2012 before the Honorable R. Ferrell Cothran, Jr. App. 755. Assistant Attorneys General Megan Harrigan and Ben Aplin represented the state, and Kenneth R. Young represented Petitioner. App. 770. By order dated July 14, 2013, Judge Cothran denied Petitioner relief. App. 837-847.

This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the solicitor's improper comment on Petitioner's lack of remorse during closing arguments since the solicitor's comments were unduly prejudicial and denied Petitioner a fair trial.

### **Relevant Facts**

It was undisputed that on the night of April 7, 2005, the decedent, Petitioner, Eunice McCall, and several others were walking to Jerome's Store, a local pool hall, when a fight broke out between the decedent and McCall. During the altercation, the decedent was shot seven times and died of his injuries. McCall stated he acted in self-defense after he was attacked by the decedent and Petitioner testified that he acted in the defense of others in an effort to protect McCall, his close friend. McCall was convicted of voluntary manslaughter in the decedent's death and Petitioner of murder.

Tiffany Hill testified that around 10:00 pm on the night of April 7, 2005 as she was walking home from a friend's house she passed by the decedent, Petitioner, Eunice McCall, and Chad James. Hill testified that she stopped walking when she heard a fight break out between the decedent and McCall. The two were "tussling with each other." She claimed that she heard three gunshots and then ran. As she was running, she heard several more gunshots. Hill denied ever seeing the decedent with a gun. App. 82, l. 2 – 86, l. 7. She also never saw Petitioner fire a weapon and testified that "you could hardly see him." App. 89, ll. 19-22; App. 96, l. 14 – 97, l. 12.

Courtney Johnson, Petitioner's girlfriend, testified that on April 7, 2005, she was at Chad James' house with Petitioner, Samantha Hickman, and several other individuals. At some point, Petitioner and Chad James left. Johnson claimed that when Petitioner returned, he pulled Johnson

into the bathroom and told her that he shot the decedent. Chad James then drove Johnson, Petitioner, Samantha Hickman, and others to Hickman's house in Camden. On the way to Camden, Petitioner was half in the trunk and half in the back seat. App. 112, l. 5 – 113, l. 24; App. 126, l. 11 - 129, l. 13. Hickman's testimony corroborated this account of events. However, she added that while the group was travelling to Camden, Petitioner talked about how he shot the decedent. App. 162, l. 19 – 168, l. 5.

Investigator Salliza Wilson of the Bishopville Police Department was the first officer to respond to the scene. When she arrived, she saw a body lying in the middle of the street. Wilson testified that when she first approached the decedent it appeared that "he was taking his last breath" and that she was unable to get EMS to the scene before he passed away. Wilson taped off the area and waited for SLED to arrive to process the scene. App. 178, l. 19 – 183, l. 8.

Captain Thomas Burke testified that he interviewed Petitioner on April 11, 2005 and that Petitioner denied any involvement in the decedent's death. Captain Burke claimed that Petitioner told him he was in Camden with his girlfriend and Samantha Hickman on the night of April 7, 2005. App. 235, l. 1 – 237, l. 25.

Detective Chez-dent Thompson testified that he interviewed Petitioner incident to his arrest on April 29, 2005. In this second statement to law enforcement, Petitioner stated that he acted in self-defense after the decedent "charged toward" him. He admitted in this statement to shooting the decedent three times in the back with a .22 caliber semi-automatic pistol. Petitioner wrote in his statement that he did not intend to kill the decedent, but that he thought that his "life was in danger." App. 401, l. 24 – 408, l. 11.

Petitioner testified that sometime after dark on the night of April 7, 2005, he, Eunice McCall, the decedent, Lenny Green, and Keith Hannabel were walking to Jerome's Store to play

pool. Petitioner explained that Green and Hannabel were in the lead, the decedent and McCall were in the middle, and Petitioner was in the back. Petitioner testified that he stopped to wipe dust off of his sneakers and noticed the decedent had his arm around McCall and the two were talking. Suddenly the decedent knocked McCall's hat off of his head and the two began to "tussle." Petitioner explained that at first he "thought they was playing" so he went back to wiping off his shoes. When he looked up again, the decedent and McCall were "fist fighting" and Petitioner realized it was "serious." App. 499, l. 3 – 501, l. 24.

Once he realized the fight was serious, Petitioner explained that he ran to the men. When he reached them, the decedent had his hands around McCall's neck and was choking him. Petitioner testified that he tried to get the decedent to stop. He yelled for help and tried to get in between the decedent and McCall. He told the decedent, "The fight is over. You won." The decedent responded, "No. I am going to kill this nigger." Petitioner testified that as he was trying to break up the fight, he "heard a shot, and I jumped back to see if I was hit and I wasn't. And seconds later, I heard another shot." Petitioner stated that these two shots were fired by McCall. App. 501, l. 25 – 503, l. 24.

After the second shot was fired, the decedent was still choking McCall and showed no signs of "loosening or weakening" his grip. Petitioner testified, "I came to the conclusion I had to shoot him . . . because he was still choking [McCall] after he was shot." Petitioner explained that he knew the decedent had recently cut another man's throat and he feared for McCall's life. Petitioner remembers shooting the decedent four times. App. 503, l. 25 – 508, l. 14.

After Petitioner shot the decedent, the decedent removed his hands from McCall's neck and began to reach for the gun that was in McCall's hand. The decedent and McCall struggled over the

gun and another shot went off. When that last shot went off, the decedent finally stopped struggling and Petitioner ran from the scene. App. 508, l. 15 – 509, l. 22.

Petitioner testified that he had only seconds to make a decision that night and that his knowledge of the decedent's reputation for violence, specifically the incident in which he cut another man's throat only two months prior, influenced his decision. Petitioner further testified that he cannot think of anything he could have done differently that would have spared the decedent's life, but still saved McCall. App. 513, l. 11 – 514, l. 17.

Cory McClem testified during Petitioner's case in chief that he was attacked by the decedent on January 25, 2005 (less than three months before this incident) and stabbed in the neck. McClem still has a scar on his neck from the attack. McClem explained that the police took out a warrant for the decedent's arrest due to this incident. App. 566, l. 5 – 568, l. 1.

McCall corroborated most of Petitioner's testimony. He testified that on the night of April 7, 2005, he walked with Petitioner, the decedent, Keith Hannabel, and Lenny Green to the pool hall. McCall explained that Lenny Green and Keith Hannabel were a "good distance" in front of Petitioner, McCall, and the decedent. McCall testified that Petitioner stopped and knelt down, but he and the decedent kept walking. The decedent then began to question McCall about a prior confrontation between McCall and the decedent's cousin. McCall testified that the decedent threatened him and said, "Anybody that fuck with him or his family, he would fuck them up." The decedent then knocked McCall's hat off of his head, struck him, and then the two began to fight. App. 583, l. 2 – 586, l. 23.

McCall explained that after he and the decedent "traded blows," the decedent began to choke him and was "trying to squeeze the breath out of me." McCall testified that he feared for his life and thought the decedent was trying to do serious bodily harm to him. He also testified that he

was aware of the fact that the decedent had cut Cory McClem's throat two months before. App. 586, l. 24 – 590, l. 4.

Eventually, the decedent loosened his grip on McCall's neck as the decedent reached for something. McCall testified that he did not know what the decedent was reaching for, but he tried to grab the decedent's hand. The two began to struggle over a gun and shots were fired. After the first and second shots were fired, the men continued to struggle. After several more shots went off, the struggle ended and McCall ran from the scene. App. 590, l. 5 – 593, l. 19.

McCall testified that he remembered Petitioner approaching him and the decedent during the struggle. App. 592, ll. 5-7. When Petitioner reached him and the decedent, the decedent's hands were already around McCall's neck. App. 616, ll. 2-8. McCall explained that Petitioner told the decedent "to let me go," but the decedent responded that "he was going to kill me." App. 592, ll. 8-18. McCall further explained that after the first shots went off, the decedent showed no signs of withdrawing from the attack and that's when Petitioner fired his weapon. App. 616, ll. 9-16.

McCall stated that he only struggled with the decedent that night because he was trying to protect himself and was afraid the decedent was going to kill him. He claimed that he had no way of getting away from the decedent when the decedent's hands were around his neck because the decedent was stronger than him. He also testified that the gun that he and the decedent struggled over came from the decedent and that he was unarmed. App. 594, l. 19 – 595, l. 24.

On April 8, 2005, Dr. Janice Ross, a forensic pathologist, performed an autopsy on the decedent. App. 267, ll. 11-19. Ross testified that the decedent had seven gunshot wounds. She explained that an x-ray showed a total of six bullets still in the body, indicating only one bullet had exited the body. Ross numbered the wounds for organizational purposes, but she explained that the numbers did not indicate the order in which the wounds were inflicted. App. 282, ll. 2-7.

The first wound was to the left chest and struck the left lung, the heart, and the liver. This wound was the only wound that was classified by Ross as fatal. Ross explained that this wound caused a lot of bleeding and ultimately death. App. 285, ll. 5-23. The second gunshot wound was to the right abdomen. The third wound was near the belly button and went just underneath the skin. This bullet was the only bullet to exit the body and did not strike any organs. The fourth wound was to the right knee. The fifth wound was to the right chest, but also did not strike any organs and was found a couple inches below the skin. Both the sixth and seventh wounds were to the left back. The sixth wound struck the left lung and was found near the spinal cord and the seventh wound hit the left lung and the liver. App. 282, l. 10 – 283, l. 23.

Dr. Ross claimed that both the sixth and seventh wounds were “potentially fatal” because they caused a lot of bleeding. She explained that if the decedent had not died from the gunshot wound to the chest (wound one), he would have died from either one of the gunshot wounds to the left back unless he received immediate medical attention. App. 286, l. 11 – 287, l. 22.

Ross testified that the fatal gunshot wound to the chest was inflicted by a medium caliber bullet. However, she claimed that the other six wounds were caused by a small caliber bullet, indicating that at least two guns were used. App. 285, l. 23 – 286, l. 10. Ross conceded on cross-examination that she did not know what caliber bullet inflicted wound three as the bullet was never recovered because it exited the body. App. 306, ll. 3-19. Therefore, according to Ross, five of the wounds were caused by a small caliber bullet and at least one of the wounds was caused by a medium caliber bullet.

Additionally, Ross testified that the toxicology report indicated that the decedent’s blood alcohol content was .215 percent. App. 310, l. 6 – 311, l. 25.

Illa Simmons, an expert in gunshot residue and an employee of SLED, testified that gunshot residue was found on the back of the decedent's right hand, his right palm, and the back of his left hand. Simmons testified that this indicated that the decedent either fired a weapon or was in close proximity to a weapon when it was fired. She stated that he would have had to have been within five feet of a weapon when it went off in order to get gunshot residue on his hands. App. 324, l. 1 – 328, l. 22.

Vello Paavel, an expert in firearms and tool mark identification and also an employee of SLED, testified that he received five substantially complete bullets and one bullet fragment that were recovered from the decedent's body. One of the five bullets recovered from the body was consistent with being shot by a 38 Special, a 35 Magnum, or any other similar caliber cartridge. This bullet was identified as wound one by the pathologist and he agreed with the pathologist that it was a medium caliber bullet. The other four bullets were all 22 caliber long rifle bullets all fired from the same weapon. Paavel further testified that the bullet fragment recovered from the decedent's body was consistent with a 22 caliber long rifle bullet, but it was too damaged to compare it to the other four 22 caliber long rifle bullets. App. 331, l. 23 – 341, l. 5.

### **State's Closing Argument**

During the state's closing argument, the solicitor made the following remarks:

And what happened was, [the decedent] was shot seven times and left laying in the street to die like an animal. And he did die. And the two men that did this heinous crime and put these bullets in his body did not call for help. Didn't call for help at the scene. Didn't call for help at one of the other houses. Didn't call for help any time. What does that show you, does that show compassion and remorse? Or does that show guilt and concern for their own selves not to call and get involved?

App. 668, ll. 1-10.

Trial counsel did not object to the solicitor's comments.

## **Evidence at PCR and Order of Dismissal**

Petitioner testified at the PCR hearing that the solicitor “engaged in improper argument” regarding Petitioner’s lack of remorse during his closing argument that was highly prejudicial. Petitioner stated that trial counsel’s failure to object to this improper argument and request a curative instruction was ineffective assistance of counsel. Petitioner explained, “Comments by the prosecution upon an accused failure to express remorse, it would invite the jury to draw an adverse inference mainly because the defendant didn’t appear penitent.” App. 777, l. 12 – 778, 22.

Trial counsel testified that he thought the solicitor’s argument was a comment on the facts of the case. He stated, “Frankly, that’s a close call. My thinking on that’s going to be if you’re going to object to that in a solicitor’s closing, you better make sure you win that objection. If not, you’re just painting a big yellow sign in front of the jury that this hurts. I don’t know which way that would have gone.” Trial counsel further testified that he would agree that “[t]here’s generally a fair amount of latitude” in closing arguments. App. 801, l. 20 – 802, l. 15.

The PCR court held that trial counsel was not ineffective for failing to object to the solicitor’s closing argument finding that the solicitor’s argument was merely a comment on the facts and that both “solicitors and defense attorneys have wide latitude in their closing arguments.” App. 844-845.

## **Discussion**

In State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987), our Supreme Court held that “the solicitor’s improper reference to appellant’s lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof.” The Court further held, “Comments by the prosecution upon an accused failure to express remorse

invite the jury to draw an adverse inference merely because the defendant did not appear penitent.”

Id.

Additionally, in Fossick v. State, 317 S.C. 375, 376, 453 S.E.2d 899, 900 (1995), our Supreme Court held that the PCR judge erred in failing to grant post conviction relief when the defense attorney did not object to the solicitor’s closing argument that the petitioner showed no remorse.

This Court should likewise find trial counsel ineffective for failing to object to the solicitor’s improper comments on Petitioner’s lack of remorse during closing arguments since the solicitor’s comments were unduly prejudicial and denied Petitioner a fair trial.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel’s performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

In this case, trial counsel’s performance was deficient, as it clearly fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. Trial counsel was ineffective for

failing to object to the solicitor's comments that the decedent was "left laying in the street to die like an animal" and that "the two men that did this heinous crime and put these bullets in his body did not call for help . . . Does that show compassion and remorse? Or does that show guilt and concern for their own selves . . .?" App. 668, ll. 1-10. A reasonable attorney would have objected and requested, at the minimum, a curative instruction.

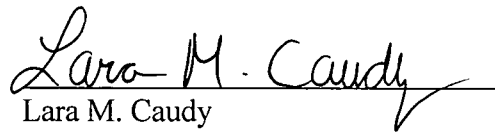
Petitioner was prejudiced because trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 692). Specifically, Petitioner was prejudiced because trial counsel's failure to object denied Petitioner his constitutional right to plead not guilty and put the state to its burden of proof. The solicitor's comments were improper and invited the jury to draw an adverse inference that Petitioner acted with malice when he shot the decedent instead of in the defense of others as Petitioner submitted at trial. Since the element of malice is a key distinction between murder and voluntary manslaughter, Petitioner clearly suffered prejudice by trial counsel's failure to object.

Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See Strickland, 466 U.S. 668.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,

A handwritten signature in black ink that reads "Lara M. Caudy". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lee County  
R. Ferrell Cothran, Jr., Circuit Court Judge

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EFRAIN THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

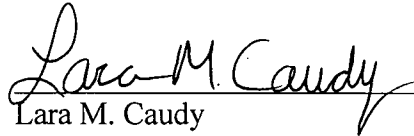
RESPONDENT

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CERTIFICATE OF SERVICE

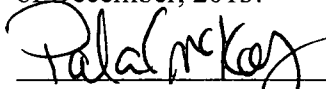
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 20th day of December, 2013.

  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day  
of December, 2013.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.