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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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JAN 17 2014

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Certiorari to York County

Edgar W. Dickson, Circuit Court Judge

S.C. Supreme Court

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DERRICK TYRONE BLAKE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-001196

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PETITION FOR WRIT OF CERTIORARI

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Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor’s closing argument when the solicitor’s comments: impermissibly appealed to the passions of the jurors; played on the jury’s fear of the impact of drugs on our society and invited the jury to convict Petitioner to keep the streets safe from drugs; went beyond the evidence presented at trial and the reasonable inferences therefrom; and so infected the trial with unfairness as to make the resulting conviction a denial a of due process.

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## **ISSUE PRESENTED**

Whether trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments: impermissibly appealed to the passions of the jurors; played on the jury's fear of the impact of drugs on our society and invited the jury to convict Petitioner to keep the streets safe from drugs; went beyond the evidence presented at trial and the reasonable inferences therefrom; and so infected the trial with unfairness as to make the resulting conviction a denial a of due process?

## STATEMENT

### **Indictments**

On August 21, 2008, the York County Grand Jury indicted Petitioner Derrick Tyrone Blake of (1) distribution of crack cocaine and (2) distribution of crack cocaine within proximity of a park. App. 305-310.

### **Trial**

On December 2-3, 2008, Petitioner was tried before the Honorable John C. Hayes, III and a jury. App. 1-176. Petitioner was represented by James W. Boyd, and the State was represented by Assistant Solicitor E.B. Springs. App. 1. The jury found Petitioner guilty as charged. App. 170, ll. 17-25. Judge Hayes sentenced Petitioner to fifteen years for distribution for crack cocaine, second offense and to fifteen years for the proximity charge, with the sentences to run concurrent. App. 176, ll. 18-23; 307; 311.

### **Direct Appeal**

Appellate Defender M. Celia Robinson filed an appellant's brief on Petitioner's behalf to the South Carolina Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). App. 179-192. On February 10, 2011, the Court of Appeals dismissed Petitioner's appeal. App. 193.

### **Application for Post-Conviction Relief and Evidentiary Hearing**

On September 7, 2011, Petitioner filed an application for post-conviction relief ("PCR") alleging, among other things, his trial counsel's failure to object to certain statements made by the solicitor during closing argument to the jury. App. 194-200. The State filed its Return on September 24, 2012. App. 201-205.

On October 9, 2012, Petitioner appeared before the Honorable Edgar W. Dickson for an evidentiary hearing. App. 206-271. Petitioner was represented by Leah Moody, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 206. Both Petitioner and his trial counsel testified at the hearing. App. 210-269.

**Order of Dismissal**

On May 3, 2013, Judge Dickson filed his Order of Dismissal denying and dismissing Petitioner's PCR application with prejudice. App. 294-303.

This petition for writ of certiorari follows.

## ARGUMENT

**Trial counsel provided ineffective assistance of counsel by failing to object to the solicitor's closing argument when the solicitor's comments: impermissibly appealed to the passions of the jurors; played on the jury's fear of the impact of drugs on our society and invited the jury to convict Petitioner to keep the streets safe from drugs; went beyond the evidence presented at trial and the reasonable inferences therefrom; and so infected the trial with unfairness as to make the resulting conviction a denial a of due process.**

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984) “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant 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, 466 U.S. at 692.

## **Facts of Case**

Petitioner was indicted for distribution of crack cocaine and distribution of crack cocaine within proximity of a park after allegedly selling crack cocaine to an undercover informant working with the Multi-Jurisdictional Drug Enforcement Unit of the Rock Hill City Police Department.

Informant Antwan Benjamin set up a drug deal for law enforcement on the afternoon of February 20, 2008. Benjamin was already facing a distribution of crack cocaine second offense and looking at twenty-five years in prison. App. 77, l. 25 – 78, l. 10. Concerned with the prospect of facing a great deal of time in jail, Benjamin decided to become an undercover informant to try to get as little jail time as possible. App. 79, l. 24 – 81, l. 5.

Benjamin told law enforcement he would meet with Petitioner to buy crack cocaine. App. 63, l. 22 – 64, l. 6. Prior to the buy, law enforcement searched Benjamin's vehicle. His vehicle was very messy, yet the police only searched it for approximately two minutes. App. 57, ll. 6-9; 68, ll. 1-2; 83, l. 19 – 86, l. 10. During the search of his vehicle, Benjamin asked the officers, "You all think I would set somebody up?" App. 84, l. 14 – 85, l. 23. Law enforcement wired Benjamin and gave him \$180.00 for the buy. App. 68, ll. 5-13.

Benjamin testified that when he arrived at Petitioner's house, Petitioner was rolling a marijuana joint. App. 86, l. 25 – 87, l. 11. Benjamin said Petitioner did not have the drugs for Benjamin at that point. Accordingly to Benjamin, Petitioner was waiting on someone else to bring the drugs. App. 68, l. 17 – 69, l. 5. Benjamin said Petitioner came back with the drugs, and the money was exchanged. App. 70, ll. 3-8. Benjamin testified that the final price was \$150.00. App. 70, ll. 7-8. Benjamin conceded the crack cocaine he allegedly

bought from Petitioner was packaged very small and would have been very easy to hide. App. 94, l. 18 – 95, l. 18. Therefore, between Benjamin's messy vehicle which law enforcement barely searched and the small package of crack cocaine that would have been very easy to hide, it would not have been difficult for Benjamin to set someone up for selling drugs.

Notably, the video recording did not show Petitioner handing Benjamin any crack cocaine. App. 93, ll. 18-25. The only evidence at trial that Petitioner gave Benjamin any crack cocaine was Benjamin's testimony, which given Benjamin's record and his motivation to testify, was certainly far from credible.

In addition, Benjamin stated he saw a black car at Petitioner's house which he suggested Petitioner's supplier was driving. However, no black car was shown on the video recording, and the officers in the area monitoring the drug deal never observed any black car. App. 60, l. 17 – 61, l. 4; 94, ll. 1-7, 101, ll. 13-17. This suggested Benjamin's account was not accurate.

Petitioner also testified at trial. He said when the video shows him walking away from Benjamin, he was going into his yard to make sure a stray dog walking nearby was not going to get into his yard since Petitioner's dog was in heat at the time. App. 119, ll. 6-13. Petitioner also said the only thing he handed Benjamin was a joint. App. 119, ll. 15-18. Petitioner testified he never handed Benjamin any crack cocaine. App. 123, ll. 13-15.

During closing argument to the jury, the Solicitor made several remarks that were not objected to by Petitioner's trial counsel, including:

This is a business man. This isn't a punk kid eighteen year old standing on a corner. This is a forty-four year old business man. Benjamin said I want to meet your guy. He's say you're not going to meet my guy. He's not going

to cut himself out. He's not going to do that he is a business man. App. 157, ll. 15-21.

He's in this for the money. It's all about him. It's not about the lives that the crack is going to affect. This isn't just about the addict. This is about the families; it's about the people they steal from, it's about the rent that doesn't get paid, the food that doesn't get put on the table and the electricity bill that doesn't get paid. It's about the clerk that gets robbed or shot. App. 157, l. 21 – 158, l. 2.

Hand to hand at the window on the movie things are going back and forth. App. 159, ll. 1-2.

After deliberations, the jury found Petitioner guilty of both distribution of crack cocaine and distribution of crack cocaine within proximity of a park. App. 170, ll. 17-23.

At the PCR evidentiary hearing, Petitioner testified that the remarks made by the solicitor to the jury during closing were improper because “he [the solicitor] was making statements that were not in evidence for one and that . . . inflamed the passion of the jury. That was his personal opinions. He is interjecting his personal opinions in the closing arguments. App. 227, l. 7 – 230, l. 15.

During his PCR hearing testimony, Petitioner's trial counsel acknowledged that the solicitor went into “an area that you could argue is improper . . . .” App. 252, ll. 18-19. Trial counsel did not want to object, however, because he believed it would appear rude in front of the jury. App. 252, ll. 22-25.

The PCR court, in denying Petitioner's PCR application, ruled trial counsel was not ineffective for failing to object to the solicitor's closing argument where “the record and the evidence at trial support[ed] the Solicitor's version of the facts and the allowable inferences therefrom.” App. 299. The PCR court also found the solicitor's comments did not “infect the trial with unfairness to make the [Petitioner's] conviction a denial of due process.” App. 300.

## **Deficient Performance and Prejudice**

The United States Supreme Court has long ago counseled prosecutors to “refrain from improper methods calculated to produce a wrongful conviction . . . .” See Berger v. United States, 295 U.S. 78, 88 (1935). During closing argument, “[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, 642, 591 S.E.2d 608, 610 (2004). Yet, the “argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” State v. Rudd, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). As this Court explained,

Solicitors are bound to rules of fairness in their closing arguments ... While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (internal citation and quotation omitted).

“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.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding “[i]mproper comments do not automatically 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.”); See State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873

(1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”). Ultimately, “[t]he appropriateness of a solicitor's . . . argument is a matter left to the trial court's sound discretion.” Id. at 548, 586 S.E.2d at 156.

In this case, the solicitor's remarks to the jury during closing which were not objected to by Petitioner's trial counsel were not based upon or supported by the evidence, were calculated to arouse the jury's passions or prejudices, and went beyond the outer boundaries of proper closing argument.

In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), in a conspiracy to traffic cocaine case, the prosecutor made the following remarks to the jury in his closing argument:

Ladies and gentleman, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and *ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?*

336 S.C. at 652, 521 S.E.2d at 746 (emphasis in original).

The Court of Appeals held the argument was calculated to appeal to the jury's passions and prejudices by “playing on the jury's fear of the impact of drugs on our society.” Id. at 653; 521 S.E.2d at 747. In finding the prosecutor's argument clearly improper, the court concluded the “argument invited the jury to convict the Defendants, even if the evidence did not prove their guilt beyond a reasonable doubt, in order to keep the streets safe from the scourge of drugs.” Id.

In Petitioner's case, the solicitor also played on the jury's “fear of the impact of drugs on our society” with the following argument:

He's in this for the money. It's all about him. It's not about the lives that the crack is going to affect. This isn't just about the addict. This is about the families; it's about the people they steal from, it's about the rent that doesn't get paid, the food that doesn't get put on the table and the electricity bill that doesn't get paid. It's about the clerk that gets robbed or shot.

App. 157, l. 21 – 158, l. 2.

In this argument to the jury, the solicitor went well beyond the record and any reasonable inferences from the record. None of this – about crack users and dealers stealing from people, not paying rent, not putting food on the table, not paying electricity bills, and robbing and shooting store clerks – was found anywhere in the record. Suggesting that families would go hungry and become homeless and that store clerks would be robbed and shot if the jury did not convict Petitioner “invited the jury to convict” Petitioner even if they reasonably doubted his guilt.

The Court of Appeals has observed:

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawmaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

Id. at 654, 521 S.E.2d at 747; see also United States v. Monaghan, 741 F.2d 1434, 1441 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); United States v. Hawkins, 595 F.2d 751, 754 (D.C.Cir.1978) (Prosecutors are not “at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem.”), *cert. denied*, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir.1977) (“[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this

defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); United States v. Radka, 904 F.2d 357, 361 (6th Cir.1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'").

Trial counsel was accordingly deficient in failing to object to the solicitor's closing remarks to the jury asking the jury to convict Petitioner to keep families from going hungry and homeless and to prevent store clerks from being robbed and shot.

Trial counsel should have also objected to remarks made by the solicitor which were not supported by the evidence:

This is a business man. This isn't a punk kid eighteen year old standing on a corner. This is a forty-four year old business man. Benjamin said I want to meet your guy. He's say you're not going to meet my guy. He's not going to cut himself out. He's not going to do that he is a business man.

Hand to hand at the window on the movie things are going back and forth.

App. 157, ll. 15-21; App. 159, ll. 1-2.

The video recording made by informant Benjamin did not show any hand to hand transaction, and this comment therefore inaccurately described the evidence presented at trial. App. 93, ll. 18-25.

In addition, the solicitor's comments inferring that Petitioner was a sophisticated business man also overstepped the bounds of the evidence presented at trial. There was no evidence at trial that Petitioner was a savvy drug dealer with some sort of lucrative business profiting from the sale of drugs. The solicitor's comments improperly characterized Petitioner as a drug dealer and presupposed Petitioner's guilt before the jury found Petitioner guilty of distribution of crack cocaine.

Petitioner's trial counsel was therefore also deficient in failing to object to these improper jury remarks by the solicitor which went beyond the evidence and inappropriately suggested Petitioner was a sophisticated drug dealer.


Trial counsel's failure to object to the solicitor's improper remarks during closing argument was not harmless error. The evidence in the case against Petitioner was not overwhelming where the video recording did not show any drug transaction between Petitioner and Benjamin and the case hinged on the questionable testimony of a confidential informant who had plenty of motivation to falsely testify.

Accordingly, trial counsel's failure to object to the solicitor's closing remarks to the jury prejudiced Petitioner's trial. This Court should therefore reverse the PCR court's order denying relief.

**CONCLUSION**

For the reasons set forth herein, Petitioner Derrick Tyrone Blake respectfully requests this Court to grant his Petition for Writ of Certiorari and allow full briefing on the issue.

Respectfully submitted,

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of January, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
Edgar W. Dickson, Circuit Court Judge

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DERRICK TYRONE BLAKE,

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 J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Derrick Tyrone Blake, #332138, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 17th day of January, 2014.

  
Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day  
of January, 2014.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.