

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY - 1 2014

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

S.C. Supreme Court

EFRAIN THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000591

REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The state is incorrect in arguing Petitioner did not suffer prejudice from trial counsel's failure to object to the solicitor's improper comments during his closing argument on Petitioner's lack of remorse in this murder case.

Petitioner has shown he was prejudiced by the solicitor's comments on Petitioner's lack of remorse and that the outcome of his trial likely would have been different if trial counsel had properly objected because the comments suggested Petitioner acted with malice, which was a crucial issue in the case.

In State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996), *overruled on other grounds by State v. Watson*, 349 S.C. 372, 563 S.E.2d 336 (2002), this Court reversed Reid's convictions for murder and assault and battery with intent to kill (ABIK) after it found the trial court erroneously admitted testimony regarding Reid's lack of remorse, specifically that he did not ask about the status of his passengers after he crashed his vehicle during a high speed chase. This Court stated, "References to a defendant's lack of remorse are . . . improper as violative of a defendant's Fifth, Eighth, and Fourteenth Amendment rights." Id. at 78, 476 S.E.2d at 696 (citing State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (1988), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988); State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); and State v. Sloan, 278 S.C. 435, 298 S.E.2d 91 (1982)). Furthermore, this Court found the error in admitting testimony of Reid's alleged lack of remorse was not harmless because whether Reid acted with malice was the "crucial issue in the case" since the jury was also charged on reckless homicide, involuntary manslaughter, and assault and battery of a high and aggravated nature (ABHAN). Id. at 78-79, 476 S.E.2d at 697.

Malice was also the crucial issue in Petitioner's case because, in addition to murder, the jury was also charged on voluntary manslaughter. The pertinent distinction between murder and voluntary manslaughter is malice. The solicitor's comment on Petitioner's lack of remorse impermissibly and strongly suggested to the jury that Petitioner acted with malice because he was not remorseful for his actions. Therefore, just as this Court found the improper testimony on Reid's lack of remorse could have been used by the jury to "tip the scales," the improper comments made by the solicitor regarding Petitioner's alleged lack of remorse could have been used by the jury to convict him of murder as opposed to the lesser offense of voluntary. Id. at 79, 476 S.E.2d at 697.

Furthermore, the comments were particularly egregious where Petitioner raised the complete defense of the defense of others and where the jury was also charged on self-defense. The jury may have used the solicitor's comments on Petitioner's lack of remorse as proof of malice to negate Petitioner's complete defense of the defense of others. Therefore, unlike the state argued in its return, Petitioner was prejudiced by the solicitor's improper comments on his alleged lack of remorse and there is a reasonable probability that the outcome of Petitioner's trial would have been different but for trial counsel's failure to object to these comments. See Return p. 8-9; see also Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

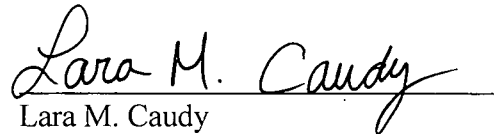
Additionally, in Sloan, this Court held the solicitor's comment that Sloan lacked remorse because he never told the jury he was sorry was improper "as no right is more fundamental than the right of an accused to plead not guilty and *put the State to its burden of proof.*" 278 S.C. at 440, 298 S.E.2d at 94-95 (emphasis added). Similarly, Petitioner was prejudiced because he pled not guilty and was unable to properly put the state to its burden of proof. See State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986); see also Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793.

Instead, the solicitor's prejudicial comments on Petitioner's lack of remorse impermissibly shifted the burden to Petitioner where he raised the complete defense of the defense of others.

CONCLUSION

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

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of May, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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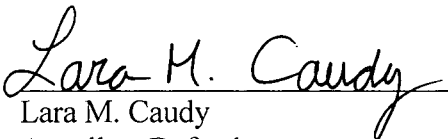
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

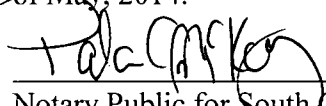
I certify that a true copy of the reply to the return to the petition for writ of certiorari in this case has been served on Megan E. Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of May, 2014.


Lara M. Caudy

Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of May, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.