

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Berkeley County

S.C. Supreme Court

G. Thomas Cooper, Circuit Court Judge  
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VERNON MICHAEL WILCOX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000411  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to object to speculation from the emergency room physician that the victim could have died from her injuries and that petitioner’s case involved the top two to three percent of the most severe domestic violence injuries he had seen, since this speculation about what could have occurred resulted in petitioner receiving a more severe prison sentence ..... 7

CONCLUSION ..... 9

PETITION TO BE RELIEVED AS COUNSEL ..... 10

ISSUE PRESENTED

Whether the PCR court erred by ruling defense counsel was not ineffective at sentencing for failing to object to speculation from the emergency room physician that the victim could have died from her injuries, that petitioner's case involved the top two to three percent of the most severe domestic violence injuries he had seen, since this speculation about what could have occurred resulted in petitioner receiving a more severe prison sentence?

## STATEMENT

Petitioner was indicted for kidnapping, attempted murder, criminal domestic violence of a high and aggravated nature, and unlawful conduct towards a child. App. 158; 171; 172. After several witnesses testified during petitioner's trial on June 26, 2012, before the Honorable J. C. Nicholson, petitioner decided to enter a guilty plea. Petitioner was represented by Percy Beauford. The assistant solicitor was Anne Williams. App. 1.

Petitioner told the judge that he understood attempted murder carried a thirty-year sentence, and that kidnapping also carried a potential thirty year sentence. Petitioner acknowledged he also understood the possible sentences for unlawful conduct towards a child and criminal domestic violence of a high and aggravated nature. In addition, petitioner understood the judge could order consecutive sentences. App. 4, l. 21 – 5, l. 12.

Defense counsel Beauford informed the judge that petitioner was simply unable to recall many of the events that occurred on the night the victim received her injuries. Petitioner told the judge he wished to plead "no contest" to the charges. Judge Nicolson told petitioner that a "no contest" plea was not an option. He could either plead guilty or not guilty. Petitioner then responded that he would plead "guilty." App. 10, l. 5 – 11, l. 18. The judge found there was a factual basis for the guilty plea. App. 18, ll. 7-19.

The following day, on June 27, 2012, a sentencing hearing was held. Percy Beauford again represented petitioner and Anne Williams was again the assistant solicitor. App. 21. The assistant solicitor told the judge that petitioner was concerned the victim was "cheating on him," and she maintained petitioner had threatened the victim about the consequences. The assistant solicitor Williams also said that petitioner called the police after the incident and confessed "so he did remember it then." App. 24, l. 6 – 25, l. 24.

The assistant solicitor then asked Doctor Michael Masiowski to “address some of the injuries and how close it came to being a much different kind of case.” App. 28, l. 22 – 29, l. 9. Masiowski had been an emergency room physician in North Charleston for the past twelve years, and he had been an emergency room physician for sixteen years. Masiowski opined that the victim’s injuries, which he saw on July 8, 2010, were in the “top two to three percent in terms of the severity of injuries that I’ve seen associated with domestic violence. Unfortunately, we see a lot of cases of domestic violence and this one I think was especially severe.” App. 29, ll. 10-24.

Masiowski offered that there was evidence “of a closed head injury. We did do a CAT scan which, fortunately, *did not show any internal bleeding.*” App. 28, l. 22 – 30, l. 4. (emphasis added). Nonetheless, Masiowski said that the victim could have died from her injuries. He based this upon the fact that there *could have been* bleeding inside of the brain. Masiowski then told the judge the definition of a subdural hemorrhage, and he again talked about the consequences of bleeding on the inside of the brain. App. 30, ll. 4-24.

When the judge asked Masiowski about shaken baby syndrome, Masiowski continued to explain to the judge about bleeding inside the brain, and the “long-lasting effects of head injuries.” App. 31, l. 13 – 33, l. 17. The court asked defense counsel Beauford if he desired to ask Masiowski about the victim’s injuries, and defense counsel declined the opportunity to question Masiowski. App. 33, ll. 18-25.

The assistant solicitor asked the judge for a sentence in “the higher end of the sentencing range.” She claimed petitioner’s violence in this case indicated that he could engage in severe violence in the future. App. 44, l. 11 – 45. l. 2.

The victim told the judge that she loved petitioner “very much.” She could not understand why he harmed her. App. 46, l. 5 – 50, l. 25. Petitioner then told the judge that he was a veteran, and he received a “general discharge.” App. 60, l. 2 – p. 63, l. 5.

The defense then presented the testimony of Doctor Mulbry, a psychiatrist, who evaluated petitioner. Doctor Mulbry said petitioner was “a very responsible guy with some difficulty coping with emotion who went off to Iraq and came back not ruined, but a bit damaged.” Doctor Mulbry opined there was “pretty clear evidence of PTSD [post-trauma stress disorder].” App. 64, l. 4 – 68, l. 19.

Judge Nicholson sentenced appellant to twenty years imprisonment for kidnapping, ten years for attempted murder, a concurrent eight year sentences for criminal domestic violence of a high aggravated nature, and eight years for the harming a child count. Appellant was also given five years probation following his sentence. App. 76, l. – 77, l. 7.

Petitioner filed an application for post-conviction relief on March 4, 2013. App. 80-100. The state filed a return requesting an evidentiary hearing dated January 20, 2014. App. 101-106.

An evidentiary hearing was convened on September 10, 2014, before the G. Thomas Cooper, Jr. Lance Boozer represented petitioner and Ashley Wilson was the assistant attorney general. App. 107.

Petitioner testified that the emergency room doctor gave damaging testimony that “consisted of a lot of ‘but ifs.’ His testimony didn’t stand firm on the injuries the victim actually received, and it was more so a hypothetical testimony. But, if the victim was hit over here [indicates] could have been much more serious than it was. He didn’t rely directly on the events -- the injuries the victim received.” App. 117, ll. 9-22.

Petitioner told the PCR judge that defense counsel Beauford “never even clarified with the court that this was a hypothetical testimony. He never made -- pointed out and made sure the fact that, you know, it was -- he wasn’t speaking on the injuries that the victim actually received. It’s *like he just bowed down and allowed this hypothetical for the judge to rely on these ‘what ifs’ in order to have an idea of what to sentence me to.*” App. 127, ll. 10-18. (emphasis added). Petitioner testified that even though his trial had started before he pled that “I had no idea what the trial strategy was.” App. 131, ll. 11-18.

Defense counsel Beauford testified that he could tell before the trial was aborted that appellant and the victim still loved each other. Beauford claimed the judge limited his ability to question the emergency room physician about his hypotheticals regarding what the victim’s actual injuries were versus what they could have been. App. 141, l. 11 – 143, l. 21. Beauford reasoned that it really did not matter since the physician he presented on petitioner’s post-trauma stress disorder was “very effective” mitigation. App. 143, l. 5 – 144, l. 20.

An order of dismissal was filed on February 23, 2015. App. 156-170. The PCR judge found that Doctor Masiowski’s testimony about the victim’s injuries was not objectionable, and therefore, counsel was not deficient for failing to object to that testimony. App. 167. From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

## ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to object to speculation from the emergency room physician that the victim could have died from her injuries and that petitioner's case involved the top two to three percent of the most severe domestic violence injuries he had seen, since this speculation about what could have occurred resulted in petitioner receiving a more severe prison sentence.

As seen, the emergency room physician speculated that the victim could have died from her injuries. The physician also talked to the sentencing judge extensively about bleeding "inside the brain", and subdural hematomas even though the victim did not suffer any bleeding inside of her brain. The physician also told the judge that the victim's injuries in this case were in the top two to three percent of the domestic violence injuries he had seen in his sixteen years of being an emergency room physician. All of this was obviously calculated to ensure the most severe sentence possible for petitioner.

The solicitor then speculated that the severe injuries in this case caused concern that petitioner would be a repeat offender, even though the victim told the judge this was the only incident of violence between them, and that she loved petitioner very much. Again, the emergency room physician's testimony was calculated to sway the judge to impose a severe sentence because it was readily apparent that the victim still cared for petitioner.

While a sentencing judge may consider a wide variety of factors in fashioning a sentence, the opinions by medical or psychiatric expert must be reliable. See, Simpson v. Moore, 367, S.C. 587, 606-607, 627 S.E.2d 701, 711-712 (2008). In sentencing, the trial court is limited by constitutional provisions that require that the evidence be relevant, *reliable and trustworthy*. See, State v. Hutto, 356 S.C. 384, 388-389, 589 S.E.2d 202, 204 (2003). Although evidentiary rules are

inapplicable in a sentencing proceeding, the evidence and information considered still must be relevant, reliable and trustworthy. State v. Thompson, 355 S.C. 278, 584 S.E.2d 143 (Ct.App. 2003); State v. Gullledge, 326 S.C. 220, 228, 487 S.E.2d 590, 594 (1997).

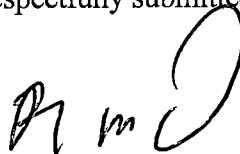
In this case, it is clear the emergency room doctor speculated broadly about what could have happened to the victim in this case. Defense counsel erroneously testified that the judge did not allow him to question the emergency room physician about his "findings." The judge only told defense counsel that he was going to allow full cross-examination. The sentencing judge did not tell defense counsel that he could not probe the physician about his claims regarding the extent of the victim's injuries, and what injuries she actually suffered. The physician's testimony was nothing more than a speech about the evils of domestic violence that were unrelated to the victim's actual injuries in this case.

It is apparent petitioner was prejudiced by this testimony given that petitioner received a twenty-year prison term for the only act of domestic violence between and the victim, and where the victim told the judge she still cared for petitioner "very much."

CONCLUSION

By reason of the foregoing arguments, the PCR court should be reversed, and petitioner's guilty plea vacated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M D", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of September, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO BERKELEY COUNTY  
G. THOMAS COOPER, CIRCUIT COURT JUDGE

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VERNON MICHAEL WILCOX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000411

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PETITION TO BE RELIEVED AS COUNSEL

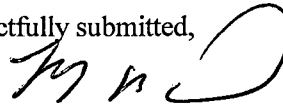
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Counsel for Vernon Michael Wilcox states:

1. He is a Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 10, 2014. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Vernon Michael Wilcox.

Respectfully submitted,



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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 8th day of September, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Berkeley County  
G. Thomas Cooper, Circuit Court Judge

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VERNON MICHAEL WILCOX,

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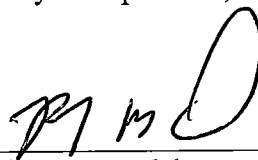
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CERTIFICATE OF SERVICE

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I certify that a true copy of the Johnson 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 Vernon Michael Wilcox, #351460, at Macdougall Correctional Institution this 8th day of September, 2015.

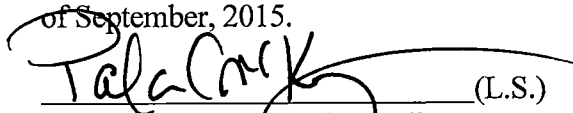


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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day  
of September, 2015.

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