

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

SEP 14 2015

\_\_\_\_\_  
Certiorari to Horry County  
Benjamin H. Culbertson, Circuit Court Judge  
\_\_\_\_\_

**S.C. Supreme Court**

JOHN B. FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002774  
\_\_\_\_\_

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

ROBERT M. PACHAK  
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

INDEX

INDEX .....1  
ISSUE PRESENTED .....2  
STATEMENT .....3  
ARGUMENT .....5  
CONCLUSION .....10

ISSUE PRESENTED

Whether trial counsel was ineffective in failing to object and move for a mistrial after the solicitor in his closing argument repeatedly said petitioner sinned and when he disparaged criminal defense attorneys?

## STATEMENT

Petitioner was convicted of murder, armed robbery, and criminal conspiracy after a jury trial held before the Honorable Rodney C. Peebles on February 14, 2000, in Horry County. The convictions were overturned by the South Carolina Court of Appeals on January 5, 2004. State v. Frazier, 357 S.C. 161, 592 S.E.2d 621 (Ct. App. 2004)

A second trial was held on May 16-20, 2005, before the Honorable Paula H. Thomas and a jury. Petitioner was convicted. He was sentenced to 30 years for murder, 30 years for armed robbery, and to 5 years for criminal conspiracy. Morgan Martin, Esq., Thomas Brittain, Esq., and Natasha Hanna, Esq. were the defense attorneys. Gregory Hembree, Esq. and Fran Humphries, Esq. were the solicitors. (App. p. 1- p. 1341)

Petitioner again appealed his convictions. The South Carolina Court of Appeals affirmed the murder and conspiracy convictions but reversed the armed robbery conviction on November 8, 2007. State v. Frazier, 375 S.C. 575, 654 S.E.2d 280 (Ct. App. 2007) On petitions for writ of certiorari by both parties, the South Carolina Supreme Court affirmed the murder and conspiracy convictions and reinstated the armed robbery conviction. State v. Frazier, 386 S.C. 526, 689 S.E.2d 610 (2010)

Petitioner filed an application for post-conviction relief on September 26, 2011. (App. p. 1342- p. 1348) Amendments to the application were filed on April 23, 2013. (App. p. 1357- p. 1372) Respondent filed a return and motion to dismiss dated December 1, 2011. (App. p. 1374- 1377) An amended return was filed on December 9, 2011. (App. p. 1378-p. 1381) An evidentiary hearing was held on June 16-17, 2014, before the Honorable Benjamin H. Culbertson. Petitioner was present and was represented by Brana J. Williams, Esq. Respondent was represented by Joshua Thomas, Assistant Attorney General. Petitioner testified on his own behalf and presented the

testimony of Christopher Hensley, Kahle Schettler, Courtney Fox, Sharon Haymaker Aldridge, and Jane Lovette. Testifying for respondent were Morgan Martin, Esq. and Fran Humphries, Esq. (App. p. 1382- p. 1646) On October 28, 2014, Judge Culbertson issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 1647- p. 1676) Petitioner filed a motion to reconsider/alter or amend the findings of the court and the order of dismissal dated December 22, 2014. (App. p. 1677- p. 1690) Respondent filed a return to applicant's motion for reconsideration and a motion to strike dated January 6, 2015. (App. p. 1691- p. 1699) Petitioner filed a reply to respondent's motion to strike dated February 3, 2015. (App p. 1700- p. 1702). On July 13, 2015, this Court issued an order finding the Rule 59 (e) motion untimely.

This petition follows.

## ARGUMENT

Trial counsel was ineffective in failing to object and move for a mistrial after the solicitor in his closing argument repeatedly said petitioner sinned and when he disparaged criminal defense attorneys.

This Court wrote in its published opinion in this case as follows:

Kimberly Renee (Renee) and Brent Poole were married. Renee, an exotice dancer, was having an affair with Frazier. The State's theory of the case was that Frazier and Renee conspired to murder Brent.

State v. Frazier, 386 S.C. 526, 528, 689 S.E.2d 610, 611 (2010).

The solicitor's closing argument in this case was fraught with errors that prejudiced petitioner. In Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) a defense attorney was held ineffective in failing to object to a solicitor's closing argument that vouched for the credibility of State's witness. In Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004), a defense attorney was held ineffective for failing to object to a solicitor's closing argument that vouched for the credibility of a police officer and which stated that absent witnesses would have provided testimony cumulative to the officer's testimony. This Court held that the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), another defense attorney was held ineffective in failing to object to a solicitor's opening argument that abundantly used religiously-tinged language that enhanced the impropriety of his argument where he repeatedly made references to his witness's soul.

This Court has also ruled that a solicitor's duty is to see that justice is done. State v. Darden, 264 S.C. 86, 212 S.E.2d 587 (1975). His "argument must be carefully tailored so as not to appeal to

the personal bias of a juror or be calculated to arouse his passion or prejudice.” State v. Lindler, 276 S.C. 304, 278 S.E.2d 335, 339 (1981) Improper arguments may even be reversible error even when there is no objection to them. Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994).

In this present case, the solicitor began closing argument by telling the jury that petitioner “chose to commit the ultimate sin for the love of a very bad women.” (App. p. 1262, lines 13-14). Then he acknowledged that this case was “largely about circumstantial evidence.” (App. p. 1262, lines 17-19) There was no objection to the remark about petitioner’s “sin”.

During the course of the solicitor’s closing argument, trial counsel did object to four (4) instances where the solicitor did go beyond the record and the trial court did tell the jury to disregard and/or strike the objectionable portion of the solicitor’s argument. (App. p. 1284, line 25 – p. 1285, line 4; App. p. 1285, lines 17-24; App. p. 1297, lines 11-19; App. p. 1305, lines 11-19). Trial counsel, however, never asked for a mistrial and never asked for objections to other portions of the solicitor’s closing argument where he could have objected and have moved for a mistrial in light of all of the objections he did make which were ruled in his favor.

After the first part of the solicitor’s closing argument where he said petitioner sinned, he then went on to disparage criminal defense attorneys. He talked about the musical “Chicago”. He explained as follows:

This musical, Broadway musical is about this woman who kills her boyfriend, he's getting ready to leave her and she shoots and kills him and in the movie she's played by Renee Zellweger and Richard Gere plays the --her lawyer and he's a guy named Billy Flynn and he's like just, you know, this, this, you know, criminal defense lawyer and in one scene Billy Flynn is kind of talking about how he does his work, you know, how he works his magic and he sings this song, Richard Gere sings this song and I'm not going to sing for you because that would be the end of this case, but Richard Gere sings this song and he says, ""Give them the old razzle dazzle." He says, ""How can they hear the truth above the roar? How can they see with sequins in their eyes, " and essentially he says if you put on a good enough show it doesn't really matter what the truth is because the crowd will love you and the final, one of the final lines in the song is, “Give them the old razzle dazzle and they’ll let you get away with murder.”

(App. p. 1292, line 10- p. 1293, line 2).

Trial counsel did not object to this over-the-top disparagement of defense attorneys. In the preamble to Rule 407 to the Rules of Professional Conduct in section 5 it is stated:

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. (emphasis supplied)

Also, a fair trial is implicit in the Due Process clause of the fourteenth Amendment. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297; Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600; Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546 13 L.Ed.2d 424; Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. A jury is charged with giving the State and a defendant a fair trial and they should not be encouraged to disparage defense attorneys.

Finally, the solicitor ended his closing argument in the following manner:

A man, a man will commit a lot of sins for the love of a bad woman. John Boyd Frazier committed a lot of sins because he wanted the love of Kimberly Renee Poole. John Boyd Frazier sinned when he entered into an adulterous relationship with Kimberly Renee Poole. John Boyd Frazier sinned when he convinced and assisted Kimberly Renee Poole to abandon the holy bonds of her marriage and leave the marital home. John Boyd Frazier sinned when he took advantage of his friends and brought them into this conspiracy. He sinned when he lied in an effort to cover up his crimes. He sinned on June the 9th of 1998 in so many ways. He sinned when he put a gun to the head of William Brent Poole and pulled the trigger, but ladies and gentlemen, his greatest sin, his most diabolical and evil sin was the robbery, and I don't mean the fake robbery he and Kimberly Renee Poole staged to cover this crime. I mean the robbery of a two and a half year old girl of a father. He's gone. She will never get him back. Brent Poole, because of the sins of John Boyd Frazier, was not there when went to kindergarten, her first day of school. Brent Poole, because of the sins of John Boyd Frazier, will not have her father, Brent Poole will not be able to buy her first prom dress, and folks, because of the sin of John Boyd Frazier Brent Poole will not be there when she walks down the aisle with a ring like this on her finger.

MR. MARTIN: I object. I object, and ask that this entire line of argument be stricken from the record.

THE COURT: Let me have you come forward.

(Whereupon, a Bench conference was held in the presence,<sup>15</sup> but out of the hearing, of the jury.)

THE COURT: All right, ladies and gentlemen of the jury, if you will disregard the last argument and that is about the impact that it may or may not have on the daughter in this case. That is not for your consideration, and I'll tell you more about that in just a moment. You recall the testimony as you heard it from the witness stand and base any decision you make on the evidence and testimony presented in this courtroom. Go right ahead.

(App. p. 1304, line 11- p. 1305, line 23)

While trial counsel did object to the last portion of the solicitor's argument concerning the victim's 21/2 year old daughter, it is apparent from the curative instruction given that he did not object to the multiple use of the words "sin", "sins", and "sinned." Neither did he move for a mistrial after his objection or on the combination of all of his objections and the failure to object to the "Chicago" argument.

Petitioner testified at the PCR hearing that the solicitor preyed on the religious biases of the jury and he called the defense a show. (App. p. 1485, line 7- p. 1486, line 17)

Respondent asked trial counsel about the solicitor's mention of petitioner committing sins in his closing argument. Trial counsel said he did not recall that argument. (App. p. 1579, line 23- p. 1580, line 2) On cross-examination, trial counsel admitted from the bench conference after his objection that the record did not say what the basis for his objection was. When asked if he moved for a mistrial, he said, "I don't think I did." (App. p. 1596, line 23- p. 1597, line 18) He was asked as he continually made objections and asked that things be stricken, did he ever make a motion for a mistrial. He said, "Not that I recall." He was asked why he did not make a mistrial motion. He said, "I didn't feel it was appropriate I guess, or I don't know." (App. p. 1598, line 20- p. 1599, line 1)

This Court has previously held that “counsel must articulate a valid reason for employing a certain strategy to avoid finding of ineffectiveness.” Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel has not done that in this case. The State’s case was based on circumstantial evidence. The murder weapon was never found. Forensics could only say a 9mm pistol was used. They could not tie it down to a particular manufacturer. The solicitor’s emotional argument bolstered the State’s case and it was prejudicial to petitioner.

CONCLUSION

Petitioner's writ should be granted and his convictions should be reversed.

Respectfully submitted,



---

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

---

JOHN B. FRAZIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

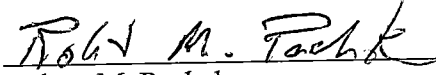
APPELLATE CASE NO. 2014-002774

---

CERTIFICATE OF SERVICE

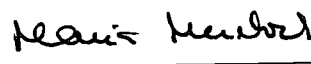
---

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 Joshua L. Thomas, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. John B. Frazier, #264488, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29355, this 14th day of September, 2015.

  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of September, 2015.

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