STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable Steven H. John, Circuit Court Judge

Opinion No. 2016-UP-430 (S.C. Ct. App. Filed October 19, 2016)

2014-GS-26-02361

THE STATE,

RESPONDENT,

V.

THOMAS JAMES,

PETITIONER

APPELLATE CASE NO. 2014-002326

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 17, 2016.

QUESTION PRESENTED

The Court of Appeals erred by holding it was not an abuse of direction for the trial court to allow the solicitor to call former solicitor Von Herrmann as a witness to "explain" why certain charges were dismissed against its star witness, Keir Johnson, where Johnson admitted that he lied to the police, but maintained he was now telling the truth without consideration, since allowing the solicitor to testify about prosecutorial discretion to explain leniency towards the state's witness was improper, as were the limitations on cross-examining the former solicitor given Rule 611 (b), SCRE once she was allowed to testify.

STATEMENT OF FACTS

Procedural History

Petitioner Thomas Booker James and co-defendant Carnail Graham were indicted by the Horry County Grand Jury for the offense of murder. R. 917. The state's star witness, Keir Johnson, was also charged in this murder.

Petitioner James and co-defendant Graham had their cases called to trial on October 14, 2014 before the Honorable Steven H. John, and a jury. Bobby Fredrick represented appellant. David Canty represented co-defendant Graham. Nancy Livesay was the assistant solicitor. R. 1.

At the conclusion of the trial, the jury found both Petitioner and co-defendant Graham guilty of murder. R. 904. Judge John sentenced both Petitioner and co-defendant Graham to thirty-two years imprisonment. R. 909, l. 18 – 910, l. 11.

The Court of Appeals affirmed in State v. Thomas James, 2016-UP-430 (October 19, 2016). App. 1-2. Petitioner sought rehearing. App. 3-17. Rehearing was denied. App. 18-19. This petition for a writ of certiorari follows.

Trial facts

The decedent, Keia, lived with her boyfriend, "Splurge," in a mobile home outside of Conway. Splurge did not work but he drove a white Lexus. R. 42, l. 6 - 44, l. 4. Their roommate, Carlton Watts, testified the mobile home was located on a dead end dirt road called Brown Swamp. There were no streetlights around. R. 42, l. 6 – 43, l. 15.

They only used the back door to the trailer, and that they never used the front door. On the early morning of the murder, between 2:30 and 3:00 a.m., from all of the evidence presented, Watts came out of his room. He saw the decedent sitting in a chair, and he asked her why she was not

asleep. The decedent told Watts that she would be going to bed soon. Watts went back to bed. He was listening to music on his iPad when he fell asleep. R. 44, l. 23 – 45, l. 21.

About 30-45 minutes later: "That's when I hear a big boom and like 3 or 4 shots go off and I jumped up, and then I just jumped back on the bed and just rolled under it and started praying and everything. And then like I hear like 2 or 3 more shots go off. And then I hear her scream, and she's like, Splurge, Splurge, they are breaking in. And then another 2 shots go off." R. 44, l. 23 – 45, l. 21.

Watts also heard someone else screaming, seemingly before the shooting: "Where is it, where is it, we're not playing, where is it?" R. 45, ll. 22-25. The attackers had entered through the front door. There was an alarm system in this mobile home. It "was going off, it's just steady going off. So I waited until I felt like it was safe to come out." Watts testified he ran out the back door, and he saw a man and a woman approaching him.[1] They told Watts that they had heard the shots, and they had already called the police. R. 45, ll. 4-23.

Watts could not identify the assailants since he had been hiding under the bed. All he saw was "two pair of sneakers all black and one black with red check marks on it." R. 54, ll. 8-11; R. 81, ll. 3-4.

Watts knew both petitioner and co-defendant Graham. He went to school "with one of them". Watts had been close to the decedent Keia "all of his life." R. 79, ll. 5-23.

On cross-examination, Watts said that the police arrived quickly. As will be seen infra, neighbor David Grissett had called 911 because he had been watching a suspicious brown van slowly moving around on the dead end dirt road that early morning.

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1 The shooters entered through the front door.

Watts recalled that the police, with guns drawn, ordered anybody remaining in the mobile home out --"with their hands up." R. 84, ll. 6-20. Splurge came out of the mobile home with his hands in the air. Strangely, Watts testified that Splurge was acting "retarded" at the time. R. 85, ll. 4-21. Watts said that he did not know if Splurge "emptied his 357 magnum revolver through his doorway" at some point.[2] R. 87, ll. 9-11. On redirect examination, Watts maintained that the decedent had been running "to Splurge" at the time of the shooting since her body was found on the bed.[3]

David Grissett was the neighbor on the isolated dirt road who called 911 at about 3:00 a.m. on the morning of the shooting. Grissett said he first saw the suspicious brown van in the area "a few minutes earlier before the whole thing happened and whatnot." R. 96, l. 5 - 97, l. 20.

Grissett said he was suspicious of the brown van because it was two or three o'clock in the morning, and the van parked "like two streets over and came back." The brown van then "stopped in the same spot at the end trailer, the last trailer." R. 98, ll. 2-20.

Grissett telephoned his friend Conswella in the "last trailer," and "a couple of other people that was in the neighborhood" to alert them of the suspicious brown van. R. 99, ll. 2-17. While watching the van, Grissett recalled: "I just heard like gunfire. I think Swella came out on the porch and *she asked one of the guys something.* And like after awhile she was asking a question . . . some gunfire again, you know a bunch of commotion. And, you know I seen somebody run, like two people." R. 99, ll. 5-25. (emphasis added0.

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2 A couple of witnesses testified that they did not hear "a toilet flush" during the delay, but common sense dictated this was a drug related offense.

3 As will be seen infra, the pathologist, Dr. Edward Proctor, testified that it would have been "extremely difficult" for her to have been running given her injuries from the gunshot wound to her chest. R. 90, ll. 3-18.

These two people came running "from the house." They ran to the van, jumped in, and the van drove away. R. 99, l. 25 – 104, l. 7. Grissett confirmed that this was a dead end dirt road, and that were no street lights in the neighborhood. R. 104, ll. 4-25. Grissett allegedly could not describe or identify the two people who ran from the mobile home to the van. R. 105, ll. 7-9.

On cross-examination by petitioner's defense counsel, Bobby Fredrick, Grissett denied knowing petitioner, his co-defendant Graham or Watts. R. 110, ll. 1-9. Grissett said that he could "not recall" whether he told defense investigator Bill Beam **that he knew both petitioner and the co-defendant, and that neither were the men running from the trailer to the van.** R. 110, l. 10 – 111, l. 24.

Grissett confirmed that he knew Splurge "from the neighborhood," and that he mentioned him in the 911 call. Grissett also stated that the old brown van had a bad muffler that called even more attention to it that morning. R. 114, ll. 3-20.

Horry County police officer Matthew Singleton testified he arrived at the scene of the shooting at about three a.m. He remembered Splurge coming out of the mobile home when the police ordered anyone remaining inside to come out. The decedent's body was found on the bed with blood surrounding it. R. 128, l. 14 – 133, l. 15.

Officer Singleton confirmed that he did not see the suspicious brown van in the area. Singleton also verified that he wrote in his report that there was some delay in Splurge coming out of the house.[4] R. 139, l. 17 – 140, l. 24.

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[4] Dr. Edward Proctor performed the autopsy on the decedent on November 8, 2011. He testified that the victim was 5'2," 140 pounds. She died from a gunshot wound to her chest, and there was no gunshot residue found. Thus, the shot could not have been closer than 18-24 inches. R. 146, l. 11 – 151, l. 19. Dr. Proctor estimated that a large caliber weapon was involved in the shooting. He also opined that it would be not "be likely" that the decedent would have been able to run from a chair in one room to another room with her injuries. R. 156, l. 8 – 159, l. 12

The brown van was left in the front yard of one Tiffany Oliver. It was apparently left there between 3:00 and 6:45 in the morning.[5] R. 162, l. 25 – 165, l. 21. Oliver's house was also on another isolated dirt road that was a dead end. She said she did not get very close to the brown van when she discovered it in her yard that morning. She telephoned the police between 6:40 and 7:30 that morning because she did not want the van in her yard. R. 164, l. 3 – 167, l. 17.

The star witness

With little but raw suspicion at this point, Keir Johnson claimed petitioner and co-defendant Graham were with him in his girlfriend's brown van on the morning of the shooting. Prior to his testimony defense counsel Fredrick citing State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) as authority that the defense had a right to cross-examine Johnson about **his sentencing exposure, and** his dealings with the solicitor's office in this case. R. 422, l. 5 – 440, l. 11. The trial judge noted that Johnson gave a statement implicating both defendants, and he then Johnson was granted bond. The state also dismissed a burglary charge against Johnson. R. 432, l. 16 – 438, l. 22.

The solicitor claimed that Johnson had already given his statement, and she maintained that Johnson "did not need" any sentencing consideration from the state in return for his cooperation, and testimony. "We had no reason to dismiss the charges." R. 438, l. 23 – 440, l. 11.

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5 This was the time between the murder, and her discovery of the van. She testified her live-in boyfriend left for work about 5:00 a.m., and he did not tell her about a van being in their yard. It was only when she was getting her child ready for the "early school bus" that she saw the van.

The solicitor at this point began to argue that she should be able to call the former solicitor, Heather Von Herrmann, as a witness **to "explain"** the alleged prosecutorial decisions involving Johnson's charges. R. 440, l. 12 – 452, l. 6.

Defense counsel Fredrick immediately noted his objections with calling the former solicitor as a witness for such an explanation. The defense had the right to probe Johnson for his bias on cross-examination. That right was well established under South Carolina precedent. Calling Von Herrmann for her to explain her prosecutorial decisions was "improper." R. 442, l. 11 – 444, l. 16. The judge stated that he would allow the impeachment of Johnson by the defense attorneys. R. 444, l. 17 – 445, l. 8.

Johnson would admit throughout his cross-examination that he lied to the police. However, Johnson continued to maintain that once he had an attorney, Ron Hazzard, he was told to "tell the truth." Johnson claiimed the truth was that that petitioner and co-defendant Graham were with him on the night of the shooting, and he claimed they entered the mobile home while he waited in the brown van. Johnson claimed that petitioner and Graham came running out of the trailer and jumped in the van – he maintained that he did **not hear any shots fired and thought this was a "normal" crack buy.** R. 447, l. 6 – 450, l. 13.

Johnson continued to claim that <u>he had not been promised anything</u> for his testimony, and that *he had not received any consideration* in exchange for his testimony.[6] R. 447, l. 6 – 450, l. 13. Johnson said that he drove to Splurge's house and parked on dirt road. As stated, Johnson claimed he thought petitioner and Graham were "going to buy some drugs," and that was it. Johnson said he noticed a man watching the van so he circled around towards another trailer. Petitioner and Graham came running out of the mobile home towards the van, jumped in, and he drove away. Johnson

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6 Johnson referred to Petitioneras "Cutty," and Graham as "Dubba."

testified that he noticed a Horry County Sheriff's Deputies car in the area, and therefore he abandoned the van in "somebody's back yard and got out of the van, and we went in the woods or whatever." Johnson told different stories – lies – about what happened. Johnson claimed he called his friend, " Mike Pyatt, to come pick me up, and he came and picked me up and took me to my grandma's house." R. 450, l. 8 – 451, l. 22. At another point Johnson told the police he got a cab ride out of the area. As stated, Johnson's admissions of lying to the police about various items were almost too numerous to mention. R. 462, l. 22 – 473, l. 21; R. 470, l. 3 – 476, l. 20; R. 512, l. 5 – 513, l. 21; R. 518, ll. 3-22; R. 521, ll. 5-12; R. 524, l. 6-7. These are only some of Johnson's admissions of lying to the police.

Johnson maintained that once he had Public Defender Ron Hazzard as his attorney that he was told to tell the truth. Johnson testified that he was telling the truth when he implicated petitioner and Graham in the murder. Again, Johnson maintained that he only participated because he thought he was going to get an ounce of crack-cocaine. It was just an "innocent" drug buy. R. 546, ll. 15-16.

As stated above, on cross-examination by defense counsel Fredrick, Johnson admitted that he told the police he may have gotten a cab ride after he abandoned the van. Johnson would later claim his friend, Mike Pyatt, gave him a ride from the scene where he abandoned the van.[7] R. 516, l. 4 – 518, l. 2. Defense counsel Fredrick continued to strongly question Johnson's credibility. Johnson admitted at another point that he had lied about being robbed. R. 518, l. 16 – 602, l. 12.

Johnson admitted to counsel for the co-defendant, Mr. Canty, that he had "lied through his teeth." R. 524, ll. 3-7. On redirect-examination **by the solicitor Johnson was led into saying** that

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7 Johnson admitted he had the van reported stolen to cover his tracks.

he did not tell the police about Mike Pyatt picking him up, and giving him a ride **because they did not ask**. R. 557, ll. 15-18.

This record shows that while defense counsel Fredrick impeached Johnson about other charges being dismissed, and his sentencing exposure, Johnson was very evasive. R. 482, l. 24 – 496, l. 21. Johnson denied knowing that a murder conviction carried a minimum sentence of thirty years. He claimed not to know the sentence for other charges. His other charges were dismissed "only" because he had a good lawyer, Johnson said. R. 498, l. 5 – 500, l. 14. Johnson told the jury he was not lying during the trial. R. 500, ll. 20-21.

The former solicitor as an "explanation" witness

Defense counsel Fredrick told the judge if the state intended to call the former solicitor Ms. Von Herrmann that the defense had a matter of law to address. R. 563, ll. 6-12. Solicitor Livesay then verified that she intended to call Von Herrmann to reply to "questions about Johnson's charges being dismissed" in this case. Defense counsel Fredrick objected to Von Herrmann being allowed to testify in this manner about her prosecutorial discretion in this case. Fredrick told the trial judge that allowing such testimony "was improper." Fredrick also said that if the judge allowed Von Herrmann to testify over his objection that the defense was entitled to cross-examine her on any issue related to the case. R. 565, l. 10 – 567, l. 7.

The judge asked defense counsel Fredrick to proffer his cross-examination of the former solicitor **in advance of her testimony**. Fredrick protested that "some questions may change based on her direct examination." R. 563, l. 6 – 567, l. 19.

Von Herrmann admitted that she was a solicitor in this murder case for "*almost the entire pendency of the case*." R. 568, ll. 1-18. She testified that she could not recall whether there were any returns to search warrants regarding cell phone records pertinent to this case. She said they

would be in her file if they existed. She testified that she would need to get her file to refresh her memory. Solicitor Livesay said she would get the former solicitor's file for her based on the cell phone records inquiry. R. 568, l. 22 – 570, l. 5.

Von Herrmann maintained that she could not recall whether Johnson's cell phone record revealed he was at the crime scene. [8] She said "a variety of people" worked on the cell phone records. R. 570, l. 7 – 571, l. 7.

Von Herrmann reviewed the indictment and said a scrivener's error had caused the wrong victim's name to be placed in the indictment. R. 571, l. 6 – 572, l. 9. Von Herrmann also said she did not recall whether shoe impressions were taken from the crime scene. R. 572, ll. 17-25. Defense counsel Fredrick told the judge "At the moment on the fly, that is all the questions I have." R. 573, ll. 1-3.

Defense counsel Canty then asked if there were any statements his client gave that were not turned over to the defense. Von Herrmann said she did not recall but noted that at times statements *were not worthy of belief,* so she deemed them not to be exculpatory, and they were not turned over to the defense. R. 574, l. 15 – 575, l. 12.

Defense counsel Fredrick then said he would withdraw his objection to Von Herrmann being allowed to testify if the defense were afforded the extensive latitude that Rule 6ll (b), SCRE provided to the defense. **The judge was not going to make any such promise. He also told told defense counsel "don't read me the rule,"** and he again stated the defense and the judge may not agree about what the scope of the cross-examination of Von Herrmann. R. 576, ll. 11-25.

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8 Defense counsel hammered in his closing about the incompetence and apathy of the solicitor's office for the truth in this case. This included the cell phone records which could have **exonerated** appellant. R. 795, l. 20 – 819, l. 1.

Jury in

Heather Von Herrmann then testified in the presence of the jury. She acknowledged that she prosecuted Keir Johnson's pending charges. R. 578, l. 20 – 579, l. 22. She told the present solicitor some of Johnson's charges had been dismissed. Von Herrmann then sought to "explain" that a burglary first charge and an assault and battery charged were dismissed *at the request of Johnson's former girlfriend, the victim.* R. 580, ll. 2-16. Another armed robbery and possession of a weapons charge were dismissed because Von Herrmann apparently thought the complaining witness *was framing Johnson* because Johnson would not return her romantic gestures. R. 580, l. 17 – 581, l. 15.

Von Herrmann told the jurors" "**We try to do our best as solicitors to go through and look at these cases and find the ones that we feel like are prosecutable and carry those cases forward. And ones that we, you know, don't feel like there is sufficient evidence to bring to a jury, we dismiss.**" R. 580, l. 17 – 581, l. 21. (emphasis added). Von Herrmann then "explained" that "I believe those are the charges that were dismissed on Mr. Johnson. Of course, at that time the murder charge was pending, and obviously I did not dismiss that." R. 581, l. 16 – 582, l. 2.

On cross-examination by defense counsel Fredrick she admitted that the victim in one case had ran screaming toward a police officer with blood covering her body. However, Von Herrmann "explained" that petitioner ran from the police and "was cut as well". She said this appeared a mutual combat situation to her, and she offered the defense counsel Fredrick also knew where a "**victim is non-cooperative it is very, very difficult to get a conviction on those type of cases.**" R. 583, l. 21 – 585, l. 12. (emphasis added).

Von Herrmann testified she did go to the crime scene in this case. R. 587, ll. 14-19. However, she again stated she was not aware of whether the cell phone records were closely

reviewed in this case. Von Herrmann seemed to rationalize that the local police departments and SLED would be responsible for the scope of such a murder investigation. R. 585, l. 16 – 588, l. 3.

Von Herrmann also acknowledged she opposed bond for co-defendant Graham while a solicitor. She offered that there were a number of witnesses against Graham. R. 590, ll. 9-13.

Von Herrmann told defense counsel Canty that there was no *quid pro quo* for a defendant cooperating, and his charges being dismissed. "*That's not the way it works.*" She told the jurors that **if the defendant entered into a proffer agreement the solicitor's office tried to verify the information and that the solicitor's office did not promise anything beyond informing the judge of the level of cooperation.** R. 593, l. 13 – 595, l. 23.

Von Herrmann admitted she entered into a consent order with Johnson's attorney, Ron Hazzard, so Johnson could make bond and get out of jail. R. 596, ll. 3-5. She also testified that the solicitor's office did not think Johnson was a principal in the crime, they did not believe he entered the mobile home, and "**that his [Johnson's] level culpability was less.**" R. 596, l. 3 – 599, l. 21. During the middle of this cross-examination the judge sent the jury out of the courtroom. R. 599, l. 18 – 600, l. 8.

Solicitor Livesay maintained to the judge that the solicitor's office "*has no ability to charge anyone.*" She said only the police could seek a warrant and a magistrate issue a warrant. She argued the defense cross-examination was not relevant. R. 601, l. 1 – 607, l. 20. (emphasis added).

When the jury came back into the courtroom Canty asked Von Herrmann about her statement that their "were a number of witnesses against my client." He asked Von Herrmann if Howard Parker was one of those witnesses. Von Herrmann responded: "I don't recall." The solicitor objected to the relevance of this inquiry. The judge then told Canty that based on her response **that was the end of the inquiry**. R. 609, l. 12 – 611, l. 13.

Howard Parker had been earlier questioned about Levana Jackson calling Parker's friend Terry Bease to set up this robbery. The solicitor also objected to the relevance of that testimony. When defense counsel Frederick went to impeach Parker about his statement that they had considered Splurge a "good person for them to hit a lick on," Parker maintained that he was either "lying or wrong." Counsel also questioned Parker about his "shoe size, [for the molds taken at the trailer]," his claim that he got "nothing out of testifying," and why he had not been charged with murder. The judge told the defense to **"move on"** when witness Parker protested the relevance of the cross-examination. R. 384, l. 6 – 386, l. 19; R. 409, l. 2 – 410, l. 13.

In her closing argument, the solicitor maintained there was no evidence anyone else committed the crime. She said, **"Heather Von Herrmann didn't fall for it, nu-uh**. The guy that had it after me, or after Heather, he didn't fall for it. But yet here we are. Here we are. *Heather von Herrmann dismissed some cases against Bootsie [Johnson]*, **and she told you why**. But the one she didn't dismiss was the murder case. She has the discretion to dismiss it, to plead it, to charge it with anything she wants to. She has that power . . . **She's not only a witness, she's a (sic) attorney for our office at one time and still a lawyer. She told you, these are the reasons why I dismissed it**, but what I didn't dismiss was that murder case." R. 873, ll. 1-19. (emphasis added).

Court of Appeals

The panel of the Court of Appeals (Lockemy, C.J., and Konduros and McDonald, JJ) in a summary unpublished opinion without oral argument. App. 1-2. Petitioner sought rehearing, and argued, inter alia, that "[t]his Court may have overlooked the fact that allowing a solicitor to "explain" why she allegedly chose not to prosecute the state's star witness on certain charges – where that witness admittedly repeatedly lied to the police – and where the solicitor granted him other great leniency based on her beliefs as to his culpability was improper. The solicitor's

testimony bolstered the credibility of the shaky government witness, and put the prestige of the government behind him. It entailed the testifying solicitor giving her opinion on the evidence before the jury, and it evaded their province. All of this entailed a prejudicial abuse of discretion by the trial judge. Moreover, the limitations on the defense cross-examining the former solicitor – once she erroneously was allowed to explain away her leniency as to the state's star witness, her view of the evidence, and her actions and inactions as a solicitor in this case – violated Rule 611 (b), SCRE. Rehearing petition at 1-2. App. 3-4.

Petitioner reminded the Court:

> "With little but raw suspicion at this point [in the trial], Keir Johnson, who was also charged with this murder, was successful in making himself the state's star witness instead of a defendant. During petitioner's trial he arrogantly mocked the attorneys cross-examining him stating his outstanding lawyer, Ron Hazzard, had out maneuvered the co-defendants on trial, and put him in the catbird seat. R. 498, l. 5 – 500, l. 14. Johnson now claimed petitioner and co-defendant Graham were with him in his girlfriend's brown van on the morning of the shooting. Prior to his testimony defense counsel Fredrick cited State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012), State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), and State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) for the proposition that the defense had a right to cross-examine Johnson about his sentencing exposure, and his dealings with the solicitor's office in this case. R. 422, l. 5 – 440, l. 11. The trial judge noted that Johnson gave a statement implicating both defendants, and he then he was granted bond. The state also dismissed a burglary charge. R. 432, l. 16 – 438, l. 22.
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> The solicitor claimed that Johnson had already given his statement, and maintained that Johnson therefor "did not need" any sentencing consideration from the state in return for his cooperation, and testimony. "We had no reason to dismiss the charges." R. 438, l. 23 – 440, l. 11.
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> The solicitor at this point began to argue that she should be able to call the former solicitor who worked on this case for a long time, Heather Von Herrmann, as a witness to "explain" the prosecutorial decisions involving Johnson's charges. R. 440, l. 12

> – 452, l. 6. Defense counsel Fredrick immediately noted his objections to calling the former solicitor as a witness for such an "explanation." The defense right to probe Johnson for his bias on cross-examination was well established under South Carolina precedent. Calling Von Herrmann for her to "explain" her prosecutorial decisions was "improper." R. 442, l. 11 – 444, l. 16."

App. 3-4.

ARGUMENT

The Court of Appeals erred by holding it was not an abuse of direction for the trial court to allow the solicitor to call former solicitor Von Herrmann as a witness to "explain" why certain charges were dismissed against its star witness, Keir Johnson, where Johnson admitted that he lied to the police, but maintained he was now telling the truth without consideration, since allowing the solicitor to testify about prosecutorial discretion to explain leniency towards the state's witness was improper, as were the limitations on cross-examining the former solicitor given Rule 611 (b), SCRE once she was allowed to testify.

Defense counsel correctly argued that a former solicitor should not be allowed to testify as a witness to "explain" her alleged prosecutorial discretion in this case. In fact, defense counsel said that "but for" Johnson's claims, which had to be taken at face value at the directed verdict stage, he would have asked the court to direct the verdict for petitioner. R. 683, ll. 9-12. The bottom line here is that the present solicitor put the prestige of the government behind Johnson by calling the former solicitor to tell the jurors that Johnson did not gain anything by testifying for the government. It was the province of the jury to judge the credibility of the witnesses, including Johnson, and it was improper for the government to offer the former solicitor's "explanations" in support of Johnson's claims that he was now telling the truth. Johnson undoubtedly felt emboldened by the government's frontal assault in support of his testimony, and against his prior victims.

As seen, Johnson claimed he did not receive any consideration for testifying against petitioner. He also maintained he did not know the sentences for the crimes he had been charged with. Against this backdrop, the state wanted an "explanation" to be given to the jury about the

charges being dropped, and other preferential treatment Johnson had received. Such "explanations" involving prosecutorial discretion were improper as defense counsel argued.

In State v. Joseph, 328 S.C. 352, 491, S.E.2d 275 (Ct. App. 1997), the Court of Appeals correctly held that it was prejudicial error for the trial court to allow a witness to explain the circumstances surrounding his conviction for giving false information to the police. The Court noted, at the time, that a witness could be impeached by evidence of a prior conviction for a crime of moral turpitude. State v. Outlaw, 307 S.C. 177, 179, 414 S.E.2d 147, 148 (1992). "However, the details of the crime for which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible, the witness has 'already been afforded [the] opportunity to defend himself against the charge and his [conviction] is conclusive.'" State v. Joseph, 328 S.C. at 361, 491 S.E.2d at 279-280. The same **concept** should apply here – although what occurred here through the former solicitor's explanations was much worse than the explanation allowed in State v. Joseph.

The solicitor's office chose to dismiss certain charges against star witness, Johnson. Johnson took every opportunity to "explain" – spin -- why he was not getting consideration for his testimony against petitioner although it may appear that way to a rational person. He repeatedly claimed that he had an excellent lawyer, and that is why the solicitor's office dismissed charges against him. Thus, Johnson was given every *opportunity* to defend himself against proper impeachment of bias and motive to misrepresent, and explain why, *in his opinion*; he was not being given substantial consideration for his testimony.

A solicitor, conversely, is a "minister of justice." They are not merely advocates for the government. A "prosecutor has special responsibilities to due justice and is held to the highest

standards of professional ethics." State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Von Herrmann was allowed to testify as a minister of justice that the state dismissed two very serious charges against Johnson because his girlfriend did not want to prosecute. Yet, solicitors are used to prosecuting domestic violence charges all the time even when the victim later requests the solicitor to drop the matter, and begs that office not to prosecute.

Regarding another serious charge against Johnson, the former solicitor "explained" that she did not find the prosecuting witness credible. The government, according to the former solicitor, decided that the complaining witness wanted to have a romantic relationship with Johnson, and the complaining party allegedly was retaliating for his rejection. The solicitor, and the former solicitor, were "all in" behind the magnanimous Johnson.

As seen, the minister of justice, who acknowledged she was **the solicitor on this case at relevant times**, testified that serious charges were dismissed against Johnson because the victim, his girlfriend, did not want to continue to prosecute. The former solicitor told the jurors that it was difficult to prosecute a case where the victim was reluctant to cooperate. In fact, as seen above, she **lectured defense counsel Fredrick**, and asserted that petitioner's attorney was aware of this fact also. The jury was asked to believe the former solicitor knew more than they did about what occurred, and that she made the right prosecutorial decision to dismiss the charges against Johnson.

The former solicitor's testimony was obviously designed to support Johnson's testimony that he was not given sentencing consideration for his testimony by way of the dismissal of the charges. The jury need not be concerned with Johnson's credibility given that the government was not. Such explanations of prosecutorial discretion by their nature constitute improper

vouching of the witness by placing the government's prestige behind the witness' testimony, and his "innocent" explanation for the matter at issue. Von Hermann was telling the jury her prosecutorial discretion was proper in not going forward against Johnson on these charges, *and helping him get released on bond. She did not think Johnson was as culpable.* See State v. Shuler, 334 S.C. 604, 630, 545 S.E.2d 805, 818 (2001), State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001).[9]

Defense counsel in this case correctly objected to Von Hermann being allowed to testify about her prosecutorial discretion. He further argued that if the trial judge was going to allow the former solicitor to testify over his objection, then she was open to cross-examination on any relevant issue under Rule 611(b), SCRE. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." As seen, the trial judge stated that what defense counsel thought was relevant, and what the judge thought was relevant may be different matters. The defense obviously wanted to question the former solicitor, who again was the prosecutor on this case for a substantial time, about the failure to pursue leads, and pursue other subjects of investigation.

As seen, the defense strongly questioned the integrity of the investigation as far as the cell phone records. The defense had its own expert witness, Roger Boyell, on the subject of "electronic communications, specifically cell phone tracking" when it was time for the defense case. R. 711, ll. 8 – 718, l. 7. Boyell testified about Keir Johnson's two cell phones, the Graham phone, and Michael Pyatt phone. R. 726 – 779.

However, the former solicitor claimed she could not answer questions about the cell phone records without access to her file. The present solicitor promised to obtain Von

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[9] *reversed on other grounds* in Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002).

Herrmann's file so she could refresh her memory about the cell phone records. However, in the "back and forth" involving the extent of the cross-examination the trial judge was going to allow, the present solicitor apparently never obtained the former solicitor's file for her.

Former Solicitor Von Hermann also could recall whether any shoe impressions were taken from the crime scene. State's witness John Caulder, testified that he was **not** asked to analyze any shoe impressions in this case. He had collected a cast from the "crime scene" which was on the "prosecutor's table" during his testimony. R. 298, l. 12 – 302, l. 16. Again, witness Watts could not identify the robbers, and he only saw their shoes from under the bed.

Howard Parker was questioned about his statements to detectives about Lavena Jackson setting up the robbery, and what he saw regarding the brown van. R. 383, l. 3 – 402, l. 7. He was also asked about his shoe size – since they could have been a "match," and not being charged with murder. R. 409, l. 2 – 410, l. 15.

Von Hermann also could not recall whether there were any statements that were not turned over to the defense. She rationalized that a solicitor at times made judgment calls on whether a statement was even credible enough **to her** to warrant disclosure.

At each stage of the cross-examination, the former solicitor seemed to have an explanation for leniency for Johnson, in addition to "not recalling" why certain things were not done in the investigation of petitioner's case. That is not an attack, but, for example, "a variety of people" worked on the cell phone record," she may not have found some statements worthy of belief and therefore may not have turned them over to the defense. When counsel for the co-defendant attempted to question Von Herrmann about Howard Parker, she again responded that she did not recall. The judge then stated that was the end of the inquiry.

In short, this record reveals that Von Herrmann did not recall anything of value about the integrity and extent of the investigation in this case. However, she vividly recalled that the investigation showed Johnson was much less culpable in this case, and that was why she entered into a consent order for his bond.

She also claimed that there was no "quid pro quo for a defendant cooperating and his charges being dismissed." She told the jury that they solicitor's office had *to verify the information given by the defendant* (here Johnson), and she maintained *the solicitor's office did not promise anything besides informing the judge of the level of cooperation.* r. 593, l. 13 – 595, l. 23. (emphasis added).

In short, the judge's decision to allow Von Herrmann to testify about her prosecutorial discretion regarding Johnson was prejudicial error as seen above. Further, his reluctance to allow cross-examination on the particulars of the extent of the investigation in this particular case was disastrous and unfair. However, once the trial judge allowed the former solicitor to testify over objection, under South Carolina law cross-examination is limited **only** by the requirement that the inquiry relate to matters pertinent to the issues involved or the impeachment of the witness. State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972).

"Since it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony, 'as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,' 98 C.J.S. Witnesses s 460; and 'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness, 98 C.J.S. Witnesses s 560a." State v. Brewington, 267 S.C. 97, 100-101, 226 S.E.2d 249, 250 (1976).

Further, Rule 611(b), SCRE rejected the more restrictive language of the federal rule which limited cross-examination to the subject matter of the direct examination, and matters affecting the credibility of the witness.

In sum, the state got everything it wanted by having its former employee, the former solicitor, *explain her prosecutorial discretion* in dismissing charges against Johnson, and explaining why he was allowed out on bond. As seen, the former solicitor told the jurors that Johnson was less culpable in this case, and she "explained" why charges were dismissed against Johnson. She went so far as to tell the jurors that there is no quid pro quo for a defendant getting sentencing consideration in return for his testimony –"that is not the way the system works." Such a fantasyland explanation of prosecutorial discretion should be reversible error in and of itself – but the Court of Appeals held otherwise in affirming.

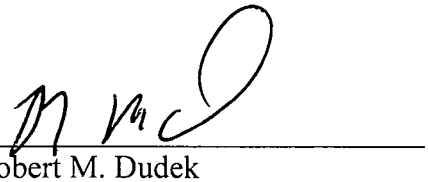
Moreover, there was so much more prejudicial error in allowing Solicitor Von Herrmann's testimony here. She could not "recall" anything about the particular investigation in this case as it related to petitioner, and she maintained those matters were left for law enforcement to handle as if the solicitor's office was not involved. In short, and in sum, Johnson was a critical witness in this case, and the former solicitor should not have been allowed to "explain" her prosecutorial discretion to validate Johnson's testimony and put the government's imprimatur behind him.

Certiorari is respectfully warranted in this case.

CONCLUSION

By reason of the foregoing arguments, certiorari should be granted to allow full briefing on this issue.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2016.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable Steven H. John, Circuit Court Judge

Opinion No. 2016-UP-430 (S.C. Ct. App. Filed October 19, 2016)
2014-GS-26-02361

THE STATE,

RESPONDENT,

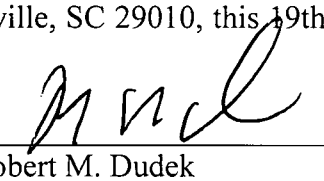
V.

THOMAS JAMES,

PETITIONER

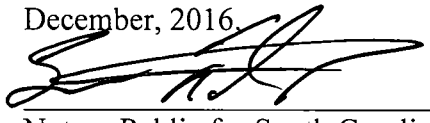
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Thomas James, #361800, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 19th day of December, 2016.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of December, 2016.



(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.