

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable L. Casey Manning, Circuit Court Judge

LOUIS SANDERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000591

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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S.G. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in failing to find trial counsel ineffective for not objecting to a prejudicial comment made by the State in closing argument that the lawyer for a State's witness feared that his client would be hurt as a result of testifying against Petitioner at trial, implying that Petitioner had threatened the witness?

STATEMENT

In August of 2007, the Richland County Grand Jury indicted Petitioner Sanders for murder, indictment #2007-GS-40-6002. On July 28, 2008, Petitioner proceeded to jury trial before the Honorable G. Thomas Cooper Jr. Camille Everhart, Deon O'Neil and Casey Secor represented Petitioner at trial. Vanessa Cooper Shipley and Joanna McDuffie prosecuted the case. On August 1, 2008, the jury returned a guilty verdict. Judge Cooper sentenced Petitioner to life without parole pursuant to S.C. Code §17-25-45. A timely notice of intent to appeal was filed and the direct appeal perfected. On January 27, 2010, the South Carolina Court of Appeals dismissed the appeal. State v. Sanders, 2010-UP-047 (S.C. Ct.App. filed January 27, 2010).

On May 4, 2010, Petitioner filed an application for post-conviction relief (PCR). The State filed a return on July 19, 2010. On April 21, 2012, an evidentiary hearing was held before the Honorable Casey L. Manning. Nicole Simpson represented Petitioner at the PCR hearing. Brian Petrano represented the State. In a written order signed March 7, 2016, Judge Manning denied relief and dismissed the application. A timely notice of intent to appeal was served on March 22, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in failing to find trial counsel ineffective for not objecting to a prejudicial comment made by the State in closing argument that the lawyer for a State's witness feared that his client would be hurt as a result of testifying against Petitioner at trial, implying that Petitioner had threatened the witness.

The jury found Petitioner guilty in the shooting death of Israel Cannon. Initially brothers Garry B. Green and Justin Grren were also charged with the murder of Cannon. Both brothers testified against Petitioner at trial. Garry B. Green was allowed to plead guilty to accessory after the fact of murder. (App. p. 418, line 15 – p. 419, lines 1-3). The State dismissed the charges against Justin Green. (App. p. 629, lines 1-12). Anthony P. Smith was also called as a witness by the State. Smith shared a jail cell with Petitioner at the Richland County Detention Center for approximately two weeks. (App. p. 797, line 1 – p. 798, lines 1-23). According to Smith, Petitioner discussed his case and discovery material with Smith. (App. p. 798, lines 3-20). Smith confirmed that after he was subpoenaed to testify, he was granted a PR bond and released from jail. (App. p. 803, line 21 –p. 804, lines 1-10). Smith claimed that he feared for his safety at the Detention Center. (App. p. 804, lines 1-4). Smith admitted that people at the jail do not like “snitches.” (App. p. 806, lines 3-7).

In closing argument the State told the jury:

So what does common sense tell you? That man told his roommate too much information about what he was doing that night. And the police sought Smith out. Smith did not seek out the police. And he's not a government informant. He's not getting paid. And, yes, the judge let him out on a PR bond because his lawyer asked her to because he was scared his client was going to get hurt after testifying against Mr. Sanders in this trial.

(App. p. 1046, lines 15-23). Trial counsel failed to object. While Smith's testimony inferred that “snitches” are generally disfavored at the jail, the State's closing argument stated that

Smith's lawyer was scared for his client inferring that Smith was specifically afraid of Petitioner and implying that Petitioner had threatened Smith. The State's closing argument constituted improper character evidence and trial counsel should have objected.

During the PCR hearing trial counsel admitted that the State's closing argument was "detrimental to Mr. Sanders's character." (App. p. 1206, lines 13-18). The PCR judge found that Petitioner failed to demonstrate that trial counsel's performance was unreasonable under prevailing professional norms. (App. p. 1222). The PCR judge erred. Trial counsel was ineffective in failing to object to the prejudicial comment made by the State in closing argument. Telling the jury that Smith's lawyer was scared for his client was highly prejudicial and outside the record. The comment inferred that Smith was specifically afraid of Petitioner, implied that Petitioner had threatened Smith and constituted improper character evidence.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744


(2004). “The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” *Id.* at 609–10, 602 S.E.2d at 744. “ ‘While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.’ ” State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). “ ‘The solicitor's closing argument must, of course, be based on this principle.’ ” *Id.* “Improper 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.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “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.” *Id.*; 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.”).

The solicitor's closing argument in the present case was improper. Telling the jury that Smith's attorney was scared his client was going to get hurt after testifying against Petitioner was highly inflammatory and outside the record. Implying that Petitioner threatened Smith is outside the record and was calculated to arouse the juror's prejudice. Trial counsel was deficient in failing to object. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. The State did not present overwhelming evidence of guilt. The identification of Petitioner was questionable and most of the State's case was based on testimony

from the Green brothers, who had much to gain from their testimony against Petitioner, and Smith, who was released from jail after being subpoenaed to testify at Petitioner's trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2017.

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IN THE SUPREME COURT

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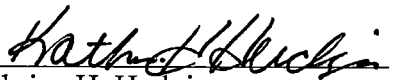
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Louis Sanders states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge L. Casey Manning, which was held on May 21, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Louis Sanders.


Respectfully Submitted,


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 29th day of March, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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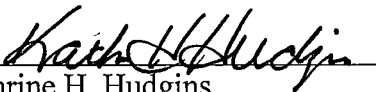
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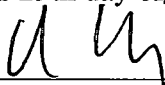
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Louis Sanders, #164301, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 29th day of March, 2017.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 29th day of March, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025