

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Marlboro County

RECEIVED

Honorable G. Thomas Cooper, Circuit Court Judge

OCT 09 2017

S.C. SUPREME COURT

JOHN L. HOGAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002452

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the assistant solicitor's closing argument where she asserted Petitioner lacked remorse since this improper argument likely inflamed the passions and prejudices of the jury and led the jury to convict Petitioner of murder as opposed to voluntary manslaughter?

STATEMENT OF THE CASE

Petitioner was indicted by a Marlboro County Grand Jury on September 30, 2010 for the offense of murder. App. 837-838. His case was called to trial on January 10, 2012 before the Honorable Howard P. King, and a jury. App. 231. Assistant Solicitors W. Shipp Daniel and Mary Thomas Johnson-Lee represented the state, and Daniel L. Blake represented Petitioner. App. 231.

The state alleged at trial that Petitioner killed Monesha Brown on June 5, 2010. App. 837-838. Petitioner, who suffered from drug addiction since he was a teenager, met the decedent after he relapsed near the end of May 2010 and began using crack cocaine after having been sober for a couple of years. App. 314, l. 23 – 315, l. 2; App. 580, ll. 13-14.

Queen Brown, the decedent's mother, cooked dinner for her family and some members of her church every Wednesday evening. Brown reported her daughter missing when she did not attend a weekly family dinner. The police immediately began searching for her. App. 319, l. 14 – 321, l. 6. Brown admitted her daughter was addicted to crack cocaine. App. 323, ll. 16-18.

Lieutenant Larry Turner, an investigator with the Bennettsville Police Department, remembered the decedent was reported missing on June 16, 2010. App. 324, l. 10 – 325, l. 11; App. 326, ll. 2-9. Petitioner became a suspect because he was the last person seen with the decedent. App. 328, ll. 20-23. There was evidence that a one-time confidential informant was involved in buying crack cocaine with the decedent and Petitioner on the night the decedent was killed.

Lieutenant Turner interviewed Petitioner July 21, 2010 at the Bennettsville Police Department. App. 329, ll. 4-12. Petitioner denied any involvement in the decedent's disappearance. App. 336, l. 9 – 337, l. 11. Turner interviewed Petitioner again on July 23, 2010.

During this interview, Petitioner confessed that he had killed the decedent during a confrontation. App. 337, ll. 12-25.

Investigator Sean Feldner with the Marlboro County Sheriff's Office was also involved in interrogating Petitioner on July 23, 2010. App. 374, ll. 1-13. Feldner testified Petitioner initially denied responsibility for the decedent's death. App. 375, l. 16 – 376, l. 11. After Petitioner denied involvement, Feldner told Petitioner: "You owe it to the family to bring closure for her and to the kids, and you need to man up, and you need to tell us the truth and what really happened to Monesha Brown [the decedent]." App. 376, ll. 13-18. Petitioner then confessed that he drove around Bennettsville with the decedent while the two smoked crack cocaine. They went to his trailer intending to have sex and took a bath together. After getting out of the bathtub, Petitioner went into the kitchen to get a beer. When he reentered his bedroom, he saw the decedent going through his wallet. Petitioner became enraged and began fighting with the decedent who was violently angry at being confronted while apparently stealing Petitioner's money. Petitioner threw the decedent into a wall. App. 376, l. 25 – 382, l. 7.

The decedent then grabbed a knife from the kitchen and stabbed Petitioner in his side. The two struggled over the knife. Petitioner ultimately grabbed the knife from the decedent and stabbed her in the neck. He then duct taped her hands behind her back so that she could not harm him any further, and placed her in the bathtub. After putting the decedent in the bathtub, Petitioner smoked more crack cocaine. He told Feldner that "the Devil told [him] [he] needed to finish her off." App. 376, l. 25 – 378, l. 17.

Petitioner then got a knife from the kitchen and sliced the decedent's neck on both sides. Petitioner told investigators he put the decedent's body in a barrel, and disposed of the barrel. App. 378, l. 20 – 379, l. 5. Petitioner led the police to the decedent's body, which was found in

“the barrel . . . located off of 38 South” in a wooded area. App. 379, ll. 5-7; App. 381, l. 25 – 382, l. 24.

Petitioner’s testimony at trial was consistent with his confession to the police. See App. 557, l. 4 – 637, l. 24.

During her closing argument, the assistant solicitor asserted:

Remorse. When he came in today, John Hogan [Petitioner] sat on that stand up there. He cried. He claimed he’d been suicidal. Claims he cries daily. He cried on the stand also. **But remember he cried on the stand, if you think back, only when he was talking about his wife, his child, or the church. He didn’t cry when he was talking about what happened to Monesha [the decedent]. He wasn’t remorseful for that. He’s remorseful for having got caught.** I would cry, too, if I was about to be arrested.

App. 663, ll. 6-14 (emphasis added).

Trial counsel did not object to this improper argument. The trial judge ultimately instructed the jury on the law of murder and voluntary manslaughter. App. 683, l. 18 – 688, l.18.

On February 8, 2012, the jury found Petitioner guilty of murder. App. 697, ll. 7-16. He was sentenced to life without parole. App. 712, ll. 21-23.

On March 11, 2015, after his conviction and sentence were affirmed on direct appeal, Petitioner filed an application for post-conviction relief raising the claim argued in this petition. App. 760-768. The state filed a return to this application dated September 10, 2015. App. 769-774. An evidentiary hearing was convened on July 19, 2016 before the Honorable G. Thomas Cooper. App. 775. Assistant Attorney General Justin J. Hunter represented the state, and Lance Boozer represented Petitioner. App. 775.

Petitioner testified at the evidentiary hearing that his counsel was ineffective for failing to object to the solicitor’s closing argument where she commented on his lack of remorse. He asserted, “The prosecution doesn’t have the right to say a man has no remorse for what he did. It

inflames the jury.” Petitioner maintained trial counsel’s failure to object to the solicitor’s improper argument prejudiced the outcome of his trial. App. 783, ll. 7-23.

Daniel Blake, Petitioner’s trial counsel, testified that he did not object to the assistant solicitor’s closing argument concerning Petitioner’s lack of remorse because he did not “want to draw attention to the issue by objecting.” App. 804, ll. 16-25. He explained that Petitioner’s remorse “was an issue throughout the trial” and that he “strongly presented” Petitioner’s remorse during his opening statement and closing argument. Blake also said Petitioner talked “a great deal” about his remorse when he testified before the jury. App. 804, l. 16 – 805, l. 10. He maintained that the solicitor’s argument was merely her interpretation of the evidence presented during the trial. App. 805, ll. 1-6.

The PCR court ultimately found Petitioner failed to prove counsel was ineffective for failing to object during the state’s closing argument. App. 831. The court found the comments made by the assistant solicitor were not objectionable and were not so “severe as to appeal to the person biases of the jury or infect the trial with unfairness.” App. 831. Therefore, the court denied Petitioner relief.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the assistant solicitor’s highly inflammatory comments about Petitioner’s lack of remorse during her closing argument, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the assistant solicitor's closing argument where she asserted Petitioner lacked remorse since this improper argument likely inflamed the passions and prejudices of the jury and led the jury to convict Petitioner of murder as opposed to voluntary manslaughter.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to object to the assistant solicitor's closing argument where she asserted Petitioner lacked remorse. Petitioner was prejudiced by counsel's deficient performance because the solicitor's improper argument likely inflamed the passions and prejudices of the jury and led the jury to convict Petitioner of murder as opposed to voluntary manslaughter. Petitioner admitted to killing the decedent, but asserted he killed the decedent after a confrontation and struggle over a knife.

As stated above, the assistant solicitor asserted during her closing argument:

Remorse. When he came in today, John Hogan [Petitioner] sat on that stand up there. He cried. He claimed he'd been suicidal. Claims he cries daily. He cried on the stand also. **But remember he cried on the stand, if you think back, only when he was talking about his wife, his child, or the church. He didn't cry when he was talking about what happened to Monesha [the decedent]. He wasn't remorseful for that. He's remorseful for having got caught.** I would cry, too, if I was about to be arrested.

App. 663, ll. 6-14 (emphasis added). Counsel did not object.

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 (1984). The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance

was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

“While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor’s closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.” 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)). This Court has repeatedly held “that comments concerning a defendant’s lack of remorse [are] constitutionally impermissible because they violate an accused’s Fifth, Eighth, and Fourteenth Amendment rights.” State v. Diddlemeyer, 296 S.C. 235, 239, 371 S.E.2d 793, 795 (1988) (citing State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987); and State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986)). For example, in State v. Johnson, this Court held that the solicitor’s improper reference to Johnson’s lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof. 293 S.C. at 323, 360 S.E.2d at 319.

Trial counsel was ineffective for failing to object to the assistant solicitor’s closing argument where she commented on Petitioner’s lack of remorse. As asserted, this Court has long held that it is improper for the state to comment on a defendant’s alleged lack of remorse because

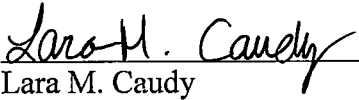
such comments violate an accused's Fifth, Eighth, and Fourteenth Amendment rights. See Diddlemeyer, 296 S.C. at 239, 371 S.E.2d at 795. A competent criminal defense attorney would have objected when the assistant solicitor argued Petitioner was not remorseful for the death of the decedent and that his only remorse was that he "got caught." App. 663, ll. 11-13. Trial counsel's failure to do so constituted deficient performance. See Strickland, 466 U.S. at 687. The solicitor's argument was improper because it was a comment upon Petitioner's constitutional right to plead not guilty and put the state to its burden of proof. See Johnson, 293 S.C. at 323, 360 S.E.2d at 319.

Petitioner was prejudiced by counsel's deficient performance because the solicitor's unobjected to comments concerning Petitioner's alleged lack of remorse likely inflamed the passions and prejudices of the jury and certainly affected the outcome of his trial. While Petitioner admitted to killing the decedent during a confrontation and struggle over a knife, he asserted he was only guilty of voluntary manslaughter. The jury found Petitioner guilty of murder likely because of the solicitor's improper argument. It is obvious that counsel's deficient performance in failing to object to the state's argument prejudiced Petitioner. Respectfully, this Court should reverse the ruling of the PCR court and grant Petitioner a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. Ultimately, Petitioner respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully Submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 2017.

STATE OF SOUTH CAROLINA
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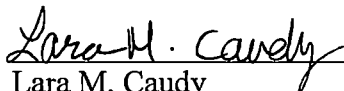
PETITION TO BE RELIEVED AS COUNSEL

Counsel for John L. Hogan states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on July 19, 2016 before the Honorable G. Thomas Cooper. In her opinion, seeking certiorari from the order of dismissal is without merit.
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 the Court relieve her as counsel for John L. Hogan.

Respectfully Submitted,

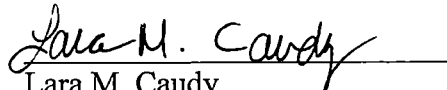

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of October, 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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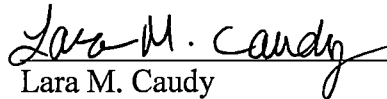
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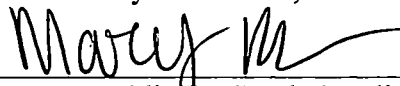
CERTIFICATE OF SERVICE

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 have been served upon Johnny Ellis James, Jr., 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 upon John L. Hogan, #349628, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 9th day of October, 2017.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of October, 2017.



Notary Public for South Carolina
My Commission Expires: May 12, 2027.