

STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

---

ROBERT LEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000187

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

Laura R. Baer  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT OF THE CASE.....2

ARGUMENT .....3

**The PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where he failed to object to the solicitor’s improper comments during closing argument.**

Relevant Facts .....3

Discussion .....7

CONCLUSION.....10

PETITION TO BE RELIEVED AS COUNSEL .....11

**ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where he failed to object to the solicitor's improper comments during closing argument?

## STATEMENT OF THE CASE

### Indictment and Trial

On September 30, 2010, the Spartanburg County Grand Jury returned an indictment against Petitioner Robert Lee, Jr. for murder. App. 795.

On November 28 – December 1, 2011, Lee appeared for trial before the Honorable J. Derham Cole and a jury. App. 1. Lee was represented by Brendan Delaney, and the State was represented by assistant solicitors Derrick Bulsa and Chad Graham. App. 1.

The jury returned a verdict of guilty as indicted. App. 591 – 593. Judge Cole sentenced Lee to life imprisonment. App. 595.

### Direct Appeal

Lee's direct appeal was perfected by the filing of the Brief of Appellant by Deputy Chief appellate defender Wanda H. Carter. App. 597. Assistant attorney general Anthony Mabry represented the State. App. 611. On April 16, 2014, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished, *per curiam* opinion. State v. Lee, 2014-UP-169 (S.C. Ct. App. filed Apr. 16, 2014). The remittitur was issued on May 2, 2014. App. 648.

### Post-Conviction Relief

On June 13, 2014, Lee filed an application for post-conviction relief ("PCR"). App. 650. The State filed its return on November 18, 2014. App. 657. On January 11, 2016, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. App. 662. Lee was represented by J. Brandt Rucker and the State was represented by assistant attorney general Alicia Olive. App. 662. Following testimony from Robert Lee, trial counsel Brendan Delaney, and Lee's younger sister Sheera Lee, the matter was taken under advisement. App. 764, ll. 24-25. On July 18, 2016, Judge Cothran filed an Order of Dismissal, denying Lee's PCR application. App. 777.

## ARGUMENT

**The PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where he failed to object to the solicitor's improper comments during closing argument.**

### *Relevant Facts*

Petitioner Robert Lee was accused of murdering Rebecca Rosa (hereinafter "Rosa"), with whom he had a seven-year relationship that resulted in two children. App. 103, ll. 5-8; App. 433, l. 16 – 434, l. 1. Rosa and the children had recently moved from the trailer she shared with Lee to a "Safe Home" and then to an apartment. App. 104, ll. 4-19; App. 105, ll. 1-13; App. 287, l. 25 – 288, l. 9. On Friday, June 11, 2010, Rosa had other family members watch her children so that she could go out with her brother, Jonathan Rosa. Their last stop of the night was "Club Sidelines," following which Jonathan dropped Rosa off outside of her apartment at approximately 3:00 a.m. on the morning of Saturday, June 12, 2010. App. 183, l. 22 – 187, l. 9. When Rosa did not return to pick up her children later that morning, her family became concerned. App. 106, ll. 14-21. They called the Food Lion where she worked and learned that she had not come in for her shift either. App. 106, ll. 22-25. The family contacted police and organized a search party, which found her body buried in the woods near Tibbs Road on Tuesday, June 15, 2010. App. 226, l. 12 – 231, l. 23. An autopsy revealed three knife wounds, one to the abdomen and two to the back. App. 499, l. 16 – 500, l. 16; App. 502, ll. 3-5. Police later arrested Lee in connection with Rosa's death. App. 452, ll. 2-7.

During Lee's trial, the prosecution was precluded from admitting photographs of the decedent's decomposing body. App. 329, l. 14; App. 330, ll. 15-22; App. 501, ll. 15-25; App. 791. However, there was some testimony regarding the condition of the body. Forensic technician Courtney Westfall went to Tibbs Road to process the area where the body was found.

App. 325, ll. 9-10; App. 328, l. 5 – 329, l. 25. The solicitor asked if Westfall noticed any wounds on the body, to which she responded: “The body was starting to decompose. It was very bloated. There were -- there was something protruding from her abdomen. The shirt was pulled up probably about to here, about mid, mid ways. And there was what appeared to be internal organs coming out of her abdomen.” App. 330, ll. 1-12. Forensic pathologist Dr. John David Wren later testified: “The defect in her abdomen where she had been stabbed, her intestines had - - as they swelled and as one decomposes, gas is produced. And it pushed the intestines out through the, the defect in the abdomen there.” App. 500, ll. 4-7.

The solicitor acknowledged the inadmissibility of the photographs at the outset of his closing argument, stating: **“I couldn’t show you a picture of the wounds to Ms. Rosa because it’s not allowed by the evidence.** I have to show you a mere diagram that Dr. Wren prepared.” App. 547, ll. 20-22 (emphasis added). Nevertheless, he said: **“I wish you could have seen the picture of the body of Ms. Rosa as she was pulled out of the dirt, her intestines bloating out of her body.”** App. 549, ll. 4-6 (emphasis added). Relatedly, he said: **“I can’t imagine what was going through Matthew Cook’s mind as he pulled his sister out of a grave.”** App. 558, ll. 6-7 (emphasis added). The solicitor concluded his argument by saying: “But for the grace of God that led Matthew Cook to his sister Rebecca Rosa might never have been found. I ask that you **give the family closure** and find the proper verdict of the crime as charged of murder. Thank you.” App. 558, l. 25 – 559, l. 4 (emphasis added).

The solicitor also argued in his closing that malice was evidenced by the fact that one of the knife wounds was a “stab with a twist.” App. 547, l. 23 – 548, l. 4; App. 549, l. 1. Dr. Wren actually testified:

The immediately fatal wound was in the abdomen, and that wound was what we call an in-and-out stab wound in that the blade went in and the blunt edge was superior and the sharp edge was inferior. **And then either the knife turned or the person turned.** And as it came back out it made essentially another cut that was a little bit shorter than the one at the top.”

App. 506, ll. 9-15 (emphasis added). Dr. Wren never testified that the knife was twisted in the victim’s “gut,” as the solicitor contended in his closing. See App. 547, ll. 23-25.

At the PCR hearing, Lee contended that his trial attorney rendered ineffective assistance by failing to object to the solicitor’s improper comments during closing argument. App. 694, l. 17 – 696, l. 6. On direct examination, trial counsel Brendan Delaney said that he did not recall the solicitor’s reference in closing arguments to the excluded photographs, but said that he may have missed an objection. App. 736, l. 12 – 737, l. 6. He acknowledged that attorneys “try to give the other side as much leeway as we can during closing” but did not have any policy against objecting during closing arguments. App. 736, ll. 17-23. On cross-examination, Delaney said that he “probably should’ve objected to that as being overly prejudicial.” App. 747, l. 15 – 748, l. 3. He then agreed that “improper argument” would have been the proper objection to make and that the comment may have been aimed at inflaming the jury and preying upon their emotions. App. 748, ll. 4-14. On redirect, Delaney was read the portion of the closing argument where the solicitor said “I wish you could’ve seen the picture of the body of Ms. Rosa as she was pulled out of the dirt, her intestines bloating out of her body.” App. 755, ll. 17-25. Delaney said that he probably should have objected because both the photographs and any reference to them were overly prejudicial. App. 756, ll. 1-13.

During cross-examination, Delaney recalled the solicitor’s argument in his closing that the knife had been turned but could not recall whether that argument was actually based upon any testimony in the record. Delaney agreed that if the argument was not supported by the

underlying evidence, he should have objected to the solicitor's statement. App. 750, l. 25 – 751, l. 16. On redirect, Delany again stated that he could not recall whether the solicitor's argument was consistent with the medical examiner's testimony. App. 756, ll. 3-17.

In the Order of Dismissal, the PCR court found that Lee failed to establish deficiency or prejudice with respect to trial counsel's failure to object during the solicitor's closing argument. App. 790 – 792. Interestingly, the Order made no mention of trial counsel's concession that he "probably" should have objected to discussion of the excluded photographs in the solicitor's closing argument. App. 781; App. 790 – 792. While counsel's testimony is not determinative, the recitation of facts related to his testimony on the failure to object during closing contains several misstatements and drastically overstates his recollection of the evidence. Compare App. 781, with App. 736, l. 12 – 737, l. 23; App. 747, l. 15 – 748, l. 14; App. 750, l. 25 – 751, l. 16; App. 755, l. 17 – 756, l. 17. The PCR court ultimately determined that Lee failed to show deficient representation because the solicitor's comments were supported by the evidence introduced at trial, finding:

The forensic pathologist had already testified about the extent of the victim's injuries, including the bloating of her intestines, and the fact that the stab was consistent with either her body twisting or the assailant twisting the knife. The solicitor's comments did nothing more than comment on the inferences to be drawn from the evidence adduced at trial.

App. 791 – 792. The court ruled that Lee further failed to show a reasonable probability that but for the alleged deficiency, the outcome of the trial would have been different. App. 792. Rather, the court ruled:

Even though the solicitor mentioned that a photograph had been excluded from evidence, the jury had already heard medical testimony about the injuries and about the appearance of those injuries. The solicitor's comments contained no description that had not already been presented to the jury through testimony at trial. Furthermore, the trial judge instructed the jury that closing statements are not evidence.

App. 792. Accordingly, the PCR court dismissed Lee's application with prejudice. App. 793.

### *Discussion*

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRPC). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the

record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). “[S]olicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom.” Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016). “In keeping their closing arguments within the record, solicitors additionally must tailor their remarks ‘so as not to appeal to the personal biases of the jury’ or ‘arouse the jurors’ passions or prejudices.’” Id. (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)). “Accordingly, solicitors should avoid comments that ask jurors to place themselves in the victim’s—or another party’s—shoes, because those types of comments tend to completely destroy all sense of impartiality of the jurors.” Id. at 251, 785 S.E.2d at 477 (internal citations and quotations omitted).

Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Humphries v. State, 351 SC 362, 570 S.E.2d 160 (2002). “On appeal, the appellate court will view the alleged impropriety of the solicitor’s argument in the context of the entire record, including whether the trial judge’s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant’s guilt.” Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). 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. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868 (1974); Simmons, 331 S.C. at 338, 503 S.E.2d at 166-67.

Contrary to the PCR court’s findings, the portions of the solicitor’s closing argument at issue were not supported by the evidence such that defense counsel was deficient in failing to object to them during trial. While the trial judge allowed testimony regarding the condition of the body, the solicitor specifically acknowledged that the photographs of the body were excluded

from evidence. App. 547, ll. 20-22. His statement to the jury that he wished they “could have seen the picture of the body of Ms. Rosa as she was pulled out of the dirt, her intestines bloating out of her body” was not as innocuous as the State alleged on PCR. App. 549, ll. 4-6. Initially, of course, the photograph was not in evidence, so any reference to it was improper because it went outside of the record. Moreover, his statement had no bearing upon any element of the alleged crime. There was no dispute that the body found off of Tibbs Road belonged to Rosa – the defense stipulated that Rosa was identified as the decedent utilizing dental records. App. 77, l. 14 – 78, l. 13; App. 355, l. 5 – 356, l. 19. Rather, the only purpose of telling the jury that he wished they had seen the photographs was to provoke them to imagine what Rosa’s body most have looked like. The solicitor was relating to the jurors that oral descriptions of the condition of the body paled in comparison to the actual photograph. Coupled with his later statement that he could not imagine what was going through Matthew Cook’s mind as he pulled his sister out of a grave and request that the jury give the family “closure,” this was a clear play to the passion and emotions of the jury. App. 558, ll. 6-7; App. 558, l. 25 – 559, l. 4. Similarly, the solicitor’s argument that the knife was twisted, evidencing malice, was not supported by the evidence. Dr. Wren never definitively testified that the knife had been twisted in the abdominal wound. His testimony was that “either the knife turned or the person turned.” App. 506, ll. 12-13.

In this case, the jurors had four possible verdicts – not guilty, guilty of involuntary manslaughter, guilty of voluntary manslaughter, or guilty of murder. App. 536, l. 24 – 538, l. 1; App. 568, l. 21 – 576, l. 19. Upon request, the jury was reinstructed on the definitions of murder and voluntary manslaughter, and the point was emphasized that voluntary manslaughter lacked malice. App. 584, l. 16 – 590, l. 12. Under such circumstances, the solicitor’s comments appealing to the passions and emotions of the jury and misrepresenting the testimony to support

an inference of malice were prejudicial to Lee's case. As a result, the PCR court erred in failing to find that trial counsel rendered ineffective assistance of counsel. Lee is accordingly entitled to a new trial.

**CONCLUSION**

Based on the foregoing, Petitioner Robert Lee, Jr., respectfully requests that this Court grant the petition for certiorari and order further briefing on the issue raised herein.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

---

ROBERT LEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

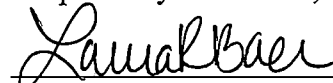
---

Counsel for Robert Lee 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 evidentiary hearing before Judge R. Ferrell Cothran, which was held on January 11, 2016, 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 Robert Lee.

Respectfully Submitted,



---

Laura R. Baer


Appellate Defender

ATTORNEY FOR PETITIONER

This 25th 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."

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 25th day of October, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

\_\_\_\_\_  
ROBERT LEE, JR.

PETITIONER

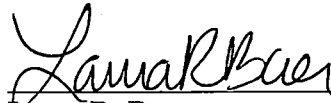
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
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 Valerie Garcia Giovanoli, 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 Robert Lee, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 25th day of October, 2017.



\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 25th day of October, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027