

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable G. Thomas Cooper, Circuit Court Judge

HENRY JAMES ROSS, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000768

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether trial counsel's failure to object to the solicitor's burden-shifting and inflammatory closing argument constitutes ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel?

STATEMENT

In July 2010, a Darlington County grand jury indicted petitioner for first-degree burglary, armed robbery, ABHAN, and a weapons charge. App. 405. On January 31, 2011, petitioner was tried before the Honorable Howard P. King and a jury. App. 1. Patti M. Parker and John Holt represented the State. App. 1. Matthew S. Swilley, William E. Grove, and J. Richard Jones represented petitioner. App. 1. App. 9, ll. 6 – 8. The jury acquitted petitioner of all charges except first-degree burglary. App. 323, l. 16 – 324, l. 23. Judge King sentenced petitioner to twenty-five years' imprisonment. App. 343, ll. 18 – 21. On February 5, 2014, the Court of Appeals dismissed petitioner's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Ross, Op. No. 2014-UP-52 (S.C. Ct. App. Feb. 5, 2014).

On June 9, 2014, petitioner filed a PCR application. App. 346. On July 20, 2016, a hearing was held before the Honorable G. Thomas Cooper. App. 363. Tristan M. Shaffer represented petitioner. App. 363. Caitlin E. Hastings represented the State. App. 363. On February 24, 2017, Judge Cooper denied petitioner's application. App. 405. This petition follows.

ARGUMENT

Trial counsel's failure to object to the solicitor's burden-shifting and inflammatory closing argument constitutes ineffective assistance in derogation of petitioner's Sixth Amendment right to counsel.

In this close case in which the jury acquitted petitioner on three of his four charges, trial counsel's failure to object to the solicitor's final improper remarks prejudiced petitioner. App. 296, l. 22 – 297, l. 8. The solicitor told the jury the case was about right and wrong and said “we” have laws that govern “our” communities. App. 296, l. 22 – 297, l. 8. Trial counsel admitted he should have objected to this argument when he testified at petitioner's PCR hearing. App. 398, l. 23 – 400, l. 2.

On Thanksgiving night 2009, Christy Williamson and a friend went to a nightclub called “The Hut.” App. 125, l. 13 – 126, l. 5. App. 144, l. 21 – 145, l. 11. Williamson had two vodka cocktails. App. 146, ll. 5 – 13. She came home between 1:30 and 1:45 AM. App. 126, ll. 2 – 5. Williamson put on her pajamas and got ready for bed. App. 126, l. 11 – 127, l. 20.

Williamson noticed one of her bedroom doors was cracked. App. 127, ll. 7 – 20. She opened the door and saw a man she claimed was petitioner. App. 127, ll. 7 – 20. The man's face was covered. App. 128, l. 15 – 129, l. 3. The man had a knife and Williamson grabbed his wrist. App. 129, l. 14 – 131, l. 13. As they struggled, the man demanded money. App. 129, l. 14 – 131, l. 13. Williamson gave him \$120.00 from her pocketbook. App. 129, l. 14 – 131, l. 13. The man held a knife to her throat, asked if she was ready to die, and touched her breasts. App. 131, ll. 17 – 22. Williamson escaped and ran from her house. App. 130, l. 17 – 131, l. 13.

The man also ran. App. 130, l. 17 – 131, l. 13. Realizing the man was out of her house, Williamson ran back into her house and tried to lock the door. App. 130, l. 17 – 131, l. 20. The man once again tried to force his way in the house. App. 130, l. 17 – 131, l. 20. His covering was gone and Williamson could see his face. App. 130, l. 17 – 131, l. 13. Williamson succeeded in locking the door and called 911. App. 131, l. 14 – 132, l. 10. The man fled when he saw Williamson with her cell phone. App. 132, ll. 6 – 10.

Williamson made an in-court identification of petitioner. App. 143, ll. 2 – 7. Petitioner lived four houses down from Williamson. App. 148, ll. 15 – 20. Williamson knew his family. App. 146, l. 18 – 147, l. 5. She claimed that she had never previously seen petitioner, but then admitted that she “might have” sporadically seen him walking down the street. App. 148, l. 15 – 149, l. 8.

Williamson initially identified petitioner after going to the police station the night of the incident and looking through possibly as many as 500 photographs in a police database. App. 140, l. 21 – 141, l. 20. Williamson described the identification procedure as “sitting there at the computer clicking on pictures, looking at pictures, just going through them looking at them, one at a time.” App. 141, ll. 1 – 14. When she “stumbled across” petitioner's picture, Williamson paused and told the officer “this kind of looks like the fellow that I saw through my moon window.” App. 141, ll. 1 – 14.

In her statement given the day the assault, Williamson did not mention seeing the perpetrator's face through a window. App. 152, ll. 2 – 6. Her porch light was not lit. App. 159, ll. 13 – 15. When she saw the attacker's face through the door, the only light was from the dining area inside Williamson's house. App. 159, l. 13 – 160, l. 7. Before going to the police station, Williamson had no idea who had assaulted her. App. 141, ll. 21 – 25.

After the assault, the police located a suspect in a grocery store parking lot whose clothing matched Williamson's description. App. 166, l. 22 – 167, l. 5. The police took Williamson to the store to see if she could identify the suspect. App. 166, l. 22 – 167, l. 5. The suspect smiled at Williamson. App. 168, ll. 20 – 23. Williamson hesitated and was nervous about telling the police that their suspect was her assailant. App. 169, ll. One – 3. She ultimately told the police the man at the grocery store was not her attacker. App. 166, l. 22 – 167, l. 5.

The police found no fingerprints or DNA at the scene. App. 172, ll. 2 – 15. The police never found a knife. App. 169, ll. 13 – 15. The police did not look for witnesses in the neighborhood. App. 169, ll. 20 – 23. App. 201, ll. 10 – 21.

Petitioner voluntarily went to the police department on his own. App. 189, ll. 8 – 24. He denied breaking into anyone's house. App. 191, ll. 10 – 12. The police let him go home after their interview. App. 192, ll. 6 – 11. Two days later, they arrested petitioner. App. 192, ll. 12 – 23. The police recorded a video statement. App. 192, ll. 17 – 23. Petitioner admitted being at Williamson's house in his statement, but denied assaulting her or having a knife. App. 28, l. 20 – 281, l. 6. Trial counsel argued that nothing in petitioner's statement was corroborated by Williamson's version of events, that he was uneducated, and only told the police what they wanted to hear, and that after he realized what he had done he became hysterical. App. 270, l. 21 – 273, l. 7.

Petitioner's mother testified that he was home on Thanksgiving night. App. 230, ll. 13 – 22. Her house was small and she could usually tell by people's voices who was home. App. 231, ll. 1 – 19. She heard voices after she went to bed. App. 232, ll. 9 – 19. Petitioner's mother woke up at 3:00 AM to go Black Friday shopping. App. 232, lines 9 – 24. Petitioner went with

her. App. 233, ll. 7 – 11. Petitioner's father and brother also testified that they stayed up all night playing cards. App. 239, ll. 4 – 23. App. 247, l. 1. To – 248, l. 18. Terry Burgess, petitioner's cousin, was also at the house playing cards. App. 252, l. 21 – 254, l. 10.

Petitioner's father awakened petitioner at 3:00 AM to go Black Friday shopping. App. 240, ll. 11 – 15. Neither of petitioner's parents saw him with cash during their holiday shopping. App. 233, ll. 12 – 16. App. 241, ll. 2 – 9. The jury acquitted petitioner of all charges except for first-degree burglary. App. 323, l. 17 – 324, l. 23.

The solicitor made her final summation during her closing argument with the following statements:

It is with no joy or happiness that I stand here before you today. This is not about who wins or who loses. Do you want to know why, because nobody wins in this scenario? Nobody wins. A young man sits over there with a good bit of his life ahead of him. Nobody wins. **But it is about right and it is about wrong. We have laws in this state that we live in that govern our communities.** And that is when you go back there and you deliberate and consider the evidence.

App. 296, l. 22 – 297, l. 4. Trial counsel did not object to this argument. App. 296, l. 22 – 297, l. 8. At the PCR hearing, trial counsel admitted that he should have objected to the solicitor's improper argument. App. 398, l. 23 – 400, l. 2. The PCR court held trial counsel acted within reasonable professional norms and that petitioner could show no prejudice. App. 410.

The PCR court erred. Trial counsel's failure to object to the solicitor's improper argument prejudiced petitioner and requires reversal of his conviction. Strickland v. Washington, 466 U.S. 668 (1984). A solicitor's argument is bound by rules of fairness and may not be calculated to arouse a juror's passions or prejudice. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The argument here violated the prohibition against arguments which invite jurors to place themselves in

the shoes of the victims or of a party. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, “Let him go, let him come back to Williamsburg County. Let him come in your wife’s bedroom or your mother or daughters, any of them, what would you do?” Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to “completely destroy and nullify all sense of impartiality in a case of this kind.” Id. at 506, 144 S.E.2d at 482.

The solicitor’s argument here about “our” communities and the state where “we live” violated this prohibition against asking the jurors to speak for the community. See also Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). The argument asked the jurors to take a side against criminals in general, portrayed the solicitor as speaking for the community, and was not confined to the facts of the case.

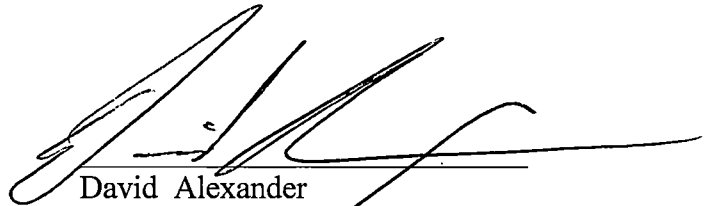
The solicitor’s argument about “right and wrong” improperly lessened the State’s burden of proof. U.S. Const. amends. V, XIV. In re Winship, 397 U.S. 358 (1970). The issue was not right or wrong, but whether the State met its burden of proof beyond a reasonable doubt. See State v. Aleksy, 343 S.C. 20, 538 S.E.2d 248 (2000) (holding instructing the jury to “seek the truth” is improper because it lessens the State’s burden of proof). The argument about right and wrong combined with the argument concerning “our” community is similar to the improper argument in State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). In Daniels, the Court held it was error for the trial judge to tell the jury their verdict “would represent ‘truth and justice for all parties.’” Daniels at 255, 737 S.E.2d at 475.

Trial counsel’s failure to object given the clear state of the law proscribing such improper arguments was deficient performance under Strickland. Trial counsel admitted he should have objected. This case was close and no overwhelming evidence of guilt exists. The improper

argument prejudiced petitioner. This Court should grant certiorari and reverse petitioner's conviction.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse petitioner's conviction, and grant him a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends to the right of the line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 2018.

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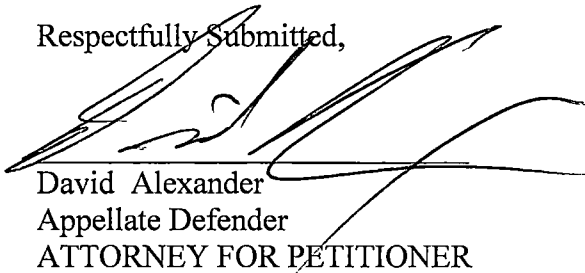
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Henry James Ross states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge G. Thomas Cooper, which was held on July 20, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Henry James Ross.

Respectfully Submitted,

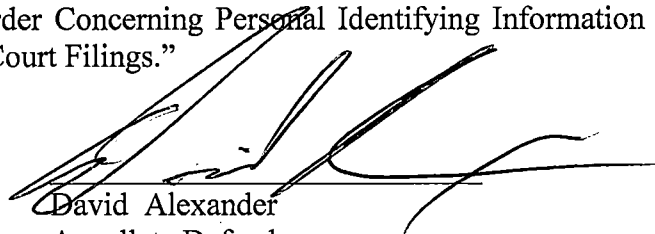


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 8th day of February, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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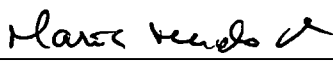
CERTIFICATE OF SERVICE

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 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 on Henry James Ross, #306790, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of February, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of February, 2018.

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