

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

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FRANKIE LEE MCGEE,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002146

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

**ORIGINAL**

**RECEIVED**

MAY 15 2019

PETITIONER

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where trial counsel failed to object to the assistant solicitor's improper remark during closing argument, where the solicitor argued that Petitioner wielded the murder weapon, a steel rod, like a baseball bat?

## STATEMENT

Petitioner was indicted by a Richland County grand jury for burglary in the first degree and murder in April 2010. App. 1607 – 1610. He proceeded to trial before the Honorable Clifton Newman and a jury on August 1, 2011. Luck Campbell, Dolly Garfield, and Nicole Simpson appeared on behalf of the state, and Petitioner was represented by Doug Strickler, Fielding Pringle, and Jennifer Davis. After deliberating for ten minutes, the jury found Petitioner guilty as indicted.<sup>1</sup> App. 1308 ll. 13 – 14. Judge Newman sentenced Petitioner to thirty years on the burglary charge and handed down a life sentence on the murder charge. App. 1318 ll. 3 – 5.

Appellate Defender Katherine Hudgins represented Petitioner on appeal. App. 1320. Petitioner's convictions were affirmed. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014). A Petitioner for Rehearing was filed on May 15, 2014. App. 1400 – 1403. The Court of Appeals denied the petition on June 19, 2014. App. 1404. A Petition for Writ of Certiorari to the Court of Appeals was filed on July 18, 2014. App. 1405 – 1419. The state filed a Return on August 13, 2014. App. 1420 – 1445. This Court issued an order denying the petition on December 4, 2014. App. 1446.

Petitioner filed an application for post-conviction relief on May 18, 2014. It contained multiple allegations of ineffective assistance of counsel, including claims that his trial attorneys failed to object to various remarks by witnesses and assistant solicitors. App. 1447 – 1455. Because his direct appeal was still pending, the state filed a Return and Motion to Dismiss Without Prejudice. App. 1456 – 1457. An Order of Dismissal Without Prejudice was filed on June 11, 2014.

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<sup>1</sup> According to the trial transcript, “the reading of the verdict and polling of the jury was not on [the] audio recording.” App. 1308 ll. 13 – 14.

A second and timely application for post-conviction relief was filed on January 13, 2015. App. 1461. This one likewise contained many allegations of ineffective assistance of counsel directed at his trial attorneys and appellate attorney alike. App. 1461 – 1487. The state made its Return on or about June 11, 2015. App. 1488 – 1493. PCR counsel filed an Amended Application for Post Conviction Relief on November 2, 2015. App. 1494 – 1495.

An evidentiary hearing took place before the Honorable Paul Burch on August 30, 2017. Anna Browder represented Petitioner, and Jessica Kinard appeared on behalf of the state. App. 1497. Petitioner, Doug Strickler, Fielding Pringle, and Katherine Hudgins testified at the hearing. By way of a forty-four page Order of Dismissal, the PCR court denied relief. App. 1563 – 1606.

This appeal follows.

## ARGUMENT

**The PCR court erred in denying relief, where trial counsel failed to object to the assistant solicitor's improper remark during closing argument, where the solicitor argued that Petitioner wielded the murder weapon, a steel rod, like a baseball bat.**

### Relevant facts

Temika Ashford was at the home of Reverend Tryon Eichelberger on the evening of May 3, 2009. App. 870 l. 6 – App. 873 l. 25. The two had met two or three years ago. He had previously helped Ashford with some of her bills. She got to his house around 11:00 pm. Id. While sitting in the living room, a noise was heard, and Reverend Eichelberger went to check on it. App. 874 l. 1 – App. 875 l. 25. He left the room and encountered an unknown person. Id. Ashford heard a commotion, then yelling, and then she ran and got into her car. Id. She drove away and attempted to call Reverend Eichelberger. App. 876 l. 14 – App. 877 l. 3. After circling back near the house in her car, she saw a person but did “[n]ot get a good look.” App. 878 ll. 3 – 20. She described a husky man “with a big belly” and a receding hairline wearing a white t-shirt. App. 878 l. 24 – App. 879 l. 10. She indicated that this man was wearing white gloves and holding a long object. Id.

While waiting for the police to arrive after she called 911, Ashford noticed a man who she believed was the same person she observed on Reverend Eichelberger's porch walking down the street. App. 73 ll. 1 – 18. Law enforcement apprehended a man matching Ashford's description, David Williams. App. 831 l. 16 – App. 833 l. 24. Ashford identified Williams as the man who she saw on Reverend Eichelberger's porch. App. 928 l. 7 – App. 929 l. 12. Williams was later eliminated as a suspect. App. 1017 ll. 15-18. Reverend Eichelberger died in July 2009 as a result of the injuries he sustained on May 3, 2009. App. 989 ll. 15 – 23.

Because law enforcement was having a difficult time locating suspects, three officers interrogated and secretly recorded Petitioner for over an hour while slamming their hands on the table and cursing him. App. 109 l. 19 – App. 117 l. 1; App. 119 ll. 1 – 20; App. 126 l. 23 – App. 130 l. 24. Arthur Thomas, one of the City of Columbia officers, admitted that “[c]ursing at the subject who is being interrogated or interviewed is normal in the course of an interview for the Columbia Police Department” and that it takes place when he is the one asking questions.<sup>2</sup> App. 127 ll. 2 – 13. During the course of the interrogation, Thomas cursed at Petitioner: “I’ve got an ass of people in Columbia that I could choose from where I wouldn’t have to ride the fuck out to Wateree to interview you.” App. 129 ll. 7 – 10.

Thomas was frustrated because of the inability of witnesses to make an identification. Larry Harp, one of the decedent’s neighbors, was unable to identify Petitioner from a photographic lineup approximately three months after the assault. App. 202 l. 3 – App. 203 l. 6. In March 2010, approximately ten months after the assault, law enforcement contacted Harp again. App. 203 l. 7 – 206 l. 20. At that time, Harp allegedly identified Petitioner. Id. However, Harp had only seen Petitioner in the afternoon, not during the evening time when the decedent was assaulted. App. 210 l. 23 – App. 211 l. 10. Further, Harp vacillated during the March 2010 identification, going back and forth between two different photographs of different men. App. 220 ll. 6 – 25. Similarly, Ashford was shown a total of six different lineups but never positively identified Petitioner. App. 229 ll. 4 – 23.

Petitioner was arrested on March 17, 2010, almost a year after the assault occurred. App. 1502 ll. 10 – 17. He was incarcerated from the time he was arrested until the trial began. App.

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<sup>2</sup> Thomas indicated that “an interrogation is using different tactics and so forth to get information from an individual” and “an interview is ... asking questions and getting a response from an individual.” App. 127 l. 14 – App. 128 l. 1.

1503 ll. 3 – 5. He met with two members of his defense team, Mr. Strickler and Ms. Pringle, at the jail on multiple occasions. App. 1503 ll. 9 – 12. At the evidentiary hearing in his case, he offered testimony regarding his allegations of ineffective assistance of counsel, including the claim that counsel failed to object during the state’s closing argument.

### Discussion

Petitioner asserted that his trial attorneys “allowed the prosecutor to stand up in front of the jury and take the metal bar and [hold] it up,” even though he was never identified as being in the neighborhood or at the decedent’s house on the night of the assault. Petitioner correctly characterized the solicitor’s remarks and accompanying actions as prejudicial and therefore objectionable:

She took the metal bar and stood up in front of the jury and said, “Jury, the defendant sitting there, Frankie McGee, you cannot let him get away with this murder. He took this metal bar. He went down there to that man[’s] house. He broke in that door, and he struck that man with that metal bar like he was playing baseball, jury. You cannot let him get away with this. You need to find him guilty. And he committed the crime, jury.”

And they believed the prosecutor because she’s a[n] officer of the Court. And that was wrong.

App. 1524 ll. 9 – 18.

### Discussion

In supporting any allegations of ineffective assistance of counsel, a PCR applicant must satisfy a two-prong test. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the applicant must demonstrate that trial counsel’s performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). “Under this prong, ‘the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” Id. (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052) (internal

alteration marks omitted); see also Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001) (stating that the applicant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness).

Second, the applicant must demonstrate that trial counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. 2052). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

The appropriateness of a solicitor's closing argument is a matter left to the trial court's sound discretion. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). An appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion. State v. Penland, 275 S.C. 537, 539, 273 S.E.2d 765, 766 (1981). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial [court]'s instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003).

The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 169, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "In applying the harmless error rule, the court must be able to declare the error had little,

if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.” State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct. App. 1996).

“A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors.” Rudd, 355 S.C. at 548, 586 S.E.2d at 156. “Further, the argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.” Id. at 549, 586 S.E.2d at 156.

During closing arguments, the assistant solicitor likened the use of a winch bar to a baseball bat, thus preying on the jury's emotions. App. 1227 ll. 1 – 7. At the evidentiary hearing, Mr. Strickler did not recall the state's use of the baseball bat analogy but suggested that it would not surprise him to learn that the assistant solicitor had done so. App. 1542 ll. 2 – 14. The visual of Petitioner supposedly attacking the decedent with a metal bar and swinging it like a baseball bat invited an improper response from the jury. Defense counsel should have objected, and the failure to do so prejudiced Petitioner.

**CONCLUSION**

Based on the foregoing, Petitioner respectfully requests that this Court grant certiorari to allow full briefing on the issue.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Honorable Paul M. Burch, Circuit Court Judge

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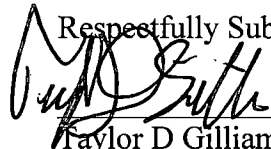
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PETITION TO BE RELIEVED AS COUNSEL  
—————

Counsel for Frankie Lee McGee 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 post-conviction relief hearing before Judge Paul M. Burch, which was held on August 30, 2017, 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 Frankie Lee McGee.

Respectfully Submitted,



—————  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 15th day of May, 2019.

**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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ATTORNEY FOR PETITIONER

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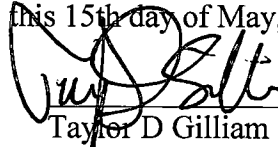
V.

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 Lindsey McCallister, 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 Frankie Lee McGee, #241658, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of May, 2019.



—————  
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 15th day of May, 2019.

Mary Allaire (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 12, 2027.