

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

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TRAVIS HAIR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000865

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Joanna K. Delany  
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South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether the PCR court erred where it found counsel provided effective assistance where counsel did not object to a comment by the solicitor in closing argument that improperly appealed to the emotions of the jurors, and where the comment infected the trial with unfairness and deprived petitioner of due process of law?

## STATEMENT

On December 16, 2013, a Hampton County Grand Jury indicted petitioner for the offense of first degree burglary. App. 481 – 482. Petitioner was tried jointly with a codefendant, Tonya McAlhaney (McAlhaney), before the Honorable Brooks Goldsmith and a jury, from February 3 – 4, 2014. App. 1; App. 83. Petitioner was represented by Stephanie Smart-Gittings. App. 2. McAlhaney was represented by Steve Plexico. App. 2. The state was represented by Kelvin Wright. App. 2.

The state alleged petitioner was intoxicated on November 23, 2013, when he went into a house on Plywood Street in Hampton with McAlhaney and Ricky Sauls (Sauls). App. 192, ll. 1-9; App. 231, ll. 2-5; App. 234, ll. 18-22. The prior owner of the house had passed away, and there was conflicting evidence as to whether the house was a dwelling—there was testimony the house was being slept in several times a week; there was testimony that no one lived there. App. 152, ll. 3-23; App. 159, l. 13 – 160, l. 10; App. 229, ll. 19-21.

After he entered the house, petitioner immediately fell asleep and when he awoke, he left.<sup>1</sup> App. 198, l. 13 – 199, l. 12. The next day, police officers responding to a burglary report found McAlhaney again in the house on Plywood Street. App. 131, ll. 21-22; App. 132, ll. 17-20. McAlhaney did not have permission to be there, and she had a stolen item (prescription cough syrup) in her blouse. App. 254, ll. 4-10.

Officers then searched McAlhaney’s house, where they found petitioner and Sauls, who was McAlhaney’s boyfriend. App. 254, l. 11 – 255, l. 9; App. 190, ll. 8-12. Sauls showed police officers items he had stolen from the house on Plywood Street, including liquor and knives. App.

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<sup>1</sup> Sauls said plainly that petitioner did nothing more than sleep when he entered the house. App. 198, l. 13 – 199, l. 12. Nevertheless, Sauls, who said he had been drinking liquor and “King Cobras” that night, alternatively claimed that petitioner “was in there plundering.” App. 206, ll. 9-11; App. 234, ll. 18-25.

193, ll. 5-6; App. 256, ll. 4-8. Other items that had been stolen from the house on Plywood Street, including jewelry and pills, were found behind McAlhaney's house. App. 255, l. 21 – 256, l. 1.

Neither petitioner nor McAlhaney testified at their joint trial. However, Sauls testified the three went into the house after McAlhaney was encouraged to do so by one Larry Crosby (Crosby). App. 190, l. 23 – 192, l. 3. Sauls claimed that Crosby encouraged McAlhaney to go in the house and look for pills because Crosby was a drug addict. App. 200, ll. 11-19.

In closing argument, petitioner's defense counsel posited the state had not met its burden of proof that the house was a dwelling. App. 316, l. 16 – 317, l. 7. In the same vein, the trial judge charged the jury on the lesser offense of second degree burglary. App. 336, l. 22 – 337, l. 4. In closing argument, the solicitor improperly appealed to the passions and prejudices of the jury when it told the jurors to

make a decision and decide **do you want people in the community to go in people's houses at night time and then get charged with a lesser charge**, or do you want them to be found guilty of what the statute says they did, go into a house without consent and at night time with the intent to commit a crime therein.

App. 306, l. 25 – 307, l. 6 (emphasis added). Defense counsel did not object.

Petitioner was convicted as indicted and he was sentenced to fifteen years incarceration. App. 483; App. 367, ll. 8-10. After his conviction was affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR). App. 404 – 413; 421 - 422. On October 13, 2017, a hearing was held on the matter before the Honorable Thomas A. Russo. App. 423. James Falk represented petitioner and Ruston Neely represented the state. App. 424.

Petitioner's defense counsel testified and claimed that she did not object to the above-cited comment by the solicitor because she did not believe the comment was improper. App. 447, ll. 20-23.

On May 2, 2019, the PCR court issued an order of dismissal in which it addressed counsel's failure to object to the solicitor's comment in closing argument that the jury should "decide do you want people in the community to go in people's houses at night time and then get charged with a lesser charge . . ." App. 477. The order stated that the PCR court found petitioner "failed to prove [c]ounsel was deficient for failing to object to a statement that was not objectionable." App. 477. "This [c]ourt also finds [petitioner] failed to prove he was prejudiced by [c]ounsel's failure to object to the solicitor's closing argument such that there was a reasonable probability the result of the trial would have been different had she made the objection." App. 477 – 478.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred where it found counsel provided effective assistance where counsel did not object to a comment by the solicitor in closing argument that improperly appealed to the emotions of the jurors, and where the comment infected the trial with unfairness and deprived petitioner of due process of law.

The solicitor's argument to the jury implied that if the jurors found petitioner guilty of the lesser offense of second degree burglary then they would invite crime into their community. This was an improper appeal to the passions and prejudices of the jury, and counsel should have objected.

A solicitor's closing argument must not be calculated to arouse the jurors' passions or prejudices. *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not 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, 324, 468 S.E.2d 620, 624 (1996). Solicitors must "confine their comments to the facts presented and reasonable inferences from such facts." *Id.* at 326, 468 S.E.2d at 625. *See Tappeiner v. State*, 416 S.C. 239, 252, 785 S.E.2d 478 (2016) (solicitor's remarks regarding whether the jurors would want accused babysitting their children improperly appealed to the jurors' emotions, rather than the evidence in the record).

Counsel should have objected to the solicitor's comment in closing argument. The solicitor told the jury it should consider: "do you want people in the community to go in people's houses at night time and then get charged with a lesser charge . . ." App. 306, 1. 25 – 307, 1. 2. This comment was an improper appeal to the jurors' emotions, since the solicitor focused the

jury not on whether the state had proven the elements of first degree burglary, but on overall community safety. Counsel's failure to object to the solicitor's inherently prejudicial argument was ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees an accused 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. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced him. *Id.* at 687.

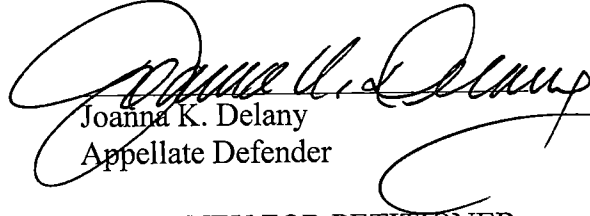
"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. 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.* at 338, 503 S.E.2d at 166-67 (internal citations omitted). *Accord State v. Day*, 341 S.C. 410, 424, 535 S.E.2d 431, 438 (2000); *State v. Hawkins*, 292 S.C. 418, 422, 357 S.E.2d 10, 13 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *Fortune v. State*, Op. No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019) (Davis Adv. Sh. No. 47 at 16).

Here, the evidence against petitioner was not overwhelming. There was conflicting evidence as to whether the house was a dwelling or merely a structure. There was also evidence that petitioner did not take anything from the house and instead simply fell asleep. Because

counsel did not object, no curative instruction was given. Counsel's error here deprived petitioner of his right to due process given that the solicitor's comment improperly infected the trial with unfairness when he urged the jury, in essence, to consider community safety rather than the state's burden of proof in determining its verdict. *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166; *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

**CONCLUSION**

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing of this issue.

A handwritten signature in black ink, appearing to read 'Joanna K. Delany', is written over the typed name and title.

Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of January, 2020.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

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TRAVIS HAIR,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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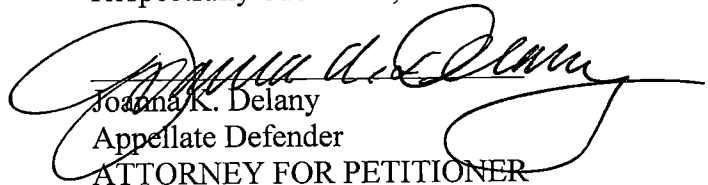
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Travis Hair 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 post-conviction relief hearing before Judge Thomas A. Russo, which was held on October 13, 2017, 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 Travis Hair.

Respectfully Submitted,

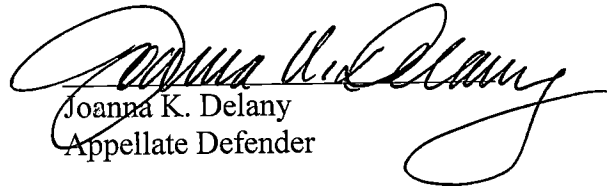


Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 24th day of January, 2020.

**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."

  
Joanna K. Delany  
Appellate Defender

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

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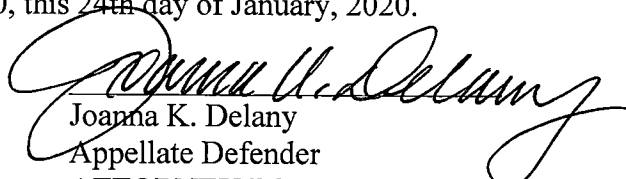
RESPONDENT

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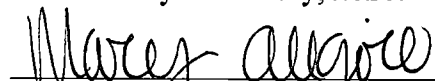
CERTIFICATE OF SERVICE

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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 Benjamin Limbaugh, 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 Travis Hair, #283042, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 24th day of January, 2020.

  
Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24th day of January, 2020.

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