STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

JABRIEL L. SINGLETON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001496

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to object to the state's closing argument where the solicitor argued Petitioner executed the decedent, shot the other occupant of the car and left him to die, and then "actually tried to come back multiple times, the State submits, to make sure that he finished the job but he was unsuccessful" since there was no evidence presented to support this theory, and where this improper argument unfairly prejudiced Petitioner?

STATEMENT OF THE CASE

The state claimed at trial that this was a case of "coldblooded" and premeditated murder. App. 1103, ll. 12-13; App. 1109, ll. 8-24. The evidence showed little, if any, planning. The state's theory was that Petitioner, who was alone, concocted a plan to rob Deshawn Jones and Jonathan Frazier (nicknamed "King Breeze" and "Crash" respectively) in Jones's car, in the driveway of someone he did not know, located in a remote part of Richland County, in broad daylight, without any escape plan other than running through the woods. App. 1102, l. 23 – 1131, l. 7.

Petitioner testified that he acted in self-defense. He asserted that Jones and Frazier wanted to purchase marijuana from him, drove him to this remote location, and then tried to rob him inside the car. App. 996, l. 15 – 1010, l. 24. Petitioner was seated in the backseat. App. 1007, ll. 10-21. Fearing for his life because he had earlier seen Jones with a gun, Petitioner pulled his own pistol and fired into the front seats until it was empty. App. 1012, l. 6 – 1015, l. 15. Petitioner got out of the car through the back driver's side door. App. 1015, ll. 16-18. Jones and Frazier were still in the front seat of the car and Petitioner feared they would attempt another attack. App. 1015, l. 16 – 1016, l. 5. Petitioner dumped the shell casings out of his gun and reloaded. App. 1015, l. 19 – 1016, l. 19. He saw Frazier reaching under the driver's seat where he believed their gun was located. App. 1016, ll. 11-19. Petitioner's leg was stuck in the car and by the time he freed it, Frazier had a gun and was out of the car coming toward him. App. 1017, ll. 3-16. Petitioner fired. App. 1017, ll. 3-16. Frazier fell to the ground. App. 1017, ll. 3-16. Petitioner ran into the woods. App. 1017, ll. 3-16. He dropped his gun, but did not stop to grab it. He just ran. App. 1017, ll. 3-16.

Even though Frazier was shot in the neck and hand, bleeding, and having difficulty breathing, he walked past several houses where he could have asked for help in favor of a route to a more distant house, which took him by a heavily wooded area. App. 243, ll. 2-23; App. 193, 18 – 194, l. 1. Frazier claimed no one other than Petitioner had a gun. App. 244, ll. 18-20. No gun was ever found in the case. App. 777, ll. 5-7. Law enforcement used a dog to search for a gun, but only searched near the house where Frazier asked the owner to call 911. App. 402, l. 1 – 404, l. 17. The police did not take the dog near the crime scene. App. 404, ll. 15-17.

Jones died at the scene. App. 193, ll. 4-17; App. 194, ll. 9-17. Law enforcement found him in the car behind the steering wheel unresponsive. App. 193, ll. 4-17. Frazier survived his injuries and testified at trial. Frazier stated he and Jones wanted to buy "a couple of ounces of weed and an X-box" from Petitioner. App. 226, ll. 6-23. After hanging out with Petitioner and others at a recording studio, they drove to meet Petitioner at his girlfriend's house. App. 223, l. 15 – 227, l. 21. Jones drove Frazier, Petitioner, Petitioner's girlfriend, and another woman to Zaxby's. App. 229, l. 15 – 230, l. 9. He dropped the two women off at Zaxby's. App. 230, ll. 2-7. Petitioner was in the backseat. App. 230, ll. 8 -9.

Frazier claimed Petitioner directed them out into the country to Hopkins. App. 230, l. 23 – 231, l. 17. They sat in the car. App. 235, ll. 8-25. Even though the state claimed this was a coldblooded case of premeditated murder, and Petitioner was in the backseat and could have simply shot both Jones and Frazier in the head from behind, Frazier testified Petitioner got out of the car and offered to let Frazier shoot his gun. App. 235, l. 24 – 236, l. 11. The three men laughed that Frazier was "a punk" because he was scared to shoot Petitioner's gun. App. 235, l. 24 – 236, l. 6. Frazier claimed that "a few seconds later I just heard shots." App. 236, ll. 5-6.

According to Frazier, Petitioner fired into the car through the front passenger's side window. App. 236, l. 9 – 237, l. 15. Frazier's "window was kind of down." App. 236, ll. 16-18. Petitioner fired multiple shots through this window, hitting Jones and Frazier and shattering the front driver's side window. App. 237, ll. 1-10; App 422, ll. 13-22. Somehow, the window on the passenger side closest to where Petitioner was supposedly firing suffered no damage. App. 422, ll. 13-22. Moreover, there were no bullet holes on the outside of the vehicle. App. 366, ll. 16-20.

Frazier blacked out, but remembered Jones throwing cash at Petitioner during the shooting. App. 238, ll. 14-24. Frazier loss consciousness again. App. 239, ll. 2-4. When Crash regained consciousness, he saw Petitioner on the driver's side reloading. App. 239, ll. 7-12. Frazier "rushed him." App. 239, ll. 7-12. After a tussle, Petitioner pointed the gun at Frazier and backed him into the car. App. 240, ll. 1-20. Petitioner demanded Frazier's phone. App. 240, l. 21 – 241, l. 8. After Frazier gave Petitioner the phone, Petitioner fired two more times with one of the shots hitting Frazier's hand. Frazier passed out again. App. 241, l. 24 – 242, l. 11. When Frazier awoke, Jones was dead and Petitioner was gone. App. 242, l. 12 – 243, l. 13.

While the state claimed the forensic evidence overwhelmingly supported Frazier's version of events, the forensic evidence was far from conclusive. Gunshot residue was found on Jones and on multiple places inside of the car. App. 651, l. 20 – 655, l. 18. The state's gunshot residue expert admitted that if a gun were fired inside of the vehicle, some residue could escape through the windows, "otherwise, it's contained in them – I mean, it's like shooting a gun inside the box. Everything is going to be inside the box." App. 659, ll. 17-24. When asked on cross-examination whether gunshot residue would be found inside a car if someone was standing outside of the vehicle shooting, the state's expert equivocated, "It can be; but depending on how

far away and the position of the gun and all of that other stuff, it can be." App. 659, l. 25 – 660, l. 5.

One of the gunshot wounds to Jones's head had stippling, which indicated the gun was fired at very close range. App. 722, l. 16 – 723, l. 8. This wound went from left to right and downwards, which would be consistent with a shot from the back seat, although the state argued this showed Petitioner had executed Jones after he reloaded on the driver's side. App. 724, ll. 1-7; App. 1103, ll. 12-22. Jones's other gunshot wounds had a right-to-left trajectory. App. 724, l. 13 – 731, l. 25. The pathologist claimed these wounds would be consistent with someone twisting to shield him or herself. However, it also seems consistent with someone twisting away from the backseat to retrieve a firearm. App. 729, l. 24 – 730, l. 5; App. 730, ll. 16-24. The pathologist admitted he had no way of knowing whether someone was turned or in which position the individual was sitting from analyzing these wounds. App. 759, ll. 21-25. Fired shell casings were recovered from the driver's side of the vehicle, which would be consistent with both Petitioner's and Frazier's version of events. App. 320, ll. 4-6.

During the state's closing argument, the assistant solicitor argued that after Petitioner executed Jones and shot Frazier leaving him in the car to die, Petitioner "actually tried to come back multiple times, the State submits, to make sure that he finished the job but he was unsuccessful." App. 1106, ll. 3-15. Trial counsel did not object to this argument despite the fact that there was no evidence to support this theory.

A Richland County Grand Jury indicted Petitioner on July 18, 2012 for murder and attempted murder. App. 1266-1269. His case was called to trial on March 4, 2013 before the Honorable R. Knox McMahon, and a jury. App. 1. Assistant Solicitors Kathryn Cavanaugh, Nicole Simpson, and John Steadman represented the state. App. 1. Tivis Sutherland represented

Petitioner. App. 1. On March 8, 2013, the jury found Petitioner guilty as indicted. App. 1158, ll. 4-12. He was sentenced to life without parole for murder and thirty years for attempted murder. App. 1173, ll. 14-21.

The Court of Appeals dismissed Petitioner's direct appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). App. 1193-1194.

On March 25, 2016, Petitioner filed an application for post-conviction relief. App. 1195-1200. The state filed a return to this application dated June 30, 2017. App. 1201-1206. An evidentiary hearing was convened on December 11, 2017 before the Honorable Clifton Newman. App. 1207. Assistant Attorney General Jessica Kinard represented the state, and Jonathan Waller represented Petitioner. App. 1207.

Tivis Sutherland, Petitioner's trial counsel, testified at the evidentiary hearing that there was no evidence to support the assistant solicitor's argument in closing that Petitioner left after shooting Jones and Frazier and came back to "finish off" Frazier. Sutherland admitted he had no trial strategy for failure to object and should have objected to "facts not in evidence." App. 1236, l. 17 – 1237, l. 15.

By order filed August 28, 2019, the PCR judge denied Petitioner relief. App. 1252-1265. The judge found Petitioner failed to prove counsel was deficient or that he was prejudiced by counsel's alleged deficiency. The judge concluded the assistant solicitor's comments during closing argument "reflect a reasonable inference from the evidence presented at trial" and did not constitute "an improper argument." App. 1260. He emphasized that Frazier testified he and Jones were both shot before Frazier lost consciousness and that when Frazier regained consciousness, he struggled with Petitioner, who ultimately shot Frazier again. After Frazier managed to make it to a neighbor's house, Petitioner appeared again in close proximity and Frazier feared Petitioner would "going to

get him." App. 1260-1261. Moreover, the judge cited physical evidence that showed Jones was "shot at close range in a trajectory going the opposite direction from the other shots." App. 1260-1261.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel where violated when trial counsel failed to object to the state's improper closing argument, this appeal follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to object to the state's closing argument where the solicitor argued Petitioner executed the decedent, shot the other occupant of the car and left him to die, and then "actually tried to come back multiple times, the State submits, to make sure that he finished the job but he was unsuccessful" since there was no evidence presented to support this theory, and where this improper argument unfairly prejudiced Petitioner.

Petitioner's Sixth and Fourteenth Amendments rights to the effective assistance of counsel were violated when trial counsel failed to object to the assistant solicitor's improper closing argument in which she claimed Petitioner "tried to come back multiple times . . . to make sure he finished the job" since there was no evidence presented during trial that Petitioner ever returned to the car to ensure Frazier was dead. This improper argument was unfairly prejudicial to Petitioner because the state used this theory to claim Petitioner acted with malice when he shot Jones and Frazier as opposed to in self-defense as Petitioner testified.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and 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).

"In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (quoting Vaughn v. State, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004)) (internal quotation marks omitted); See Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) ("To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial."). "[S]olicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom." Id. at 250, 785 S.E.2d at 477 (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). "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)).

Trial counsel was ineffective for failing to object to the assistant solicitor's improper closing argument in which she claimed Petitioner "tried to come back multiple times . . . to make sure he finished the job" since there was no evidence presented during trial that Petitioner ever returned to the car to ensure Frazier was dead or attempted to look for him after the shooting ended. While the neighbor who ultimately called 911 claimed she saw a man wearing all black running by

her house, this testimony alone does not support the solicitor's assertion that Petitioner had returned "multiple times" to "make sure he finished the job." The solicitor's argument was merely used to arouse the jurors' passions or prejudices.

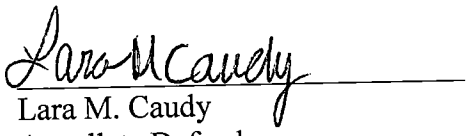
Petitioner was prejudiced by counsel's deficient performance because this improper argument was extremely prejudicial. The state used the argument to claim Petitioner acted with malice when he shot Jones and Frazier as opposed to in self-defense as Petitioner testified.

Respectfully, this Court should grant certiorari and ultimately reverse Petitioner's convictions and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. He ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jabriel L. Singleton 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 record of Petitioner's post-conviction relief hearing, which was held on December 11, 2017 before the Honorable Clifton Newman, 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 Jabriel L. Singleton.

Respectfully Submitted,

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 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."

Lara M. Caudy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have 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 upon Jabriel L. Singleton, #331891, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 21st day of February, 2020.

Lara M Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2020.

Lindsey M. Matthews

Notary Public for South Carolina
My Commission Expires: October 22, 2024.