

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Marion County

Honorable D. Craig Brown, Circuit Court Judge

LINDELL DAVIS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001568

JOHNSON PETITION FOR WRIT OF CERTIORARI

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May 21 2021

S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err in finding trial counsel was not ineffective where counsel failed to object to the state's impermissible comments during closing resulting in the denial of petitioner's right to a fair trial?

STATEMENT

On November 6, 2014, a Marion County grand jury indicted petitioner for criminal solicitation of a minor and criminal sexual conduct (CSC) with a minor, second degree. App. 269. Petitioner's case was called to trial on November 16, 2015, before the Honorable William H. Seals Jr., and a jury. App. 1. Hank Anderson represented petitioner, and David Richardson, assistant solicitor, and Lauren Hummel, assistant solicitor, represented the state. App. 1.

On November 17, 2015, the jury found petitioner guilty of CSC with a minor, second degree and criminal solicitation of a minor. App. 183. Judge Seals sentenced petitioner to concurrent terms of fifteen years' imprisonment for CSC with a minor, second degree and eight years' imprisonment for criminal solicitation of a minor.

Appellate counsel, Robert Dudek, filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). On December 6, 2017, the Court of Appeals dismissed the appeal. *State v. Davis*, Op. No. 2017-UP-450 (S.C. Ct. App. filed December 6, 2017).

Thereafter, petitioner filed an application for PCR on June 18, 2018. App. 187-93. An evidentiary hearing was held before the Honorable D. Craig Brown on December 19, 2019. App. 210. Jonathan Waller represented petitioner, and Samuel Key, assistant attorney general, represented the state. App. 210.

On October 19, 2020, Judge Brown signed an order denying PCR. App. 245-67. The court found that the state's comments during closing were not impermissible and counsel was not deficient for failing to object. The court also found petitioner failed to show how the state's comments during closing resulted in him receiving an unfair trial. App. 263-66.

This petition for a writ of certiorari follows.

ARGUMENT

The PCR court erred in finding trial counsel was not ineffective where counsel failed to object to impermissible comments made by the state during closing arguments which resulted in the denial of petitioner's right to a fair trial.

Relevant facts

At trial, the state alleged Christal Saldierna caught petitioner having sex with her fifteen-year-old niece (minor). Petitioner and Saldierna were friends, and petitioner often came to Saldierna's home to use the gym equipment in her detached garage (Shed). App. 86, ll. 4-20. On the evening of May 31, 2014, petitioner was in Saldierna's shed working out. When petitioner finished, he sent a text to minor to come and lock up the shed. Minor testified at trial that while she was in the shed petitioner removed her pants and they had sex. App. 63-66. Saldierna testified that she went to check on minor because it was getting late and when Saldierna entered the shed, she saw minor laying on the weight bench with petitioner straddling her. Saldierna admitted at trial that she did not see any penetration. App. 87-89.

Petitioner chose not to testify or put up a defense at trial. Instead, petitioner relied on the state's lack of physical evidence that there was penetrative sex. App. 150-51; 172.

During closing the solicitor made the following remark without objection from trial counsel:

And the reason that stuff is brought out is to cause you to have some doubt that Aunt Christal didn't really see what she thought she saw. And that [minor] didn't really feel what she knows she felt because that's the case sitting right over there. **They are the witnesses. They are eyewitnesses. They were there when it happened. The only other person that was there is [petitioner]. So these folks sitting over here are the only ones who could tell you what happened in that shed.**

App. 152, ll. 1-10.

Later in the closing the solicitor said:

This is the process folks. This process that we're going through right now is how people are held accountable of their actions in our society. We got the [sic] system on the planet designed to give people a fair shot ... **[a]nd we have to do what the law says we got to do and we got to hold [petitioner] accountable for what they did no matter how tough it is . . . we can't be letting fifty [] year old men who are having sex with fifteen year olds [sic] just walk away from it like it didn't happen.**

App. 157, ll. 6-16.

The solicitor also stated:

The defendant is in a position to coerce and is in a [familial] ... or custodial or has official authority over the child or big emphasis here or the defendant is older than the victim. He's fifty-four, she's fifteen we got that all day long. Therefore, we don't have to have this other one but arguably we do. **You know, he was a friend of the family, a much older adult . . . arguably he's in a position of authority over a child who stays at the house a lot of the time.**

App. 160, ll. 2-12.

At the PCR hearing trial, counsel testified that, at the time, he did not believe any of the solicitor's comments during closing were objectionable. Trial counsel admitted his failure to object was not a strategic decision. App. 234-36. He conceded that "technically [he] could have objected" to at least one of the comments made during closing but stated "it's got to be pretty egregious" for him to object during closing because he does not think attorneys should object during closing statements. App. 240-41.

Discussion

To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been

different. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Simmons v. State*, 308 S.C. 481, 419 S.E.2d 225 (1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

To find whether the solicitor's comments in closing argument violated the petitioner's due process rights, the Court 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. *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37, (2019). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.* 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.*; see also *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998); *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

The PCR court erred in finding that the state's comments during closing were permissible and that counsel was not deficient for failing to object. The first and most troubling instance was where the solicitor impermissibly commented on petitioner's right to remain silent by pointing out that, other than Saldierna and minor who both testified, petitioner was the only other person who could tell the jury what happened that evening. That comment highlighted to the jury that petitioner did not tell his side of the story and invited it to draw the conclusion that petitioner was guilty because he chose not to testify. See *Griffin v. California*, 380 U.S. 609 (1965) (the state may not directly or indirectly refer to or comment on a defendant's exercise of a constitutional right, namely his right to remain silent).

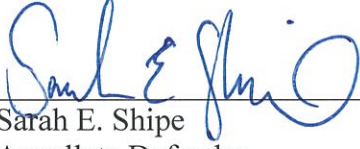
Later in the state's closing, the solicitor improperly suggested to the jury his personal opinion that the petitioner was guilty by using "we," and argued facts that were not in evidence

by suggesting that petitioner was in a position of power over minor. *Berger v. United States*, 295 U.S. 78 (1935) (closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice); *State v. New*, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999) (closing argument should remain within the record evidence and the reasonable inferences therefrom). Petitioner was a friend of Saldierna and, while he frequently came over to work out, there was no evidence presented at trial that he was ever involved in minor's life to the extent where he had any authority over her. Petitioner had the right to a fair trial, and the solicitor's impermissible comments to the jury, without any objection from trial counsel, violated that right.

The PCR court erred in finding petitioner failed to show prejudice where the solicitor's comments to the jury so infected the trial with unfairness as to make the resulting conviction a denial of due process.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2021.

STATE OF SOUTH CAROLINA

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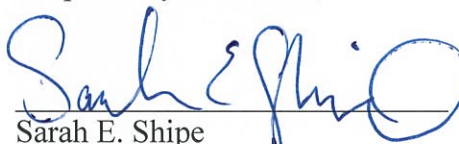
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Lindell Davis 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 D. Craig Brown, which was held on December 19, 2019, 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 Lindell Davis.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2021.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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."


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