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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

RICHARD E. TEDFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001957

PETITION FOR WRIT OF CERTIORARI

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel provided effective representation in petitioner's burglary trial where counsel failed to object to the solicitor's closing argument that petitioner wanted to rape the complainant, where this was not a reasonable inference as the argument was based solely on the fact that the complainant was nude but there was no showing the intruder knew she was nude, since this allowed impermissible fear and speculation to infect petitioner's trial?

STATEMENT

Petitioner was tried for two counts of first-degree burglary and two counts of grand larceny before the Honorable Perry H. Gravely and a jury from October 13 – 15, 2015. R. 1; R. 791 – 798. Richard Warder represented petitioner; Mark Moyer and Andrea Phillips represented the state. R. 1.

Petitioner testified that his actions on the morning in question were the product of a "night from hell." R. 542, l. 23 – 543, l. 1. He explained that he was with his fiancé when they drove from Wellford to Greer and she purchased methamphetamine, and that late at night an argument transpired between the couple and she left him on the side of the road. R. 481, l. 21 – 482, l. 25. Petitioner said he walked for hours and "got red mud all over [his] pants and look[ed] terrible," but eventually his fiancé's friend, "Derek or Dirk" Sakela arrived to pick him up in a black Toyota Scion. R. 483, l. 19 – 484, l. 25; R. 486, ll. 20-25; R. 520, ll. 15-20.

A black Toyota Scion was stolen from Melody Wilbanks' (Wilbanks) home by a burglar that morning, and the car, which was later found abandoned and damaged behind an office building, contained items stolen from Arlene Walker (Walker). R. 152, l. 18 – 153, l. 9; R. 270, l. 2 – 271, l. 5; R. 287, ll. 4-17; R. 313, ll. 8-16. It was subsequently discovered that an uninhabited, newly-constructed house belonging to Walker had also been burglarized. R. 264, ll. 8-20; R. 308, ll. 5-15. Walker had brought household items to the new house, but no one lived there yet. R. 264, l. 18 – 265, l. 22. She found that items had been stolen, the house was damaged, and towels and toiletries had been used. R. 267, l. 24 – 270, l. 9.

Petitioner's fingerprints were found inside Wilbanks' abandoned Scion and inside the Walker property's bathroom. R. 315, ll. 1-10; R. 388, l. 17 – 389, l. 19; R. 399, l. 13 – 400, l. 7. Residents of the rural area saw petitioner that morning in the Scion, and claimed he behaved in a

suspicious manner. R. 182, ll. 15-22; R. 186, ll. 7-16; R. 196, ll. 9-13; R. 220, l. 2 – 222, l. 16; R. 229, ll. 19-24. One of the residents recalled that petitioner asked, "[I]f there was a Dirk or a Derek at my house." R. 222, ll. 4-5.

Petitioner denied burglarizing the Walker property, which was an unoccupied house in a neighborhood under construction, but explained that he paid a laborer in the neighborhood to allow him in to take a shower since he was so muddy. R. 484, l. 23 – 486, l. 13. He admitted using the towels but denied damaging or stealing anything. R. 509, ll. 19-20; R. 510, l. 15 – 511, l. 2. Petitioner said Derek then picked him up in a black Scion and he said he thought Derek was "tweaking" on drugs that morning. R. 530, ll. 10-12; R. 488, ll. 15-18.

In contrast, the Wilbanks burglary was of an occupied home with the homeowner present. Wilbanks' husband had left for work and Wilbanks, who slept in the nude, was still asleep when she heard glass shatter and ran into the living room to see "a man coming in through the window." R. 141, l. 8 – 143, l. 6. Wilbanks retreated to her bedroom and locked the door, but after that door was broken down she retreated to the bathroom and hid in a closet. R. 144, l. 12 – 145, l. 9; R. 246, ll. 19-20. When Wilbanks heard the intruder trying the bathroom doorknob she fired a pistol and heard the burglar retreat. R. 147, ll. 3-5; R. 149, ll. 13-15. She heard her purse being rummaged through and the sound of her car keys jingling. R. 148, l. 23 – 149, l. 7. After police officers arrived she realized her Scion had been stolen. R. 151, l. 15 – 152, l. 6.

Wilbanks did not get a close look at the intruder and could not identify the person, and there was no forensic evidence located in the home. R. 143, l. 15 – 144, l. 8; R. 347, ll. 18-23. Wilbanks did offer that she could tell the burglar was a white male, although she told Officer Shaw on the scene that the man might have been black. R. 343, ll. 12-17; R. 143, l. 25 – 144, l. 2. **There was no evidence the burglar saw Wilbanks**. No one besides Wilbanks witnessed the

burglary. Petitioner adamantly denied any knowledge of or involvement in the burglary of Wilbanks' home. R. 493, l. 7 – 494, l. 10.

In closing argument, the solicitor improperly appealed to the passions and prejudices of the jury by suggesting petitioner intended to rape Wilbanks, a gratuitous accusation of uncharged sexual misconduct, where there was no testimony about this alleged motive during the trial. The solicitor argued,

> We also know he was following Ms. Wilbanks into her bedroom where she's hiding to get away from him. **And did he also enter that home with the intention to rape? Did he intend to do that only when he saw Ms. Wilbanks come into the room naked? Or did he not have an intention of rape. We know he was certainly going after her.** We don't know for sure.

R. 575, ll. 6-14 (emphasis added). Defense counsel did not object.

The jury deliberated for five and a half hours before convicting petitioner of first-degree burglary, second-degree burglary, grand larceny, and petty larceny.[1] R. 627, l. 24 – 628, l. 11.

Defense counsel explained that petitioner was an honorably discharged veteran who had post-traumatic stress disorder and had been in pre-trial detention for twenty-seven months. R. 631, ll. 4-24. The court sentenced petitioner to concurrent terms of imprisonment of twenty-three years, twelve years, ten years, and thirty days, respectively. R. 641, l. 17 – 642, l. 2; R. 799 – 802.

After his convictions were affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR). A hearing was held on the matter June 20, 2018

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[1] The state amended the indictment for the Walker burglary from first-degree to second-degree since the property was not a dwelling, and amended the accompanying grand larceny to petty larceny based on the value of the items that were taken. R. 469, l. 13 – 470, l. 15; R. 472, l. 11 – 474, l. 3. Petitioner was convicted as indicted on the Wilbanks burglary and larceny.

before the Honorable Letitia H. Verdin. R. 723. Rodney Richey represented petitioner and Deshawn Mitchell represented the state. R. 723.

At the PCR hearing, petitioner testified that his counsel failed to object and request a curative instruction when the solicitor made inflammatory remarks about rape in his closing argument, and that this was deficient since there were "no allegations in the trial of any sexual intent." R. 735, l. 14 – 736, l. 6. Defense counsel said he agreed the solicitor's remarks were improper: "Certainly, it's inflammatory. It probably was objectionable." R. 757, ll. 8-16. However, defense counsel said he did not object because "maybe there was some factual inference out of that conduct"—breaking into the bedroom and then trying to enter the bathroom. R. 757, ll. 16-24. "The jury could have wondered about his intent." R. 757, ll. 23-24. "But more importantly to me also, is the risk of objecting to the words 'rape' and just highlighting it . . ." R. 477, l. 25 – 478, l. 2.

PCR counsel revisited the matter in his summation. "As to this closing argument, the reference to the word 'rape,' I do not believe there was any evidence in the record that [the intruder] did any act while he was in there to attempt to rape this lady. Zero." R. 765, ll. 13-17.

The PCR court denied petitioner relief and its order of dismissal stated: "This court finds [t]rial [c]ounsel was not ineffective for failing to object to the State's remarks during closing arguments." R. 783 – 784. The PCR court wrote, "Here, this court finds a reasonable inference could be found from the evidence presented at trial including the testimony at trial from the victim in the case. During the trial, the State asked Ms. Wilbanks if she was clothed that morning and she responded she was not." R. 784. "Moreover, this court finds [petitioner] cannot demonstrate he did not receive a fair trial because of these remarks." R. 784. "Furthermore, [t]rial [c]ounsel testified he did not object to the [s]olicitor's comments during closing arguments

because the jury could have inferred from the testimony given at trial that the scenario offered by the [s]olicitor may be true." R. 784.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding defense counsel provided effective representation in petitioner's burglary trial where counsel failed to object to the solicitor's closing argument that petitioner wanted to rape the complainant, where this was not a reasonable inference as the argument was based solely on the fact that the complainant was nude but there was no showing the intruder knew that she was nude, since this allowed impermissible fear and speculation to infect petitioner's trial.

The solicitor's argument that petitioner intended to rape Wilbanks was based solely on the facts that Wilbanks slept in the nude and that the burglar did not confine himself to the living room. This argument was not a reasonable inference since there was no evidence the burglar had seen Wilbanks and knew she was nude, and there was no other indicia of sexual intent. The improper argument appealed for a verdict on the basis of fear and speculation and petitioner was prejudiced since the evidence against him was not overwhelming.

Deficiency

A solicitor's closing argument must not appeal to the personal biases of the jurors nor 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). "[I]ts 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.

Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), presented a similar factual scenario to the case at hand. In *Simmons*, the defendant was tried for burglary and ABHAN, at a time when burglary permitted the jury to make a recommendation of mercy. In closing, the

solicitor misstated the law regarding a mercy recommendation. The solicitor also implied that the defendant intended to rape the burglary complainant. "He had something evil on his mind. He went in, it was obvious the people were upstairs. He knew exactly what he wanted. He saw Mrs. Lewis sleeping in her bed in the darkness, exactly what he wanted . . ." *Id.* at 336, 503 S.E.2d at 165.

The Court reversed Simmons' conviction based on the solicitor's misstatement of the law but found that the rape issue was unpreserved as it was not addressed in the PCR court's order. However, the Court did write, "[I]t is a close question whether the solicitor went outside the record by inferring the crime petitioner intended to commit was rape." *Id.* at 341, 503 S.E.2d at 168. Ultimately, the Court observed that even if the remarks were improper, they did not prejudice the defendant because the evidence against him was overwhelming. *Id.* The Court did not provide the factual allegations in its opinion, so it is not possible to parse why the rape argument was a "close question" rather than obviously improper.

Here, on the facts of this record, however, the rape argument was improper. There was no evidence the burglar intended a sexual assault. Instead, this was mere speculation based on the complainant's state of undress. The complainant had merely been sleeping that way—there was nothing about her nudity that indicated an intent to rape. The intruder did not force her to disrobe. There was no evidence that petitioner saw the complainant or otherwise knew that she was nude.

Counsel admitted the argument was inflammatory and objectionable but said he did not object because he did not want to "highlight" the argument. "Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "However, counsel

cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Id.*

The South Carolina Supreme Court has found a failure to object to improper closing argument based on a stated strategy of not drawing attention to the argument to be an invalid rationale that is not accorded deference. In *Brown v. State*, 383 S.C. 506, 512, 680 S.E.2d 909, 912 (2009), the solicitor urged the jury to "speak up for" the child victim during its deliberations in a sexual assault trial, and the defendant's counsel failed to object to this "golden rule" violation. Counsel said he did not object because he "didn't want to exacerbate a bad set of facts to point out to the jury something that would already aggravate what appeared to be a pretty bad case." *Id.* at 512-513, 680 S.E.2d at 913. The South Carolina Supreme Court explained that notwithstanding counsel's purported strategy choice, "it was incumbent upon" him to object: "[W]e find this 'strategy' cannot be construed as a valid one given the evident impropriety of the solicitor's remarks." *Id.* at 517, 680 S.E.2d at 915.

Here, counsel's failure to object was not a valid strategic choice. The jury heard the solicitor's spurious allegations, which went outside the record since there was no evidence the intruder knew the complainant was nude. Although counsel knew the remarks were objectionable, he did not object. His purported strategy decision cannot save an otherwise inexcusable failure to object to an inherently prejudicial statement. It was incumbent upon counsel to object here, and his failure to so object was deficient performance.

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.

"A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors." *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). It is error for the state to invite the jury to speculate about a matter irrelevant to a defendant's guilt because it is an "appeal for a verdict based on fear and speculation." *See State v. Sloan*, 278 S.C. 435, 438, 298 S.E.2d 92, 93 (1982). Counsel's failure to object to the solicitor's inherently prejudicial argument was ineffective assistance of counsel.

Prejudice

"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).

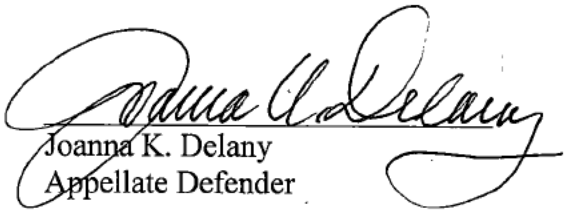
In *State v. Hawkins*, 292 S.C. 418, 422, 357 S.E.2d 10, 13 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the solicitor's improper closing argument was held to have "infected the trial with unfairness by arousing the passion and prejudice of the jury and interjected an arbitrary factor into the jury's deliberations." Here, the

solicitor's accusation that petitioner intended to rape Wilbanks aroused the passion and prejudice of the jury by inviting a verdict on an improper basis.

The evidence against petitioner was not overwhelming. The jury deliberated for five and a half hours. As to the Wilbanks burglary, the **only** evidence against petitioner was that he was seen in her car shortly after it was stolen. No evidence placed him inside the house and he adamantly denied involvement. Counsel's error significantly undermines confidence in the outcome of the trial, and leaves a reasonable probability that, but for his error, the result of the trial would have been different. *See Smalls v. State*, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018).

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of July, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this 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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V.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Richard Earl Tedford, #365731, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 1st day of July, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 1st day of July, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028