

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2021-UP-180 (S.C. Ct. App. Filed May 19, 2021)

Lower Court Case No. 2018-GS-42-1409

THE STATE,

RESPONDENT,

V.

ROY GENE SUTHERLAND, III

PETITIONER

APPELLATE CASE NO. 2021-000868

REPLY TO RETURN TO PETITION FOR WRIT
OF CERTIORARI TO THE COURT OF APPEALS

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ARGUMENT

In this murder trial the Court of Appeals erred in affirming the trial judge’s refusal to dismiss the first jury panel and bring in a new jury panel when the prosecutor, prior to jury selection, allowed family members and friends of the deceased to introduce themselves to the jury and note their affiliation with the church.2

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QUESTION PRESENTED

In this murder trial, did the Court of Appeals err in affirming the trial judge's refusal to dismiss the first jury panel and bring in a new jury panel when the prosecutor, prior to jury selection, allowed family members and friends of the deceased to introduce themselves to the jury and note their affiliation with the church?

ARGUMENT

In this murder trial the Court of Appeals erred in affirming the trial judge's refusal to dismiss the first jury panel and bring in a new jury panel when the prosecutor, prior to jury selection, allowed family members and friends of the deceased to introduce themselves to the jury and note their affiliation with the church.

Allowing friends and family members to personally address the jury panel is a novel issue that this Court should prohibit. In this case five friends or family members of the deceased personally addressed the jury panel prior to jury selection. One person, William Lawrence Ashcroft, told the jury that he was the Sunday school teacher of one of the family members of the deceased and a deacon in their church. The judge erred in refusing to dismiss the first jury panel that friends and family members of the deceased improperly addressed. The comments made to the jury panel by the friends and family members constitute an improper outside influence in violation of the Sixth Amendment right to a fair trial by an impartial jury. The friends and family members, as third parties, made improper contact with the jury panel. The trial judge abused his discretion by not dismissing the tainted jury panel and summoning a new jury panel, free from outside influence and third party contact.

The friends and family members of the deceased improperly ingratiated themselves to the jury panel and improperly aroused sympathy for the deceased. By allowing the friends and family to personally address the jury and discuss their affiliation with the church, the State was able to make an improper personal appeal to the jurors. ("In arguing before a jury, no attorney shall address or refer to by name or otherwise any member of the jury he is addressing, or otherwise make any personal appeal to any or all members of the jury. Rule 22, SCRCrimP). Additionally, the interaction with the jury panel improperly suggested that the deceased was a good person.

Respondent argues that, “These potential jurors had to hear from friends and family members, either through the trial judge, or from the friends or family members themselves. Hearing from these individuals allows potential jurors to reveal if any relationship existed with any of these people. If attorney can be made aware of any relationship, preemptive strikes can be used if necessary.” (Return to Petition for Writ of Certiorari p. 6). The potential jurors did not have to hear from friends and family members. Any relationships between potential jury members and the friends and family members of the deceased could have been explored by the judge without the friends and family members personally addressing the jury panel. It was unnecessary for anyone but the judge¹ to address the jury panel.

In State v. Green, 427 S.C. 223, 235, 830 S.E.2d 711, 716 (Ct. App. 2019), aff’d as modified, 432 S.C. 97, 851 S.E.2d 440 (2020), the South Carolina Court of Appeals wrote:

Our federal and state constitutions guarantee a criminal defendant the right to a trial by an impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, §§ 3, 14. The right can be infringed when a third party makes improper contact with the jury, for the right is meaningful only if the jury remains free from outside influence, including exposure to evidence or information that has not been introduced during the trial. Turner v. Louisiana, 379 U.S. 466, 471–72, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

While Green involved a bailiff improperly replying to a jury member’s question during jury deliberations and both this Court and the Court of Appeal found that the reply did not rise to the level of a violation of the Sixth Amendment right to a fair and impartial jury, the case demonstrates the importance of preventing third parties from making improper contact with the

¹ It appears that the trial judge asked Solicitor Barnette to introduce the friends and family members and instead they introduced themselves to the jury panel. (R. p. 15, line 7 – p. 16, lines 1-4). Pursuant to S.C. Code §14-7-1020 the questioning of the jury panel should be done by the judge.

jury. In the present case friends and family members as third parties made improper contact with the jury panel. None of the friends and family members were called as witnesses at trial.

S.C. Code §14-7-1020 provides:

The **court** shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

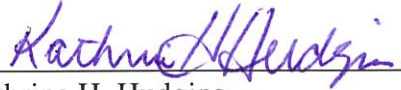
(emphasis added). The statute does not provide for third parties or even the attorneys to address the jury panel during voir dire.

The comments made to the jury panel by the friends and family members constitute an improper outside influence in violation of the Sixth Amendment right to a fair trial by an impartial jury. The friends and family members, as third parties, made improper contact with the jury panel. The judge could have cured the error by simply dismissing the tainted jury panel and bringing in another jury panel. The trial judge erred in refusing to dismiss the jury panel that had been personally addressed by friends and family members. The error violated Petitioner's Sixth Amendment right to a fair and impartial jury. The error requires reversal.

CONCLUSION

Based on the argument above, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,



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Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2021.