

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge

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**Apr 15 2020**

**S.C. SUPREME COURT**

CURTIS T. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001694

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Did the PCR court err in finding trial counsel was not ineffective for failing to object to statements made by the solicitor during closing that were inflammatory and improperly played to the jury's emotions where the solicitor repeatedly referred to the decedent as an "Iraqi war veteran," one wounded man's body as having been "splattered," and another injured man's wound as a "bone sticking out [of] his leg?"

## STATEMENT

On April 30, 2007, a Lexington County grand jury indicted petitioner for murder, two counts of assault and battery with intent to kill, and possession of a weapon during the commission of a violent crime. App. 1116-23.

Petitioner's case was called to trial on September 14-18, 2009, before the Honorable Robin B. Stillwell in Lexington County. App. 1. Elizabeth Fullwood represented petitioner and Donald Myers and Colleen Dixon represented the state. App. 2.

At trial, petitioner admitted responsibility in the incident but asserted self-defense and defense of others. Petitioner testified in his defense. Rebekah Fleming, petitioner's ex paramour and mother of his unborn child, started dating Isaac Wilson. Isaac was unhappy that Rebekah and petitioner continued having a close friendship. One evening, Isaac and his roommate, Walter Gadson, showed up at Rebekah's home. Rebekah had petitioner over and was braiding his hair. App. 110, l. 24-111, l. 1. Petitioner left Rebekah's home in his car, Isaac and Walter followed him. At a stoplight Isaac and Walter confronted petitioner and pointed a gun at him. App. 667-75. Petitioner went home and told his brother, Kerwin Parker, about the confrontation and they decided to go talk things over and make peace with Isaac. App. 677, l. 14-678, l. 14.

When petitioner and his brother arrived at Isaac's apartment his brother got out to go speak with Isaac and petitioner stayed in the car. A short time later, petitioner saw his brother running back towards the car. There were three men, Isaac, Walter, and A.J. Wilson, with guns pointed at his brother. App. 687, l. 25-688, l. 25. His brother stopped and tried to calm the men down saying, "I'm going to leave, me and my brother." App. 903-05. Petitioner heard the sound of a gun cocking and saw Walter running towards his brother. In an effort to stop Walter from shooting his brother, petitioner pressed the gas pedal aiming the car at Walter. At that time,

Walter turned the gun towards petitioner inside the car and petitioner continued driving towards him and hit Walter with the car. App. 905-06. When petitioner got out of the car, Isaac and A.J. were circling his brother with shotguns pointed at him. In fear for his life and that of his brother, petitioner shot Isaac and A.J. App. 902-14. Ultimately, Isaac Wilson was killed, A.J. Wilson sustained injury to his spinal cord, and Walter Gadson sustained an injury to his leg.

During the state's closing, Solicitor Myers, referring to A.J. Wilson said, "his whole body [was] splattered, his spinal cord [was] severed." App. 806, ll. 18-20. Solicitor Myers repeatedly said: "Isaac[] [is] dead, A.J.[] [is] in a wheelchair, Walter[] [has] got a bone sticking out [of] his leg." App. 814, ll. 6-7; 816, ll. 16-17; 819, ll. 24-25; 830, ll. 21-22. Later, Myers referred to the decedent as "[a]n Iraqi war veteran" and A.J. Wilson as [a] young man who [is] asleep in a chair for the rest of his life." App. 833, ll. 3-5.

Before deliberation, the jury was instructed on murder, voluntary manslaughter, assault and battery with intent to kill, assault and battery of a high and aggravated nature, mutual combat, self-defense, and defense of others. App. 852-64. The jury found petitioner guilty of voluntary manslaughter, two counts of assault and battery of a high and aggravated nature, and possession of a weapon during the commission of a violent crime. App. 876. On October 21, 2009, Judge Stillwell sentenced petitioner to an aggregate term of thirty-five years' imprisonment.

A hearing was held on October 3, 2011, to reconstruct portions of trial missing from the original transcript due to the court reporter's equipment malfunction. Subsequently, an *Anders*<sup>1</sup> brief was filed on petitioner's behalf. Petitioner's convictions were affirmed pursuant to the *Anders* procedure in *State v. Johnson*, 2013-UP-022 (S.C. Ct. App. filed Jan. 16, 2013).

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<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967).

Thereafter, petitioner filed an application for PCR on August 22, 2015. App. 971. On April 21, 2015, an evidentiary hearing was held before the Honorable Brooks Goldsmith. App. 993. Anna Good represented petitioner and Walt Whitmire, assistant attorney general, represented the state. App. 993.

At the evidentiary hearing petitioner testified regarding solicitor Myers' statements during closing. Petitioner said trial counsel did not object to any of the inflammatory statements made during closing. App. 1004, l. 14-1005, 25. Trial counsel Fullwood testified it was her general practice not to object during closing unless "golden rule type of argument[s]" were made or arguments tending to ask for a verdict based on something outside the evidence. Fullwood agreed solicitor Myers had past convictions reversed on appeal based on prejudicial comments made during closing. Fullwood admitted she did not object to any of the statements made by Myer's during closing. App. 1046, ll. 14-25; 1053, l. 21-1055, l. 18.

On June 7, 2019, Judge Goldsmith signed an order denying PCR. App. 1078-1107. Judge Goldsmith found the portions of the state's argument argued above were neither inflammatory nor improper based on the record. App. 1099. Judge Goldsmith also found any references to the condition of the injured men "closely contained to and reasonably inferred from the record of the injuries sustained," the state did not impermissibly play to the passions or prejudice of jury by referring to the decedent as a veteran, and that the arguments were permissible. App. 1099-1100.

On July 26, 2019, petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCF. App. 1111. On September 10, 2019, Judge Goldsmith signed an order denying petitioner's motion. App. 1115.

This appeal follows.

## ARGUMENT

The PCR court erred in finding trial counsel was not ineffective for failing to object to statements made by the solicitor during closing that were inflammatory and improperly played to the jury's emotions where the solicitor repeatedly referred to the decedent as an "Iraqi war veteran," one wounded man's body as having been "splattered," and another injured man's wound as a "bone sticking out [of] his leg."

Improper comments do not automatically require reversal if they are not prejudicial to the defendant. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). On appeal, the 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 was overwhelming evidence of the defendant's guilt. *Id.* The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *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. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760, cert. denied, 522 U.S. 853 (1997).

The state's closing argument "must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice." *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Solicitor Myers violated this well established rule by repeatedly referring gratuitously to the men's injuries, "his whole body [was] splattered, his spinal court is severed," "one[] [had] a bone sticking out [of] his leg," as well as referencing the decedent as "an Iraqi War veteran," a fact that had no relevance in petitioner's trial. The sole purpose of Myers' repetitious statements was to arouse the emotions of the jury and distract from the credibility of two of the state's witnesses. At trial, A.J. Wilson, Walter Gadson, and

petitioner each testified regarding the incident. Walter had multiple prior convictions including burglary and fraudulent check writing. App. 140-41. A.J. claimed he was not under the influence of any substance however, he had marijuana and ecstasy pills in his pocket on the night of the incident. App. 266. The version of events given by petitioner differed from the state's witnesses, A.J. and Walter who both testified that petitioner was the aggressor that night notwithstanding the prior confrontation at the stoplight. The inflammatory statements made during closing greatly prejudiced petitioner in a trial where the credibility of witnesses, especially petitioner, was at stake.

In *Fortune v. State*, our Supreme Court found the solicitor's "improper remarks violated the defendant's rights under the Due Process Clause," and reversed the denial PCR. *Fortune v. State*, 428 S.C. 545, 547, 837 S.E.2d 37, 38 (2019). Here, trial counsel was deficient for failing to object to Myers' inflammatory statements. Myers' repetitious statements asked the jury to make a decision based on emotion rather than the evidence presented. It should be of no import to the jury whether decedent was a war veteran or worked in retail. Furthermore, petitioner was prejudiced where Myers' graphic depiction of the injuries likely improperly influenced the jury as it deliberated regarding petitioner's valid claim of self-defense.

**CONCLUSION**

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

s/ Sarah E. Shipe

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Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2020.