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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Petition for Writ of Certiorari
to Berkeley County
Deadra L. Jefferson, Trial Judge
Diane S. Goodstein, PCR Judge

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Appellate Case No. 2023-001325

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LEE DELL BRADLEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION**
**FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

### Petitioner's Questions

Whether the PCR court erred in finding trial counsel was effective when she abandoned a self-defense charge originally suggested by the solicitor when the facts presented at trial and acknowledged by the State supported a charge on both self-defense and accident since they are not mutually exclusive?

Whether the PCR court erred in finding it proper and fair comment on the evidence for a solicitor to repeatedly call Petitioner Bradly a liar during closing argument in violation of the long-standing prohibition on such improper argument?

### Respondent's Counterstatement of Question

Did the PCR court properly find Petitioner did not prove counsel was ineffective for not objecting to the court's failure to charge self-defense when the trial court and the PCR court had a proper understanding of self-defense law and did not err as a matter of law, no evidence supported the charge, and counsel made a valid, strategic decision to pursue accident rather than self-defense and thus was not deficient?

Did the PCR court properly find Petitioner did not prove counsel was ineffective for not objecting to the State's closing argument when the comments were not improper and did not so infect the trial with unfairness as to violate due process?

## STATEMENT OF THE CASE

*Procedural History*

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In June 2016, the Berkeley County Grand Jury indicted Petitioner for murder (2016-GS-08-1249). On July 11, 2016, Petitioner proceeded to a jury trial before the Honorable Deadra L Jefferson. Assistant Public Defenders Debra K. Littlejohn and Keisha V. White represented Petitioner, and Assistant Solicitors Anne M. Williams and Wilton H. McNeely prosecuted the case. The jury convicted Petitioner as indicted, and Judge Jefferson sentenced him to life.

Petitioner filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal and filed a brief arguing the trial court erred in allowing (1) evidence of Petitioner's prior conviction and (2) expert testimony that a woman's risk of being murdered increases when she prepares to leave her domestic abuser. The South Carolina Court of Appeals affirmed. The remittitur was sent May 29, 2019.

On August 23, 2019, Petitioner filed an application for post-conviction relief (PCR) alleging *inter alia* that trial counsel was ineffective for not objecting when the State called him a liar during closing argument. Respondent filed a return requesting an evidentiary hearing.

On April 16, 2021, an evidentiary hearing convened before the Honorable Diane S. Goodstein. Petitioner was present and represented by Christopher Murphy, Esquire. Assistant Attorney General Benjamin H. Limbaugh represented Respondent. At the hearing, Petitioner proceeded on the allegation related to the State's closing argument as well as an allegation that counsel was ineffective for not objecting to the Court's failure to charge self-defense when the State opened the door for the charge in opening by arguing one of Petitioner's stories about the

incident was that he and the victim "tussle[d] for the knife."[1] On July 27, 2023, Judge Goodstein issued an order denying and dismissing Petitioner's PCR application. This petition for a writ of certiorari follows.

*Summary of evidence presented at trial*

At trial, Karen Harrington, the Human Resources Manager for the Fruit of the Loom Distribution Center, testified Frances Lawrence (Victim) last worked May 20-21, 2014. She stated Victim left at 12:58 a.m. on Wednesday, May 21st. (App. 134-37).

Dorothy Rivers, Victim's sister, testified Petitioner lived with Victim "back and forth." Rivers testified she visited Victim the Tuesday morning before Victim was killed; during that visit Victim was not speaking to Petitioner and the mood was "really, really thick." (App. 232, 238-42). According to Rivers, Victim had packed several boxes and was planning to move out. (App. 243). Rivers did not see Victim again after that day. (App. 245). Rivers testified Petitioner told her the following Thursday (May 22) that he and Victim had "a big argument," he was moving to North Carolina, and Victim was staying with a friend for a few days. (App. 245-46).

On May 23, 2014, Petitioner called 911 and stated he and his girlfriend had struggled over a knife, and she fell on the knife and died. Although Petitioner claimed he was on Highway 78 when he placed the 911 call, his cellphone was using a tower near I-95. Petitioner hung up before the operator obtained a precise location. (App. 109-10, 127, 457). Petitioner later told police that that he and Victim "struggled, and they both fall and he falls on top of her." (App. 477).

Deputy Stacey Cross was dispatched to the home on the morning of May 23, 2014, and discovered Victim's deceased body in the bathroom with a stab wound on her chest. (App. 321-

[1] Petitioner raised additional allegations that were ruled upon, but he has not raised those issues in his petition for a writ of certiorari.

25, 372). Police searched the home but did not find any blood on knives, any object that could have been the murder weapon, or any sign of struggle. (App. 384, 391, 398, 469-70).

Dr. Lee Tormos, the forensic pathologist, opined Victim died from a single stab wound and had been dead for at least thirty-six hours. She further opined it was "not very likely" Victim fell on the knife and killed herself due to an individual's natural reflex to extend her arms and brace herself when falling forward. Dr. Tormos stated the wound was inconsistent with Victim falling on the knife, and Victim had bruises on her shoulders and arms that were consistent with struggling and being held down.

At trial, Petitioner proceeded on a defense of accident. During the charge conference, the parties discussed self-defense as follows:[2]

> [Trial counsel]: Your Honor, the only one I think Mrs. Williams and I had actually also somewhat talked about is the charge of self defense—
>
> The Court: Well, if you all agree, I don't have any problem with it.
>
> [Trial counsel]: We don't agree. We talked about it.
>
> **[Solicitor] Williams: We don't agree on self-defense, your Honor.**
>
> [Trial counsel]: We don't agree—
>
> The Court: What facts are there to support a self defense instruction?
>
> [Trial counsel]: Without fault in bringing on the difficulty? If you look at it strictly—
>
> The Court: That is just an element of self defense. Self defense means that somebody was trying to kill me. They were trying to use deadly force and I had to use deadly force to defend myself. When you use self defense, you say, I killed them. You admit I killed them, and I did it to prevent them from killing me. And I used the force

[2] This charge was raised by trial counsel after the trial court asked counsel what charges she was requesting. (App. 522-29).

> that was necessary for me to fend off what I perceived was a deadly attack. Are you saying that you're going to argue to this jury that your client killed Ms. Lawrence?
>
> [Trial counsel]: I—
>
> The Court: Because that's what you would have to say.
>
> [Trial counsel]: We will—
>
> The Court: The facts to this point support solely accident, which is he said when he came home, she was furious. She lunged at him with a knife. She had prepared in advance to lunge at him with a knife because it was sitting in a—a location that was convenient to her. That she lunged at him. He tussled with her to take the knife. They slopped on this rug. She fell on it. He panicked. He held her until she expired very quickly. He washed her up, changed her clothes, and then he left the residence.
>
> So in order for me to instruct self defense, you would have to concede that he stabbed her, which eliminates accident. There are two opposing defenses. You can't have one—well, I guess conceivably you—well no, you can't—you can't say I accidentally shot a gun when I intended to kill someone—
>
> [Trial Counsel]: Just strike that I asked it; how is that?
>
> The Court: Okay. That works.

(App. 527-29, emphasis added). The trial court charged accident but not self defense. The jury convicted Petitioner of murder.

*Petitioner's testimony at the PCR hearing*

At the PCR hearing, Petitioner testified he would never hurt Victim and they had "never even fought before," although he recalled a prior verbal argument where police were called. (App. 671-72). Petitioner stated he had a gambling addiction but had promised Victim he would quit. (App. 672). However, the night of the stabbing, he had been out gambling all night. (App. 673). Petitioner testified he returned home the next morning and was in the bathroom when he "turn[ed] around and she charged in with a knife." (App. 674). He recalled,

> Well, when she came into the bathroom, I had just got through using it, you know, zip my pants up. She came at me with the knife. This finger right here (indicating), this finger I cannot use. I grabbed her by the wrist and when I grabbed her by the wrist and she had the knife, she snatched away from me. **When she snatched, she punched herself, we hit the floor.** We both hit the floor because the bathroom has linoleum on the floor. We had two throw rugs on the floor, little throw rugs and that's what caused us to slip and fall.

(App. 675, emphasis added). Petitioner stated his only injury was on his "other hand when she scratched me. I'm trying to hold this hand down and grab the knife, she scratched me . . . ." (App. 676). Petitioner reiterated, "I was the victim of this case. **I didn't come at her with a knife, I didn't stab her with a knife.**" (App. 679, emphasis added). He reiterated again,

> A. **I didn't stab her, she stabbed herself.**
>
> Q. All right.
>
> A. **What would be my purpose to stab her?** Think about that. What would be—I am the one coming in late the next morning. So **I have no reason to stab her.** Why would I stab her? A woman that I loved and cherished as much as I did her.

(App. 682). He maintained he "truly loved" Victim and "would never hurt" her. (App. 673).

On cross-examination, Petitioner again consistently maintained he did not stab Victim:

> [F]irst off, **you said you would never stab the victim**, is that accurate?
>
> A. **That's accurate.**
>
> Q. And your contention the whole time was that this was an accident, is that right?
>
> A. That's all it was, an accident.
>
> Q. And you're aware that for self defense you were going to have to present that you did, in fact, stab the victim? Do you understand that?
>
> A. Yes, sir. But listen, I mean—ask me that question you just asked me just now?

Q. You know if you were going to present a defense of self defense, you were going to have to say that you stabbed her but it was because she was attacking you. Do you understand that?

A. Yeah, but **I didn't stab her.**

Q. Right, okay. I just want to make sure we're on the same page about that. So, your contention the whole time is that this was an accident, right?

A. That' exactly what it was. I mean, her intention was to kill me maybe, but it's an accident. **She didn't mean to kill herself. She didn't mean to stick herself, that's what I would say.**

(App. 686-87, emphasis added).

## STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to the court's failure to charge self-defense when the trial court and the PCR court had a proper understanding of self-defense law and did not err as a matter of law, no evidence supported the charge, and counsel made a valid, strategic decision to pursue accident rather than self-defense and thus was not deficient.**

Petitioner asserts trial counsel was ineffective for "abandon[ing] a self-defense charge originally suggested by the solicitor when the facts presented at trial and acknowledged by the [S]tate supported a charge on both self-defense and accident since they are not mutually exclusive." Contrary to Petitioner's argument, however, the solicitor opposed a self-defense charge and did not consent to it. (App. 527-28). Further, Petitioner's contention that the trial court, trial counsel, and the PCR court all misapprehended self-defense law lacks merit and is not supported by caselaw. As the trial court correctly noted, evidence was not presented at trial to support self-defense, making counsel's failure to object reasonable under prevailing professional norms and not deficient. Finally, the PCR court properly found counsel employed a valid strategic reason in withdrawing her request for self-defense. Thus, the PCR court properly denied relief.

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984);Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d624, 625 (1989). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 115, 386 S.E.2d at 624.

> A person is justified in using deadly force in self-defense when:
>
> (1) The defendant was without fault in bringing on the difficulty;
>
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
>
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
>
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

In State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019), the Court of Appeals expounded on the overlap and potential confusion between the defenses of accident and self-defense:[3]

> If the harm was caused by accident, the defendant is not criminally responsible because of the absence of criminal intent. It is precisely this lack of intent that separates accident from self-defense, for **self-defense "admits an intentional killing,** and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." State v. McDaniel, 68 S.C. 304, 317, 47 S.E. 384, 389 (1904). The defense of accident sometimes surfaces in homicide cases, often alongside self-defense. Despite their varying levels of intent, accident and self-defense are not always mutually exclusive defenses. See State v. White, 425 S.C. 304, 311, 821 S.E.2d 523, 527 (Ct. App. 2018); State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012). Of course, **accident may appear in contexts far removed from self-defense.** Blackstone gives the example of a man lawfully working with a hatchet when the head flies off and kills a bystander. 4 W. BLACKSTONE, COMMENTARIES
>
> The confusion in explaining the defense of accident crops up when

[3] The issue in Owens addressed the language of the trial court's *accident* charge. Id. at 329, 831 S.E.2d at 128.

> no distinction is made between a defendant who has lawfully armed himself with a weapon in self-defense and then accidentally harms the victim (e.g., he stumbles and his finger slips and pulls the trigger) and a defendant who has lawfully armed himself with a weapon in self-defense and then intentionally harms the victim. Only the defendant in the former situation is entitled to the defense of accident, and he is also entitled to have the jury charged that his conduct in arming himself in self-defense was lawful.

Id. at 330–31, 831 S.E.2d at 128–29 (emphasis added).

*a. The trial court and PCR court had a proper understanding of the law regarding self-defense and did not err as a matter of law.*

Much of Petitioner's argument is premised on his assertion that both the trial court and the PCR court misunderstood and misapplied the law regarding self-defense. However, contrary to Petitioner's assertion, the PCR court did not misconstrue the law or Owens in determining no evidence supported self-defense. Rather, the trial court and the PCR court properly understood and applied the law regarding self-defense—making counsel's withdrawal of the request for this charge when evidence did not support it reasonable under prevailing professional norms and not deficient.[4]

At trial, when discussing self-defense, the trial court noted no evidence showed Petitioner *intentionally* stabbed Victim. (App. 527-29). At the PCR hearing, trial counsel agreed that self-defense would require Petitioner to admit he stabbed Victim—which Petitioner had never done. (App. 704). This was a proper understanding of the law. See Owens, 427 S.C. at 330-31,

[4] To the extent Petitioner seeks to "clarify" or alter Owens, PCR is not the proper avenue to change substantive criminal law. See Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged Just as we do not require attorneys to be clairvoyant in anticipating changes to the law, we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority." (internal footnotes omitted)).

831 S.E.2d at 128-29 ("It is precisely this lack of intent that separates accident from self-defense, for **self-defense "admits an intentional killing** . . . ." (emphasis added)).

Petitioner attempts—for the first time on appeal—to contend this was an improper understanding of the law. This argument, however, was not raised to the PCR court and thus is not preserved. See Palacio v. State, 333 S.C. 506, 514 n.7, 511 S.E.2d 62, 66 n.7 (1999) (finding argument not raised to PCR court was not preserved).

Further, Petitioner's argument that the trial and PCR court misapplied self-defense fails on the merits. Petitioner's argument that the elements of self-defense "do not require the defendant to affirmatively use the instrument which caused death or injury" is patently misplaced. In fact, the fourth element of self-defense requires the jury to conclude that "the defendant had no other probable means of avoiding the danger of losing his own life or sustaining seriously bodily injury than to act as he did in this particular instance." Dickey, 394 S.C. at 499, 716 S.E.2d at 101. Petitioner provides no legal support for his contentions that self-defense "does not require control over and intentional use of the deadly instrument, or that "grappling over a knife with an assailant" is sufficient to support self defense. Further, these arguments ignore binding precedent indicating that self-defense "admits an intentional killing." See, e.g., Owens, 427 S.C. at 330-31, 831 S.E.2d at 128-29 ("It is precisely this lack of intent that separates accident from self-defense, for self-defense 'admits an intentional killing . . . .'").; State v. McDaniel, 68 S.C. 304, 47 S.E. 384, 389 (1904) ("[Accident] is distinguishable from **self-defense as a plea, which admits an intentional killing,** and sets up as justification a necessity to kill in order to save the accused from death or serious bodily harm, whereas a defense of homicide by accident denies that the killing was intentional." (emphasis added)); c.f. State v. White, 425 S.C. 304, 312, 821 S.E.2d 523, 528 (Ct. App. 2018) (finding trial court erred in not charging self-defense in addition to accident when

"there was evidence White unintentionally stabbed Johnson *and also evidence he intentionally stabbed Johnson*" (emphasis added)); State v. Williams, 400 S.C. 308, 316–17, 733 S.E.2d 605, 610 (Ct. App. 2012) (finding evidence supported both self-defense and accident when "Williams' testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim").

Petitioner's attempt to use PCR as a mechanism to refine Owens or make it mean something other than its plain language is misplaced. PCR not an appropriate avenue for changing substantive criminal law. See Pantovich, 427 S.C. at 562–63, 832 S.E.2d at 600 ("Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged Just as we do not require attorneys to be clairvoyant in anticipating changes to the law, we do not hold the PCR court erred in the face of what was—at the relevant time—clear and binding authority." (internal footnotes omitted)).

Based on the foregoing, the trial court properly applied self-defense law—making counsel's decision to withdraw the requested charge when no evidence supported it reasonable under prevailing professional norms and not deficient.

*b. The evidence presented at trial did not support self-defense; thus, Petitioner cannot show prejudice from counsel's withdrawal of her request for this charge.*

The PCR court properly found Petitioner did not prove prejudice from counsel's withdrawal of the request to charge self-defense because evidence did not support this charge.[5]

[5] Petitioner's argument that the solicitor "initially argued the facts presented warranted both accident and self-defense charges" ignores the fact the solicitor ultimately did *not* agree to the charge and is not relevant to the issue of whether evidence supported self-defense. (Pet. 5).

Although self-defense and accident "are not always mutually exclusive," depending on the evidence, they *can* be. See State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012) ("[S]elf-defense and accident charges are often mutually exclusive . . . ."). Here, the only evidence presented—at both trial and the PCR hearing—was that Petitioner did not stab Victim—making the stabbing unintentional. In fact, at the PCR hearing, Petitioner repeatedly maintained he did not stab Victim. (App. 679, 682, 686-87). No evidence presented at trial supports a finding that Petitioner intentionally stabbed Victim in self-defense.

Because no person (other than Petitioner and Victim) witnessed the stabbing itself, the only evidence presented at trial about the stabbing were Petitioner's statements. In his initial statement to 911, Petitioner relayed he and Victim struggled over a knife, and she fell on the knife and died. (App. 109-10, 127, 457). This statement, if believed by the jury, does not support a finding that Petitioner "actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger"; or that Petitioner "had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did." Dickey, 394 S.C. at 499, 716 S.E.2d at 101.

Petitioner's 911 statement likewise does not support a finding that Petitioner intentionally stabbed Victim. See Owens, 427 S.C. at 330-31, 831 S.E.2d at 128-29 ("It is precisely this lack of intent that separates accident from self-defense, for self-defense 'admits an intentional killing . . . .'"); contra. White, 425 S.C. at 312, 821 S.E.2d at 528 ("While it is true accident and self-defense "are often mutually exclusive," a trial court should charge both *when there is evidence*

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Although the solicitor *did* initially suggest this charge, she later unequivocally opposed it. (App. 521-22, 527).The trial court would have abused its discretion if it had given the charge when it was not supported by evidence—especially over the solicitor's objection. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (providing a jury charge must be supported by evidence).

*in the record to support both charges.*" (emphasis added)); id. (finding trial court erred in not charging self-defense in addition to accident when "there was evidence White unintentionally stabbed Johnson *and also evidence he intentionally stabbed Johnson*" (emphasis added)); Williams, 400 S.C. at 316-17, 733 S.E.2d at 610 (finding evidence supported both self-defense and accident when "Williams' testimony at trial vacillated as to whether he acted intentionally or unintentionally when he shot the victim").

In addition to his statement to 911, Petitioner told law enforcement that that he and Victim "struggled, and they both fall and he falls on top of her." (App. 477). This statement likewise does not support findings that Petitioner "actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger"; that Petitioner "had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did"; or that Petitioner intentionally stabbed Victim.[6]

It is telling that Petitioner points only to attorney argument and his PCR testimony in his petition detailing the evidence that supposedly supported self-defense. (Pet. 9-10). Critically, statements and arguments by attorneys are not evidence. See S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). Further, Petitioner knowingly waived his right to testify at trial, and thus his PCR testimony was not before the trial court when it assessed whether evidence supported self-defense.[7]

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[6] Evan at the PCR hearing, Petitioner maintained he did not stab Victim. If he did not stab Victim, then he could not have intentionally stabbed her and thus did not act in self-defense.

[7] Petitioner does not allege in his petition for writ of certiorari that counsel was ineffective in any advice regarding whether he should testify. Further, Petitioner maintained throughout his PCR testimony that he did not stab Victim; thus, his PCR testimony does not support self-defense.

In the absence of any evidence that Petitioner intentionally stabbed Victim (in an act of self-defense), the trial court properly declined the charge. Further, because the trial court properly declined the charge, Petitioner cannot demonstrate prejudice from counsel's withdrawal of this request.

*c. The PCR court properly found counsel made a strategic reason to withdraw self-defense and thus was not deficient.*

The PCR court properly found counsel made a strategic reason to withdraw self-defense and focus on accident. At the PCR hearing, counsel clearly recalled proceeding on accident and articulated the evidence that supported that theory. (App. 691-92). She further recalled that Petitioner maintained he did not intentionally stab Victim. (App. 697-98, 700). A review of the trial transcript shows counsel made a strategic reason to withdraw the self-defense request when she was told the court would not instruct accident if it instructed self-defense. Specifically, counsel was questioned about whether she intended to argue that Petitioner purposefully stabbed Victim; thereafter, she withdrew her request for self-defense and focused on accident instead. (App. 527-29). Because evidence did not support self-defense and counsel's strategy centered on accident (which was supported by evidence), counsel's decision did not fall below prevailing professional norms. Thus, the PCR court properly found counsel was not deficient.

**The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to the State's closing argument when the comments were not improper and did not so infect the trial with unfairness as to violate due process.**

Petitioner argues counsel was ineffective for not objecting when the solicitor called him a liar during closing argument. However, the PCR court properly found these comments were not improper and thus counsel was not deficient for failing to object. Further, the PCR court properly found these comments did not so infect the trial with unfairness as to violate due process, and thus

Petititioner did not prove prejudice.

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its 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). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010).

"A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). Likewise, "a prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, as previously explained, doing so is one of the fundamental responsibilities of a lawyer." Id. at 111, 886 S.E.2d at 212.

*a. The solicitors comments were not improper, and thus counsel was not deficient for not objecting.*

During closing argument, the solicitor argued, "Let's look at the statements of the investigators, look at his demeanor. It's—it's almost impossible to keep up with all of the lies that he tells us in his statement. You need to rewatch it—please do. The story keeps evolving." (App. 554). After discussing several inconsistencies between Petitioner's statements and the evidence, the solicitor argued,

> He also tells detectives for some reason—[Rivers], remember, goes by Ann. That he called her. And I don't know why he makes that up. It's just one more in the stack of lies. But she testified that he never called her. Because I think they said, well, did you call anyone? Did you call her family? He said, Oh, yeah, I called Ann. Not true.

(App. 559). Later, the solicitor argued,

> Over and over again, [Petitioner] talked about how crazy [Victim] was acting. At one point, he said she was psychotic. And we have no objective evidence, the autopsy. There's no drugs in her system except for hypertension. There's no alcohol in her system, although in his statement to police he said they were both drinking a lot. He has to say that because he has to sort of explain why she's acting so crazy. He's a liar. I didn't say he was a smart liar, but he obviously hasn't thought it through to the point where, you know, the blood work is going to show whether she had the alcohol in her system. But she had no alcohol in her system.

(App. 557-58). At the PCR hearing, counsel averred these comments were not so egregious as to infect the trial with unfairness. (App. 694).

This PCR court properly found the solicitor's comments were reasonable inferences based on the evidence and not objectionable. See Vasquez, 388 S.C. at 458, 698 S.E.2d at 566 ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."). These comments were made while the solicitor pointed out inconsistencies in Petitioner's statements. Specifically, the solicitor referenced inconsistencies between Petitioner's statements to law enforcement and statements in jail calls, and Petitioner's claim that Victim was high and drunk during the attack even though the autopsy showed no drugs or alcohol in her system. The solicitor detailed the inconsistencies between Petitioners statements and other testimony and evidence presented at trial and pointed out contradictions between the multiple stories given by Petitioner. The solicitor's comments were reasonable inferences based on the evidence. Further—and critically—the solicitor's comments were proper for closing argument. See Busse, 439 S.C. at 111, 886 S.E.2d at 212 ("[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, as previously explained, doing so is one of the fundamental responsibilities of a lawyer."). Because the comments were not improper, the PCR court properly found counsel was not deficient for not

objecting.

*b. The comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.*

"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." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and 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." Id.

Even if the comments were improper—which the State does NOT concede—the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. See Vasquez, 388 S.C. at 458, 698 S.E.2d at 566 ("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."). Because the foregoing argument contained reasonable inferences from the evidence, it is not reasonably likely any objection would have been sustained. Further, none of these comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." See Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Thus, the PCR court properly found Petitioner did not prove prejudice

## CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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