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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Daniel McLeod Coble, Circuit Court Judge

CHRISTOPHER MARQUAVIOUS MOORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001080

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1.

Whether the PCR court erred by finding defense counsel was not ineffective for failing to request an instruction that a person "did not have the duty to retreat if it would increase the danger to himself" in this self-defense case particularly where the solicitor in closing focused on how petitioner allegedly could have avoided the fatal situation, and where defense counsel was conflated principles of immunity not being the proper subject of a jury charge with this retreat instruction not being a proper and warranted jury charge?

2.

Whether the PCR court erred by finding defense counsel was not ineffective for failing to request a jury instruction that the defendant had the right to "act on appearances" and that "he did not have to wait for the decedent to get the drop on him" since the jury understanding these principles of self-defense would have assisted the defense given the facts of this case?

3.

Whether the PCR court erred by finding defense counsel was not ineffective for failing to object to the solicitor's closing argument that the defense attorney's job was to confuse the jury and for it to believe the defendant's lies whereas the solicitor was seeking the truth and justice for the decedent and his family since this was a highly improper prosecution argument was prejudicial to petitioner?

STATEMENT OF THE FACTS

Procedural history

Petitioner was indicted at the June 2, 2015, term of the Chester County grand jury for the offenses of murder, and possession of a weapon during the commission of a violent crime. App. 1079-1082. Petitioner's case was first called to trial on April 18, 2016, before the Honorable Paul M. Burch, and a jury. Petitioner was represented by William Frick and Devon Neilson. Solicitor Randy Newman and assistant solicitors Julie Hall and Riley Maxwell prosecuted the case.

The first trial ended in a hung jury after the jury announced it was deadlocked. App. 1001-1002.

Petitioner's case was again called to trial on June 27, 2016, before the Honorable Paul M. Burch, and a jury. William Frick again represented petitioner. Julie Hall and Riley Maxwell were the assistant solicitors. App. 1. The jury found petitioner guilty of murder. App. 786, ll. 12-16. Judge Burch sentenced petitioner to life imprisonment without parole, and he imposed a five year consecutive sentence on the firearm charge. App. 799, ll. 23-24.

Petitioner then filed an application for post-conviction relief on September 24, 2019. App. 802-813. The state filed a return on March 30, 2021. App. 814-820. Petitioner also filed an amended application for post-conviction relief on February 15, 2023. Supp. App. 1-17.

An evidentiary hearing was convened on February 16, 2023, before the Honorable Daniel Coble. Dayne Phillips represented petitioner and Danielle Dixon was the assistant attorney general. App. 821.

An order of dismissal, which included vacating the firearm conviction, was filed on July 17, 2023. App. 1001-1069. PCR counsel then filed a motion to alter or amend pursuant to Rule 59(E), SCRCP, on July 22, 2023. That motion was denied App. 1070-1076.

This petition for a writ of certiorari follows.

Trial facts

Petitioner's defense in this case was self-defense. However, the solicitor poisoned the jury during the state's opening statement by claiming petitioner and several other men were planning an unrelated burglary on the night of the fatal encounter with the decedent. The solicitor said that petitioner together with "[o]ther people, borrowed a truck, went to a location in Chester county to commit a crime, they were trying to commit armed robbery, they set up on a house. Mr. Williams—the victim's house, was right across the way from that house. They parked this truck . . . it was a borrowed truck, parked it there. This defendant was a passenger in the back seat so he's in the back seat on the passenger side of the truck, and he's got this gun. There were I think a total of four or five—and that will all come out—other handguns in the car. They got out of the truck, walked across the grass a little ways, set up on this house intending to rob these people and they never came home." App. 61, ll. 14-25.

The solicitor continued telling the jury that the decedent's wife noticed this car and she called the decedent. The decedent was a former officer. He had earlier told his wife if she ever saw anything suspicious on or near their property to notify him. The decedent drove through the area, noticed "this truck pulling out, doesn't know who the people are and he falls in behind them, and you're going to hear testimony that he followed [them] through Chester about two and a half miles. And there will be testimony and evidence that he [the decedent] did at some point

fire a thirty-eight-caliber handgun two times, and there are two spent shell casings [from] that gun and that he had gunshot residue on both of his hands . . ." App. 62, ll. 12-20.

The solicitor said while the decedent was following this vehicle, petitioner "rolls out of the car with this gun after he's been followed by Mr. Williams [the decedent] while they're in the chase, at some point he decides to leave the safety of that vehicle, roll out of the car and shoot Mr. Williams with this gun. And that's basically the whole case." App. 62, l. 20- 63, l. 1. As will be seen, petitioner said he fell out of the car after opening the door to discard his illegally possessed gun. He shot at the decedent in self-defense.

Defense counsel Frick told the jury that any evidence of a planned robbery that never occurred was irrelevant. He offered that the evidence would show that the decedent chased the car petitioner was riding in "through downtown Chester sometimes at high rates of speed." The decedent fired first upon their car, and petitioner returned fire in self-defense. Defense counsel said that the only question for the jury to resolve was "why did this happen? And the simple fact of the matter is that this happened because Odell Williams decided to follow the car, then chase it, then shoot at it, and then continue to shoot at it. That's what it's about. Stay focused on what we're here about." App. 66, ll. 4-7.

Chester County Sheriff's Deputy Kyle Cummings testified on November 4, 2014 he was dispatched on a "shots fired" call. He was informed a car had struck a residence on Roundtree Circle in Chester county. App. 69, l. 14-70, l. 19. Cummings approached the vehicle and he saw the decedent inside. "It was obvious that Mr. Williams had been shot, obvious trauma to his face..." The decedent tried to talk but he could not speak. App. 74, ll. 4-13. The decedent was able to get out of the vehicle under his own power and he was placed in a lawn chair. App. 74, ll. 4-21.

The state relied heavily on the testimony of a jailhouse snitch, Steve Breland, who claimed while he was petitioner's cellmate petitioner showed him his discovery "and a couple of pictures." Breland was incarcerated pretrial for a hit-and-run causing death offense that occurred on February 17, 2016. App. 582, l. 7- 583, l. 25. The following occurred between the solicitor and Breland about what petitioner allegedly told him:

> Q. Okay. Did you -- what did he tell you?
>
> A. He was saying at a point of time that he was being chased by the councilman [the decedent]. And one of the photos showed that they turned on a street where it was a very sharp left turn, and Mr. Moore said that the gun had dropped on the ground, that he got out to retrieve the gun, and he said that when he got out they pulled off and they left him, and then as he was running across the street he said that he [held] the gun up and was shooting over his left shoulder. And at the time when I said, "Well, Chris, I'm about 5-10 and a half and you are about 6-3, about 6-4, usually I stand when I stand up to my car and my car catches me about top of my chest, so if you were shooting at your shoulder length you should have shot over the councilman's car and it shouldn't have hit it." But he said he was running and shooting at the same time.
>
> Q. Did you do any military service or anything in your background?
>
> A . Marine Corps.
>
> Q. Have you ever seen a gun like -- I'll show you what has been marked as State's Exhibit 12 and entered into evidence. Have you ever seen a gun like this?
>
> A. Similar to that, yes, ma'am.
>
> Q. Did you and Chris Moore have any conversations about what kind of gun he was talking about shooting over his shoulder?
>
> A. No, ma'am. We didn't talk about the type of gun he had but it was a semiautomatic. And it was a semiautomatic and I told him, "If you were shooting over your shoulder and normally a M16 or AK usually it would deafen your ear." And one of the motions of discovery [said that] all of the shells -- he said he fired 17 times,

> but he stated that he was running and shooting over his shoulder. Well, on the motion of discovery it should have been some shells in the same direction that he was traveling and shooting, because guns of this particular kind eject the bullets out on the right side. So there wasn't -- on the motion of discovery investigators said there wasn't no shells as he was traveling like he said he was.

App. 585, l. 3 - 586, l. 16.

Breland said at another point, petitioner told him that one of the other men in the truck, Quinton "told me to get out [of the truck] and shoot the councilman." App. 588, ll. 6-24. Breland claimed he told the police about petitioner's statements because petitioner told him he was going to beat up another inmate, and Breland also feared for his safety. Breland claimed he was not promised anything to testify against petitioner. App. 590, l. 8- 592, l. 18.

On cross-examination, Breland admitted he gave his statement to the police about a month after he was denied bond. App. 600, l. 2- 601, l. 6. On redirect examination, Breland asserted he did not believe petitioner's statements about falling out of the truck by accident. App. 603, l. 15- 602, l. 3.

Petitioner testified in his own defense. Petitioner said that he went with the other men in the truck that evening because the men they went to see a person who "owed us money." App. 672, ll.7-11. Each of them had a gun. App. 672, ll. 14-18. Petitioner was sitting in the rear passenger seat. They parked "in the parking lot, but I didn't know it was someone's property." App. 673, ll. 5-25.

The men left about ten-to-fifteen minutes later after no one arrived at that house. As they drove down the road, they noticed a Cadillac was following them. App. 676, l. 10- 680, l. 19. When their vehicle slowed down to make a turn, they heard three gunshots coming from behind them. App. 680, ll. 14-24.

When defense counsel asked petitioner how he knew the shots were coming from behind them, petitioner answered his attorney "because I've been in plenty of incidents where I've done been shot at." App. 680, ll. 20-24. Petitioner testified he was getting ready to throw his gun in a ditch he was familiar with when he fell out of the car. He fell out of the car because the driver accelerated unexpectedly. Petitioner did not willingly get out of the truck. App. 681, l. 17- 682, l. 2. Petitioner said he wanted to throw the gun into this ditch because he was familiar with the area and he knew he could come back and get his gun. App. 683, ll. 1-18.

As petitioner got up off of the ground, he saw the decedent's Cadillac approaching. He also heard two more gunshots. Petitioner returned fire "because I felt like my life was in danger." Petitioner said he fired a "bunch of times" while he returned fire. App. 686, l. 1- 687, l. 3.

Petitioner related that the decedent's car just stopped in the road after the gunshots were fired. "I took off running through the grass like – I could show you on the map exactly where I took off running at." App. 688, ll. 4-18. Petitioner ran because he knew he could not legally be in possession of a fireman. He initially lied to the police because he was convinced he was going to be convicted even though he acted in self-defense. He thought that he would spend the rest of his life in prison if convicted. App. 691, l. 5- 693, l. 2. Petitioner said he was sorry the decedent was shot and that the fatal encounter with the decedent had occurred. App. 699, l. 16- 700, l. 4.

On cross-examination, petitioner said that the men he was with that night intended to use their guns only to get their money back -- to collect a debt -- and they did not plan to harm anyone. App. 706, l. 11- 707, l. 10. Petitioner said that he fired his gun in self-defense until his gun stopped firing. He learned from his discovery that out of the eighteen shots fired, that he hit

the decedent's car "at least six times." App. 702, ll. 4-22. Petitioner was now aware one of those shots hit the decedent and killed him. App. 720, ll. 18-22.

State's closing argument

During the state's closing argument, the solicitor claimed that jailhouse snitch Steve Breland had a "dose of conscience." He also asserted petitioner's self-defense case did not make sense. He also maintained that petitioner firing eighteen shots indicated petitioner acted with malice. App. 753, l. 2- 768, l. 7.

The solicitor told the jurors that a reasonable person would not have gotten out of the car "even if he was scared in the car." The solicitor said petitioner could have called the police and avoided the danger. The solicitor maintained that petitioner was only following the orders of Quinton McClinton to get out of the car and "take care of this guy." App. 768, l. 12- 769, l. 5.

The solicitor concluded by telling the jury, without objection: "The defense's job is to confuse you and to believe the defendant's lies. Don't fall for it. We come seeking the truth and we come seeking the justice for Odell Williams, but we also come seeking justice for his family." App. 770, ll. 1-5.

The jury found petitioner guilty of murder and possession of a firearm during a violent crime. Judge Burch sentenced petitioner to life imprisonment without parole, and he imposed a five year consecutive sentence on the firearms conviction. App. 786, ll. 12-16; App. 799, ll. 23-24.

PCR testimony

Petitioner testified at the PCR hearing that he wanted the driver of the car, co-defendant Quinton McClinton, to testify in his defense. McClinton could have testified that he did not order petitioner to get out of the car and shoot the decedent. McClinton could also have told the

jurors that he fell out of his car that night by accident. Petitioner thought a lot of the jurors wanted to hear from McClinton since he was the driver of the car. App. 829, l. 18- 830, l. 24. Petitioner recalled that trial counsel Frick did not think it was a good idea for McClinton to testify given his criminal record. App. 830, ll. 2-24.

Petitioner also testified that he did not talk to Steve Breland about his case. Petitioner told Frick before trial that Breland was lying about petitioner's alleged admissions to him about how the shooting had occurred. App. 831, l. 13- 834, l. 11.

Petitioner's trial attorney, William Frick, also testified during the PCR hearing. Frick testified that he did not ask for a jury instruction that a defendant did not have a duty to retreat if it would have increased the danger the defendant was in at the time. Frick said his experience as a trial lawyer in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) convinced him that specific instructions on self-defense were not favored by the court. App. 931, ll. 4-18. In fact, as seen infra, this Court held in Curry that jury instructions on the Castle Doctrine and "stand your ground" were not proper since immunity was a pre-trial consideration for the trial court only.

Frick said he did not have any "specific reason" not to ask for a jury instruction that a defendant had the right to act on appearances and he also did not have to let the decedent get the drop or "draw point" on him. Trial Counsel Frick then added that he did not think these instructions applied to petitioner's case since the decedent was not "laying in wait" but was chasing the other men. Conversely, petitioner was the man on the side of the road shooting at the decedent. Trial counsel reasoned petitioner could have been accused of "laying in wait" given these facts. App. 931, ll. 4-18.

Frick further rationalized that he was just trying to get a self-defense instruction of any kind in this case, and therefore he was not concerned with the particulars of that instruction. He

also testified that he did not know whether the jury actually paid attention to any "additional minutiae" as far as a self-defense instruction from the court was concerned. App. 931, l. 19 - 932, l. 8.

Appellate counsel Susan Hackett then testified that the jury instructions that the defendant did not have a duty to retreat if it would increase the danger to himself, that the defendant had the right to act on appearances, and that he did not have to wait for his attacker to get the drop on him before acting in self-defense were each correct statements of law. Appellate counsel said she would have raised the failure of the trial court to charge these instruction on appeal if trial counsel had requested them, they had been denied by the trial judge. Appellate counsel cited State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) and State v. Hendrix, 270 S.C. 653, 244 S.C.2d 503 (1978)in support of her testimony that these three self-defense jury instructions were all correct statements of the law. App. 976, l. 20 - 978, l. 7. Appellate counsel also testified that refusal to charge requested jury instructions are often a fertile ground for reversal on appeal. App. 978, ll. 8-15.

The PCR judge issued an order of dismissal filed on July 17, 2023. App. 1001-1069. PCR counsel filed a motion to alter or amend the order of dismissal pursuant to Rule 59(e), SCRCP, because the order did not address defense counsel's failure to request the jury instruction that a person did not have a duty to retreat if doing so would have increased the danger to himself. In addition, the order of dismissal did not address trial counsel's failure to request an instruction that the defendant had the right to "act on appearances" and he did not have to wait for the decedent to "get the drop" on him. App. 1071.

The motion to alter or amend also noted that the order of dismissal did not address petitioner's allegation that trial counsel was ineffective for failing to object to the solicitor's

improper statements during closing argument that the job of the defense attorney was to confuse the jury and for it believe the defendant's lies, where conversely the solicitor was seeking truth and justice for the victim and his family. App. 1074.

ARGUMENT

1.

The PCR court erred by finding defense counsel was not ineffective for failing to request an instruction that a person did not have the duty to retreat if it would increase the danger to himself in this self-defense case particularly where the solicitor in closing focused on how petitioner allegedly could have avoided the fatal situation, and where defense counsel was conflated principles of immunity not being the proper subject of a jury charge with this retreat instruction not being a proper and warranted jury charge.

As seen, the solicitor in his closing argument questioned the reasonableness of petitioner's actions when the decedent fired at the vehicle in which petitioner was a passenger. The solicitor told the jurors that petitioner should have hidden inside the vehicle he was riding in, called the police, and essentially Monday morning quarterbacked petitioner's actions in returning fire rather than retreating or hiding. App. 753, l. 2- 769, l. 5.

In State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 330 (1989) this Court stated, "[i]n charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Here, as seen, defense counsel did not consider the facts or circumstances of the case when requesting proper self-defense instructions. Counsel admitted he was satisfied just to get a bare bones self-defense instructions.

However, a defendant is not required to retreat if he has "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 [the] particular instance." State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998). See, also, State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hardin, 114 S.C. 280, 103 S.E.2d 557 (1920). The jury needed to understand this element of self-defense given the facts of this case.

In this case, the following occurred at PCR when defense counsel was asked why he did not request the jury instruction on this element of self-defense:

> Q [T]here's no strategic reason why you wouldn't have asked to have that jury instruction or jury charge on self-defense to say that the person doesn't have a duty to retreat when it would increase their danger?
>
> A I mean, I'm afraid that it gets closer to what I ask for in the Curry case where I got the judge to formulate a charge that the Supreme Court said you can't get that charge. So having had that experience, no, I would not have asked for that specific charge.
>
> Q Okay.
>
> A Right or wrong, I mean, that's why I would not have asked for that specific charge because I've got what the Supreme Court told me in Curry.
>
> Q So your belief at that point based on your experience of being the trial lawyer in Curry, you felt like that was a bridge too far? You're asking for too much?
>
> A That's nice.
>
> Q That's your position?
>
> A It is. I mean, I don't think it's correct. I mean, legally correct I think I should be able to get that charge.
>
> Q And since it wasn't asked again in hindsight we have the benefit of doing that here in a PCR. In hindsight, should you have asked for it? I mean, you just said –
>
> A Also knowing that now judges will do it if you ask for it, but at the time you just couldn't get it. I've heard of judges that *when you ask to charge the language from that act, that they will do it*, but that's been far subsequent to this trial.
>
> Q All right. I'm not trying to dilute it because we going a little bit in circles. And you're saying at the time you didn't do it because one you didn't think the judge would have given it to you?
>
> A Yes, and two I was intimately aware of what the Curry case said that said you couldn't get that charge.

App. 929, l. 4 – App. 930, l. 14.

In State v. Curry, this Court held that the trial court erred in instructing the jury in accordance with the Protection of Persons and Property Act, and the defendant could not complain about the unwarranted jury charge because it was favorable to the defense. In Curry, defense counsel sought to invoke immunity, S.C. Code Section 16-11-40 (C) at the directed verdict stage. This Court held immunity was properly denied.

This Court in Curry also held S.C. Code Section 16-11-440 (C) should not have been charged to the jury once immunity was denied by the trial judge. The jury was erroneously instructed that if the defendant "was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, even to the extent of using deadly force or great bodily injury if it was necessary to prevent death or great bodily injury to himself or others." State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013)

Defense counsel here respectfully learned the wrong lesson from State v. Curry. The jury instruction that a defendant need not retreat if doing so put himself in greater danger was well established long before this trial. See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 330 (1989) *citing* State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hardin, 114 S.C. 280, 103 S.E.2d 557 (1920). Defense counsel conflated his "experience" from Curry on it being error for the trial court to charge the "stand your language" from the immunity statute to the jury with erroneously thinking petitioner did not have the right to this legitimate well established jury instruction on there being no duty to retreat if doing so puts you in greater danger. In short, immunity is a pre-trial determination by the trial court. Self-defense is a matter for a properly

instructed jury to decide. Immunity and stand your ground are no longer considerations once the trial begins.

Defense counsel's deficiency in this regard prejudiced petitioner, and he should have been granted PCR relief. See Strickland v. Washington, 466 U.S. 668 (1984).

2.

<u>The PCR court erred by finding defense counsel was not ineffective for failing to request a jury instruction that the defendant had the right to "act on appearances" and that the defendant "did not have to wait for the decedent to get the drop on him" where jury understanding these principles of self-defense would have assisted the defense given the facts of this case.</u>

As seen, trial counsel testified he was only trying to get a self-defense instruction in this case, and he clearly misunderstood the holding of <u>State v. Curry</u> that he thought limited legitimate jury instructions on the "elements" of self-defense. He also testified that he did not know whether the jury paid attention to any "additional minutiae" as far as self-defense instructions from the trial judge were concerned. App. 951, l. 19 – App. 932, l. 8.

Appellate counsel testified that she would raised the issue of the judge not charging the jury on the defendant's right to act on appearances and that he did not have to wait until his attacker got the drop on him before acting in self-defense *if* defense counsel would have requested these instructions, and the judge refused to charge them. App. 976, l. 20 – App. 978, l. 15.

It is clear in a self-defense case, that the defendant has the right to act on appearances. <u>See State v. Fuller,</u> 397 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1989). <u>See also State v. Jackson,</u> 277 S.C. 271, 87 S.E.2d 681, 684-685 (1955); <u>State v. Rivers,</u> 186 S.C. 221, 196 S.E. 6, 10 (1938). More recently, in <u>State v. Dickey,</u> 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011), this Court reiterated that a person has a right to act on appearances, even if the person's belief is ultimately mistaken. <u>State v. Fuller,</u> 297 S.C. 440, 443–44, 377 S.E.2d 328, 331 (1989). This Court also reiterated that a defendant is not required to wait until the adversary is on equal terms or until he has fired or aimed his weapon in order to act. In short, the defendant is not obligated

to let his adversary get the drop on him before acting in self-defense. See State v. Dickey, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011) *citing* State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); State v. Hendrix, 270 S.C. 653, 244 S.C.2d 503 (1978). See State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936).

Further, as seen, appellate counsel testified she would have raised the refusal to charge on these jury instructions if defense counsel had asked for them. That refusal would have been reversible error on direct appeal in all likelihood. State v. Jackson, 384 S.C. 29, 35, 681 S.E.2d 17, 20 (Ct. App. 2009)

These jury instructions on the elements of self-defense were particularly pertinent in this case given the unusual facts of this case where the petitioner was riding in a vehicle that was being shot at by the decedent. Petitioner testified that he fell out of the car accidentally and he returned fire towards the decedent in self-defense once even the "protection" on being inside the car was gone. Petitioner was exposed to the decedent at that point.

The solicitor's dispassionate "reasonableness" argument dissecting petitioner's behavior during that precarious time also highlighted the need for the jury to understand that petitioner had the right to act on appearances, and he did not have to wait for the decedent to get a further advantage or "the drop on him" before acting in self-defense. Since the failure to request these self-defense proper jury instructions prejudiced petitioner, the PCR court erred in denying petitioner PCR relief. See Strickland v. Washington, supra.

3.

The PCR court erred by finding defense counsel was not ineffective for failing to object to the solicitor's closing argument that the defense attorney's job was to confuse the jury and for it to believe the defendant's lies whereas the solicitor was seeking the truth and justice for the decedent and his family since this was a highly improper prosecution argument was prejudicial to petitioner.

The Due Process Clauses of both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty "without due process of law." U.S. Const. amend. V; *Id.* amend. XIV, § 1. To determine whether a prosecutor's comments during closing argument violated a defendant's due process rights, the appellate court *on direct appeal* must first determine whether the comments were improper, and if so, whether the improper argument(s) so unfairly prejudiced the defendant as to deny him a fair trial. See Darden v. Wainwright, 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *quoting* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

In United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990) the Fourth Circuit noted that "the test for reversible prosecutorial misconduct" in a prosecutor's closing argument is "the prosecutor's remarks or conduct must in fact have been improper, and ... such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial" (citation omitted)).

This Court addressed a strikingly similar legal issue in Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019). Specifically, the solicitor in Fortune improperly argued in closing:

"[M]y job is to present the truth." In fact if you look in the Code

> of Laws which mandated what a solicitor's job is we can't be like a normal attorney is. . . . We have to say what the truth is . . . On the other hand, the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is [to] confuse jurors. Their job is to do whatever they have to -- without regard for the truth to get a not guilty verdict.

Fortune v. State, 428 S.C. 545, 551, 837 S.E.2d 37. 40 (2019).

This Court held that the solicitor's comments "were absolutely inexcusable." "Courts have universally condemned comments like this." *Id.* at 551, 837 S.E.2d at 41. This Court in Fortune cited Berger v. United States and stated, "Over eighty years ago, addressing prosecutorial misconduct not unlike the assistant solicitor's closing argument in this case, the Supreme Court of the United States admonished prosecutors to uphold the integrity of the State in prosecuting crimes." *Id.*; See Berger v. United States, 295 U.S. 78, 88(1935).

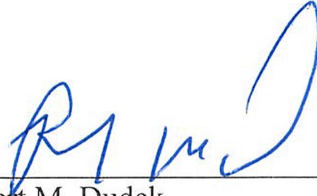
In State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), this Court repeated that "Solicitors are bound to rules of fairness in their closing arguments. Earlier in State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) this Court cautioned that "[w]hile the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done."

Here, the solicitor's conclusion to his closing argument urging that the defense attorneys were simply lying hacks devoid of any ethical core or moral compass was improper. Conversely, the solicitor urged that the state was protecting the memory of the decedent for his family. The jury's choice was to choose being fooled by petitioner's lying attorneys, or honoring the life of the decedent for the sake of his grieving family by convicting petitioner. The solicitor's argument was improper and unfairly prejudiced petitioner's right to a fair trial.

Trial Counsel maintained that he did not object during the state's closing argument because he did not believe the comments in closing were objectionable. He was wrong. Counsel should have objected to this highly improper closing argument. Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (2019). Since this closing argument prejudiced petitioner, the PCR court erred in denying relief. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be granted to allow full briefing on these issues.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of June, 2024.