

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2014-UP-088 (S.C. Ct. App. filed 3/5/2014)

08-GS-10-1082, 3646

THE STATE,

RESPONDENT,

V.

DERRINGER YOUNG,

PETITIONER

Appellate Case No. 2014-001128

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX..... 1
CERTIFICATE OF COUNSEL..... 2
QUESTION PRESENTED 3
STATEMENT OF THE CASE..... 4
ARGUMENT 5

The Court of Appeals erred in affirming the trial court’s failure to sustain Petitioner’s objection to and declare a mistrial based upon the prosecutor’s closing argument that Petitioner threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Petitioner’s right to due process.

CONCLUSION 19

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 24, 2014. App. 39.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial court's failure to sustain Petitioner's objection to and declare a mistrial based upon the prosecutor's closing argument that Petitioner threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Petitioner's right to due process?

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Petitioner for murder and assault and battery with intent to kill (ABWIK) during its February 2008 term. R. 387-388; R. 390-391. The prosecution, represented by Burns M. Wetmore and Peter M. McCoy, called the case to trial on July 19, 2010 before the Honorable Kristi L. Harrington. R. 1-2. Lorelle Proctor and Jessica Mullaney represented Petitioner. R. 2. The jury found Petitioner guilty as charged on both counts. R. 375, l. 12 – R. 376, l. 2. Judge Harrington sentenced Petitioner to imprisonment for twenty years on the ABWIK conviction and life on the murder conviction. R. 378, l. 20 – R. 379, l. 2.

Petitioner filed a timely notice of appeal and perfected his appeal. On March 5, 2014, a three-judge panel of the Court of Appeals, including Chief Judge Few, Judge Short, and Judge Konduros, affirmed Petitioner's convictions and sentences in an unpublished opinion. App. 1-3; State v. Young, No. 2014-UP-088 (S.C. Ct. App. filed Mar. 5, 2014). On March 20, 2014, Petitioner filed a petition for rehearing. App. 4-14. On March 21, 2014, the Court of Appeals requested the state to file a return. On March 27, 2014, the state filed a return. App. 15-38. On April 24, 2014, the Court of Appeals denied Petitioner's petition for rehearing. App. 39.

Petitioner now files this petition for a writ of certiorari.

ARGUMENT

The Court of Appeals erred in affirming the trial court's failure to sustain Petitioner's objection to and declare a mistrial based upon the prosecutor's closing argument that Petitioner threatened three witnesses when no evidence in the record supported the statements, which so infected the trial with unfairness as to make the resulting conviction a denial of Petitioner's right to due process.

Why this Court Should Grant Certiorari

Pursuant to Rule 242(b) of the South Carolina Appellate Court Rules, a writ of certiorari is not a matter of right and will be granted "only where there are special and important reasons." One of the characters of reasons enumerated is that the decision of the Court of Appeals is in conflict with a prior decision of this Court. Another character of reason enumerated is where substantial constitutional issues are directly involved. The decision by the Court of Appeals in Petitioner's case presents a conflict with prior decisions of this Court and directly involves substantial constitutional issues. Therefore, this Court should grant certiorari.

Relevant facts

During his closing argument, the prosecutor argued facts not in evidence resulting in prejudice to Petitioner. Specifically, the prosecutor indicated that two witnesses did not appear for trial and one witness feigned memory loss because of threats by Petitioner. The record contained no evidence of threats by Petitioner to those witnesses or any evidence that would permit a reasonable inference of such.

Prosecutor's closing argument

During his closing argument, the prosecutor argued to the jury that Petitioner had threatened witnesses.

And let me talk about three people who saw this happen: Joshua Crider, Shemera Brown, and Renardo Smalls. Is there a reason - - is there a reason why Renardo Smalls got up on that stand and told you he didn't remember what happened that night? Is there a reason for that? There is a reason for that, and the reason is right here [indicates]. Is there a reason why Shemera Brown has cooperated with police from day one and has not shown up for this trial this week? Is there a reason for that? That reason is right here [indicates]. Is there a reason why Danny Agerson cooperated with the police from the very beginning - - .

R. 332, l. 23 – R. 333, l. 9. Immediately, Petitioner objected to the prosecutor's improper closing argument. R. 333, ll. 10-11. However, the trial judge overruled the objection. Thus, the prosecutor continued with his line of argument:

Is there a reason why Danny Agerson is not here this week and he's cooperated with the police? That reason is right here [indicates].

Joshua Crider, Danny Agerson, Shemera Brown, and Renardo Smalls have all see[n] first hand with their eyes what this man is capable of. Joshua Crider came in here. He's locked up. [Petitioner] can't get to him. He's locked up. He's in jail.

R. 333, ll. 16-23.

Petitioner's Mistrial Motion

Petitioner moved for a mistrial in addition to his objection based upon the prosecutor's closing argument telling the jury that witnesses did not appear for trial because Petitioner had threatened them. R. 357, ll. 2-7. Petitioner argued the comments were improper and shifted the burden to Petitioner to deny any threats. Petitioner further argued the argument infected the trial with unfairness and violated due process. Petitioner explained that the prosecutor's closing argument was prejudicial based upon the testimony of Clayton, who claimed Petitioner threatened him at the detention center. R. 357, ll. 7-18.

The trial judge denied Petitioner's motion for a mistrial. The judge explained that she had instructed the jury prior to closing arguments and at the time of Petitioner's objection that the arguments were not evidence. R. 357, l. 19 – R. 358, l. 3.

A review of the testimony of the witnesses reveals a complete lack of evidence to support the prosecutor's argument to the jury. Furthermore, the testimony of one witness completely contradicted the prosecutor's argument that the witness was scared of Appellant because the witness testified unequivocally that he was not frightened.

Joshua Crider

The prosecution's primary witness was Joshua Crider, who was a bouncer at Club 843, the location of the alleged shooting. R. 24, ll. 1-19; R. 61, ll. 3-5. Crider testified that in November of 2007 Danny Agerson got into a physical altercation with a female at Club 843. This irritated the disc jockey who stopped playing music, causing everyone in the club to turn their attention to the fight. Crider and other security officers attempted to break up the fight and remove Agerson outside the club. Then, Agerson and his friends attacked the security officers. R. 29, ll. 2-23; R. 30, ll. 18-21; R. 63, ll. 20-23; R. 64, l. 6 – R. 66, l. 10. The scene quickly turned into "an all-throw-out brawl." R. 30, l. 21 – R. 31, l. 2. Crider turned on the club's lights and forced everyone to leave, but the fighting continued. R. 31, l. 17 – R. 32, l. 10; R. 66, l. 24 – R. 68, l. 10. Crider testified that during this mayhem, he saw Petitioner shoot Agerson, the man who had been causing problems in the nightclub, in the lower right abdomen. R. 34, ll. 3-9; R. 35, ll. 11-13; R. 36, ll. 21-23; R. 37, ll. 1-3; R. 69, l. 14-17; R. 75, ll. 10-15.

Crider further testified that Petitioner then got into an older model car, possibly a Mercury Grand Marquis, in which a black male and female were waiting. Petitioner exited the vehicle, exchanged words with another man who was standing in front of the car and then shot the man. R. 34, ll. 10-21; R. 37, ll. 11-14; R. 39, ll. 10-15; R. 39, ll. 17-25. Petitioner, his friend and the friend's girlfriend then left the club. R. 41, ll. 15-21.

Although Crider's testimony at trial matched the physical evidence from the scene, interestingly, his 911 call during the actual shootings and his statement to officers during the early morning hours did not match the physical evidence or his trial testimony. R. 46, ll. 18-25. For example, Crider testified at trial that Petitioner shot Agerson in the lower abdomen, but on the 911 call, he said the shot was to the chest. R. 47, ll. 1-4. Additionally, Crider testified only three people were in the car in which Petitioner left the scene; however, on the 911 call, he stated there were four people in the car. R. 47, l. 25 – R. 49, l. 3. Crider testified that after Petitioner left he heard no more shots. R. 49, ll. 4-6; R. 76, ll. 11-22. On the 911 tape, he told authorities he continued to hear gunshots. R. 70, l. 15 – R. 71, l. 8. Further, Crider told the responding officers Petitioner was traveling in a Lincoln, rather than a Mercury as his trial testimony indicated. R. 50, ll. 17-21. Crider testified that when officers took him to the scene of a traffic stop, where he identified Petitioner as the shooter, he saw that the car was not a Lincoln, but was a Mercury. R. 52, ll. 11-24.

Although Crider testified that he received no promises for his testimony during the prosecution's questioning of him, on cross-examination, Crider admitted that he hoped to receive a downward departure in federal court in exchange for his testimony against Petitioner.¹ Crider admitted the prosecutor agreed to write a letter explaining Crider's cooperation and testimony. R. 58, ll. 10-13; R. 73, ll. 14-22; R. 77, l. 15-22. Additionally, Crider testified that he cooperated with police and the prosecution to do his "responsibility as a citizen." R. 79, ll. 2-23.

¹ Crider had been convicted of conspiracy to sell cocaine first degree and conspiracy to commit money-laundering in federal court. R. 73, ll. 23-25. The record was unclear as to how much time Crider received for those federal convictions. Petitioner stated Crider received eighty years or forty years. The prosecution was unsure of the exact number, but considered it a "big sentence." R. 14, ll. 1-10. In addition, Crider had a 2004 conviction for pointing and presenting a firearm. R. 22, l. 22 – R. 23, l. 1.

Renardo Smalls

During the 2010 trial regarding the 2007 shooting incident at Club 843, the prosecutor called Renardo Smalls, Petitioner's cousin, to testify. R. 83, ll. 7-10. Smalls testified he remembered driving a car to Club 843 and that Petitioner was with him. R. 83, ll. 12-25; R. 84, ll. 13-15. However, he did not remember the kind of car he was driving at the time. R. 84, ll. 3-4. Smalls testified that he and Petitioner went their separate ways at the club. Smalls then got drunk. R. 84, l. 18 – R. 85, l. 11. Smalls also recalled people fighting in and out of the club. R. 85, ll. 12-14. Smalls went to his car during the fighting. R. 86, ll. 1-3. Smalls did not remember hearing gunshots and did not remember talking to police due to his intoxication. R. 86, ll. 6-22. When the prosecution presented him with a statement purportedly made by him to police, he admitted his signature appeared on the typed statement, but he had no independent recollection of the events of that night. R. 87, ll. 10-22; R. 88, l. 23 – R. 89, l. 5; R. 91, l. 5 – R. 92, l. 9; R. 104, l. 22 – R. 105, l. 5. Thereafter, the prosecutor introduced Smalls' statement into evidence and published it to the jury. According to the statement, Smalls heard a gunshot. He then saw Petitioner and a female walking towards his car. He also saw another man walking towards them. He described the other guy as the one Petitioner shot. He also stated that Petitioner threw the gun out the window of the car. R. 101, l. 4 – R. 102, l. 24.

The prosecutor asked Smalls if he were scared or nervous about testifying, and he responded negatively. R. 103, ll. 11- 14. When the prosecutor asked if anyone had talked to him or communicated anything to him about testifying, Petitioner objected on the bases of hearsay and relevance. Then a bench conference, which was not recorded, transpired. Ultimately, the judge sustained Petitioner's objection to the testimony. R. 103, l. 15 – R. 104, l. 2.

George Gomes

Officer George Gomes with the North Charleston Police Department testified on behalf of the prosecution. He testified that when he arrived at the scene of Club 843 to investigate the alleged shooting, Agerson had been transported to the hospital already. R. 214, ll. 13-23. Eight days later, Gomes met with Agerson for the first and only time. R. 215, ll. 7-8. Gomes obtained a written statement from Agerson, but had no other contact with Agerson. R. 215, ll. 13-20. In preparing for the trial, Gomes and the prosecution attempted to locate Agerson, but were unable to do so. R. 216, ll. 4-25.

Gomes testified that he also interviewed Shemera Brown, who identified herself as Petitioner's girlfriend. R. 217, ll. 9-20. Brown provided a statement and was cooperative in the investigation. R. 218, ll. 5-15. According to Gomes, Brown told officers where Petitioner threw the gun out the car after the alleged shooting. R. 218, l. 16 – R. 219, l. 4. Gomes further testified that the police department and the prosecuting agency had been in contact with Brown and met with her on several occasions, including a meeting during the latter part of the week before the trial. R. 219, ll. 10-23. However, Gomes was unable to locate Brown for the trial. R. 219, l. 21- R. 220, l. 3.

Larry Clayton

As its final witness, the prosecution called Larry Clayton to testify. Clayton testified that in November of 2009, he was in the local jail due to "some family court child support issues." R. 313, ll. 9-13. While in the jail, he was housed near Petitioner. R. 313, ll. 14-17. Clayton claimed he overheard Petitioner discussing the alleged shooting with others. R. 313, l. 18 – R. 314, l. 4. Clayton further claimed Petitioner said to Clayton: "I'll shoot you in the fucking head like I did the guy at Club 843." R. 314, ll. 13-15. Additionally, Clayton claimed Petitioner said to him: "I ain't no pussy about the shit I do." R. 316, ll. 1-3. When the prosecutor pressed Clayton on whether the

statement had anything to do with the alleged shooting, Clayton changed his testimony to reflect that Petitioner said “I’ll shoot you in the head like I did the guy at Club 843; I ain’t no pussy about the shit I do; I ain’t take no crap off nobody.” R. 316, ll. 5-11. The prosecutor then presented Clayton with a written statement he provided and asked if the statement refreshed his recollection of what transpired. Clayton claimed it did and testified Petitioner actually said “he’d shoot me and watch my brains spill out.” R. 316, l. 19 – R. 317, l. 19.

On cross-examination, Clayton admitted that snitching on fellow inmates “usually helps” a person get out of jail. R. 318, l. 22-25. He further admitted that in the jail, anyone can read anyone else’s materials, including discovery in criminal cases. R. 219, ll. 4-15. He also admitted that he had a pending escape charge, which was being prosecuted by the same agency prosecuting Petitioner. R. 319, l. 22 – R. 320, l. 8.

Discussion

Although a solicitor should prosecute vigorously, he is a minister of justice. Thus, his job is not to convict a defendant, but to see justice done. A prosecutor’s argument must be based upon that basic principle of the criminal justice system. State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). The prosecutor’s closing argument “must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence.” State v. Vaughn, 362 S.C. 163, 607 S.E.2d 72 (2004)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Where a prosecutor makes an improper argument, the question is whether “the remark ... so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This Court explained an 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).

In Donnelly, 416 U.S. at 643-644, the United States Supreme Court held the prosecutor's improper comments were not so egregious such that they infected the trial with unfairness making the resulting conviction a denial of due process in light of the trial judge's "special pains" to cure the error and the ambiguous nature of the argument. Although the Donnelly Court afforded no relief to the defendant, the Court reaffirmed the long-standing legal principle that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." Id., at 646 (citing Miller v. Pate, 386 U.S. 1, 7 (1967)). The Donnelly Court distinguished the facts before it from Miller, where the prosecutor repeatedly showed the jury a pair of stained undershorts allegedly belonging to the defendant, which the prosecutor described as stained with blood. The undershorts were actually stained with paint. The Donnelly Court explained that "[t]he 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations." On the contrary, "[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion, not evidence, do not reach the same proportions." Id. Likewise, the Court distinguished Donnelly from Brady v. Maryland, 373 U.S. 83 (1973). As explained by the Court, in Brady, the prosecutor withheld evidence that was directly relevant to the defendant's involvement in the crime. The Court expressed that "manipulation by the prosecution was likely to have an important effect on the jury's determination." Id., at 647.

In Darden v. Wainwright, 477 U.S. 168, 179-182 (1986), the Court held the prosecutor's argument deserved the condemnation it had received; however, the Supreme Court ultimately determined the argument had not so infected the trial with unfairness as to make the resulting

conviction a denial of due process. Although the comments were improper, they did not deprive the defendant of a fair trial because the argument did not manipulate or misstate the evidence and did not implicate other specific rights of the defendant, such as the right to counsel or the right to remain silent. *Id.*, at 181-182. Importantly, the Court explained first, “[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense.” *Id.*, at 182. Second, the Court noted the trial court instructed the jury numerous times that their decision must be based on the evidence and the arguments of counsel were not evidence. Third, the Court explained the evidence against the defendant was “heavy.” *Id.*

This Court addressed this issue in *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994). In Elijah Mincey’s drug distribution trial, two witnesses testified that Mincey had not participated in the drug transaction. Those witnesses were present for the drug transaction and had entered guilty pleas to distribution for their involvement. *Id.*, at 357, 444 S.E.2d at 511. In his closing argument, the prosecutor called Mincey “a pretty intimidating man.” He further argued Mincey “must be pretty intimidating for these guys to come before Judge Connor, tell her, yes, we’re guilty of this.” *Id.* (emphasis in original). Concerning the confidential informant in the case, the prosecutor stated “Maybe she’s intimidated by Elijah. She’s got children. She lives down there too.” *Id.*, at 358, 444 S.E.2d at 511. The Court held the prosecutor’s argument was improper and trial counsel was ineffective for failing to object. “References to threats or dangers to witnesses are improper unless evidence is offered connecting the defendant with the threats.” *Id.* (citing *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985)). As explained by the Court, Mincey’s defense was that he was not involved in the drug transaction. The prosecutor’s implication that the two witnesses gave false testimony due to intimidation or threats contradicted this defense. The prosecutor’s argument

was improper because “[t]here was, in fact, no evidence that Mincey intimidated any of the witnesses.” Id., at 358, 444 S.E.2d at 511.

This Court granted a defendant a new trial where a prosecutor’s closing argument, which “misstated the law by improperly injecting parole considerations into the jury’s sentencing decision and equating a finding of guilty with a recommendation of mercy with a much lighter sentence of an acquittal.” Simmons, 331 S.C. at 338-339, 503 S.E.2d at 167. Although the trial judge informed the jury that the responsibility of sentencing the defendant was for the judge alone, the judge did not explain the sentencing consequences of the verdicts available to the jury. Id., at 339, 503 S.E.2d at 167. Therefore, the instructions did not cure the improper argument. Additionally, the Court was not persuaded by the overwhelming evidence of the defendant’s guilt because the prosecutor’s argument prevented the jury from fairly considering a verdict of guilty with a recommendation of mercy. Id., at 340, 503 S.E.2d at 167.

In Vaughn, 362 S.C. at 171, 607 S.E.2d at 76, this Court held a defendant was entitled to a new trial based upon the solicitor’s improper closing argument. The defendant’s attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id., at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors’ time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant’s attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said “the very same thing” that the officer presented said. Id., at 168, 607 S.E.2d at 74.

This Court recognized that improper argument includes vouching for a witnesses and initiating argument about the testimony of absent witnesses. Id., at 169, 607 S.E.2d at 75. Additionally, this Court recognized that the defendant “‘opened the door’ to some response from the solicitor” based on is closing argument concerning the absence of witnesses. Id., at 170, 607 S.E.2d at 75. This Court held that the solicitor’s response was unfair and prejudicial in light of the lack of evidence of the defendant’s guilt. Id., at 170, 607 S.E.2d at 75-76.

In State v. Barroso, 320 S.C. 1, 20-21, 462 S.E.2d 862, 874-875 (Ct. App. 1995), rev’d on other grounds, State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997), the Court of Appeals dealt with the prosecution offering testimony from a witness in a statewide grand jury drug conspiracy case where the wife of a state’s witness found a note under her windshield which stated: “I know where you live.” His wife also received a telephone call wherein she was told “testify and you die,” and the caller then hung up. Id. at 21, 462 S.E.2d at 875. The trial court sustained defense counsel’s objections to this witness intimidation evidence and instructed the jury to disregard it through a curative instruction. Id. at 21-22, 462 S.E.2d at 875. While holding it was not an abuse of discretion to deny the mistrial motion in that instance, the Court noted the extreme prejudice and unfairness to the defendant when there was nothing to connect the alleged threat or intimidation to the particular defendant. Id. at 22, 462 S.E.2d at 876. The Court described the prosecutor’s actions as “‘trial by ambush’” because the prosecutor knew several days in advance what the witness would say. Id. at 22, 462 S.E.2d at 876.

In State v. Merriman, 287 S.C. 74, 83, 337 S.E.2d 218, 224 (Ct. App. 1985), the Court of Appeals held it was “a rather egregious example of prosecutorial misconduct” where the prosecutor elicited testimony that the witness had been in protective custody over the last week or ten days. The Court explained that “[t]he general rules is that references to threats or dangers

to prosecuting witnesses are improper unless testimony is offered connecting the defendants with the threats of danger.” Id. However, the Court found no error in failing to grant the mistrial motion because the judge gave a “full and complete” curative instruction to disregard the answer. Id.

In a recent capital case, this Court found a solicitor’s closing argument to require reversal where the solicitor informed the jury that if the death penalty were not returned, then it would be the equivalent of “declaring an “open season on babies in Lexington County.”” The only purpose of such a statement was to inflame the jury. Additionally, the prosecutor told the jury repeatedly that he “expected” the jury to return a death verdict, which was in direct contradiction of case law. Finally, the prosecutor ended his argument by producing a large black shroud and draping it over the baby’s crib, which he wheeled into the courtroom in a staged funeral procession. State v. Northcutt, 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882(2007).

The Court of Appeals rejected Petitioner’s argument by citing to State v. Bantan, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010) and State v. Webb, 389 S.C. 174, 697 S.E.2d 662 (Ct. App. 2010). App. 2. The series of parentheticals explained that a trial judge must exercise sound discretion in handling a motion for mistrial and that such motions should be granted only when absolutely necessary following a showing of error and prejudice. App. 2. The parentheticals further explained although improper comments do not automatically require a reversal if they are not prejudicial, the solicitor’s closing argument must not appeal to the personal biases and emotions of the jury and must stay within the record. App. 2. Finally, the parentheticals referred to errors in closing arguments being harmless when overwhelming evidence of guilt is shown. App. 2. Although the Court of Appeals’ reasoning was unclear in light of its brevity, it appears the Court

determined the trial judge had erred in failing to sustain the objection, but no prejudice resulted.

This was clear error.

The closing argument presented by prosecutor in the instant case was clearly improper. Repeatedly and dramatically, the prosecutor pointed to Petitioner as the reason why two witnesses did not appear and one allegedly feigned a faulty memory where no evidence supported the prosecutor's false statements. The prosecutor further exacerbated this improper argument by saying that the only witness to testify was willing to do so only because Petitioner could not get to him because the witness was safe in jail. Thus, the prosecutor's argument was clear: Petitioner threatened witnesses with violence to intimidate them into not testifying. The record contained no evidence of threats against those witnesses, much less threats by Petitioner against the witnesses. The trial judge overruled Petitioner's objection to the improper argument signaling to the jury that what the solicitor claimed was true and accurate. The trial judge failed to instruct the jury to disregard the prosecutor's improper argument; therefore, no curative instructions or corrective action was taken by the trial judge, which has been viewed as curing improper arguments in other cases.

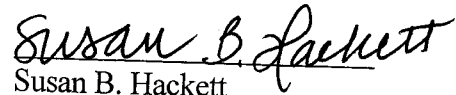
The evidence against Petitioner was not overwhelming. The main witness against Petitioner was highly motivated to testify falsely in light of his criminal charges, and his testimony differed from his 911 call significantly. No physical or forensic evidence connected Petitioner to the crime. Crider's credibility was seriously undermined by the circumstances of the scene, his inconsistent statements, and his motive to lie to assist himself. Although Smalls testified, he had very little memory of what transpired three years earlier at a nightclub while he was intoxicated. In light of this paucity of evidence, the prosecutor acted improperly, and desperately by informing the jury that Petitioner had threatened witnesses to discourage their cooperation or feign memory loss. The

prosecutor had no evidence at all to support such an improper argument. Allowing the prosecution's argument to stand would be a "prostitution of justice." See Mincey, 314 S.C. at 358, 444 S.E.2d at 511(citing State v. Rogers, 96 S.C. 350, 352, 80 S.E.620, 621 (1914)(holding that introduction of evidence that someone attempted to influence a witness by fear or fright without any evidence that connects the defendant to the tampering would be a "prostitution of justice").

CONCLUSION

Petitioner respectfully requests this Court grant his petition for writ of certiorari and order full briefing on the issue presented.

Respectfully submitted,


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 2nd day of June, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Kristi Lea Harrington, Circuit Court Judge

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SC Court of Appeals

THE STATE,

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PETITIONER

CERTIFICATE OF SERVICE

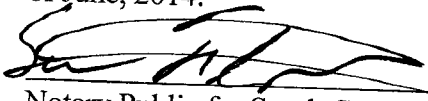
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Anthony Mabry, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals and Mr. Derringer Young #309944, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of June, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022



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June 2, 2014

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JUN 03 2014

SC Court of Appeals

J. Anthony Mabry, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
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Re: The State v. Derringer Young

Dear Anthony:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/smf

Enclosures

cc: Court of Appeals