STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
(803) 779-2555
(803) 779-2556 FAX

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies that a petition for rehearing was made and was finally ruled upon by the South Carolina Court of Appeals.

QUESTION PRESENTED

I.

Whether certiorari should be granted to review the Court of Appeals' conclusion that the Petitioner was not prejudiced by defense counsel's failure to object to the State's improper closing argument?

STATEMENT OF THE CASE

The Petitioner, Dushun Staten, was indicted in Richland County for one count of murder and one count of lynching in the first degree. On February 25 through March 1, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by David Taylor, Esquire. The Petitioner's brother and co-defendant, Lucius Staten, was jointly tried with the Petitioner on the same charges. At the conclusion of the trial, the Petitioner was found guilty as charged.[1] The Honorable L. Henry McKellar, presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the murder conviction and to ten years' imprisonment for the lynching conviction, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentences to the Court of Appeals. Robert M. Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In a published opinion filed March 7, 2005, the Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). The Petitioner then appealed to this Court, which issued a published decision vacating the Court of Appeals' opinion in part and dismissing the certiorari petition in part. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The Remittitur was issued on June 27, 2007.

On July 12, 2007, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court's Office, which was amended on March 30, 2009. The State served its Return on February 14, 2008. An evidentiary hearing into the matter was convened on April 1, 2009, before the Honorable L. Casey Manning, presiding circuit judge. On July 23, 2009, the PCR court filed an Order of Dismissal denying the Petitioner's application on all issues. The

[1] The jury convicted the Petitioner's co-defendant of lynching but hung on the charge of murder.

Petitioner then timely served a Rule 59(e), SCRCP, Motion to Alter or Amend on August 10, 2009. The PCR court denied the Rule 59(e) motion by written order filed February 17, 2011. On March 8, 2011, the Petitioner timely served a Notice of Appeal indicating his intent to appeal the orders issued by the PCR court in this case. The Notice of Appeal was received by this Court on March 9, 2011.

The Petitioner filed a Petition for a Writ of Certiorari with this Court on October 17, 2011. The State served its Return on December 19, 2011. The Petitioner filed a Reply to the State's Return on January 9, 2012. This Court subsequently transferred the appeal to the Court of Appeals. By order filed March 12, 2014, the Court of Appeals granted the certiorari petition. In an unpublished opinion filed September 30, 2015, the Court of Appeals affirmed most of the PCR court's rulings.[2] Staten v. State, Op. No. 2015-UP-465 (S.C. Ct. App. filed September 30, 2015); The Petitioner then petitioned the Court of Appeals for rehearing. The Court of Appeals denied rehearing on December 18, 2015.

The Petitioner's petition for rehearing was denied by the Court of Appeals. The Petitioner now seeks a writ of certiorari.

[2] In relevant part, the Court of Appeals held the PCR court erred in finding that defense counsel's performance was not deficient with regard to his failure to object to the State's improper closing argument.

STATEMENT OF FACTS

On January 15, 2001, the victim, Phillip Lee, was shot and killed during an altercation between two large groups of individuals near Benedict College in Columbia, South Carolina. The State presented evidence that the altercation was gang-related. At trial, the State conceded that neither the Petitioner nor his brother, Lucius Staten, shot the victim. Instead, the State presented testimony that another individual named Limel Sims shot the victim after being given a firearm by the Petitioner that he retrieved from a Mitsubishi Galant. See generally App. p. 519, line 19-p. 522, line 21; p. 599, lines 1-19. The State prosecuted the Petitioner and his brother on an accomplice liability basis.[3]

The Petitioner and his brother presented a strong defense that another individual, Maurice Sanders, fired the shots that killed the victim and that he acted alone in doing so. This defense was established through several sources. First, the Petitioner's statement to the police identified Sanders as the shooter. See App. p. 743, lines 15-18. Second, a Benedict student named Brandon McCants, who had no substantive connection to the Petitioner or to Lucius,[4] testified that Lucius told everyone to stop fighting and told the Petitioner to leave. App. p. 904, line 25-p. 906, line 20. McCants further testified that when Lucius turned to leave, Sanders opened fire and fired two shots. App. p. 906 lines 18-25; p. 910, line 13-p. 911, line 23. He also testified that no one got a firearm out of the Galant. App. p. 914, line 23-p. 915, line 11. Third, Lucius testified that he was with the Petitioner during the argument, that he told the Petitioner to get in the car, and that he did not see a firearm prior to the shots being fired. App. p. 990, line 18-p. 995, line 25. Moreover, he

[3] As to Lucius' involvement, the State presented evidence that Lucius told the Petitioner to "get the hammer"—the firearm—and that he nodded at Sims immediately prior to shots being fired. App. p. 522, lines 8-16; p. 599, lines 1-11.

[4] McCants testified that he met the Petitioner and Lucius the first week of January 2001 and had only seen them a few times by the date of the incident. App. p. 890, line 5-p. 891, line 19.

testified that both he and the Petitioner had withdrawn from the argument before any shots were fired. App. p. 1015, lines 1-18. Fourth, the defense presented the testimony of Garrett Copeland, an Allen University student and ordained minister at the time of the incident, who testified that he gave the Petitioner and Lucius a ride from the area immediately following the shooting. App. p. 1092, line 23-p. 1097, line 13. This testimony demonstrated that the Petitioner and Lucius did not leave the scene with either Sims or Sanders.

Five individuals were ultimately charged in this case: Sims, the Petitioner, Lucius, Sanders, and the Petitioner's cousin Shakeem Wilson. Sims, Lucius, and the Petitioner were all charged with murder and lynching in the first degree whereas Sanders and Wilson were only charged with accessory after the fact to murder and to lynching in the first degree. The Petitioner was found guilty as charged of both offenses, but Lucius was only found guilty of the lynching offense as the jury was hung on the murder charge.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

I. The Court of Appeals erred in finding that the Petitioner was not prejudiced by defense counsel's failure to object to the State's improper closing argument.

A. How the Issue Arose Below

At trial, there were two central disputes: (1) whether Sims or Sanders shot the victim; and (2) if Sims shot the victim, whether or not the Petitioner and Lucius acted in concert with Sims in that action. If the jury concluded that Sanders shot the victim, then the result at trial would have been an acquittal because the Petitioner and Lucius did not act together with Sanders. During its closing argument, the State sought to defuse this defense by arguing that Sanders was properly charged as an accessory due to evidence in his possession that the jury was not privy to:

> Ladies and gentlemen, the idea or the premise that Mo Sanders is the shooter is not corroborated by any evidence. In fact, all of the evidence contradicts, all of it.
>
> First, you've got three eyewitnesses, three people that were facing. Remember, I asked that question? They're here facing the shooter, not standing back here. They're facing the shooter in this well-lit area. Three eyewitnesses. Three eyewitnesses facing the shooter in a well-lit area that say the shooter had a black Northface jacket on. Nothing obstructing their view.
>
> Ladies and gentlemen, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. So was Shakeem Wilson, their cousin. They were hanging back. That's why they're not charged with murder but accessory after the fact *based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.*

App. p. 1253, line 18-p. 1254, line 14 (emphasis added). Defense counsel raised no objection to this portion of the State's closing argument.

In his Amended Application for Post-Conviction Relief, the Petitioner alleged that "[d]efense counsel was ineffective for failing to object to the solicitor's closing argument where the solicitor referred to facts not in the record." App. p. 1443. At the PCR hearing, defense counsel testified that he thought the prosecutor's closing argument was proper and that he didn't "know why he said, you all didn't hear about it, because I am almost positive they did." App. p. 1491, lines 23-24. Defense counsel further testified that he did not believe that the prosecutor referred to Sanders in his closing argument:

> Q: And you disagree that this portion of the closing argument strongly infers that the reason Maurice Sanders was not being prosecuted was due in part to matters not before the jury?
>
> A: I don't know that he's talking about Moe Sanders here. He doesn't mention his name anywhere.

App. p. 1507, lines 1-6. Finally, defense counsel testified that he wouldn't have made an objection because of the possibility that the prosecutor would "have you eat your words." App. p. 1492, lines 16-17.

The PCR court denied relief on this claim, focusing primarily on Strickland's performance prong and finding that defense counsel articulated a valid trial strategy "to not make questionable objections during closing argument because doing so can and often does backfire." App. p. 1556. The PCR court further found that there was nothing objectionable in the closing argument because

> The content of the Solicitor's closing argument were issues addressed earlier in the trial; and there were no allegations of ineffective assistance of counsel concerning the earlier instances and references of *accessory after the fact*. Attorneys for either party are permitted to comment on and reference what is already in the record. The reference to the other evidence and things done *after* the fact was merely an explanation as to why "they" were (unlike the defendants) charged with accessory after the fact – charges that were referenced earlier in the trial. Trial transcript p. 250, 832, and 1993, etc.).

App. p. 1557. With regard to Strickland's prejudice prong, the PCR court made only a general finding that the Petitioner "has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance." App. p. 1550.

In its opinion, the Court of Appeals held that "the State's comments were improper and trial counsel was deficient in failing to object." App. p. 1670. The Court of Appeals concluded that the State's argument was vouching. App. p. 1670 (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). However, the Court of Appeals concluded that the Petitioner was not prejudiced by the State's closing argument because "the State did not repeat the comments, and the comments occurred during a lengthy closing argument that spanned fifty-seven pages of the

record." App. p. 1670. The Petitioner respectfully asserts that the Court of Appeals' findings regarding prejudice are erroneous, and that certiorari should be granted.[5]

B. Discussion

"[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The critical inquiry in evaluating the propriety of a prosecutor's closing argument is "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting a conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. Dechristoforo, 416 U.S. 637, 643 (1974)).

A prosecutor's closing argument must not "manipulate or misstate the evidence." Darden at 182. Furthermore, a prosecutor's closing argument must be limited to the "evidence in the record and the reasonable inferences that may be drawn from the evidence." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). The prosecutor may violate these principles by vouching for his witnesses or bolstering his case. "Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

The Court of Appeals correctly concluded that the State's closing argument was improper because it "suggest[ed] the State had other evidence at its disposal that exonerated [Sanders and Wilson] of murder." App. p. 1670. The Court of Appeals, however, erred, when it found that the Petitioner was not prejudiced by defense counsel's failure to object to the State's closing argument.

[5] The Petitioner does not challenge the Court of Appeals' findings regarding defense counsel's deficient performance.

Specifically, the Court of Appeals concluded that since the improper argument occurred only once within an otherwise very lengthy closing argument, then the Petitioner was not prejudiced by the argument. See App. p. 1670. The Petitioner respectfully submits that there are several reasons why this conclusion was erroneous.

First, the Court of Appeals misapplied Strickland when it concluded that the prosecutor's closing argument did not prejudice the Petitioner. The focus of the Petitioner's defense was that Sanders was the sole perpetrator of the crime, and that the Petitioner and Lucius had nothing to do with him or his decision to shoot the victim. This defense necessarily hinged on the jury's belief that Sanders shot the victim. The prosecutor's closing argument singlehandedly defeated that defense because he informed the jury that he knew that Sanders didn't shoot the victim "based on evidence that you all didn't hear about." App. p. 1254, lines 11-12. Any juror that heard that argument would have heard the prosecutor explicitly telling him or her that the entire defense was meritless because of what he, the prosecutor, knew. At that point, then, a juror evaluating the case would have had only to conclude whether the Petitioner acted in concert with Sims before finding him guilty, as the Petitioner's primary defense had been conclusively disproven by the prosecutor. Inasmuch as the prosecutor's closing argument negated the Petitioner's defense, the improper argument was inarguably prejudicial.

Second, this Court's opinion in Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002), makes clear that neither of the factors set forth by the Court of Appeals should be dispositive of the claim. At the trial in question in Matthews, the State tried eleven defendants jointly.[6] During the State's closing argument, the prosecutor "vouched for the credibility of a State's witness" by stating to the jury that "I don't trust any of these people **until I corroborate their testimony.** And

[6] Some of the information regarding the trial was taken from a direct appeal involving several co-defendants who were tried jointly with Matthews. See State v. Barroso, 328 S.C. 268, 493 S.E.2d 854 (1997).

once I corroborate their testimony, yes, I put them on the witness stand." 350 S.C. at 275, 565 S.E.2d at 767 (emphasis in original). This Court concluded that this argument was prejudicial because "[c]ounsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness." Id. at 277, 565 S.E.2d at 769.

While this Court did not state the exact number of pages included in the State's closing argument in Matthews, it can be presumed that it was a lengthy argument considering that it was a joint trial of eleven defendants. Similarly, this Court did not note any other instances where the prosecutor vouched for her witnesses. Yet this Court still found that the argument was prejudicial, given the critical and improper information it conveyed to the jury. Here, the inquiry should have been the same. Even though the prosecutor's closing argument was lengthy, the improper portion of the prosecutor's closing argument conveyed such damaging information to the jury that the Petitioner's entire defense was eviscerated. Since the Court of Appeals reached a different conclusion than that reached by this Court in Matthews, and given the similarities between the closing argument in Matthews and the closing argument in this case, this Court should grant certiorari to review the Court of Appeals' opinion. See Rule 242(b)(3), SCACR.

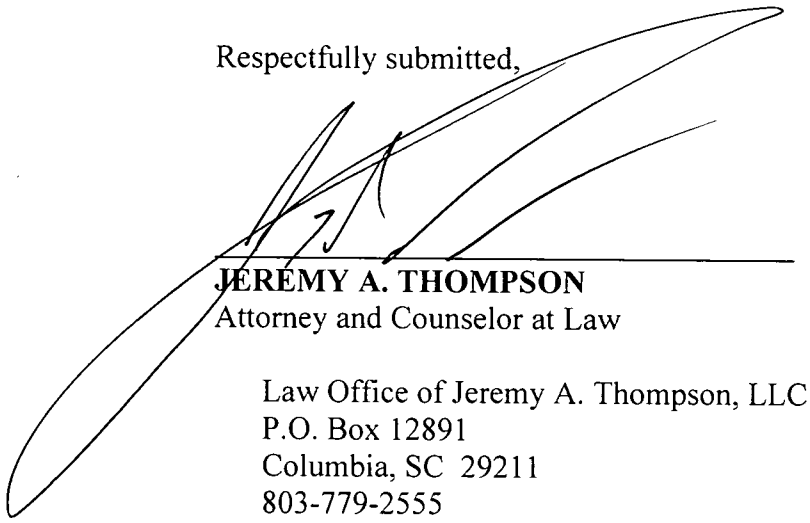
Third, there are significant negative ramifications of the Court of Appeals' reasoning. The logical counterpoint to the Court of Appeals' conclusion is that had the prosecutor made a shorter closing argument, then the Petitioner would have been prejudiced by the improper portion of the argument. In other words, the Court of Appeals' opinion instructs prosecutors that so long as they talk a lot during their closing arguments, then they can bury an improper argument somewhere in their closing summation and face no negative repercussions. Implicitly authorizing improper arguments in lengthy closings runs contrary to the principle that prosecutors are "not at liberty to

strike foul [blows]." Berger, *supra*, 295 U.S. at 88. This Court should grant certiorari due to the substantial constitutional issues presented by this case. See Rule 242(b)(4), SCACR.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



JEREMY A. THOMPSON
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 12891
Columbia, SC 29211
803-779-2555
803-779-2556 FAX
jeremyatlaw@yahoo.com

ATTORNEY FOR PETITIONER.

This 19th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Petitioner's Petition for Writ of Certiorari and one copy of Volume V of the Appendix in the above-entitled case have been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 19th day of January, 2016.

JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 19th day of January, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022