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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO THE COURT OF APPEALS
Appeal From Richland County
The Honorable L. Casey Manning Circuit Court Judge

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Opinion No. 2015-UP-465 (S.C. Ct. App. filed September 30, 2015)

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Appellate Case No. 2011-187273

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Dushun Staten, #282328, .......................................................... Petitioner,

v.

State of South Carolina, .......................................................... Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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## PETITIONER'S QUESTION PRESENTED

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

## STATEMENT OF THE CASE

The Richland County Grand Jury indicted Petitioner at the January 2002 term of General Sessions for Murder (2002-GS-40-1148) and Lynching (2002-GS-40-0786). (App. p. 1431-37). David Taylor, Esquire represented Petitioner. Petitioner and his brother, Lucius Staten, were tried jointly on the same charges.

After the State called the case to trial, Petitioner was found guilty. On March 4, 2002, the Honorable L. Henry McKellar sentenced Petitioner to thirty (30) years imprisonment for Murder and to ten (10) yeas imprisonment for Lynching, with the sentences to be served concurrently. Id.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App. p. 1308–34). The court of appeals affirmed Petitioner's convictions and sentences on March 7, 2005. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). (App. p. 1386–1417). Petitioner then appealed to the Supreme Court of South Carolina which vacated the court of appeals' opinion in part and dismissed the writ of certiorari in a published opinion. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The remittitur was issued on June 27, 2007.

Petitioner filed an application for post-conviction relief (PCR) on July 12, 2007 (2007-CP-40-4259). (App. p. 1419-25). A hearing was held at the Richland County Courthouse on April 1, 2009. (App. p. 1542-59). Petitioner was present and represented by Tara Dawn Shurling, Esquire. Brian T. Petrano, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable L. Casey Manning denied relief in an order filed June 25, 2012. Id.

Petitioner filed a Petition for Writ of Certiorari on October 17, 2011. Respondent filed a Return to Petition for Writ of Certiorari on December 17, 2011. The South Carolina Court of Appeals granted the petition by Order filed March 12, 2014. The court of appeals affirmed the

PCR court's findings as to the prior bad act issue, reversed the PCR court's findings as to deficiency on the closing argument issue, but found no resulting prejudice. Staten v. State, Op. No. 2015-UP-465 (S.C. Ct. App. filed September 30, 2015). A petition for rehearing was denied. Petition now seeks a writ of certiorari from this Court. Respondent's return follows.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

### I. The court of appeals did not err in finding Petitioner was not prejudiced by the solicitor's comments.

Certiorari is not warranted in this case because the court of appeals was correct in finding Petitioner was not prejudiced by the improper comments made by the solicitor in closing argument. Petitioner argues the court of appeals misapplied Strickland in finding that the comments did not infect the trial with unfairness. Petitioner also argues the court of appeals' findings that the length of the closing argument was a valid consideration in determining prejudiced was in error. Respondent submits the court of appeals correctly applied the applicable law in finding Petitioner was not prejudiced.

How the issue was raised below

The relevant comments made by the solicitor during closing argument are as follows:

> Ladies and gentleman, 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. 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. 1254, lines 4-14).

Relevant Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"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." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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.

Analysis

Petitioner was not prejudiced by the solicitor's improper comments made during closing argument. The comments did not infect the trial with unfairness because were very limited in time and scope. Petitioner cites Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002), in support of his argument that the length of the closing argument at issue should not be dispositive

of the analysis. Matthews held that the applicant was entitled to relief where the solicitor stated: "I don't trust any of those people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, I put them on the witness stand." 350 S.C. at 275, 565 S.E2d at 767 (emphasis in original).

Matthews is easily distinguishable from the present case. Notably, there is *no* mention of the length of the closing argument in Matthews. Petitioner asks this Court to assume it was lengthy given the number of defendants. Furthermore, the comments made in Matthews are much more egregious than what was said during Petitioner's case.

All vouching is not equal. Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944). The court of appeals was correct to consider the comments in light of the entire record. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (holding appellate courts will review the alleged impropriety in the context of the entire record). Respondent submits that the length of the argument alone is not dispositive, but rather a consideration that the court of appeals was correct to take into account. Here, the closing argument was quite lengthy and spanned fifty-seven (57) pages of a nearly 1,300 page record. Moreover, Petitioner's trial consisted of thirty-two (32) witnesses who testified over the course of five (5) days. The comments made by the solicitor were also not repeated and were not focused on by the prosecution but only mentioned during the lengthy closing. When examining the record as a whole, these isolated comments by the solicitor did not infect the trial with unfairness as to make the resulting conviction a denial of due process.

Petitioner then argues 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 repercussion." (PWC, p. 13). This analysis misinterprets the opinion. The court gave no such instruction to prosecutors. The analysis is based on a case by case basis and must encompass the entire record, not just on length and not just considering the isolated passage. The court of appeals cited Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009), to support its conclusion that there was no prejudice because of the brevity and location of the improper comments. These considerations are proper and make up but a number of factors that an appellate court must consider when evaluating prejudice.

In any event, the State presented overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). There were a number of eyewitnesses to the shooting and all implicated Petitioner in the events that caused the death of the victim. Therefore, Petitioner was not prejudiced, and the court of appeals was correct in ruling so.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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By:
ATTORNEYS FOR RESPONDENT

February 18, 2016

STATE OF SOUTH CAROLINA
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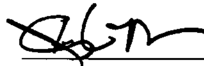
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari to the Court of Appeals** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

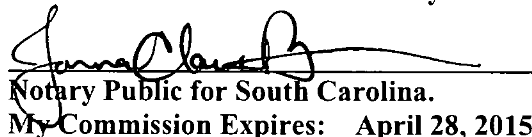
**Jeremy A. Thompson, Esquire**
**Law Office of Jeremy A. Thompson, LLC**
**PO Box 12891**
**Columbia, SC 29211**

This 18th day of February, 2016.



J. CLAYTON MITCHELL
ATTORNEY FOR RESPONDENT

**SWORN to before me this 18th day of December, 2016.**



**Notary Public for South Carolina.**
**My Commission Expires: April 28, 2015**

2007-CP-40-04259