STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

WALTER J. GREENE, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000151

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge in denying Petitioner relief from his convictions and sentences where trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the solicitor's improper closing argument regarding facts not in evidence that appealed to the jury's emotions in order to bolster a case with no physical evidence against Petitioner?.

STATEMENT

An Orangeburg County grand jury indicted Petitioner for burglary in the first degree (2010-GS-38-1024), assault and battery with intent to kill (2010-GS-38-1025), and armed robbery (2010-GS-38-1026). App. 655-656; App. 658-659; App. 661-662. The state, represented by Donald Sorenson, called the case to trial before the Honorable Edgar W. Dickson and a jury on October 5, 2010. App. 1. Margaret "Peggy" Hinds and Mark Wise represented Petitioner. App. 1. The jury found Petitioner guilty of burglary in the first degree, assault and battery with intent to kill, and attempted armed robbery, a lesser-included offense of armed robbery. App. 567, ll. 5-14. Judge Dickson sentenced Petitioner to twenty years' imprisonment for attempted armed robbery and assault and battery with intent to kill. App. 573, ll. 12-16; App. 660; App. 663. He sentenced Petitioner to twenty-five years' imprisonment for burglary. App. 573, ll. 17-20; App. 657. He ordered the sentences to be served concurrently. App. 573, l. 21; App. 660; App. 663.

Petitioner filed a timely notice of appeal, which was perfected by Elizabeth A. Franklin-Best. App. 577-588. On appeal, Petitioner challenged the trial judge's admission of an in-court identification of Petitioner by the complaining witness based upon an unduly suggestive photographic line-up procedure conducted by law enforcement. App. 577-588. In its responsive brief, the state, represented by Harold M. Coombs, Jr., claimed the error was not preserved for review because the complaining witness identified Petitioner by name without objection. App. 589-600. However, the Court of Appeals addressed the merits of the argument. Nevertheless, the Court affirmed Petitioner's convictions. App. 601-602. According to the Court of Appeals, Petitioner's "photograph [in the photographic lineup] did not stand out in such a way as to render the lineup unduly suggestive." App. 602.

On September 13, 2013, Petitioner filed an application for post-conviction relief (PCR). App. 604-613. The state, thereafter, filed its return. App. 614-618. On May 21, 2015, the matter proceeded to an evidentiary hearing before the Honorable Maite Murphy. App. 619. J. Clayton Mitchell, III, represented the state, and Jonathan D. Waller represented Petitioner. App. 619. By an order filed December 8, 2015, Judge Murphy denied Petitioner relief from his convictions and sentences. App. 647-654.

ARGUMENT

The PCR judge erred in denying Petitioner relief from his convictions and sentences where trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the solicitor's improper closing argument regarding facts not in evidence that appealed to the jury's emotions in order to bolster a case with no physical evidence against Petitioner.

Relevant facts

Evidence produced at trial

For several days in April 2010, Petitioner was staying with his mother, Deborah Miller, and her boyfriend, Gilbert "Ali" Wells, because Petitioner and his girlfriend, Donita Ross, had had a disagreement prompting Petitioner to leave their shared residence. App. 359, ll. 17-20; App. 369, ll. 3-13; App. 372, l. 9 – App. 373, l. 6; App. 373, l. 25 – App. 374, l. 5; App. 391, ll. 13-17; App. 401, ll. 4-14. Additionally, Ross was moving out of the home she was renting on that day. App. 360, ll. 1-2; App. 359, l. 21 – App. 360, l. 6. Petitioner agreed to watch Ross' children so that she could pack more easily. App. 360, ll. 4-6; App. 362, l. 19 – App. 363, l. 6. Ross left the children with Petitioner at 4 p.m. App. 360, ll. 10-12; App. 376, ll. 4-11. She picked the children up at 7:45 p.m. App. 360, ll. 12-14; App. 376, ll. 8-11. She and Petitioner talked on the porch until 9 p.m. when Ross left. App. 361, ll. 3-13; app. 376, ll. 10-11. When Ross got home, she and Petitioner talked on the phone from 10 p.m. until 11:15 p.m. App. 361, ll. 17-20.

The living arrangements at the Wells home were a bit unusual. Wells' door locked by way of a deadbolt that required a key on the inside and the outside. App. 373, ll. 13-23; App. 393, l. 17 – App. 394, l. 4; App. 394, ll. 17-22. Additionally, Wells was the only person with a

key. App. 373, ll. 7-18; App. 375, l. 25 – App. 376, l. 2; App. 399, ll. 21-23; App. 405, ll. 1-5. Perhaps the living arrangements were not so unusual in light of the fact that Wells lived in a very dangerous neighborhood. App. 391, l. 25 – App. 392, l. 7. Petitioner's mother and Wells recalled Petitioner knocking on the door at midnight on April 24, 2010. App. 374, l. 3-12; App. 401, ll. 15-23. Wells, using his key, unlocked the door to permit Petitioner to enter, and locked it thereafter. App. 374, ll. 6-12; App. 401, ll. 13-21. In light of Wells' insistence on keeping the doors locked at all times and his having the only key, there was no way for Petitioner to leave. App. 375, ll. 4-6; App. 401, l. 25 – App. 402, l. 4. In fact, Petitioner remained in the house until the next morning when Wells took him to work. App. 374, ll. 16-18; App. 402, ll. 5-16. Wells took Petitioner to work on Sunday as well because Petitioner was still staying with them. App. 374, ll. 13-18. On Monday, Petitioner reconciled with Ross. App. 374, ll. 18-19; App. 363, ll. 10-14. On Tuesday, Petitioner was arrested for armed robbery, burglary, and assault and battery with intent to kill. App. 329, ll. 18-21; App. 363, ll. 10-14; App. 374, ll. 19-21.

Latoya Wright and her one-year old daughter were visiting with the daughter's father until 2 a.m. on April 24, 2010. App. 190, ll. 3-7. Wright and her child arrived home shortly after 2 a.m. App. 190, ll. 17-18. Ten minutes later, Wright heard a knock at the door. App. 191, ll. 1-3. When Wright asked the knocker for a name, she did not recognize the name or the voice. App. 191, l. 22 - App. 192, l. 4. Wright grabbed her pistol and answered the door. App. 192, ll. 10-15. She did not recognize the person. App. 193, ll. 17-22. The person was standing three feet from her. App. 194, ll. 1-6. Although her porch light was out, Wright could see the man at her door using the faint light from her kitchen inside the house. App. 194, l. 20 – App. 195, l. 11. She described the man as short, dark-skinned, and young. App. 197, ll. 16-18. She noted he

had "twists in his hair, twist dreads, short twists in his hair." App. 197, ll. 18-20. She estimated he was five-four and had "a tear drop tattoo on his right eye." App. 197, ll. 20-24.[1]

As he asked for everything she had, the assailant pulled out a gun. App. 198, ll. 7-10. Instead of using the gun in her hand, Wright turned and ran out the back door. App. 198, ll. 18-19; App. 199, ll.1-3. The man shot in her direction twice, one bullet grazing her abdomen. App. 198, ll. 19-25; App. 199, ll. 4-23.

After running out the back door, Wright ran to a nearby convenience store. App. 202, ll. 19-25. When she arrived at the store, she told the individuals there that she had been robbed and that she had left her daughter in the house with the robber. App. 206, ll. 6-20. An individual got her daughter, and another individual, whom Wright knew only as "Lebo," took her daughter to the daughter's father's home. App. 207, ll. 1-5; App. 272, ll. 4-13; App. 279, ll. 16-20.[2] Wright got into the car with Lebo to go to the hospital; however, the two stopped when the police arrived. App. 207, ll. 8-24; App. 269, ll. 9-17. While Wright was talking to the police, Lebo

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[1] The first responding officer claimed that Wright told him the assailant was "a black male, early age, she gave me nineteen to twenty-two, and said he had real dark skin, short twists in his hair, he was wearing a, she said it was a green shirt and light blue shorts, he had a jacket on but she didn't know what color it was, and he had a tear drop tattoo on his right eye." App. 248, l. 20 – App. 249, l. 5. Additionally, he said that Wright described the assailant as "five-eight to five-nine" and was "a hundred and sixty pounds maybe." App. 249, ll. 6-11.

[2] Lebo was a nickname for Phylicia Frazier. App. 264, ll. 7-8. Wright claimed she did not know Lebo and that her only acquaintance with Lebo was seeing her in the neighborhood. She would not describe Lebo as a friend. App. 227, l. 9 – App. 228, l. 6. Lebo, on the other hand, described Wright as a close friend. App. 265, ll. 15-21.

went to pick up Wright's daughter at the insistence of law enforcement. App. 245, l. 19 – App. 246, l. 12; App. 272, ll. 11-16; App. 311, ll. 9-14.[3]

That morning, Wright described her assailant to the responding officer. App. 210, ll. 1-3. At some point in this process, Lebo returned and overheard Wright's description and asked her to repeat it. App. 211, ll. 4-16; App. 211, l. 10 – App. 212, l. 2; App. 271, l. 24 - App. 272, l. 25; App. 279, ll. 21-22. Lebo stated the description sounded like someone she knew named Walter. App. 211, l. 25 – App. 212, l. 2; App. 213, ll. 36; App. 250, ll. 1-10; App. 273, ll. 1-2. She could provide no additional information about Walter, however. App. 212, ll. 7-12.

The following day, Lebo told Wright that Walter's last name was Greene. App. 213, ll. 13-21. Lebo went to middle school with Petitioner for one year in 2001-2002. App. 213, ll. 11-12; App. 266, ll. 5-24; App. 320, l. 23 – App. 321, l. 4. Lebo admitted she had not seen Petitioner since middle school until April 23, 2010 or April 24, 2010 when she saw him at the convenience store. App. 267, l. 17 - App. 268, l. 18. Wright conveyed the last name provided by Lebo to the police. App. 213, ll. 22-24. Also, Wright claimed that when she returned to her home, she noticed the gun she dropped on her way out of the home was missing as was $100 in cash. App. 214, ll. 4-21.

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[3] There were significant discrepancies among the witnesses regarding the location of the child. Wright claimed she refused to go to the hospital until she had her child with her, and insisted she had her child prior to getting into the car with Lebo. App. 228, l. 21 – App. 229, l. 23. However, the first officer on the scene testified that Wright was in a car when he arrived and she did not have her child with her. App. 245, ll. 15-18. The officer also testified that the child was not in the house. App. 246, ll. 19-25. This officer told the jurors that the child was brought back to the scene at the insistence of law enforcement. App. 246, ll. 3-12. Lebo asserted that it was she, Lebo, who insisted on checking on the child first. App. 278, ll. 12-16. Lebo testified that she and Wright were on their way to Wright's home to check on the child and then, the two were going to the hospital. App. 269, ll.3-17; App. 278, ll. 12-16. Lebo also stated that someone she did not know went in to get the child. App. 269, ll. 3-17; App. 270, ll. 9-14; App. 278, l. 23 – App. 279, l. 4. This unknown person gave the child to Wright while Wright was still in Lebo's car. App. 279, ll. 8-14. When the cops arrived, the child was still in the car. App. 279, ll. 13-18.

On April 27, 2010, a police officer showed Wright a photographic line-up that included a photograph of Petitioner. App. 217, ll. 7-20; App. 327, l. 10 – App. 328, l. 10. Wright selected Petitioner's photograph and told the officer that he was the person who knocked on her door on April 24, 2010. App. 218, ll. 17-25; App. 328, ll. 15. On that date, Wright also gave a written statement to the police. App. 222, ll. 12-14. In that statement, she claimed she did not remember what the assailant was wearing despite her insistence at trial that she did. App. 231, ll. 4-6.

There was no physical evidence connecting Petitioner to the crime. App. 348, ll. 13-16; App. 529, ll. 14-19. The only evidence the state had was Wright's identification of Petitioner as the perpetrator during a photographic line-up and then in court. This identification was tainted by the presence of Lebo during the questioning and Lebo's input. Additionally, the identification was tainted because Petitioner was the only individual in the photographic line-up with a distinctive mark, much like a tear drop tattoo, under his right eye. App. 52, l. 22 – App. 53, l. 2.

It was unsurprising then that the solicitor used his closing argument to appeal to the jurors' emotions, despite the lack of evidence to support his arguments, in order to shore up his otherwise weak case. In describing the assailant's approach to Wright's door, the solicitor stated:

> He didn't have the gun out initially because if she looks out of a window, you know, if she peeps out the window and he's standing on her porch with a gun it ain't no way that door's getting opened. It ain't no way it's getting opened. Of course, if he's just standing there, - - you know, he had to have watched her come in, had to have watched her come in. Why else would you go up and knock on somebody's door at that hour, you know, within, ten minutes at the most of when she came in, other than the fact that he saw her and knew that she was home, and knew it was just her and a small child in there?

App. 518, l. 24 – App. 519, l. 10. Again, undaunted by the lack of any evidence to support his argument, the solicitor told the jurors that the fired bullet struck the gun that Wright was holding and shattered:

> But he finds a shell casing, he finds a shell casing and finds evidence of a bullet fragment, because I submit to you, that bullet that struck her, it had to have struck the gun she was holding, you know, it had to have hit something solid to have fragmented like that, little tiny piece of the bullet, that is what grazes her.

App. 528, ll. 15-20. Finally, the solicitor argued to the jurors that the mark on Petitioner's face *was in fact* a tear drop tattoo, when no evidence to this effect had been presented:

> And then Mr. Green, the man now who's been arrested three days later, three days later, black male, twenty-two years of age, five foot six, a hundred fifty-six pounds, dark complexion, short twists in his hair, and a tear drop, I mean, literally a birth mark or a tattoo or whatever it is, I mean, you had a chance to see it, I mean, it's clear as day on his cheek under his right eye, clear as day.

App. 531, ll. 8-16.

The solicitor's emotional plea to the jury as evidenced in these three excerpts resulted in guilty verdicts where no physical evidence existed to connect Petitioner to the crime. The only evidence against Petitioner was the complaining witness's identification of him as the perpetrator, which was countered thoroughly by trial counsel's cross-examination regarding the taint of the description in light of the Lebo's interjections, trial counsel's cross-examination of the officer regarding the unfair photographic line-up display that showed only one individual with a mark on his right cheek, and the presentation of a defense expert on memory and eyewitness identifications, who explained why memory is faulty particularly in high stress situations involving weapons.

Evidence produced at PCR hearing

When questioned about her failure to object to the solicitor's improper closing argument, trial counsel explained that it was her intention "not to call attention" to what the solicitor said because trial counsel was arguing that Petitioner was not the perpetrator. App. 639, l. 23 – App. 640, l. 3. However, trial counsel was forced to admit there was no evidence presented to support the solicitor's closing argument. App. 640, ll. 4-6. When questioned again about her failure to

object to the solicitor's closing argument, trial counsel remarked she "honestly" could not say "whether [she] missed it or [she] just didn't want to call attention to it." App. 644, l. 25 – App. 645, l. 3. She simply could not remember. App. 645, ll. 3-4.

Order denying relief

The PCR court found Petitioner's allegation that trial counsel was ineffective for failing to object to the solicitor's closing argument was without merit. App. 652-653. The PCR court explained that Petitioner challenged three sections of the solicitor's closing argument; however, the court determined that trial counsel's failure to object was not ineffective assistance. App. 652-653. The only case cited by the court in its discussion of this claim was State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738 742 (1971) for the proposition that "[t]he solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such." App. 652. Without any citation to authority, the PCR court stated, "Unquestionably, the solicitor was permitted to comment on the evidence adduced during the trial and the inferences to be drawn from it." App. 652.

Concerning the first challenged comment, the PCR court determined the solicitor was "arguing his version of events." App. 652. According to the PCR court, "[h]e drew the inference that [Petitioner] observed the victim entering her residence before committing the crimes." App. 652-653. The court concluded "this [was] not objectionable." App. 653.

Turning to the second challenged comment, PCR court stated the "solicitor was merely arguing his case and the facts as he saw them from the evidence." App. 653. As such, the court concluded the "passage [was] not objectionable because it [was] an inference that [could] be reasonably drawn from the evidence." App. 653.

Finally, the PCR court found the third challenged comment was not objectionable "because the solicitor was just repeating what the victim said in her initial statement" and such "evidence [was] clearly before the jury." App. 653. Further, the court claimed the "solicitor was also quick to note that the accuracy of that description would be left up to them as the fact finders." App. 653.

In conclusion, the PCR court held that Petitioner had failed to show that an objection, if made to any of the challenged comments by the solicitor in closing, would have been sustained or that the result of the trial would have been different. App. 653. Thus, the court held Petitioner could not prove any resulting prejudice from the alleged deficiencies. App. 653.

Discussion

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

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)). Due to the Supreme Court's jurisprudence, it is axiomatic that although a prosecutor should "prosecute with earnestness and vigor," he may not "use improper methods calculated to produce a wrongful conviction," for state and federal courts examining improper closing arguments by prosecutors. See Berger v. United States, 295 U.S. 78, 88 (1935). The requirement that a prosecutor confine his closing argument to the evidence adduced at trial and reasonable inferences therefrom is incontrovertible. It is a "fundamental rule, known to every lawyer, that argument is limited to the facts in evidence." United States ex rel. Shaw v. DeRobertis, 755 F.2d 1279, 1281 (7th Cir. 1985).

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). The 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.

The Second Circuit reversed a drug conviction finding "a real likelihood that the prosecutor's misstatements influenced the jury's verdict" where the prosecutor argued in closing that a suit fitting the defendant was found in a bag containing heroin. United States v. Forloma, 94 F.3d 91, 93-94 (2nd Cir. 1996). The sole issue at trial was whether the defendant had knowledge he was transporting heroin as there was no question there was heroin in one of the bags in the defendant's possession. The defendant told the police that he was transporting the bag for a colleague and upon his inspection, the bag contained only clothing and a telecommunications device. Id. at 93. The investigator's search of the bag containing heroin occurred simultaneously with the search of the defendant's other three bags. The investigators commingled the contents of the bags and then randomly redistributed the contents among the bags, including the one containing heroin. Id. at 94. Shortly before trial, the prosecutor summoned the defendant to try on clothing in the bag containing the drugs. Some of the clothes fit, while some did not. Id. However, due to the commingling, "there was no reason to suppose that any items *now* in the heroin suitcase had been in it" when the defendant possessed it. Id. (emphasis in original). Nevertheless, the prosecutor repeatedly argued the defendant had knowledge of the heroin because the suitcase contained a suit that fit him. Id. Due to the commingling, there "was no basis for the argument that the heroin suitcase had contained the defendant's personal belongings." Id. at 95.

The Second Circuit was persuaded to reverse where the prosecutor uttered the inaccurate assertion three times with great emphasis, the trial judge's sustaining of the defendant's objections

were not explained to the jury allowing the misperception caused by the baseless argument to continue, and the misstatements related to the only contested issue at trial. Id. at 95-96. The Second Circuit concluded "the prosecutor's unsupported arguments caused substantial prejudice to the defendant" and the court had "no confidence that the verdict would have been the same without these errors." Id. at 96.

The prosecutor's "repeated and escalating prosecutorial misconduct" in closing argument required reversal in Floyd v. Meachum, 907 F.2d 347 (2nd Cir. 1990). Not only did the prosecutor make indirect references to the defendant's decision not to testify, the prosecutor diluted the burden of proof and undermined the presumption of innocence by asserting the Fifth Amendment provided protection for the innocent, not a shield for the guilty. Id. at 353-354. On appeal, the prosecution conceded the impropriety of the prosecutor's closing remarks impliedly vouching for the credibility of a witness, whom the defense asserted was the real perpetrator. Id. at 354. "[L]iterally dozens of times throughout her opening and closing summations," the prosecutor called the defendant a liar. Id. The court found the repeated references to the defendant as a liar to be "excessive and inflammatory." Id. at 354-355. Further, the prosecutor equated the defendant's alleged lies with proof of guilt beyond a reasonable doubt. Id. at 355.

The court found the prosecutorial misconduct was severe due to the "pattern of improper remarks throughout the prosecutor's truncated initial summation and her expansive rebuttal." Id. The trial judge took no curative measures; instead, the jury heard only the usual instruction that argument is not evidence, which the court found to be "inadequate." Id. at 355-356. The evidence against the defendant depended entirely upon the credibility of one witness, whom the defense claimed was the perpetrator. Id. at 356. Thus, the court found it was not probable the defendant would have been convicted absent the prosecutor's misconduct. Id. Looking at the cumulative

effects of the prosecutor's remarks, the Second Circuit concluded the defendant suffered prejudice. Id. at 356-357.

The Eighth Circuit held a prosecutor's comments during closing that the defendant lost his job due to a failed drug test was improper and required reversal. United States v. Beckman, 222 F.3d 512 (8th Cir. 2000). The defendant was on trial for conspiracy to distribute a controlled substance. When the defendant testified, the prosecutor asked if the defendant lost his job as a truck driver because he had failed a drug test. The defendant emphatically denied this. Id. at 526. However, during the closing argument, the prosecutor argued the defendant lost his job because he was using methamphetamine and failed a drug test. Id. at 526-527. According to the Eighth Circuit, the closing argument "did more than argue permissible inferences from the evidence" because "it asserted facts not in evidence and attempted to argue and imply inferences therefrom." In fact, the evidence in the record completely contradicted the prosecutor's comments. Id. at 527. The court found the error could not be harmless when considered in conjunction with the inadequacy of the court's instruction following the defendant's objection to the improper closing argument and an error in limiting cross-examination of two witnesses. Id.

In a drug conspiracy trial, the prosecutor argued the defendant had murdered a man in a drug deal gone wrong. Two individuals involved in the drug conspiracy testified about an incident in which the defendant attempted to make a drug sale from a street curb into a car. The man in the car snatched something from the defendant. After the car pulled away, the defendant fired his gun at the car. The witnesses were unsure if the car was hit, but did see the car over a bridge embankment the following morning. There was no testimony regarding what happened to the occupants of the car. United States v. Wilson, 135 F.3d 291, 296 (4th Cir. 1998). "This lack of evidence of a death,

however, did not stop the prosecutor from arguing (over objection) in his initial closing and again in rebuttal that [the defendant] had murdered the driver of the car." Id.

The Fourth Circuit held the "murder argument" was "problematic" because it was not based on record evidence or any reasonable inference that could be drawn from it. Id. at 298. Additionally, the prosecutor had been prevented from introducing evidence of the driver's fate when the judge sustained the defendant's objection to the question posed by the prosecutor to one of the drug conspirators. Thus, the prosecutor was aware that the argument was not supported by the facts. Id. The prosecutor's "murder argument" was a last-minute surprise to the defendant because he was not charged with murder in the indictment and there was no evidence the driver denied from a gunshot inflicted by the defendant. Id.

After finding the prosecutor's argument "highly improper" because it was not supported by the evidence and was last minute, the Fourth Circuit determined the error was prejudicial. The "murder argument" was "extremely misleading" and prejudicial as "it is hard to fathom anything more prejudicial than the unproved assertion that the accused is also guilty of an uncharged crime of murder while he is on trial for another offense." Id. at 299. There was "a serious risk that the jury decided to convict" the defendant "simply because it believed he was a murderer." Id. at 300. Further, the defendant had no opportunity to counter the assertion because it was delivered at the last minute by the prosecutor. Id. at 300. The prosecutor's argument that the defendant was a murderer was "prominent and thoroughly developed" in the closing argument following a relatively short trial, where the effect of the improper conduct could not be diluted by other matters. Id. at 300-301. The only evidence against the defendant was the inconsistent testimony of the co-conspirators, who were testifying pursuant to cooperation agreements. Id. at 301. The Fourth Circuit found the prosecutor made a deliberate, calculated decision to assert facts not in evidence to

divert the jury from the real issues based upon the prosecutor's awareness that the judge had excluded evidence about the driver's fate. This gave the prosecutor "plenty of time to consider whether to turn the 'shot at the car' testimony into a murder charge." Id. at 302.

Although the Fourth Circuit found the drug trafficking evidence against the defendant to be strong, the court found the "problem" was "the prosecutor did not stop with just that evidence" where he "engaged in a significant diversion" with the murder argument. The court found the "argument was extraneous and indefensible overkill" that could not be written off as harmless. Id.

In United States v. Murrah, 888 F.2d 24 (5th Cir. 1989), the Fifth Circuit reversed the defendant's conviction where the prosecutor misled the jury regarding what a witness, who was not called to testify, would have said. During his opening statement, the prosecutor informed the jury that a witness would testify the defendant asked the witness to burn the defendant's business five months before a fire destroyed the business and had threatened to kill the witness when the witness refused. Id. at 25. However, the witness was never called to testify and the defense counsel reminded the jury of the unfulfilled promise during closing. Id. at 26. In rebuttal, the prosecutor told the jury the testimony from the missing witness would have been cumulative and the prosecution decided not to call the witness as a matter of strategy. Id. at 26. When defense counsel objected, the judge sustained the objection and instructed the jury to disregard the statement. However, "[t]he prosecutor persisted and retorted: 'I think it was a fair response.'" The judge overruled defense counsel's motion for a mistrial following this remark. Id. The prosecutor responded by informing the jurors that the defendant knew about the witness. Id.

The prosecutor then accused the defendant and defense counsel of hiding another witness – the investigator hired by the defense to determine the origin of the fire. Id. When defense counsel objected, the trial judge reminded the jury to recall the evidence in the case. However, according to

the Fifth Circuit, the "trial record reflects that there was no evidence whatever to support the suggestion that a witness had been hidden." Id.

The Fifth Circuit found "[t]he prosecutor's remarks were patently improper." Id. The court explained "[a] prosecutor may not directly refer to or even allude to evidence that was not adduced at trial" and "[a] prosecutor may not suggest that other supportive evidence exists which the government chose not to develop." "In addition to these trial verbotens, the prosecutor may not charge the defendant with extrinsic offenses." Id. at 26-27. Here, "[t]he prosecutor's remarks were inflammatory and misleading." Id. at 27. The prosecutor's argument that the witness was not called because the testimony would be cumulative "compounded the harm" by assuring the jury that the government "possessed that damning evidence but chose not to use it." Id. The accusation that the defendant and his attorney hid a witness "bordered" on a charge of obstruction of justice and was damaging to defense counsel's credibility before the jury. Id. Such a tactic "is a low blow in any trial, but it is particularly egregious in a criminal case bottomed on circumstantial evidence." Id.

Turning to prejudicial nature of the prosecutor's argument, the Fifth Circuit concluded the "harmful effect ... was pervasive and tended to divert the jury's attention from the charged offense." The damaging effect of the unsupported allegations of solicitation of arson, threats of murder, and hiding a witness were "not neutralized by the trial judge's instructions." Id. at 28.

This Court addressed the issue of improper closing arguments by solicitors 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. This 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 this 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, this 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 dido 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, the 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. The 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.

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).

In the present case, the solicitor violated his duty to be a minister of justice in order to shore up his case against Petitioner where there was no physical evidence and the only evidence against Petitioner – the complaining witness's identification – had been called into question by the contamination of Lebo's input, the evocative photographic line-up, and the defense's expert witness. The solicitor sought to frighten the jurors by painting a picture of a man – Petitioner – waiting outside a single woman's home for her to return before attempting to commit a robbery. This picture was made more sinister by adding the presence of a one-year old defenseless child. There was simply no evidence to support this argument, and the PCR judge erred in concluding the solicitor was simply arguing his version of events or that such argument was a reasonable inference from the evidence presented. The solicitor's desired effect was to frighten the jurors with images of men hiding in wait for unsuspecting single mothers before striking. Trial counsel's failure to object to this line of argument was deficient performance resulting in prejudice in light of the lack of evidence against Petitioner.

The solicitor's argument to the jurors that the fired bullet struck the gun held by the complaining witness also appealed to the jurors' emotions despite no evidence to support it. The solicitor suggested to the jurors that the witness would be dead but for her holding a gun, which stopped the bullet from striking her directly. No evidence in the record indicated the bullet struck the gun the complaining witness held. However, the solicitor evoked images of divine intervention resulting in the complaining witness surviving the encounter. The solicitor was undaunted by the lack of evidence to support this image because he had to bolster his weak case against Petitioner. Rather than "merely arguing his case and the facts as he saw them from the

evidence" as the PCR court determined, the solicitor was arguing facts not in evidence in order to appeal to the jurors' emotions and religious views. Trial counsel's failure to object to this line of argument was deficient performance resulting in prejudice in light of the lack of evidence against Petitioner.

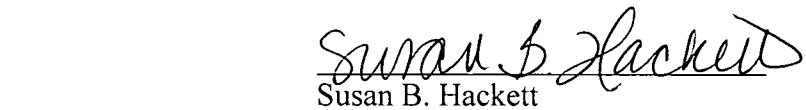
Recognizing how thoroughly the defense had impeached the complaining witness's identification of Petitioner, the solicitor sought to interject his own perceptions into the case by arguing to the jurors that the mark on Petitioner's face was indeed a tear drop tattoo. Specifically, the prosecutor juxtaposed the complaining witness's description, which included a tear drop tattoo, of the perpetrator with the solicitor's own observations of Petitioner at the trial. He told the jurors that Petitioner had "a tear drop, I mean, literally a birthmark or a tattoo or whatever it is." This was based on the solicitor's perceptions, not evidence produced at trial. The solicitor continued down this line of argument, noting the jurors "had a chance to see it," and remarking "it's clear as day on his cheek under his right eye, clear as day." While it may have been "clear as day" that some mark was under Petitioner's right eye, it was not clear as day that Petitioner had a tear drop tattoo under that eye or that the mark under his eye was of the same character as that observed by the complaining witness of her assailant. Nevertheless, the solicitor sought to inject his observations for the jury's consideration. Trial counsel's failure to object to the solicitor's closing argument was deficient performance resulting in prejudice.

These three excerpts demonstrated the solicitor's emotional plea to the jury. Faced with arguing case where no physical evidence existed to connect Petitioner to the crime and the only evidence against Petitioner – the complaining witness's identification of Petitioner – having been countered thoroughly through cross-examination and an expert witness, the solicitor resorted to arguing facts not in evidence. This desperate move appealed to the jurors' fears of men hiding in

wait for young women and innocent and defenseless children, appealed to the jurors' religious views by suggesting divine intervention saved the complaining witness's life, and fortified the weak case with his view of Petitioner's appearance. Trial counsel's failure to object to the three references in the solicitor's closing argument was deficient performance prejudicial to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for rehearing and order full briefing on the issue presented.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Maite Murphy, Circuit Court Judge

WALTER J. GREENE, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Walter J. Greene states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's PCR hearing before the Honorable Maite Murphy, which was held on May 21, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Walter J. Greene.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 26th day of August, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
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(803) 734-1330

ATTORNEY FOR APPELLANT

This 26th day of August, 2016.

STATE OF SOUTH CAROLINA

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Clayton Mitchell, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Walter J. Greene, #313126, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of August, 2016.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of August, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.