

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

 ORIGINAL

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Certiorari to Horry County  
Steven H. John, Circuit Court Judge  
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RECEIVED

MAY - 3 2012

S.C. Supreme Court

TARREN LEE RICHBURG,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not objecting to the sufficiency of the curative instruction the judge gave the jury after the solicitor made improper comments during his closing argument on Richburg's right to remain silent and shifted the burden of proof to Richburg?

## STATEMENT

In November 2006, the Horry County Grand Jury indicted Tarren Richburg on the charge of trafficking in powder cocaine 10 – 28 grams third offense. On June 4, 2007, Richburg proceeded to trial before the Honorable J. Michael Baxley and a jury. He was represented by G. Scott Bellamy, and the state was represented by Scott A. Graustein, Assistant Solicitor. The jury returned a verdict of guilty as indicted. Judge Baxley sentenced Richburg to twenty-five years. Richburg filed an appeal. The appeal was perfected through the filing of a brief by the Office of Appellate Defense. On April 12, 2010, the Court of Appeals affirmed Richburg's conviction. State v. Richburg, Op. No. 2010-UP-235 (Ct. App. filed April 12, 2010).

On January 19, 2011, Richburg filed an application for post-conviction relief (PCR). The state filed a return on March 8, 2011. An evidentiary hearing was held on August 23, 2011 before the Honorable Steven H. John. Richburg was represented by Heather M. Cannon, and the state was represented by Kristina J. Catoe, Assistant Attorney General. On August 31, 2011, Judge John issued an order denying Richburg's PCR application and dismissing it with prejudice. Richburg's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the sufficiency of the curative instruction the judge gave the jury after the solicitor made improper comments during his closing argument on Richburg's right to remain silent and shifted the burden of proof to Richburg.

Tarren Richburg was stopped outside of a convenience by Sergeant Green of the Horry County Police Department because the car he was driving matched the description of a car the Conway Police Department believed had been involved in a car-jacking. App. 59-63. Officer Santiago, who arrived to assist, testified that he observed Richburg throw something down. App. 85, ll.16-22. Officer Santiago retrieved the alleged thrown item and gave it to Sergeant Green. App. 64, ll. 13-23. The item later tested positive for cocaine and the chemist's report was admitted in evidence. App. 140 – 141.

Richburg did not testify at trial. App. 2.

During closing argument the solicitor stated:

The defense has not put up anything to say Officer Santiago wasn't telling the truth.

App.164, ll. 13-14.

Later in closing the solicitor again said:

There is not one bit of evidence, not one bit of testimony that what these officers testified to you about that that did not occur. They all came; they were sworn to testify truthfully. They testified and there is nothing that the defense has produced to say those events did not occur. And especially that what Officer Santiago testified to, and what he observed during that stop, and during that encounter that what he saw did not happen.

App.166, ll. 22 – p. 167, ll.1

Counsel moved for a mistrial based on the comments which he said were improper because they were burden shifting, or a curative instruction. App.167, ll.16-22. The judge denied the motion for a mistrial but provided a curative instruction. Defense counsel made no further objections, and proceeded with his closing argument. App. 168, ll. 5-25; App. 169, ll. 1 - 6. After the jury returned a verdict of guilty, counsel moved for new trial based on the fact that the curative instruction did not adequately address the improper closing argument. App. 200, ll.14- 25. The judge denied the motion. App.201, ll. 1-13.

At his PCR hearing, Richburg testified that his trial attorney was ineffective because counsel did not object to the curative instruction the judge gave after the solicitor made comments during his closing argument that the defense did not put up any evidence to say Officer Santiago was not telling the truth, and that the defense did not show those events did not occur. App. 243, ll. 1 – 25.

His counsel objected initially, but refused to object to the curative instruction. Richburg said the solicitor's comments affected his trial because the comments were burden shifting. They made the jury think that Richburg had to prove his innocence. App. 244, ll. 1 – 25; App. 245, ll. 1 – 12.

Richburg testified that his trial counsel did not preserve the issue of the improper comments for appeal by not objecting to the curative instruction. Richburg argued this issue on appeal but the Court of Appeals ruled that it was not preserved. State v. Richburg, Op. No. 2010-UP-235 (Ct. App. April 12, 2010); App. 245, ll. 13 – 25; App. 246, ll. 1 – 25; App. 247, ll. 1 – 7.

Trial counsel testified at the PCR hearing that he wanted a mistrial, but the judge denied that. He admitted that he did not object to the curative instruction because he thought the instruction was correct. App. 272, ll. 15 – 25; App. 273, ll. 1 – 24.

The PCR judge ruled that counsel's conduct was reasonable, and Richburg failed to prove he was prejudiced by it. The judge ruled that the solicitor's comments were in response to the extensive cross examination of the officers that their testimony was not true, and were not meant as a comment on Richburg's right to remain silent. App. 302.

The PCR ruled that the trial judge instructed the jurors that the defendant has the right to remain silent, and was not required to prove his innocence. App. 303. However, in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), the Supreme Court held that the trial judge's erroneous failure to give a curative instruction after the solicitor referred to the defendant's failure to call witnesses was not harmless, and that the trial judge's general charge , which was given shortly afterwards, did not cure the error.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result". Strickland v. Washington, 466 U.S.668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable

professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

A criminal defendant is entitled to effective representation at trial and on direct appeal. Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052(1984). In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) the deficient performance must have prejudiced the applicant's case. Id., Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

The Fifth and Fourteenth Amendments forbid comments by the prosecution on the defendant's silence. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Griffin v. California, 380 U.S. 609, 85 S.Ct.1229, 14 L.Ed.2d 106 (1965). The State may not comment on a defendant's exercise of a constitutional right. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000). Specifically, the solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense. McFadden v. State, 342 S.C. 637, 539 S.E.2d 391 (2000) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)).

In State v. Sweet, 342 S.C. 342, , 536 S.E.2d 91 (Ct.App. 2000), the Court of Appeals reversed the defendant's conviction, finding the solicitor's comments that only the defendant could rebut the testimony of two accomplices who incriminated him constituted a prejudicial comment on

the defendant's failure to testify. The Court in Sweet found the judge should have given a curative instruction or declared a mistrial. The judge in the present case gave a curative instruction but the instruction failed to cure the constitutional violation.

The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). When a Doyle violation is alleged, the appellate court applies the harmless error analysis from State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). To be harmless, the record must establish that (1) the reference to the defendant's right to silence was a single reference; (2) the solicitor did not tie the defendant's silence directly to his exculpatory story; (3) the exculpatory story was totally implausible; and (4) the evidence of guilt was overwhelming. Id. at 531, 466 S.E.2d at 366. Despite the curative instruction given in the present case, the error is not harmless.

The solicitor commented on Richburg's right to remain silent and his right to present a defense on two separate occasions. Lastly, the State failed to present overwhelming evidence of Richburg's guilt. A jury could have disbelieved Officer Santiago's testimony and concluded that the passenger who entered the store dropped the cocaine on his way inside.

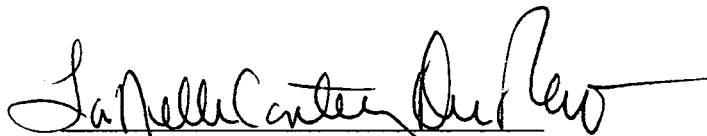
Trial counsel was ineffective for not objecting to the curative instruction because this failure prevented the appellate court from reviewing the merits of this issue. Richburg's issue on direct appeal was that the trial court erred in not granting the mistrial based on the solicitor's improper comments on Richburg's right to remain silent and shifted the burden of proof. In their opinion on Richburg's direct appeal, the Court of Appeals held that this issue was not preserved for appeal

because if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial. State v. Richburg, Op. No. 2010-UP-235 (Ct. App. April 12, 2010).

CONCLUSION

Based on the above, certiorari should be granted, and the order of the PCR court should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of May, 2012.

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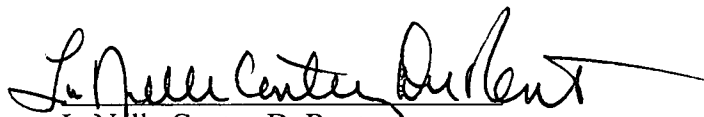
RESPONDENT

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CERTIFICATE OF SERVICE

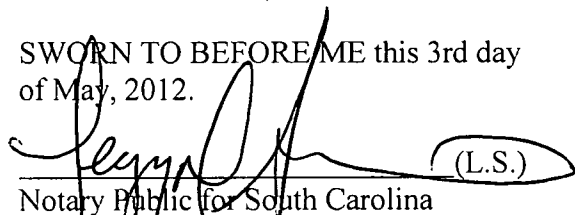
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire and Tarren Richburg, #271746 Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of May, 2012.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day  
of May, 2012.

  
(L.S.)  
Notary Public for South Carolina

My Commission Expires: December 4, 2017.