THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
General Sessions Court
Clifton B. Newman, Jr., Circuit Court Judge

Case No. 2014-GS-31-00050
Appellate Case No. 2015-000175

The State,

Respondent,

v.

Dennis E. Hoover,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, counsel for Petitioner certifies that a petition for rehearing was made by Petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's admission of a report of a medical examination, and testimony concerning the contents of that report, under the business records exception to the rule against hearsay?

2. Did the Court of Appeals err in affirming the trial court's ruling that allowed the alleged victim, Justin Boyce, to testify concerning petitioner's feelings toward his brother, Marshall Boyce?

3. Did the Court of Appeals err in affirming the trial court's rulings that allowed inflammatory comments and questions by the solicitor during his cross-examination of petitioner?

4. Did the Court of Appeals err in failing to address the cumulative prejudice from the trial court's errors and in failing to find petitioner was denied a fair trial?

STATEMENT OF THE CASE

Petitioner, Dennis E. Hoover, was indicted by the grand jury of Lee County on a charge of attempted murder. R. pp. 1-2. On January 20-22, 2015, he was tried before a jury, with Judge Clifton B. Newman, Jr., presiding. R. p. 4. The jury returned a verdict of guilty of the lesser-included offense of assault and battery in the first degree. R. p. 376. Judge Newman sentenced him to nine years' imprisonment and ordered him to pay restitution to the alleged victim in the amount of $2,820. R. pp. 3, 388. The Court of Appeals affirmed his conviction and denied rehearing. App. pp. 1-3, 11.

ARGUMENT AND AUTHORITIES

This case arose from an altercation on January 4, 2014, in the men's restroom of a convenience store in Lee County, South Carolina, between Robert Justin Boyce, a healthy 36-year-old man, and petitioner, a 60-year-old man with serious health issues. R.

p. 142. There were no witnesses to the altercation other than petitioner and Boyce. Each claimed the other was the attacker. Petitioner testified Boyce physically assaulted him, pulled a knife, and cut him, and that his actions in response were in self-defense.

The two men were both from the same community in a rural section of Lee County. R. pp. 99, 107, 149. They knew each other and had past dealings with each other and members of each other's families. R. pp. 107-08, 151-52, 246, 262.

Boyce and his younger brother, Marshall, had a past history of altercations with people, including petitioner. Petitioner described an incident in June 2011 in which the Boyce brothers assaulted him, causing injuries, and leaving him in a ditch. R. pp. 246-48, 262-63, 405-12. Others in the community were aware of the 2011 incident. R. pp. 100, 163, 231-34, 237-39. Two of those witnesses actually heard that scuffle from a distance. R. pp. 231, 234, 241. Because of that prior attack and other instances in which the Boyce brothers had blocked him in the road and darted at him with 18-wheelers, petitioner was in fear of them. R. pp. 261-62.

Another witness who had worked as a bartender described a prior incident in which the Boyce brothers and a third individual attacked a customer. R. p. 223. She believed it was their intention to do so when they entered the bar. R. p. 223. She testified they simply walked up to the customer and, without really saying anything, jumped on him. R. p. 223. The senior superlative section of Marshall Boyce's high school yearbook named him the "biggest troublemaker." R. pp. 154-55.

Petitioner was 60 years of age at the time of the 2014 convenience store incident, and he suffered from a heart condition. R. pp. 242-43. He had four stents in his heart and was on three heart medications that caused him to tire and bruise easily and to have

shortness of breath. R. pp. 243-45. He testified that, because of his poor health, he was not one to seek a fight with anyone. R. p. 244. Prior to this incident, petitioner had no criminal record. R. p. 208.

The accounts of the altercation in the men's room were in sharp dispute. Boyce testified someone entered the restroom while he was in one of the stalls. R. pp. 111-12. He claimed that when he came out of the stall, petitioner suddenly attacked him, coming at him with his fists and then cutting him. R. pp. 113, 130. He claimed petitioner was "thrashing" or "raking" him with something shiny and he put his hands up to protect himself, but he had no wounds on his arms and only one cut on a hand. R. p. 132. He described the altercation as a "scramble." R. p. 134. Despite his testimony that it was petitioner who engaged in an attack, he told the investigating officer that he made punches at petitioner as well. R. p. 192.

Petitioner testified it was Boyce who attacked petitioner. After using a urinal, petitioner was standing at the sink to wash his hands when the stall door opened and he heard the person behind him say, "It's gonna be worse this time old man." R. pp. 260, 293-94. He looked up and saw in the mirror that it was Boyce. R. p. 260. Boyce was standing right over his left shoulder and grinning, hit petitioner in the back of the head, then threw punches. R. pp. 260, 294-95. They tussled, and petitioner tried to hit back but was not able to get in a good "lick." R. pp. 260, 295. Boyce hit petitioner, who then felt something hot and knew it was a knife. R. p. 260. They grappled and fell to the floor. R. p. 260. While they were rolling on the floor, Boyce dropped the knife and petitioner was able to grab it. R. pp. 260-61. Petitioner did not deny that he inflicted Boyce's wounds, but he stated he did so in self-defense. R. p. 261. Boyce's cuts occurred after

petitioner was able to get the knife and while they were rolling and wrestling on the floor. R. p. 264. When the altercation ended, petitioner quickly left the store and returned to his truck to leave, because he knew Boyce kept an assault rifle in his truck and he feared for his life. R. pp. 267-68, 278-79.

Boyce admitted he had a knife on him at the time of the incident. R. p. 124. Petitioner testified it was this knife which he ultimately was able to grab and with which he inflicted Boyce's wounds. R. pp. 260-61. Indeed, in petitioner's statement to law enforcement officials the morning of the incident, he informed them he still had the knife, stating it was Boyce's, he was "done with it," and Boyce could have it back. R. pp. 171. Despite this statement, when the officers searched petitioner's house for evidence and saw many knives there, they seized only some box cutter blades. R. pp. 194-95, 199. They did not seize a single knife from petitioner's house in an attempt to determine if in fact Boyce's knife had ended up in petitioner's possession and whether it was the instrument used in the altercation, consistent with petitioner's account.

In addition to admitting he had a knife when the incident occurred, Boyce told the investigating officer he had the knife on his person when the officer questioned him following the incident. R. pp. 124, 203-04. Despite this information, the officer did not ask Boyce to produce the knife or attempt to inspect it. R. pp. 203-05. Rather, he simply took Boyce's word that he never took his knife from his pocket during the incident. R. pp. 205-06. Boyce's cell phone, which had also been in his pocket, was left behind in the restroom and had to be retrieved for him. R. p. 117. The defense contended Boyce's cell phone came out at the same time he drew his knife from his pocket, consistent with petitioner's account that it was Boyce who pulled a knife on petitioner. R. pp. 260, 295.

In addition to the failure to take possession of Boyce's knife, law enforcement also failed to collect other critical evidence which would have corroborated one version or the other given by the only two individuals involved. Although officers took numerous photographs at the scene, they did not take a single photograph of the interior of the restroom immediately following the altercation. R. pp. 19-20, 181. Thus, there was no evidence depicting blood smears on the restroom floor, consistent with petitioner's account, or showing the absence of such blood, to contradict that account. Although an officer photographed petitioner's hands and face, he did not ask him to remove his shirt or take any pictures of petitioner's torso, where petitioner testified he had been cut. R. pp. 183-85, 265-66, 311.

Law enforcement also did not question the store's janitor, who was present in the store and mopping at the time of the incident, who went into the men's room to retrieve Boyce's cell phone, and who could have described the nature and location of blood in the restroom and thereby corroborated petitioner's account that Boyce's cuts occurred while the men were rolling on the floor. R. pp. 210-11. The janitor's testimony would have been crucial on another point as well. The store's video surveillance footage depicted a white truck pulling into the parking area outside, sitting for more than a minute, moving off screen for a brief period, returning to the screen and stopping directly behind Boyce's truck, then backing up and moving off screen again some two minutes prior to petitioner's entering the store. R. pp. 177-78; State's Exhibit 2. The state contended petitioner was the driver of this white truck, but petitioner asserted he drove his green truck that morning, not his white truck. R. pp. 251-52, 258, 268, 273-74, 291. The janitor is shown looking out into the parking area after petitioner left the store. State's

Exhibit 2. Had the state questioned the janitor, he could have verified that petitioner left in his green truck, not the white truck depicted in the video minutes before he entered the store.

Petitioner had attempted to have arrest warrants issued for the Boyce brothers following the 2011 incident, but law enforcement refused. R. pp. 247, 266. Because of his past history of not being assisted by law enforcement, petitioner did not call the authorities after the 2014 incident. R. p. 268. He testified he did not look for help from law enforcement officers because they did not help him before. R. pp. 266, 268.

I. The Court of Appeals erred in affirming the trial court's admission of a report of a medical examination, and testimony concerning the contents of that report, under the business records exception to the rule against hearsay.

Petitioner testified that he was cut and bruised in the incident. R. pp. 260, 266, 311-12. In rebuttal, the state attempted to refute his claim of injury with hearsay evidence purporting to establish that he lacked injuries. The evidence the state sought to introduce was a report of a medical examination of petitioner conducted at the time of his booking and testimony of the custodian of that report concerning its contents. R. pp. 327-29. Over defense objections, the court admitted this evidence under the business records exception to the rule against hearsay. R. pp. 329-34. This ruling was reversible error.

The witness who testified about the booking report was the administrative captain of the Sumter-Lee Regional Detention Center. As part of her duties, she was the custodian of the records there. R. p. 327. However, she was not the person who conducted the medical examination, which she testified was done by qualified medical personnel at the facility. R. p. 328. The defense objected to her testimony concerning this report on hearsay grounds, argued the proper party to testify concerning petitioner's

medical examination was the medical personnel, and further objected to admission of the report itself. R. pp. 329, 331-32. The court admitted both the testimony and the report under the business records exception to the rule against hearsay. R. pp. 329-31, 334. The Court of Appeals affirmed this ruling. App. 2.

Hearsay evidence is inadmissible unless it falls within one of a number of specific recognized exceptions. *See* Rule 802, SCRE. The exception under which the court admitted this evidence was the exception for records of regularly conducted activities, commonly referred to as the business records exception. *See* Rule 803(6), SCRE. That exception provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; ***provided, however*, that subjective opinions and judgments found in business records are not admissible**.

Rule 803(6), SCRE (italics in original; bold emphasis added).

In this case, the court erred in admitting the hearsay testimony of the report's custodian and the report itself, and the Court of Appeals erred in affirming the lower court's ruling, because the information contained in the report and testified to by the custodian were the subjective medical opinions of the medical professional who conducted petitioner's medical examination. Such evidence is inadmissible under the specific exception in Rule 803(6) for subjective opinions and judgments, emphasized above. *See In re Care and Treatment of Harvey*, 355 S.C. 53, 62, 584 S.E.2d 893, 897 (2003) (log of treatment center for juveniles with sexually aggressive behaviors was not

admissible under business records exception because it contained subjective opinions and judgments about the progress of the committed patient's treatment and behaviors); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009) (appraiser's report of the value of a home was inadmissible under Rule 803(6) because it contained the appraiser's subjective opinion as to that value); *see also South Carolina Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 147 n.11, 705 S.E.2d 425, 430 n.11 (2011) (incident report containing officer's observations was inadmissible under the exclusion for subjective opinions and judgments contained in both Rule 803(6) and Rule 803(8), SCRE).

In the Court of Appeals, the state contended the information recited in the report constituted objective, observable facts, not subjective opinions. To the contrary, the document's questions required the medical professional who conducted the examination to answer whether certain symptoms of medical conditions were displayed by the individual who was the subject of the examination. Those questions could not be answered without the examiner's medical background, and the answers were the product of the examiner's subjective opinions as to the absence of the symptoms listed in the questions. Such opinions are not admissible under Rule 803(6).

Moreover, the admission of this evidence was prejudicial. The evidence in this case was very weak, as more fully recounted *supra* at 1-6. Only two persons had knowledge of what actually happened in the restroom, and their accounts were contradictory. The evidence that could have corroborated one account or the other was not collected by law enforcement officials in the course of their investigation. The outcome of the trial depended entirely on which of the two men the jury found credible.

Allowing inadmissible hearsay evidence of subjective opinions as to petitioner's medical condition was highly prejudicial, because it contradicted petitioner's testimony that he was cut and bruised in the altercation with Boyce. This information likely influenced the jury in finding Boyce's claims more credible than petitioner's assertion that Boyce physically attacked him, pulled a knife, and cut him. Under these circumstances, the improper admission of this evidence was not harmless but reversible error. This Court should grant a writ of certiorari, reverse as to this issue, and remand for a new trial.

II. The Court of Appeals erred in affirming the trial court's ruling that allowed the alleged victim, Justin Boyce, to testify concerning petitioner's feelings toward his brother, Marshall Boyce.

The state attempted to elicit testimony from Boyce concerning petitioner's feelings toward Boyce's brother, Marshall. The defense consistently objected to this testimony but the court ultimately allowed it. The question and answer exchange, and the intervening objections and rulings, are as follows:

> Q All right. Do you know why Dennis Hoover and your brother were at odds?
>
> A **Marshall Boyce told me before that** ---
>
> THE (sic) MR. JONES: Your Honor, **object to** what (sic) **hearsay**.
>
> THE COURT: All right. Objection is sustained as to any hearsay.
>
> BY MR. GENTRY:
>
> Q Okay. Well, let me ask you this, if he didn't say anything to you did you have any idea what the dispute was about?
>
> A Yes, sir.

MR. JONES: **Objection, must lay foundation.**

THE COURT: What's your response to the objection[?]

MR. GENTRY: Judge, I'm asking him if he knew what the dispute was between him and his brother which caused this episode on June, I believe, of 2011.

THE COURT: You can tell us if you know the nature of the dispute.

BY MR. GENTRY:

Q Do you know the nature of the dispute? If you know.

A I -- it was kind of -- **I was kind of out of the loop. Marshall had said to me** ---

Q No, I don't want to hear what Marshall said. Did Marshall have turkey houses?

A Yes.

Q Was Marshall cooperating with Tommy Hoover?

A Yes.

Q All right. You know if that upset Dennis Hoover?

MR JONES: **Objection**, Your Honor.

MR. GENTRY: If he knows.

THE COURT: Overrule the objection.

MR. GENTRY: Do you know ---

THE COURT: You've asked the question. He can answer the question.

BY MR. GENTRY:

Q Okay, go ahead (sic) answer, if you know.

A Yes, sir, it upset him.

R. p. 146, line 14 – p. 148, line 5 (emphasis added). The court committed reversible error in allowing Boyce to testify concerning petitioner's feelings toward Marshall, information he knew ***only*** as the result of inadmissible hearsay, ***not*** through his own personal knowledge.

The passage quoted above demonstrates that Boyce's knowledge of the alleged dispute between his brother and petitioner was solely based on what Marshall had said. Twice he began his answers by stating what Marshall had told him. R. p. 146, line 16; p. 147, line 15. Indeed, when asked if he knew the nature of the dispute, he answered that he "was kind of out of the loop" and then proceeded to answer with respect to what Marshall had said. R. p. 147, lines 12-15. His admission that he "was kind of out of the loop" revealed that he did not have personal knowledge but was testifying only based on what Marshall had told him. Later, when he was asked if he knew if Marshall's cooperating with Tommy Hoover upset petitioner, the defense appropriately again objected, because it was apparent that Boyce's knowledge was attributable to what Marshall had said. The court erred in overruling this objection and allowing the testimony concerning petitioner's feelings toward Boyce's brother.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE; *see State v. Frazier*, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004). Where testimony is objected to on hearsay grounds and no exception to the rule against hearsay

applies, the requisite foundation that must be laid is evidence that the witness has direct personal knowledge of the matter, knowledge not derived from hearsay. *See*, *e.g.*, *South Carolina Dep't of Soc. Servs. v. Jennifer M.*, 404 S.C. 269, 287 n.12, 744 S.E.2d 591, 600 n.12 (Ct. App. 2013); *Watson v. Sellers*, 299 S.C. 426, 432, 385 S.E.2d 369, 372 (Ct. App. 1989); *Ellison v. Pope*, 290 S.C. 100, 103, 348 S.E.2d 367, 369 (Ct. App. 1986). When the defense objected on the basis of foundation, it was incumbent upon the court to require the state to lay a foundation that the testimony was based on the witness's personal knowledge, not merely upon hearsay. *See* Rules 602, 802, SCRE.

As noted in Argument I, hearsay is generally inadmissible. *See* Rule 802, SCRE. Early in this line of questioning, the court correctly recognized the inadmissibility of Boyce's testimony based on what he had been told by his brother. After the court sustained the defense's hearsay objection and the witness continued to cast his testimony in terms of what his brother had said, the solicitor changed tactics and began asking questions with respect to what the witness "knew." This change was intended to circumvent the adverse ruling on hearsay grounds and nonetheless get the same testimony into evidence by other means. The defense properly interposed a foundation objection, because it was apparent the foundation for this witness's so-called knowledge was purely hearsay. Against the backdrop of Boyce's testimony based on what Marshall said and his own admission that he was out of the loop – ***i.e.*, did not have personal knowledge** – the court erred in allowing the witness to answer without first requiring the state to lay a non-hearsay foundation for the witness's ultimate testimony as to petitioner's feelings toward Marshall.

In affirming the ruling of the trial court allowing this testimony, the Court of Appeals cited authorities that acknowledge a witness must testify from his personal knowledge. App. p. 2, *citing* Rules 602, 801(c), 802, SCRE. However, the Court did not address what evidence established that the witness had personal knowledge in this case, rather than having learned the information about which he testified from his brother. The witness twice indicated his knowledge was based on what his brother told him. R. p. 146, line 16; p. 147, lines 14-15. The final colloquy in this passage of testimony reveals that the basis for the witness's knowledge, other than what he had been told, was never established. The trial court overruled the objection without requiring the prosecutor to lay a foundation, and the witness was allowed to provide the substantive testimony without establishing a proper foundation – the witness's personal knowledge. R. p. 147, line 21 – p. 148, line 5. The Court of Appeals erred in affirming the admission of this testimony, because no evidence established he had personal knowledge. His testimony was inadmissible hearsay under Rules 801 and 802, SCRE, and it was not within any exception to the rule against hearsay.

The Court of Appeals also cited authorities addressing insubstantial or harmless errors. App. p. 2. If the Court of Appeals deemed the testimony inadmissible but the error harmless, that determination was also erroneous. The error was not harmless. The state's case was premised entirely on the testimony of Boyce concerning what happened in the men's room. Petitioner disputed Boyce's account and testified to a very different version of events, with Boyce threatening him verbally and precipitating the conflict by striking him from behind, unprovoked. The investigating officers woefully failed to gather evidence that was available and would have confirmed which person's account

was accurate, as noted in detail, *supra* at 1-6. The case turned entirely on the credibility of the two individuals involved in the altercation. The state's theory was that petitioner harbored ill will toward the Boyces and that the confrontation was instigated by petitioner as the result of that ill will. Justin Boyce's inadmissible hearsay testimony concerning petitioner's feelings was substantially prejudicial, since there was no evidence to corroborate either petitioner's account or Boyce's account of how the altercation came about. This Court should grant a writ of certiorari, reverse on this issue, and remand for a new trial.

III. The Court of Appeals erred in affirming the trial court's rulings that allowed inflammatory comments and questions by the solicitor during his cross-examination of petitioner.

During cross-examination of petitioner, the solicitor made inappropriate and inflammatory comments and engaged in an inappropriate line of questioning clearly intended to evoke the passions of the jury and unfairly prejudice petitioner. The solicitor's comments and questions crossed the line of appropriate cross-examination in three unacceptable ways: (1) a comment that impugned petitioner's truthfulness; (2) an expression of the prosecutor's personal opinion as to petitioner's propensity toward violence; and (3) questions that suggested petitioner was intolerant and bigoted toward gay people, all detailed more fully below. In its brief in the Court of Appeals, the state did not address the merits of petitioner's argument that the comments and questions were improper. The reason is apparent – the comments were inappropriate, inflammatory, and absolutely indefensible.

To one question by the solicitor concerning evidence that had not been produced by the defense, petitioner answered, "My word is good enough." R. pp. 304-05. The

solicitor then commented, "You might think so, sir, but there are people who would dispute that." R. p. 305, lines 2-3. A defense objection was sustained and the court instructed the jury to disregard the comment. R. p. 305. Later, in response to a question concerning what happened in the altercation, petitioner finished his answer by saying, "You ever been in a fight? That (sic) the way it goes." The solicitor replied, "Yeah. . . . I doubt I've been in as many as you have." R. p. 305, lines 16-22. The defense again objected, but the court did not rule on this objection or strike the solicitor's comment. R. p. 305, line 24 – p. 306, line 3. The court erred in not sustaining this objection and in not instructing the jury to disregard the solicitor's inappropriate comment.

Later, when the state questioned petitioner about whether he had undergone a physical examination after his arrest, the solicitor asked if petitioner had been given a "once-over" and the following exchange occurred:

> A You know, I ain't trying to get smart. I get kind of a strange feeling over me when a man want (sic) to look at me.
>
> Q Uh-huh.
>
> A But I can't remember, no, sir, I don't.
>
> Q Okay. Mr. Hoover, do you think these strange feelings -- why do you get those strange feelings when a man wants to look at your body, a doctor ---
>
> A I'm not gonna get checked by all –
>
> MR. JONES: Objection, Your Honor.
>
> MR. GENTRY: ---a medical person?
>
> MR. JONES: Objection, Your Honor.

THE COURT: To what?

MR. JONES: That question is totally irrelevant. It goes far beyond probative value.

R. p. 323, line 16 – p. 324, line 6. The court overruled the objection. R. p. 324, lines 20-21. The questioning then resumed, as follows:

BY MR. GENTRY:

Q Do you always get those strange feelings when somebody wants to look at your body?

A It's according on (sic) what kind of voice they got. If he says, "Hey, Mr. Hoover, take your clothes off [change in voice reflection (sic)]". If he said, "Hey, Mr. Hoover, take your clothes off [change in voice reflection (sic)].

Q You're not a big fan of gay people are, you?

A Well, they stay over there, I stay over here.

R. p. 324, line 22 – p. 325, line 6. Following this exchange, the court sustained the objection and instructed the jury to disregard the question. R. p. 325, lines 10-13. However, the court did not instruct the jury to disregard petitioner's answer. The court's treatment of this objection – first overruling it, then sustaining it only as to the question, and not striking the entire passage – was error.

The comments and questions by the solicitor quoted above were inappropriate and inflammatory. All were designed to attack petitioner's character and to arouse negative sentiments toward him in the jurors. The first impugned his honesty. R. p. 305, lines 2-3. The second conveyed that he had a propensity toward fighting. R. p. 305, line 22.

The third portrayed him as intolerant and bigoted toward gay people. R. p. 324, line 23 – p. 325, line 6. All injected inappropriate and extraneous considerations that had no place in this trial and that tainted the jury's ability to fairly weigh the conflicting evidence. All were designed to inflame the passions of the jury.

A prosecutor may not express or imply his personal opinion about a witness's truthfulness. *See State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). A prosecutor also may not inject his personal opinion with respect to the defendant's propensity for violence. *Cf. Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (introduction of impermissible evidence to suggest defendant was bad person with propensity to commit crime). A prosecutor may not ask questions or make comments designed to evoke the jurors' prejudices. *See Vasquez v. State*, 388 S.C. 447, 460, 698 S.E.2d 561, 567 (2010) (evoking religious prejudices); *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (evoking racial prejudices). All the comments and questions of the solicitor quoted above run afoul of these principles.

The court's erroneous rulings on the defense's objections to these improper comments and questions were highly prejudicial. The jurors heard the solicitor express his personal opinion as to petitioner's dishonesty and propensity toward violence, which likely influenced their verdict. They heard questions and answers concerning petitioner's feelings toward gay people, a matter of no relevancy or probative value whatsoever but highly prejudicial and therefore inadmissible under Rule 403 of the South Carolina Rules of Evidence. These comments, questions, and answers likely inflamed the passions of the jury and resulted in unfair prejudice to petitioner, warranting a new trial.

In the Court of Appeals, the state argued this issue was not preserved for appellate review. First, the state contended the specific basis of the argument raised on appeal was not stated in the trial court. No such specificity was required, where the inappropriate nature of each comment and the basis for each objection was apparent. *See* Rule 103(a)(1), SCRE. Second, the state contended the prosecutor's comment about petitioner's being in many fights was not preserved because the court never ruled on the objection. Under the circumstances, the absence of an express ruling was tantamount to the court's overruling the objection. Counsel interposed the objection not once, but twice. R. p. 305, line 24; p. 306, lines 2-3. When the court failed to rule, it effectively admitted the line of questioning. The failure of counsel to do more should not be deemed a waiver of this legitimate and meritorious objection to the solicitor's inappropriate comment and injection of his personal opinion on an issue that was off limits in cross-examination – petitioner's alleged propensity to violence. Third, the state asserted the court struck the offending colloquy concerning petitioner's feelings toward gays. To the contrary, the court struck only the solicitor's offending question and comment, not petitioner's answer. R. p. 325, lines 10-16.

In its decision, the Court of Appeals did not address the claim of error and its resulting prejudice, merely citing the principles that there is no issue to decide where the appellant received the relief requested and that an issue cannot be raised for the first time on appeal. App. p. 3. This issue should not have been decided on preservation grounds. As outlined above, the claim of error was preserved. The basis for the defense's objections was apparent from the context. *See* Rule 103(a)(1), SCRE. To the extent the the lower court's struck an offending question, that corrective measure was insufficient,

as it struck only the question, not the answer it elicited. The line of questioning was completely inappropriate and the answer it elicited was highly prejudicial. This Court should grant a writ of certiorari, find the issue properly preserved, and find prejudicial error that requires reversal.

IV. The Court of Appeals erred in failing to address the cumulative prejudice from the trial court's errors and in failing to find petitioner was denied a fair trial.

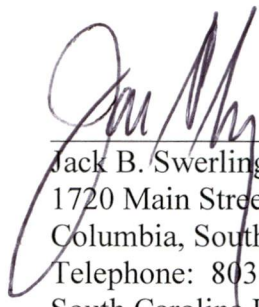
Petitioner contended that each of the errors raised on appeal was prejudicial and could not be deemed harmless in light of the weakness of the state's case and the absence of any independent evidence to corroborate or refute the account of petitioner or Boyce, and in light of the highly prejudicial nature of the solicitor's comments and questions. However, petitioner also raised a claim of cumulative prejudice from these multiple errors, requiring reversal. The Court of Appeals declined to address this issue. App. p. 3. If this Court finds error with respect to some or all of the issues argued above but also finds no single error sufficiently prejudiced petitioner that it affected the outcome or undermined his right to a fair trial, it should nonetheless find the cumulative effect of the errors was so prejudicial that petitioner was denied the fairness required by due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct. App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

The cumulative error doctrine requires reversal when multiple errors, which may be found insignificant or harmless in isolation, in combination prevent the defendant from receiving a fair trial and affect the outcome of his trial. In this case, where there was no physical evidence to corroborate either person's account as to who instigated this altercation, whose knife was involved, and how the injuries were inflicted, the outcome depended entirely on the jury's determination of who was believable. The trial court erroneously admitted improper evidence that tended to corroborate Boyce's account and undermine petitioner's credibility, rulings challenged in this appeal. The resulting prejudice from these rulings was compounded by the prejudice from the solicitor's improper injection of his own opinion as to petitioner's truthfulness and character and his improper eliciting of testimony from petitioner designed to inflame the jurors' passions and prejudices. Although objections to some of the solicitor's comments were sustained, the jury heard those comments nonetheless. The jury heard so many improper and extraneous matters that the likelihood of unfair prejudice is great. If this Court finds no single error was sufficiently prejudicial to warrant reversal, it should review the prejudicial effect of the errors in combination. The trial errors viewed together so tainted these proceedings that they denied petitioner a fair trial. This Court should grant a writ of certiorari, reverse petitioner's conviction, and grant petitioner a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari, reverse the rulings of the Court of Appeals and the circuit court, and grant Petitioner a new trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
General Sessions Court
Clifton B. Newman, Jr., Circuit Court Judge

Case No. 2014-GS-31-00050
Appellate Case No. 2015-000175

The State,

Respondent,

v.

Dennis E. Hoover,

Petitioner.

PROOF OF SERVICE

I hereby certify that I have served copies of the Petition for Writ of Certiorari and Appendix upon respondent, by mail to its counsel of record, Assistant Attorney General William M. Blitch, Jr., Post Office Box 11549, Columbia, South Carolina 29211, on September 27, 2017.

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