THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MCCORMICK COUNTY
Court of General Sessions

William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018, withdrawn, substituted, and refiled September 26, 2018).
Appellate Case No. 2019-000026

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The State, .....Respondent

v.

Joe Ross Worley, .....Petitioner.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the lower court's denial of Petitioner's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs where: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a de facto officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation. Furthermore, whether the Court of Appeals had no choice but to affirm the lower court's denial of Petitioner's request for immunity because Petitioner failed to challenge all of the court's reasons for finding he failed to carry his burden of proof. Finally, whether the Court of Appeals properly affirmed the denial of immunity where the trial court found Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Petitioner challenged in this Appeal.

2. Whether the Court of Appeals properly affirmed the trial court's denial of Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify where those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument..

## STATEMENT OF THE CASE

Petitioner was indicted at the February 22, 2010 term of the grand jury for McCormick County for Assault and Battery with Intent to Kill (2010-GS-35-052) and Possession of a Weapon during a Violent Crime (2010-GS-35-049). He was represented by C. Lance Sheek, Esquire, Billy J. Garrett, Jr., Esquire, and Carson M. Henderson, Esquire, all of the Greenwood County Bar. Respondent (the State) was represented by Solicitor Donald V. Myers and Assistant Solicitors Ervin Maye and Frank Young, all of the Eleventh Circuit Solicitor's Office.

The case was set for trial for May 31, 2011, at the McCormick County Courthouse before the Honorable William P. Keesley. (R.p.1). Prior to the start of trial, Petitioner made a motion to dismiss the charges pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2010) (the Act) and the procedures set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). On May 31-June 1, 2011, the circuit court conducted a pretrial immunity hearing. (R.p.1-p.231). At the close of that hearing, after taking testimony and hearing arguments from both sides, Judge Keesley took Petitioner's motion under advisement and told the parties he would notify them of a decision in writing. (R.p.228). In an order dated July 5, 2011, Judge Keesley denied Petitioner's request for immunity and recused himself from further participation in the case. Petitioner promptly moved for reconsideration of Judge Keesley's ruling. In a twenty-four page written order dated December 6, 2011, and filed December 8, 2011, Judge Keesley affirmed his earlier ruling and denied Petitioner's motion for reconsideration. In that order he found that Petitioner had failed to establish he was entitled to immunity under the Act and ordered "that the motion to bar prosecution of these cases is denied." In reaching this conclusion, the court: (1) summarized Petitioner's testimony from the immunity hearing (R.p.1755-p.1757); repeatedly found that testimony was not credible

(R.p.1756 & p.1760); found "[Petitioner had] absolutely no reasonable belief that anyone was breaking into his home or attempting to break into his home." (R.p.1759); noted: "The defendant has the burden of proving his claim of immunity by the preponderance of the evidence. He has failed to do so." (R.1760); and found: "The overwhelming evidence is that Mr. Worley reasonably should have known that the person he was shooting was a law enforcement officer." (R.p.1762). (R.p.1754-1777).

On January 18, 2012, Petitioner served and filed a Notice of Appeal from Judge Keesley's Order denying immunity, and on January 8, 2013, he filed an initial brief and designation of matter in support of his appeal. That initial brief focused in part on the fact that portions of the immunity hearing could not be transcribed, including the entirety of Petitioner's own testimony.[1] Petitioner framed his first issue as follows: "Because an agent of the State failed to preserve evidence of critical testimony from the hearing regarding immunity, does appellate court lack sufficient record to conduct meaningful appellate review." He argued that partial reconstruction was disfavored and that rather than remanding for an entirely new immunity hearing, he should instead receive an inference in his favor regarding all testimony and evidence that was not initially preserved for review. (R.p.757-794).

On February 7, 2013, the State submitted a motion to remand for reconstruction of the record and a motion to strike improperly designated matter from Petitioner's amended designation of matter. On February 15, 2013, Petitioner filed a return and on February 20, 2013,

[1] Petitioner testified on his own behalf at the immunity hearing; however, a transcript of his testimony was and still is unavailable due to a theft from the court reporter's car. As explained by Judge Keesley in his report to this Court, the court reporter used an outside typist to assist in preparing transcripts. She followed her standard practice of putting all of the materials to prepare the transcript into a briefcase and box that were inside her vehicle. A thief stole almost all of the materials, including the trial log, the stenograph notes and disk, and some backup tapes. From the backup tapes that were left, she created the transcript that has been filed, and she noted it was incomplete. She filed a statement about this, notifying Court Administration of the theft and the resulting gap. Judge Keesley found absolutely no wrongdoing on the part of anyone other than the thief who stole the items from the court reporter's vehicle. (R.p.1852-p.1853).

the State filed a reply. On March 6, 2013, Petitioner then filed a motion to remand for a de novo immunity hearing. On March 18, 2013, the State filed a return to Petitioner's motion and on March 25, 2013, Petitioner filed a reply. In an Order filed March 28, 2013, the Court of Appeals granted the State's motion to remand for reconstruction of the missing portions of the hearing transcript and denied Petitioner's motion for a de novo hearing. The appeal was held in abeyance pending reconstruction.

On June 14, 2013, a reconstruction hearing was convened at the McCormick County Courthouse before Judge Keesley. Petitioner was present and was represented by Desa A. Ballard, Esquire, Carson M. Henderson, Esquire, and Billy J. Garrett, Jr., Esquire. The State was again represented by Solicitor Myers and Assistant Solicitors Maye and Young. Assistant Attorney General J.C. Nicholson, III, Esquire, appeared on behalf of court reporter Rema Thomas and the Director of the Office of Court Administration, Desiree Rutledge Allen, both of whom were appearing as witnesses. The reconstruction court took testimony from Thomas, Allen, and the Honorable Gwendolyn Dorn Chiles, Clerk of Court for McCormick County. It was also provided with: (1) a copy of a September 7, 2013 affidavit from Petitioner's immunity hearing attorneys, Garrett and Henderson, which gave a summary of the testimony given by Petitioner at the May 31, 2011 immunity hearing; (2) Court's Exhibit #1 - notes from Assistant Solicitor Ervin Maye; (3) notes from Judge Keesley; (4) notes from the Deputy Clerk of Court regarding the order and time of witnesses; and (5) a copy of Judge Keesley's December 6, 2011 Amended Order, which included a factual summary of the immunity hearing. (R.p.1655-1777).

On August 21, 2013, the State filed a "Motion to Dismiss Appeal" with the Court of Appeals arguing that this Court's published opinion in *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013), mandated dismissal of Petitioner's appeal as an improper interlocutory appeal from

an order that is not immediately appealable. On the same date, the Court of Appeals issued an Order finding the appeal should be dismissed because: "Petitioner had filed a notice of appeal from the denial of his motion for immunity pursuant to the Protection of Persons and Property Act (S.C. Code §§ 16-11-410 to -450) and the denial of a request for immunity under the Act is not immediately appealable. *State v. Isaac*, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013)." The Court of Appeals further noted that the appeal had been remanded for the reconstruction of the missing portions of the immunity hearing transcript but that since reconstruction would no longer be necessary, the previous remand order was rescinded. It ordered: "At trial, the parties should proffer to the court any testimony relevant to the immunity motion that is not presented to the jury." (R.p.795-796). On August 23, 2013, Petitioner petitioned for rehearing and in an Order from the Court of Appeals filed October 21, 2013, rehearing was denied.

On December 16-19, 2013, the case proceeded to trial before the Honorable R. Lawton McIntosh. (SROA. p.1-14; R.p.797-p.1654). At the beginning of the proceeding, Petitioner was given the opportunity to do more "reconstruction"; however, his attorney advised Judge McIntosh that reconstruction seemed to be done and instead simply introduced the transcript of the June 14, 2013 reconstruction hearing and the exhibits into the record as a Court's Exhibit at trial. (R.p.797-p.798; R.p.1688-1777).

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense and the absence of the duty to retreat because Petitioner was on his own premises, as well as a charge on the defense of habitation—the jury found Petitioner guilty of assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (R.p.1598-p.1640). The trial court delayed sentencing pending a presentencing investigation including a psychological evaluation. (R.p.1640-p.1653).

On June 30, 2014, Judge McIntosh reconvened the case to impose a sentence. The Court offered to allow the parties to present testimony and then heard arguments from both sides before sentencing Petitioner to twenty (20) years' imprisonment for assault and battery with intent to kill and five (5) years' concurrent imprisonment for possession of a weapon during the commission of a violent crime. (R.p.1778-p.1798; SROA.p.15-16). On July 1, 2014, Petitioner timely filed a notice of intent to appeal his conviction and sentence.

On May 4, 2016, Petitioner filed a "Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Pre-Trial Hearing on Petitioner's Motion for Immunity from Prosecution Pursuant to the Protection of Persons and Property Act (S.C. Code Ann. § 16-11-410 et seq.)." (R.p.1799-1807). On May 6, 2016, the State filed a letter in lieu of a Return consenting to a remand to take the steps necessary, as determined by the lower court, to complete the reconstruction hearing that was held before Judge Keesley on June 14, 2013. On June 17, 2016, the Court of Appeals filed an Order granting Petitioner's motion and remanding the appeal to the McCormick County Court of General Sessions. It ordered: "Counsel for Petitioner is ordered to contact counsel for Respondent and the circuit court judge, the Honroable William P. Keesley, within fifteen days of this order to determine if any additional hearings are necessary and whether the transcript can be reconstructed." (R.p.1808-1809).

Based on a review of the Order and an exchange of letters between the parties, Judge Keesley elected to re-convene the reconstruction hearing at the McCormick County Courthouse on October 25, 2016. Petitioner was present and was represented by Assistant Appellate Defender John H. Strom, Esquire, and the State was represented by Senior Assistant Deputy Attorney General J. Benjamin Aplin, Esquire. The State raised several objections to the court taking any additional testimony or evidence in regard to reconstruction; however, those

objections were overruled and Petitioner was allowed to present testimony from trial counsel Carson Henderson, Esquire. Reserving its objections to the proceeding, the State then elicited brief testimony from Assistant Solicitor Young before Judge Keesley took the matter under advisement and concluded the hearing. (R.p.1810-p.1846).

On December 30, 2016, Judge Keesley issued a fourteen page "Report Regarding Reconstruction of the Record." That report included a procedural background, the standard for record reconstruction, a discussion of why the record was incomplete, a discussion of the missing sections of the record, a description of the materials obtained for the purpose of reconstruction, and ultimately a reconstruction of the missing sections. Judge Keesley concluded the report was submitted "in order for the appellate court to assess whether it constitutes a meaningful reconstruction of the sections of the transcript that are missing and whether Mr. Worley suffers any prejudice in his appellate rights caused by the absence of these parts of the record." (R.p.1847-1860). The Court of Appeals then allowed the appeal to proceed. Petitioner submitted a Brief in support of his Appeal. The State filed a brief in response and on July 18, 2018, the Court of Appeals issued an unpublished opinion that affirmed Petitioner's convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018). (App.p.1-p.2). On August 1, 2018, Petitioner submitted a "Petition for Rehearing and Request for Holding on Final Issue" pursuant to Rule 221(a), SCACR. (App.p.3-p.24). On August 24, 2018, the State filed a "Return to Petition for Rehearing and Request for Holding on Final Issue." (App.p.25-p.30). On September 26, 2018, the Court of Appeals issued an order finding no basis for granting a rehearing, but also withdrew, substituted, and refiled an unpublished opinion that again affirmed Petitioner's convictions. *State v. Worley*, Op. No. 2018-UP-327 (S.C. Ct. App. filed September 26, 2018). (App.p.31-p.34). On October 12, 2018, Petitioner filed a "2nd Petition for Rehearing"

(App.p.35-p.57), and on October 25, 2018, the State filed a return. (App.p.58-p.72). In an order filed December 13, 2018, the Court of Appeals denied the petition for rehearing. (App.p.73). On January 7, 2019, Petitioner filed a Petition for a Writ of Certiorari in this Court. This Return to Petition for Certiorari, submitted on behalf of the State, now follows.

Due to a combination of the lengthy but necessary procedural history set forth above and the page limit set forth in Rule 242(f), SCACR, the State hereby incorporates by reference the statement of facts recited in the Final Brief of Respondent, which was submitted to the Court of Appeals.

## CERTIORARI

The State submits that, pursuant to Rule 242(b), SCACR, there are no special and important reasons for this Court to exercise its discretion to grant certiorari and to review the decision of the Court of Appeals. Petitioner argues the Court of Appeals erred in upholding the trial court's ruling that he was not entitled to immunity under the Protection of Persons and Property Act. He further argues the Court of Appeals erred in upholding the trial court's ruling that no error occurred with respect to the Solicitor's allegedly improper comments during closing arguments regarding Petitioner's failure to testify. However, the Court of Appeals analysis on each issue was a straightforward exercise of reviewing the competent evidence that was admitted at the immunity hearing and the trial, as well as the particular facts and circumstances of Petitioner's case. As explained in detail below, Petitioner's arguments do not provide a basis for granting certiorari. For these reasons, the State respectfully asks this Court to deny the petition for a writ of certiorari.

## ARGUMENT

### I.

**The Court of Appeals properly affirmed the lower court's denial of Petitioner's motion for immunity from prosecution upon rejecting his claim that Deputy Rushton should not be considered a "law enforcement officer" under the terms of the Act due to his non-compliance with several statutory requirements regarding the qualification of deputy sheriffs because: (1) the ruling was supported by principles of statutory construction; (2) the specific terms of the Act do not require an officer to be "duly qualified" to be considered a "law enforcement officer" for purposes of the exception to a finding of immunity; (3) even if not duly qualified, Deputy Rushton was acting as a *de facto* officer; and (4) dismissal of criminal charges is not an appropriate remedy for a non-Constitutional violation. In any event, the Court of Appeals had no choice but to affirm the lower court's denial of Petitioner's request for immunity because Petitioner failed to challenge all of the court's reasons for finding he failed to carry his burden of proof. Additionally, the trial court properly found Petitioner failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity for the reasons Petitioner challenged in this Appeal.**

#### Standard of Review

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. *Curry*, 406 S.C. at 370, 752 S.E.2d at 266. In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829; *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct.

App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Elders*, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); *see also Reed v. Becka*, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) ("In appeals of pretrial rulings, this Court is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.'" (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

**The Protection of Persons and Property Act**

A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). The Act provides that:

> *A person who uses deadly force as permitted* by the provisions of this article or another applicable provision of law is justified in using deadly force and *is immune from criminal prosecution* and civil action for the use of deadly force, *unless the person against whom deadly force was used is a law enforcement officer* acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450 (Supp. 2009) (emphasis added). Thus, in the same provision the Act both creates immunity and carves out an exception so that immunity may be completely barred when the person against whom deadly force was used is a "law enforcement officer" and certain other circumstances are present. This Court has further held that, consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. *Id.* at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated

on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence."). One of the three remaining elements of self-defense is the requirement that the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. *Id.*

The Act creates a presumption that a person has proven this element of self-defense if certain conditions are met. It provides in part:

> (A) person is *presumed to have a reasonable fear of imminent peril of death or great bodily injury* to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person *if the person*:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle . . . and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> (B) *The presumption* provided in subsection (A) *does not apply if the person*:
>
> . . . .
>
> (4) *against whom the deadly force is used is a law enforcement officer* who enters or attempts to enter a dwelling, residence, or occupied vehicle in the performance of his official duties, and he identifies himself in accordance with applicable law or the person using force knows or reasonably should have known that the person entering or attempting to enter is a law enforcement officer.

S.C. Code Ann. § 16-11-440 (Supp. 2009) (emphasis added). Thus, in addition to the overall bar in section 16-11-450, the Act also eliminates the presumption of reasonable fear of imminent peril when the person against whom deadly force was used is a "law enforcement officer."[2] In the immunity hearing Petitioner's argument hinged on his contention that Deputy Rushton was not a "law enforcement officer" for purposes of the Act at the time of the incident, and therefore

[2] It is unclear what purpose is served by the narrow section 16-11-440(B) exception to the statutory presumption when an officer is entering or attempting to enter a residence, where the broader language in section 16-11-450 completely bars immunity from prosecution for any action taken in the performance of the officer's official duties.

Petitioner should not have been subject to the exception to immunity in section 16-11-450 or the exception to the statutory presumption in section 16-11-440. The State disagreed and contended that regardless of whether Deputy Rushton complied with every technical statutory requirement to become "duly qualified," the lower court properly found he was a "law enforcement officer" for purposes of the Act.

The Court of Appeals agreed with the State and rejected Petitioner's argument. It affirmed and adopted the lower court's December 8, 2011 order, which itself employed a thorough and proper analysis of each of the arguments raised by Petitioner at the immunity hearing before concluding Petitioner did not carry his burden of proving he was entitled to immunity under the Act. The lower court followed the appropriate procedure—holding a pretrial hearing, evaluating the credibility of the witnesses and weighing the evidence—and ultimately found Petitioner did not carry his burden of proof. Petitioner's arguments simply could not prevail under this Court's standard of review. As in *State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013), Petitioner's claims of self-defense and defense of habitation presented quintessential jury questions, which is not a situation warranting immunity from prosecution. The trial court's findings that Petitioner failed to carry his burden of proving there was an entry or attempted entry, and that Petitioner failed to carry his burden of proving he was not without fault in bringing on the difficulty, had evidentiary support and were not controlled by errors of law.

Similarly, the lower court's December 8, 2011 order analyzed and rejected Petitioner's myriad grounds for claiming Deputy Rushton was not a "law enforcement officer" within the meaning of the Act. The lower court's findings in this regard served merely as an additional sustaining ground to the overall denial of immunity, and as noted above, that denial was solidly grounded in credibility findings and Petitioner's abject failure to carry his burden of proving the

required elements of self-defense by a preponderance of the evidence. Indeed, the lower court held: "Even if there is some problem in considering Deputy Rushton as a law enforcement officer because of a technical condition he had not fulfilled, the Act does not preclude prosecution. The defendant has not established that he had a reasonable belief that he was not firing upon law enforcement officers." (R.p.1767). In other words, the lower court concluded Petitioner failed to establish he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief. *See Curry*, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4. (listing the four elements required by law to establish a case of self-defense). Similarly, the lower court found "that the preponderance of the evidence is that the 'difficulty' was brought on by [Petitioner's] conduct." (R.p.1774). These individual findings supported the lower court's ultimate conclusion that "Petitioner has not met his burden of proof" in establishing the elements of self-defense needed for a grant of pretrial immunity. (R.p.1773-p.1774). For all of these reasons, the lower court's denial of immunity and Petitioner's convictions were properly affirmed by the Court of Appeals. Certiorari should be denied.

## II.

**The Court of Appeals properly affirmed the trial court's denial of Appellant's motion for a mistrial on grounds that the solicitor's closing argument included improper comments on Appellant's right to testify because those comments were made in direct response to: (1) comments made by Appellant in his opening statement, (2) Appellant's failed attempts to substantiate the comments in his opening statement through examination of other witnesses, (3) the resulting lack of evidence in the record to support the comments in the opening statement, and (4) comments made by Appellant in his closing argument.**

In regard to the lower court's refusal to grant a mistrial based on the solicitor's comments in closing arguments, the Court of Appeals affirmed, noting the trial court: (1) found "the solicitor was commenting on the evidence or the lack of evidence in response to information or issues that were placed in the record by Worley and was not burden-shifting or inferring that Worley was guilty because he failed to testify," and (2) "[t]herefore the court found the comment was harmless beyond a reasonable doubt." These findings were supported by evidence in the record and therefore were properly affirmed by the Court of Appeals.

In his petition for certiorari, Petitioner contends the Court of Appeal should have reversed the convictions because the State's closing argument "constituted a direct comment" on Petitioner's right to not testify. He argues that, with respect to the showing that must be made under the harmless error analysis set forth by this Court in *Pickens*,[3] "there is no doubt that the showing was satisfied and Petitioner was denied a fair trial by the state's impermissible comments and, thus, prejudiced." Petitioner claims the State "directly referenced Petitioner's failure to testify multiple times" and that the solicitor "tied Petitioner's failure to testify directly and inexorably to Petitioner's self-defense, mistake, and accident theories. (Petition for Writ of Certiorari, p.21). The State submits Petitioner's argument is entirely without merit. The State's

[3] *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996).

closing argument was in direct response to comments made during Petitioner's opening statement, Petitioner's attempts to substantiate those comments through the examination of other witnesses, the resulting lack of evidence to support the comments in the opening statement, and Petitioner's closing argument. The State's argument did not shift the burden onto Petitioner, but instead merely made note of the lack of evidence as a whole in the record, despite Petitioner's opening statement suggesting such evidence would be forthcoming at trial. The Court of Appeals appropriately affirmed the trial court's refusal to grant a mistrial.

**Standard of Review**

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Inman*, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011); *State v. Meggett*, 398 S.C. 516, 524, 728 S.E.2d 492, 496 (Ct. App. 2012). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *Inman*, 395 S.C. at 565, 720 S.E.2d at 45. A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *Meggett*, 398 S.C. at 524. 728 S.E.2d at 496.

The trial court has wide discretion in ruling on the appropriateness of a closing argument. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003).

**Relevant Facts**

During pretrial arguments about a defense request for a jury charge on modified ammunition, counsel for Petitioner stated:

> . . . [There is] no evidence whatsoever that [Petitioner] was in any way mean-spirited towards anybody except trying to get rid of a fox earlier that evening.
>
> He fired two shots at a fox. And he really wasn't trying to kill the fox; he was trying to motivate him out of there. The fox had bothered his cat. The cat called Sweet Pea. And they had been having trouble with this fox. And that evening, earlier before this thing happened, he fired that thing from the same gun at a fox. And a fox sure isn't the police and certainly isn't a person.
>
> And so - - on the same evening, he also fired it at two fox. But, again, it's an environmental bullet.

(R.p.824-p.825). Later, during preliminary remarks, the trial judge told the jury the parties would be making opening statements and instructed that whatever was said in those statements was not evidence. (R.p.839). In his opening statement, Petitioner's counsel said in part:

> Y'all may not understand this, but as you hear this case, it's horribly tragic, because it starts off with a cat by the name of Sweet Pea, and this cat was found, and it was a scraggly cat and it had a collar on it. And Mr. Worley's father took on the cat and protected this cat, and it became a cat here in McCormick.
>
> And they'd been over on that property for over 40 years. The Worley family comes down here every weekend and has for 40 years. They've been broken into before.
>
> This family is there with his mother, who is 84 years old at the time. Mr. Joe Worley and his mother, 84 years old, in their little garage apartment, and their cat, Sweet Pea. And when you go out there, if His Honor will let you go out there, there's and elaborate cathouse and catwalk that they built. They love their little cat.
>
> Well, in September, when the Sheffields complained the first time, *there's a fox* - - actually, it was the Sheffields that told the Worleys that there was a fox out there - - *and that fox had injured this cat*, had injured it to the point they had to take it to the vet.
>
> Now, Mr. Worley that evening, the 15th, November the 15th of 2009, goes out on his balcony, and he hears a noise. *He flips on his light, and he sees movement out there, and he said, The*

> *dadgum fox again. So he's out there hollering at it and trying to get rid of it.* He goes into his house and gets his father's - - his deceased father by now - - gets his gun, and he loads it with ammo that his father had. *And he goes outside and he shoots towards the lake to motivate the fox that was bothering their cat to get out there. He shot twice. He went on back to bed. And he might have hollered, but he shot twice and then went back to bed.*

(R.p.833-p.834) (emphasis added).

Subsequently, during Petitioner's cross-examination of Deputy Moore, counsel asked: "Well, you heard Joe testify that he shot it up into the air; right?" (R.p.978, lines 11-12). The State objected to the question and the jury was sent out. The parties then engaged in a discussion with the trial judge in regard to whether Petitioner would be allowed to cross-examine other witnesses in regard to Petitioner's testimony from the pretrial immunity hearing. The trial judge said it would be inherently unfair to allow Petitioner to bring up the prior testimony and then to claim his privilege under the Fifth Amendment to not take the stand during trial. The trial court ruled it would not allow the defense to use Petitioner's pretrial testimony during the examination of other witnesses, but that if Petitioner chose to testify, the prior testimony might be admissible in cross-examination. Petitioner said he understood the ruling but contended he may still be able to use the prior testimony in some fashion as it relates to his expert witness. The judge said he would address the issue of the expert witnesses using the prior testimony if it became an issue later during the trial. (R.p.978-p.983).

Later during trial, Petitioner's neighbor, Alan Sheffield, took the stand. On cross-examination, he testified he knew the Worleys' cat Sweet Pea had been injured but he had no knowledge of how or why. Sheffield said he did not know anything about the cat having problems with a varmint and that while he had seen foxes in the area before, he does not remember ever having a conversation with Ms. Worley about a fox. (R.p.1114-p.1115). After

the State rested, during arguments on Petitioner's motion for a directed verdict, the trial judge said: "Well, there is - - the testimony was that Mr. Worley was shooting a gun at a fox. In other words, he was hunting a fox at night. Regardless of whether it's to protect some Sweet Pea cat or whatever, he was hunting at night with a .30-06." (R.p.1204, lines 7-12).

Petitioner then was sworn and advised of his right to testify and his right not to testify. He proceeded to call witnesses in his defense. First, he called his brother, Robert Worley, to the stand. Robert testified he was familiar with Sweet Pea and remembered that Sweet Pea had been injured two or three times over the years; however, he offered no testimony about how those injuries occurred and never mentioned a fox. (R.p.1253-p.1257). Petitioner later called Dr. Kirkham to the stand. He was admitted as an expert criminologist without objection. (R.p.1305-p.1320). While discussing Deputy Rushton's initial thoughts about the 9-1-1 call, Kirkham commented that because it was a rural area, the gunshots could have been someone poaching deer, "or somebody shooting at foxes or whatever." (R.p.1325, lines 16-24). Later, during cross-examination, after having opined that it was reasonable for someone in Petitioner's situation to have a fear of imminent peril or death, Kirkham was asked whether it also would then be reasonable for Petitioner to have been home and afraid earlier that night when he was instead outside shooting his rifle. Kirkham responded: "No. He was doing what he was doing. He says he was trying to motivate a fox to leave his cat, Sweet Pea, alone." Kirkham clarified he was offering an opinion about a hypothetical and that he was only assuming Petitioner was shooting at a fox. (R.p.1383, line 16-p.1384, line 1).

Petitioner also called Officer Bo Willis of the McCormick Police Department to the stand. He helped investigate the shooting, drew a diagram of the property, and took photographs of the scene. (R.p.1433-p.1446). On cross-examination, while testifying about the rifle and

ammunition used by Petitioner, Willis said the bullet used by Petitioner was "not a round you would shoot foxes with." (R.p.1457, lines 3-7). Before the defense rested, Petitioner advised the court he wished to exercise his rights under the Fifth Amendment and was not going to testify. (R.p.1472).

At the conclusion of the testimony and pursuant to a prior ruling, the jury was driven to see the Worley residence. The attorneys and the trial judge also went to the house. Upon returning, the trial judge held a charge conference to address the parties' requests to charge. (R.p.1477-p.1484). In regard to a particular request from Petitioner in regard to night hunting, the trial judge commented: "I'm not going to charge number 7, because the law in this case under the statute that I found is the evidence presented was it was shooting at a fox. Even if it's night hunting, even if he was shooting at a fox, he can't use a .30-06; he's got to use a .22 or less." Ultimately the court changed its ruling and agreed to give the charge at the end of its charge on habitation, because the night hunting appeared to be permissible under a different subsection of section 50-11-710. (R.p.1506-p.1508).

After concluding the charge conference, the parties gave closing arguments. The solicitor closed on the law, followed by a closing argument from Petitioner. (R.p.1513-p.1516). During Petitioner's close, counsel said: "Unfortunately, for the Worley family, they had problems with a fox bothering their cat." (R.p.1518, lines 4-6). He later said: "Worleys [sic] having a problem with a fox trying to kill or injure their cat, Sweet Pea. Joe shoots at the fox and yells." (R.p.1520, lines 2-4). The solicitor objected, complaining that Petitioner was not allowed to quote his prior statement. The jury was sent out and the solicitor explained he was objecting to Petitioner making a statement from facts that were not in the record. He pointed out that Petitioner did not testify and there was no trial testimony a fox was out there on the night of the

incident or that Petitioner shot at a fox. The trial court agreed, sustained the objection, and directed counsel to make his argument based only on facts in evidence. (R.p.1520-p.1521). Petitioner completed his closing argument without further mention of a fox. (R.p.1521-p.1554).

The solicitor then presented a closing argument on behalf of the State. Shortly after starting his argument, the solicitor said:

> Now, let's get all these, you know, like the traveling medicine man from Florida. All these hypotheticals and all these what ifs, and, of course, he's going to give everybody the benefit of the doubt. He's going to give these law enforcement officers the benefit of the doubt, the standards and procedures man.
>
> And what did he tell you? Well, what about this? Well, what about that?
>
> Well, let's look at what's not here. First of all, didn't that medicine man - - that traveling medicine man talk about a fox? There's a fox out there. There's an old country and western song, A fox on the run. Who saw a fox? Who got on that stand and said, on November the 15th of 2009, between two o'clock in the morning and four o'clock there was a fox out there?
>
> Well, the brother testified, and he's in Florida. The traveling medicine man is in Palm Beach in that big ol' house down there. Bo Willis testified. That's their three witnesses. Who said there was a fox out there?
>
> If y'all heard it, disregard what I say and hold it against me. I'm bad, too; I'm the Solicitor. But who said there was a fox out there? I'm half deaf, but I swear I didn't hear it.
>
> Oh, but the fox been out there before, the fox on the run. I just didn't hear anybody say there was a fox out there that night.
>
> . . . .
>
> You know, you'd think after two months, he'd shot that fox. He's such a good shot, isn't he? Seems like the fox on the run would be dead if the fox was out there. That's for you to decide, but I ain't heard it. I tried to listen. I tried to listen.
>
> . . . .

> So they call the sheriff's department. The light's still on. When the officers get out there - - now, how can a man, in 20, 25 minutes, calm down from cussing and yelling and shooting, come in and get undressed and go fast asleep? I don't know because there ain't no testimony to that.

(R.p.1556-p.1559).

**Discussion / Analysis**

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. *See* U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself." ); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Accordingly, this right forbids both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). "As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible." *State v. Weaver*, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004).

"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, 640, 539 S.E.2d 391, 393 (2000). In determining whether a solicitor's remarks constitute a comment on a defendant's failure to testify, courts generally ask: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" *United States v. Anderson*, 481 F.2d 685, 701 (4th Cir. 1973). In considering this issue, the solicitor's remarks must be evaluated in the context in which they were made. *See Weaver*, 361 S.C. at 89, 602

S.E.2d at 794 ("In making this determination, we must examine the alleged impropriety in the context of the entire record."). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Initially, the solicitor's statements that there was no testimony or evidence about a fox or Petitioner going back to bed were simply comments on the evidence presented during trial in response to Petitioner's counsel's argument. It was not a comment on Petitioner's constitutional right to remain silent and not present a defense. Indeed, contrary to the repeated assertion that the solicitor made a "direct comment" on his right to not testify, no such comment appears. (See Brief of Petitioner, p.39-p.41; Petition for Rehearing, p.19; Petition for Writ of Certiorari, p.21). Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it. *See State v. Pitts*, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971) ("The solicitor had a perfect right to state his version of the testimony and to comment on the weight that should be given to such." ). Looking to the context in which the remarks were made, the solicitor did not state Petitioner failed to present any evidence, did not claim Petitioner did not present a defense, did not shift the burden of proof onto Petitioner, and did not suggest to the jury an adverse inference should be drawn against Petitioner based on his failure to present evidence or failure to testify. *See Johnson v. State*, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) ("In context, the comment was simply a statement of the evidence which was before the jury, rather than a comment on Johnson's failure to testify.").

Viewed in the proper context, the solicitor's remarks were designed to comment on Petitioner's counsel's false promises from his opening statement, the evidence presented at trial, and the absence of evidence regarding a fox, and did not improperly shift the burden of proof or

suggest Petitioner's guilt could be inferred from his failure to testify or present a defense. *See State v. Shuler*, 353 S.C. 176, 187, 577 S.E.2d 438, 443-44 (2003) ("In any event, the solicitor's statement did not refer to Petitioner's decision to remain silent. Instead, the statement was a comment on the evidence which had been presented[.]"). The remarks merely clarified for the jury what they should and should not properly consider during their deliberations. Therefore, viewing the remarks in the appropriate context consistent with the natural inferences to be drawn from them, the solicitor's closing argument did not infringe upon Petitioner's constitutional rights or render his trial fundamentally unfair.

In addition, Petitioner's opening statement and closing argument injected the extraneous considerations of whether Petitioner was shooting at a fox and whether he had actually gone back to bed between the time of the shooting and the arrival of the police. As a result, the solicitor was fully permitted to comment on the lack of evidence regarding these issues. *See State v. Ellenberg*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006) ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." ); *see also Patterson*, 324 S.C. at 17, 482 S.E.2d at 766 (finding solicitor's closing argument comments were an invited response and did not render the trial fundamentally unfair); *State v. Meggett*, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012) (finding solicitor's statement that there was no evidence the victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial, and did not improperly shift the burden of proof or suggest that the defendant's guilt could be inferred from his failure to testify or present a defense).

Finally, even if the solicitor's remarks during his closing argument were somehow improper, Petitioner did not suffer any prejudice and his trial was not rendered fundamentally unfair by the comments. *See Weaver*, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is

improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one."). Petitioner's counsel first claimed there would be evidence about Petitioner shooting at a fox and going back to bed in his opening statement. He then repeatedly implied the existence of such evidence during examination of other witnesses. The solicitor merely responded to the argument. The comments, especially in light of the substantially consistent testimony from multiple witnesses, were entirely harmless and did not render the trial fundamentally unfair. Finally, the trial court thoroughly charged the jury on the burden of proof and Petitioner's presumption of innocence. It also specifically charged that Petitioner's failure to testify could not be considered. (R.p.1612-p.1613). Accordingly, the trial court did not abuse its discretion in denying Petitioner's motion for a mistrial and the Court of Appeals properly affirmed. The comments did not unfairly shift the burden and Petitioner was not prejudiced by the comments so as to receive an unfair trial.

The Court of Appeals appropriately affirmed and adopted the lower court's conclusions as to Petitioner's failure to carry his burden of proving his claim of immunity by the preponderance of the evidence, and it appropriately affirmed the trial court's denial of Petitioner's motion for a mistrial in regard to the solicitor's closing argument. There is no basis for granting certiorari.

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the substituted and refiled unpublished opinion of the Court of Appeals affirming Petitioner's convictions and sentence. If the Court grants Petitioner's petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT/PETITIONER

Columbia, South Carolina
January 15, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM MCCORMICK COUNTY
Court of General Sessions

William P. Keesley, Circuit Court Judge (Immunity Hearing)
R. Lawton McIntosh, Circuit Court Judge (Trial)

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Opinion No. 2018-UP-327 (S.C. Ct. App. filed July 18, 2018, withdrawn, substituted, and refiled September 26, 2018).
Appellate Case No. 2019-000026

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The State, .....Respondent

v.

Joe Ross Worley, .....Petitioner.

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**PROOF OF SERVICE**

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I, Troyeshi Brailey, Legal Coordinator, hereby certify that I have served the within *Return to Petition for Writ of Certiorari*, dated January 15, 2019, on Petitioner by depositing two copies of the Petition in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda H. Carter, Deputy Chief Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 15th day of January, 2019.

Troyeshi Brailey, Legal Coordinator

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ALAN WILSON
ATTORNEY GENERAL



January 15, 2019

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The State, Respondent, v. Joe Ross Worley, Petitioner
Appellate Case No. 2019-000026

Dear Ms. Carter:

I am enclosing two (2) copies of the Respondent's Return to Petition for Writ of Certiorari in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/tb
Enclosures

cc: Honorable Daniel E. Shearouse (original and six copies of Petition enclosed)
Victim Advocacy Division