

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JAN 13 2023

S.C. SUPREME COURT

APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas  
Honorable Edward Miller, Circuit Judge

Case No.: 2018-CP-45-0929

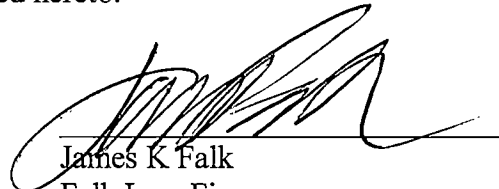
Marc Anthony Palmer 354634.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Marc Anthony Palmer appeals the Honorable Edward Miller January 3, 2023 Order of Dismissal. Undersigned counsel received notice of entry of the order on January 6, 2023. A copy of the order on appeal is attached hereto.



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STATE OF SOUTH CAROLINA )  
COUNTY OF WILLIAMSBURG )  
) )  
Marc Anthony Palmer, #354634, )  
) )  
Applicant, )  
) )  
v. )  
State of South Carolina, )  
) )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

RECEIVED

Case No.: 2018-CP-45-0488

JAN 13 2023

ORDER OF DISMISSAL

S.C. SUPREME COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Marc Anthony Palmer (Applicant) on October 29, 2018. On November 1, 2022, an evidentiary hearing convened before the Honorable Edward W. Miller. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. Following a thorough review of the trial transcript and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In May 2011, the Williamsburg County Grand Jury indicted Applicant for murder and possession of a weapon during a violent crime (2011-GS-45-0095). These charges arose from the fatal shooting of Therris Keels on October 27, 2010.

On March 11-14, 2013, Applicant proceeded to a jury trial before the Honorable William Jeffery Young. Guy Ballinger represented Applicant, and Kimberly Barr represented the State. Applicant was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for the weapon charge.

Applicant filed a direct appeal, which was perfected by Ryan L. Beasley, Esquire, and

Chief Appellate Defender Robert M. Dudek. The Court of appeals issued an opinion vacating the five-year sentence for the weapon charge pursuant to section 16-23-490(A) of the South Carolina Code but affirming all other issues on the merits. Applicant filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent January 4, 2018.

#### **Summary of Trial Testimony**

On October 28, 2010, Therris Keels (Victim) was shot in the head and in the abdomen. (Tr. 165). At trial, the State relied primarily on eyewitness testimony from Maurice Smith. Smith testified he saw Victim with Joseph Sabb on the evening of the shooting.<sup>1</sup> (Tr. 113-14). He testified he saw Applicant approach Victim; Victim put his hands up as Applicant pointed a gun and shot Victim. (Tr. 114-15). Smith testified Applicant shot Victim again after Victim fell to the ground. (Tr. 115). Applicant then crossed the road and shot Victim a third time before running off. (Tr. 116). Although Smith did not see Applicant's Dodge Neon that night, he heard its distinctive squealing sound shortly after the shooting. (Tr. 119-20).

Brittney Croskey recalled seeing both Applicant and Victim earlier that evening. (Tr. 185-86). Croskey testified she later saw Victim with his hands up and heard a gunshot. (Tr. 188). She then heard a second shot before Victim fell to the ground. (Tr. 188-89). Croskey observed the shooter stand over Victim and shoot him again. (Tr. 188-89). Prior to the shooting, she recalled seeing someone pacing back and forth under a streetlight. (Tr. 187). Croskey noted the person walked in a similar manner as Applicant. (Tr. 187-88).

Wesley Walker testified he saw Victim with Sabb on the night of the shooting, which occurred between 10:00 and 10:30 p.m. (Tr. 135, 137). He testified he did not see Victim with a gun that night. (Tr. 139). Walker stated he saw the shooter reach into his pocket, pull out a gun,

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<sup>1</sup> Sabb's nickname was "TT."

and shoot Victim twice. (Tr. 139). Walker testified the man who shot Victim had a ponytail and puffed hair, which was similar to the way Applicant sometimes wore his hair. (Tr. 140).

Investigator McFadden recovered surveillance video from a gas station near the shooting. On the video, a vehicle that Applicant later identified as his vehicle could be seen passing the gas station near the time of the shooting. (Tr. 317-25, 354-55).

In addition to the foregoing, the State presented evidence of animosity between Applicant and Victim. Smith testified a week or two before the murder, Smith saw Victim on top of Applicant. After the two were separated, Smith heard Applicant say it was not over. (Tr. 106-07). Detrel Matthews also recalled observing Applicant in an argument with Victim about a month before the murder. (Tr. 211-12). Applicant admitted he and Victim had gotten into a confrontation before, and Applicant had threatened to rob him on the day of the shooting. (Tr. 347-49, 370-71).

The State also presented evidence that Applicant had access to a pistol. Smith testified he saw Petitioner drop a gun during an altercation a few weeks before the murder. (Tr. 108-09). Matthews also recalled seeing what appeared to be a pistol fall from Applicant's waist during a prior confrontation. (Tr. 212-14). Investigator Wayne McFadden testified he learned from Matthews that Matthews' brother returned a .45 caliber handgun to Applicant before the shooting. (Tr. 312-15). Law enforcement recovered three .45 caliber shell casings from the scene but did not find any physical evidence tying Applicant (or anyone else) to the shooting. (Tr. 247-52, 255, 275-79).

SLED Agent Mark Creech testified he and two investigators interviewed Applicant but were unable to corroborate Applicant's whereabouts from 10:10 p.m. to 3:00 a.m. on the evening of the shooting. (Tr. 262-75). Investigator Wayne McFadden testified he attempted to verify Applicant's alibi for the evening of the shooting. (Tr. 305-08). He reviewed surveillance videos

from a gas station where Applicant claimed to be but did not see Applicant's vehicle in the footage. (Tr. 308-09).

### **Current Application**

Applicant timely commenced this PCR application on October 29, 2018, raising various claims of prosecutorial misconduct and ineffective assistance of counsel. At the hearing, Applicant proceeded on the following allegations:

1. **Prosecutorial Misconduct:** The State did not fully disclose the nature of its relationship with Smith and the terms of his plea agreement.
2. **Ineffective Assistance of Counsel:**
  - a. Failed to object to Brady violations;<sup>2</sup>
  - b. Failed to suppress admission of unreliable identification evidence;
  - c. Failed to make proper objections and motions at trial;
  - d. Failed to object to the solicitor's improper comments in closing and reply arguments;
  - e. Failed to place all sidebar discussions on the record; and
  - f. Made harmful arguments against his and Brittany Croskey's testimony.

Before this Court are the records of the Williamsburg County Clerk of Court regarding the underlying convictions, the trial transcript, the records from Applicant's direct appeal, and Applicant's records from the Department of Corrections.

### **Testimony Presented at the Evidentiary Hearing**

During the PCR hearing, Applicant testified about several pieces of evidence he believed the State withheld. Applicant acknowledged his vehicle—which was a distinct color—was captured on the surveillance camera of the “521 Saver” gas station in the area of the shooting and near the time of the shooting. However, he averred surveillance footage from Youngs, a different

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<sup>2</sup> Applicant indicated he was proceeding on either prosecutorial misconduct or ineffective assistance of counsel as it related to an alleged Brady violation.

gas station, would have established he was merely passing through the area and had not previously been on the gravel road where the shooting occurred.<sup>3</sup> He acknowledged seeing the 521 Saver video right before trial but asserted he never saw a video from Youngs.

Next, Applicant alleged the State did not turn over the first statement from eyewitness Brittney Croskey, who identified Applicant as the shooter at trial based on his distinct walk.<sup>4</sup> He contends Croskey initially did not mention his walk but was coached by law enforcement during her second statement to identify him based on his walk. Applicant stated law enforcement mentioned a first statement but said they had technical problems while recording it. Applicant further asserted the State did not turn over a statement from Sabb, who was walking with Victim at the time of the shooting. He contended Sabb told police he did not know who killed the victim, which was the truth.<sup>5</sup> Applicant averred he was prejudiced by the State's failure to turn over this alleged first statement from Sabb because it could have shown a prior consistent statement.

Applicant testified Investigator McFadden did not turn over the name of a confidential informant. He further averred trial counsel should have objected when Investigator McFadden testified a gun fell out of Applicant's pocket during a prior fight with a different person. Finally, Applicant testified about his belief that the State entered into a secret plea deal with Maurice Smith, who testified against Applicant at trial. Applicant explained he and Smith got into an argument in

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<sup>3</sup> More specifically, based on testimony, the gravel road was between the two gas stations. Thus, if Applicant turned off the gravel road—as the State posited—he would have passed only the 521 Saver gas station. However, if he was merely passing through the area, as Applicant alleged, he would have passed both gas stations. Applicant also raised an issue with a missing video from a Citgo gas station, although it was not clear from Applicant's testimony where that gas station was located in relation to the shooting or how it would have assisted Applicant's case.

<sup>4</sup> Applicant acknowledged at the PCR hearing that at the time of the shooting he had pins in his legs and when he was tired he sometimes walked in a distinct manner.

<sup>5</sup> At trial, Sabb testified the shooter was wearing a white mask and Sabb could not identify him. (Tr. 421, 444).

December 2011, and Smith changed his statement about the shooting after that fight. Applicant further asserted Smith had multiple drug charges but was only serving probation after two years of a mandatory ten-year, 85% sentence. He pointed to that as evidence that the State had secretly struck a deal with Smith to testify against Applicant.

Solicitor Kimberly Barr testified about Smith's multiple arrests for drug charges and recalled his charges were resolved in September 2012—prior to Applicant's trial. Barr testified that after Smith testified for the State in Applicant's trial, Smith's attorney contacted her and indicated he wanted to file a motion to reduce Smith's sentence. Barr denied that she or investigators talked to Smith about changing his statement. On cross examination, she agreed that as a solicitor, she often engaged in plea negotiations and would agree to reduce charges in exchange for a plea. She also explained that when she expects a defendant to testify against another defendant as part of a plea bargain, she will ask the court to defer sentencing until after the defendant testifies. Barr testified Smith was sentenced the day he pled and she did not have a deal with him at that time; if Barr had had a deal with Smith to testify against Applicant when Smith pled, Barr would have requested Smith's sentencing be deferred.

Barr testified the only video she recalled was the video that was introduced at trial. She recalled that video showed Applicant's car—which had a distinct color and sound—passing by the gas station at the same time 911 received calls about the shooting. Barr did not recall a video from Young's gas station; based on her recollection, Investigator McFadden testified at trial that he viewed the tape from Young's and it didn't show anything. She did not recall specifically any type of alibi defense; she stated Investigator McFadden testified at trial that he was unable to confirm the initial alibi provided by Applicant.

Regarding Croskey's alleged missing statement, Barr stated her understanding was the

recording of Croskey malfunctioned early on, but the remainder of her statement was recorded. She stated law enforcement referenced Croskey's initial statements in a supplemental report, which Barr provided to the defense. Barr was unaware of the existence of any prior written or recorded statement from Sabb; she noted investigators do not always record or memorialize statements from witnesses. Barr did not recall notes from Sabb's interview. Barr stated she was unaware of investigators utilizing any confidential informant in Applicant's case. She maintained she turned over all evidence to the defense.

Guy Ballenger (trial counsel) testified the State would not offer a plea of less than thirty years, which Applicant never wanted to accept. He explained he prepped for trial pretty much the entire time he represented Applicant. Trial counsel testified he filed a Rule 5/Brady motion, the solicitor told him there were not any videos from gas stations other than the one introduced at trial, and trial counsel had no reason to dispute that. He further asserted he did not try to investigate additional videos because if they existed, they may have actually helped the State's case. Trial counsel explained he went to great lengths at trial to show Applicant's car was not speeding when it passed the 521 Saver gas station, which he averred suggested Applicant had not just shot someone. He testified he did not want any additional videos that could refute that argument.

Regarding Croskey's allegedly missing statement, trial counsel stated law enforcement often took statements that weren't recorded. Trial counsel also testified he had conflicting statements from Croskey and used them to impeach her at trial. He testified he sent a private investigator to interview Croskey, but she was "all over the map" and ultimately told the investigator that her original statement to law enforcement was correct. Trial counsel testified he did not believe Croskey's identification of Applicant created a meritorious Biggers issue because there was not a police lineup in this case. Although he acknowledged the lack of a lineup was not

conclusive as to whether there was a Biggers issue, he noted Croskey testified at trial that she had known Applicant for about a year prior to the shooting. Trial counsel explained he tried to establish on cross-examination that Croskey had only seen Applicant four times before the shooting. Ultimately, trial counsel believed it was an issue of credibility rather than admissibility.

Trial counsel testified he was not aware of any deal the State made with Smith, and he did not expect to find any type of written plea agreement between the State and Smith. He explained that based on his practice, the only signed documents he typically receives in State court related to a plea agreement is a sentencing sheet. Trial counsel noted Beatty<sup>6</sup> was not decided until 2018 and thus was not available at the time of Applicant's trial. He was unaware of law enforcement using a confidential informant in this case. Trial counsel testified he generally does not object to everything that is technically objectionable if it is not an important issue because the jury gets tired of constant objections. He did not recall anything objectionable about the State's closing argument.<sup>7</sup> Regarding the lawfulness of Applicant's arrest, trial counsel explained he was appointed after the preliminary hearing and after Applicant had been indicted on the charges. Finally, he stated he did not notice any issues regarding the search of Applicant's car.

#### **Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court

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<sup>6</sup> State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2918) (instructing trial courts to avoid charging the jury that its job is to search for the truth).

<sup>7</sup> Trial counsel was questioned about specific portions of the trial transcript, including multiple statements made during the State's closing argument. Trial counsel's testimony on those specific passages will be discussed where relevant below.

finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

### *Ineffective Assistance of Counsel*

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant alleging ineffective assistance of counsel must prove "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 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687-88; Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

### *Brady violations / Prosecutorial Misconduct*

Applicant alleges the prosecutor and/or law enforcement engaged in misconduct by withholding key pieces of evidence, coercing witnesses to change their testimony, and entering into a secret plea agreement with Smith. This Court finds Applicant has not established prosecutorial misconduct. To the extent these allegations are framed as ineffective assistance of

counsel, this Court finds Applicant did not prove trial counsel was deficient in any manner related to this issue, nor did Applicant prove any resulting prejudice.

First, Applicant did not prove the prosecution withheld any evidence. This Court finds credible Barr's testimony that (1) she turned all evidence over to the defense, (2) the only surveillance video in the State's possession was the video that was introduced at trial, and (3) she was not in possession of any prior written or recorded statement from Sabb. This Court likewise finds credible trial counsel's testimony that he did not have any reason to believe the State withheld any videos. Regarding Croskey's alleged initial statement, this Court finds that based on the testimony of Applicant, Barr, and trial counsel, the most logical inference is the investigators had to restart the recording due to a technical problem. Critically, Barr credibly testified she turned over the supplemental reports that referenced Croskey's initial statements. Regarding the alleged use of a confidential informant, this Court finds credible Barr and trial counsel's testimony that they were not aware of law enforcement using a confidential informant as part of this murder investigation. Finally, Applicant did not introduce any of these alleged prior statements or videos at the PCR hearing, making their intrinsic value—if they existed—speculative at best. Cf. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing an applicant must produce witnesses at a PCR hearing to support a claim that counsel was ineffective for failing to interview or call potential witnesses). Based on the foregoing, this Court finds Applicant did not prove the prosecution withheld any evidence. This Court likewise finds trial counsel was not ineffective for not raising a Brady issue related to the alleged withheld evidence.

Next, Applicant did not prove the prosecution and/or law enforcement coerced witnesses to change their testimony. At the PCR hearing, Applicant averred (1) law enforcement coached Croskey to testify the shooter had a distinct walk similar to Applicant's walk and (2) Smith

changed his initial statement and testified against Applicant. However, this Court finds **credible** Barr's testimony that she did not coach or talk to any witnesses about changing their testimony, and she was likewise not aware of law enforcement coaching or talking to any witness about changing their testimony. This Court also finds **credible** trial counsel's testimony that Croskey's statements were all over the place, which trial counsel used to impeach her at trial. Based on the foregoing, this Court finds Applicant failed to prove any prosecutorial misconduct in this regard. This Court likewise finds Applicant did not prove counsel was ineffective for not raising this issue.

Finally, Applicant did not prove the existence of a secret plea agreement between Smith and the State. Critically, this Court finds **credible** Barr's testimony that (1) she did not have a deal with Smith related to testifying at Applicant's trial when Smith pled guilty, and (2) if she had entered into such an agreement with Smith, she would have asked the court to defer sentencing for Smith until after Applicant's trial. This Court notes Applicant's testimony that he and Smith got into an argument prior to Applicant's trial, which may have been the impetus behind Smith's ultimate decision to testify against Applicant. This Court further notes and finds **credible** Barr's testimony that eyewitnesses often don't initially disclose who a shooter is for various reasons. Based on the evidence and testimony presented, Applicant did not prove the existence of any secret plea agreement with Smith related to Smith testifying against Applicant. Applicant thus failed to prove prosecutorial misconduct in this regard. Likewise, Applicant failed to prove trial counsel was ineffective for not further investigating and/or raising this issue, and this claim is denied.

*Failed to move to suppress unreliable identification evidence*

During trial, Applicant questioned trial counsel about why he did not move to suppress Croskey's identification of him at trial under Neil v. Biggers. Trial counsel explained he did not believe Croskey's identification of Applicant created a meritorious Biggers issue because this was

not a situation involving a police lineup; rather, Croskey testified at trial that she had known Applicant about a year before the shooting. This Court finds Applicant has failed to show counsel was ineffective for not requesting a Biggers hearing.

“In Neil v. Biggers, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification.” State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). “Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.”

This Court finds counsel articulated a valid reason for not raising a Biggers issue and thus was not deficient. Specifically, trial counsel testified he did not believe a Biggers argument would be meritorious, and this Court agrees. The trial testimony does not establish that Croskey identified Applicant based on an unnecessary and unduly suggestive police procedure. At trial, Croskey testified she had known Applicant for about a year prior to the shooting and had seen him around town at different places, including seeing him three or four times at “the shop” where the shooting occurred. (Tr. 180-82). Croskey was also familiar with Applicant’s car—a Dodge Neon—and his walk, which she described as “tip toe kind of” and “noticeable [if] you knew it.” (Tr. 182, 188). No evidence shows Croskey identified Applicant as the shooter based on a line-up or show up; rather, her testimony reflects she spoke to police after witnessing the shooting and indicated the shooter walked in a similar manner as Applicant, whom she had known for about a year.

This Court further finds counsel articulated a valid strategy in attempting to undermine Croskey’s identification of Applicant by highlighting on cross-examination inconsistencies with Croskey’s trial testimony and her initial statement to police. Specifically, trial counsel elicited

testimony that Croskey initially “didn’t have a feeling” about who the shooter was but later determined it could be Applicant after “people started talking” about the shooting. (Tr. 198-99). Due to the relative weakness of a Biggers argument here, counsel articulated a valid strategy for undermining Croskey’s identification of Applicant through cross-examination instead and thus was not deficient.

Finally, based on Croskey’s testimony that she was familiar with Applicant, and based on the lack of any evidence that she identified Applicant through an unduly suggestive lineup or show up, this Court finds it is not reasonably likely Croskey’s testimony would have been suppressed based on Biggers. Thus, Applicant did not prove any resulting prejudice from counsel’s failure to raise this issue at trial, and this claim is denied.

*Failed to make proper objections and motions at trial*

During the evidentiary hearing, Applicant questioned trial counsel about why he did not object to various statements in the trial transcript. Specifically, Applicant pointed to the following statement made by the Court prior to trial: “This is a real trial which is a fundamental part of our democracy and it’s a search for the truth in an effort to make sure that justice is done. Searching for the truth and insuring that justice is done is often deliberate, repetitive, and slow.” (Tr. 79). Trial counsel acknowledged the Supreme Court had admonished similar language in Beatty but explained that opinion was not published until after Applicant’s 2013 trial.

This Court finds Applicant has not shown counsel was ineffective for not objecting to the trial court’s opening statements. Initially, this Court acknowledges our Supreme Court recently instructed trial courts to avoid instructing the jury that its job is to search for the truth. State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). Notably, however, Beatty was not heard until June 15, 2017—more than four years *after* Applicant’s trial. At the time of Applicant’s trial,

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), was controlling. In Aleskey, our Supreme Court found “no reversible error because the ‘seek the truth’ language was charged in conjunction with the credibility of the witnesses charge, and not with either the reasonable doubt or circumstantial evidence charges.” Beatty, 423 S.C. at 33, 813 S.E.2d at 506 (citing Aleskey). Here, this comment was made at the beginning of trial and not as part of the reasonable doubt or circumstantial evidence charges. Thus, at the time of Applicant’s trial, the court’s comments to the jury did not constitute reversible error. Trial counsel is not charged with foreseeing the later change in the law and thus was not deficient for not objecting. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (“An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.”). Likewise, because this statement did not constitute reversible error, Applicant cannot show prejudice.

Next, Applicant pointed to the following direct testimony of Smith:

Q: So you see [Applicant] then tells us what happens at that point.<sup>8</sup>

A: He came out across the road toward [Victim, Victim] was already stopped. Victim—I saw him gesture put his hands up as I guess he might of let him know I didn’t have a gun or whatever. [Applicant] had the gun pointing out at the time. [Applicant] shot him and he stood there. [Victim] he still standing there then he shot him again. He was still there and then he fell [Applicant] turned went go back across the road here this way and came back shot him again and went off the road.

(App. 115). After reviewing this testimony, trial counsel averred Smith was testifying to his own impression about what he saw, which was not hearsay. This Court agrees and finds that based upon a reading of the transcript, Smith was testifying to what he himself witnessed. This testimony is not hearsay, Applicant has not shown a valid basis to object, and Applicant has thus failed to

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<sup>8</sup> This Court finds the “s” on “tells” is most likely a scrivener’s error. Based on context, the solicitor was most likely asking, “So you see [Applicant], then tell us what happens at that point.”

prove deficiency or resulting prejudice from counsel's failure to object to this testimony.

Finally, Applicant pointed to the following direct testimony of Detrel Matthews:

Q: While you had the conversation with [Investigator] McFadden in the Sheriff's office. Did you tell him in fact that what fell from the defendant's waist was a .45 caliber pistol?

A: I never told him exactly what caliber pistol it was because I really didn't know, but I just told him I thought it was a pistol that fell out of his waist.

Q: Did you tell him at any point in time that you picked up a .45 caliber pistol?

A: No ma'am.

Q: Did you ever at any point in time tell him that [Applicant] asked for the pistol back?

A: No ma'am.

Q: Did you ever at any point and time tell him that you would not give the pistol back to [Applicant] because he threatened to shoot Mr. McBride?

A: No ma'am.

Q: Did you ever at any point and time tell him that you kept the pistol for a couple of days?

A: No ma'am.

Q: Did you ever at any point and time tell Mr. McFadden that the defendant called you repeatedly to get the gun back?

A: No ma'am.

Q: Did you ever at any point and time tell Mr. McFadden that you gave the pistol back to the defendant within three to four days after the incident with Mr. McBride?

A: No ma'am.

Q: Now in terms of your record. You've been candid about that and I appreciate that. Would it have been a violation of your parole

[had] you in fact picked up that weapon and kept it for a couple of days?

A: Yes ma'am.

(Tr. 216-17). Trial counsel agreed the foregoing could set the State up to introduce a prior inconsistent statement.<sup>9</sup> Trial counsel further explained he does not raise every technical objection if the testimony being elicited is not material or damaging because doing so can aggravate the jury.

This Court finds (1) the foregoing testimony was non-material because Matthews denied almost every question asked by the solicitor and (2) counsel articulated a valid strategy in not objecting to non-material testimony because doing so could annoy the jury. This Court further finds Applicant failed to articulate a valid objection to this testimony and thus failed to prove counsel was deficient for not objecting. Finally, this Court finds Matthews' denial of almost every question asked by the solicitor made it not reasonably likely this testimony materially impacted the jury and affected the outcome of this trial. Thus, Applicant has not established deficiency or prejudice, and this claim is denied.

*Failed to object to the solicitor's improper arguments*

At the evidentiary hearing, Petitioner questioned trial counsel about several portions of the State's closing argument. Specifically, he asked counsel about the following:

I prosecuted Maurice Smith. Maurice Smith came in this court room he pled guilty and I was standing basically in the same position I'm standing right now and as I recollect his testimony when Mr. Ballinger asked him what were you convicted of he said distribution and trafficking

(Tr. 488).<sup>10</sup> Petitioner asked counsel whether the following constituted a personal attack:

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<sup>9</sup> The State, however, did not move to introduce any prior inconsistent statement from Matthews.  
<sup>10</sup> In his application, Petitioner averred Smith's sentencing sheet indicated assistant solicitor Christopher Durant was the prosecuting attorney—not Barr, and counsel was ineffective for not objecting when the solicitor presented this "false evidence" to the jury. (Pet. 58-59).

And folks when I talked about the defendant cutting his hair, I wasn't talking about it because I thought he was trying to conceal evidence on his hair. I was talking about it because he is trying to present an image to you of a person he is not. You know he comes into this courtroom he wants to portray himself as conscientious, studies, and you know he hits all the high marks. Young man not married check, no children check, college student check, clean cut check, nice suit check, nice tie check, shiny shoes check. He wants to create the best possible impression on this jury but it's a lie. The image that you saw in this courtroom this week folks that's a lie and just like he told me when I'm asking him questions, don't get it twisted. Ladies and gentlemen you all cannot get it twisted because this is not the person that you see in the courtroom is not the same individual who in his private life back on October 27, 2010 took a .45 caliber pistol and loaded to bullets into the victim's body.

(Tr. 478-79). Petitioner asked counsel whether the following constituted improper bolstering:

So [the investigator] then goes to [Matthews'] parole officer and says listen ma'am I got a murder down here Williamsburg County. I got somebody that puts the murder weapon in the defendant's hand can you please just not violate this guy if he comes forward and he tell me the truth. Parole office says no . . . .

(Tr. 484).

I would submit to you that there is something incredibly liberating about prison and I know that sounds ironic and it doesn't make—but when you go to prison and you're doing your time. I would submit to you that it kind of allows you to get it off your chest, because [Smith] knows what happened that night and he told you it's not just like I'm remembering today that [Applicant] killed [Victim]. I knew back then that [Applicant] killed [Victim] did I come forward and say yea Mr. Policeman I saw it I'm an eye witness it was [Applicant] no I didn't do that but it's[—]and please be clear it wasn't that [Smith] was uncertain back then he knew back then as he testified to you during this trial. Here is where I think it's so important and why I would submit to you that he is believable.

(Tr. 489-90). Finally, Petitioner asked counsel whether the following constituted pitting:

Now as it relates to this issue about whether or not the shooter had the mask. Here's what I would tell you about that, to this day, TT, Mr. Sabb, is traumatized by that he couldn't bring himself to see the picture of [Victim] there. When he gave his statement to the police he says he sees the person come towards [Victim]. [Victim] walks

up to the person, he says he hears a shot and takes off running. Now in terms of this issue about the white mask. What I would suggest to you is that when somebody points a gun at an individual and what we know is that, when [Victim] was stuck in the stomach he and the shooter were face to face. So the gun is likely held by [Applicant] like this against [Victim] and so when he fires the pistol here's a flash or light that comes from the muzzle of the gun . . . . Now [Applicant] was wearing glasses at the time. What I would suggest to you was that perhaps with the flash of the muzzle that that created a light that created a reflection on his glasses and I would submit to you that TT probably thought the person had a white mask on, but TT was clearly at least[,] according to his testimony[,] at least 15 yards away from where this happened and he didn't see or hear anything else as he can recall after that point. So I would just tell you that because quite frankly I don't think the defendant would've worn a mask because he wanted people to know that it was him.

(App. 492-93). When questioned about the preceding, counsel noted he and Petitioner “disagree[d] on what’s objectionable” and testified he did not see any basis to object. He testified it was the solicitor’s summation of evidence and was not out of line.

This Court finds Applicant has failed to show counsel was ineffective for not objecting to the foregoing portions of the State’s closing argument. Counsel testified he believed the foregoing was the State’s summation of the evidence and he saw no basis to object. Based on its review of the transcript, this Court agrees the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object. See State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) (providing statements made during a closing argument must be viewed “in the context of the entire record”). This Court thus finds counsel was not deficient in this regard.

Likewise, this Court finds Applicant has failed to show how any objection would have changed the outcome of trial and thus has not shown prejudice. Overall these arguments did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” See id. (“The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”); id. (“Improper comments

during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument.”). This Court further finds it is not reasonably likely a motion for a mistrial would have been granted based on the foregoing arguments. Thus, Applicant has not proven deficiency or prejudice, and this claim is denied.

#### *Golden Rule Argument*

At the evidentiary hearing, Petitioner asked counsel if the following was an improper golden rule argument:

He committed a cold blooded, ruthless murder and at some point if we're going to just lie down and surrender our community to this type of street justice then it's time for all of us to hand our hats up. We might as well go home. Judge Young might as well retire his robe. I might as well quit this job and just do only private practice and we might as well quit blowing our money away destroy that courthouse across the street because we don't need it. If the defendant can come in here and kill somebody in cold blood and walk away with because [sic] he had the presence of mind to throw away the evidence. Then we might as well and we all say that we're done. I employ you all not to do that and I employ you all to return a guilty verdict.

(495). Counsel agreed it “could be viewed in that fashion.”

This Court, however, disagrees and finds the foregoing did not amount to a Golden Rule argument. “The Golden Rule Argument is one that suggests to the jurors they put themselves in the shoes of one of the parties.” State v. Rice, 375 S.C. 302, 334, 652 S.E.2d 409, 425 (Ct.App.2007). “In the criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place.” Id. “Such an argument tends to destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” Id. The argument here did not ask the juror to put themselves in the place of the victims and thus did not amount to a Golden Rule Argument. See Harris, 382 S.C. at

122, 674 S.E.2d at 540 (“In the present case, reviewing the closing argument in the context of the entire record, the State did not make a Golden Rule Argument. Simply put, the State did not ask or suggest to the jury that they place themselves in the shoes of the victims.”). Applicant has not set forth any other reason or basis that he believes trial counsel should have objected to this portion of the argument and thus has failed to prove counsel was deficient. Likewise, this Court finds that even if the foregoing argument was objectionable, this comment did not “infect the trial with unfairness as to make the resulting conviction a denial of due process,” and it is not reasonably likely any objection would have changed the outcome. See id. (“The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”); id. (“Improper comments during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument.”). Applicant has thus failed to prove any resulting prejudice from counsel’s failure to object to this portion of the argument, and this claim is denied.

*Failed to place all sidebar discussion on the record*

At the evidentiary hearing, Petitioner questioned counsel about a sidebar in the transcript; counsel recalled his objection was overruled at the sidebar, but he could not specifically recall what the sidebar was about.<sup>11</sup> This Court finds Applicant has not shown trial counsel was ineffective for not placing this sidebar on the record. Initially, Applicant has not shown what the sidebar was about, other than the objection that was in the transcript and thus preserved for appeal. Thus, any finding of deficiency or prejudice is speculative. This Court finds Applicant has not proved this claim and this claim is denied.

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<sup>11</sup> Prior to the sidebar, counsel objected to testimony based on hearsay, and the solicitor responded, “Judge, this is impeachment testimony.” (App. 310-11).

*Made harmful arguments against his and Brittany Croskey's testimony*

In his application, Petitioner asserted counsel was ineffective for questioning him about whether anyone other than Croskey and "Big Moe" identified him as the shooter. (Pet. 72). Specifically, he averred Croskey did *not* identify him as the shooter. He likewise contended counsel was ineffective for "misrepresent[ing] the petitioner by inferring that the defendant's car was the car on the gravel road, inferring the petitioner, his client, is guilty." (Pet. 73). At the evidentiary hearing, however, Petitioner did not offer any testimony as to how he believed this questioning and argument by trial counsel harmed his case. He likewise did not question trial counsel about this issue at all.

This Court finds Applicant has failed to meet his burden of proof on this issue. Further, this Court has reviewed the transcript and finds counsel was not deficient for asking Petitioner this question or making this argument.<sup>12</sup> This Court likewise finds Applicant has not shown he was prejudiced by this question and argument by trial counsel. Thus, this claim is denied.

**Conclusion**

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Pursuant to Rule

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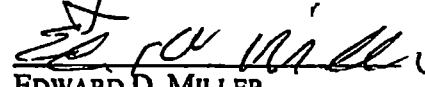
<sup>12</sup> Croskey *did* identify Applicant as the shooter at trial. (Tr. 192). Further, a review of the portion of trial counsel's closing argument cited by Applicant shows trial counsel was noting discrepancies in testimony to cast reasonable doubt on the State's theory of the case. (Tr. 468).

71.1(g), SCRCF, if an applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 3 day of Jan<sup>2023</sup>, ~~2022~~.

  
EDWARD D. MILLER  
Presiding Judge  
Third Judicial Circuit

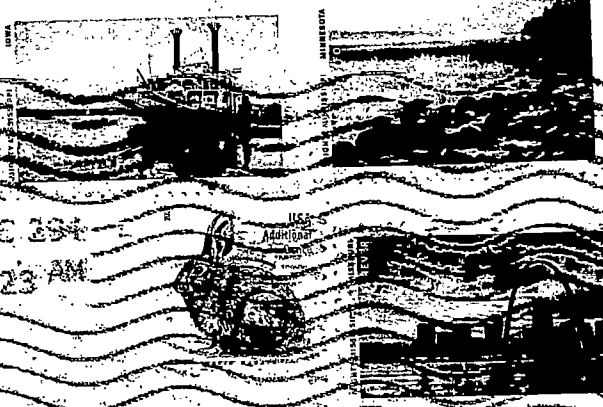
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S.C. SUPREME COURT

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