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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR court err in finding counsel was effective when counsel admitted that he did not believe the court rules allowed him to object to the numerous improper and prejudicial statements made by the solicitor during her closing argument?

2. Did the PCR court err in finding counsel was effective when counsel failed to object to testimony regarding a fight unconnected to the homicide victim in this case under Rule 404, SCRE, which included an alleged threat by petitioner to kill the unrelated combatant and was the only evidence that placed a gun in petitioner's possession of the caliber used in this case?

3. Did the PCR court err in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFadden concerning petitioner's possession of a gun that matched the caliber used in this case?

4. Did the PCR court err in discounting the issue surrounding Maurice Smith's criminal history on the sole basis that the solicitor denied there was a secret plea deal rather than address the state's obligation to fully disclose Smith's criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he received and could expect to receive by testifying against petitioner?

5. Did the PCR court err in finding trial counsel was effective when he failed to request a hearing under Neil v. Biggers, 409 U.S. 188 (1972) on the out of court identification of petitioner by Brittany Croskey whose identification was tainted by police misconduct and who was influenced by rumors she heard around town rather than what she observed on the night of the murder?

STATEMENT

In the words of solicitor Kimberly Barr, the murder case against petitioner Marc Palmer was built on circumstantial evidence and two witnesses who identified petitioner as the shooter: Maurice Smith and Brittany Croskey.[1] App. 337, ll. 2-16. The testimony of both these key witnesses was impacted by ineffective assistance of counsel and state misconduct as discussed *infra*.

Smith was a convicted felon and testified following a plea bargain on unrelated charges that reduced some charges and dismissed others. App. 692, l. 2 – 693, l. 13. Within two weeks after testifying, Smith received further consideration from the solicitor when she initiated a downward departure of his sentence due to his substantial help against petitioner. App. 652, ll. 15-24. The solicitor misrepresented Smith's guilty plea and sentencing to the jury. App. 488, l. 17 - 489, l. 7. The solicitor cut off trial counsel's cross-examination of Smith regarding his plea negotiations by objecting that it assumed "facts not in evidence" and the trial court sustained the objection.[2] App. 127, ll. 2-8.

Croskey indicated she could not identify the shooter until the police officer who interviewed her suggested that the suspect's unusual walk would help jog her memory, after which she identified the shadowy figure she saw from a distance as petitioner based solely upon his walk. App. 187, ll. 15 – 24; 203, l. 19 – 204, l. 11. Trial counsel elected not to attempt to suppress the tainted identification since he did not believe it fell under Neil v. Biggers, 409 U.S. 188 (1972) since it "was not a photo lineup." App. 724, ll. 6–15.

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[1] Petitioner was indicted and charged with murdering Therris Keels and possessing a weapon during the commission of a violent crime. App. 521-22.

[2] The case was tried before a jury and the Honorable W. Jeff. Young on March 11 to 14, 2013. At trial, petitioner was represented by Guy Ballinger and Barr represented the state. App. 1.

Part of the circumstantial evidence presented at trial was a fight between petitioner and an individual unconnected to the Keels murder that happened weeks before the crime, which included an alleged threat by petitioner to kill the unrelated combatant. App. 315, ll. 11 – 15. This prior altercation was also the only connection between petitioner and the alleged murder weapon. Trial counsel did not contest the admission of this prior bad act testimony under Rule 404, SCRE.

During her closing argument, the solicitor interjected information not in the record and vouched for witnesses. App. 488, ll. 16-21. She appealed directly to passion and prejudice as a basis for finding petitioner guilty, going so far as to include disappointing the trial judge and destroying our system of justice if a conviction was not returned. App. 495, ll. 4-17. Trial counsel made no objection during the closing argument, believing under the rules he was not allowed to object. App. 729, ll. 1-8.

After conviction on direct appeal, the South Carolina Court of Appeals vacated the sentence on the gun charge but affirmed the conviction for murder.[3] State v. Palmer, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016). Petitioner filed his application for relief asserting multiple reasons to question the fairness of his trial, including prosecutorial misconduct and ineffective assistance of counsel. An evidentiary hearing was held on November 1, 2022, before the Honorable Edward W. Miller. James Falk represented petitioner and Danielle Dixon appeared on behalf of the state. App. 624. Petitioner testified as did trial counsel, Ballinger, and solicitor Barr. The PCR court denied relief by order of dismissal dated January 3, 2023.

This petition for certiorari follows.

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[3] Following a guilty verdict, the trial court sentenced petitioner to life, with five years consecutive for the weapon charge. App. 518, ll. 9–20.

ARGUMENT

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

1. The PCR court erred in finding counsel was effective when counsel admitted that he did not believe the court rules allowed him to object to the numerous improper and prejudicial statements made by the solicitor during her closing argument.

In the present case, the PCR court noted *numerous* areas of concern from the solicitor's closing argument. App. 776-779. The fact the trial counsel did not object a single time during these instances was explained by his *admitted lack of understanding* of his obligation to object and his belief that the "rules" prohibited him from objecting.[4] App. 729, ll. 1-8. Despite the numerous areas of improper argument noted in the order, the PCR court ruled the solicitor's argument "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. This holding is neither supported by the record nor an accurate

[4] "If I believe they crossed the line, I raise it post-argument. I mean, again, I think the criminal rules prevent an objection while the solicitor is arguing. I mean, I think the criminal rule says shall not interrupt opposing counsel." App. 729, ll. 1-6.

legal conclusion.[5] As counsel was *admittedly ineffective* in understanding his role during closing, the only question for this Court to resolve is whether the solicitor's closing stepped over the line and infected the trial with unfairness.[6]

A. The solicitor urged conviction of petition to avoid disappointing the trial judge and destroying the symbols of our criminal justice system including her office and the courthouse.

The solicitor's final words to the jury focused on the dangers of "street justice" and included the following admonition:

> [Petitioner] 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 [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 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 [implore] you all not to do that and I [implore] you all to return a guilty verdict, thank you.

App. 495, ll. 4-17. By tying a finding of "not guilty" to the rejection and destruction her own office as solicitor, the trial judge's robes as symbols of his office of impartiality, the courthouse

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[5] "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "[W]hile [solicitor] may strike hard blows, [solicitor] is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

[6] It is "incumbent" for "trial counsel to object to the solicitor's" improper closing arguments. Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). As noted in Brown, even when trial counsel articulates some valid strategy for failing to object to improper closing (as opposed to the clear misunderstanding of the law trial counsel claimed here), such strategy will not be found valid in the face of the "evident impropriety of the solicitor's remarks." Id.

itself as a symbol of justice, and "surrendering" the community at large to criminals are clear efforts to push the jury to render its verdict, not on the shaky and contradictory statements of the witnesses produced at trial, but on an improper basis.

The PCR court focused solely on whether this portion of the closing violated the "golden rule" argument prohibition, finding it did not specifically request that jurors put themselves in the "shoes of one of the parties." App. 779. While the PCR court concentrated on whether this technically violated the "golden rule" prohibition, it failed to consider the reason the "golden rule" argument is prohibited in the first instance: it "impermissibly appeal[s] to the passion of the jurors by asking them to 'speak up' for [the] victim." Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009); *see also* State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (holding a new trial should be granted when the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). Rather than relying on the evidence presented at trial, the solicitor placed a "parade of horribles" before the jury should they not render a guilty verdict. The solicitor implored the jury to not let that parade happen. App. 495, ll. 15-17.

"A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence." State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999) (quoting United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984)). As in Liberte, wrapping the conviction of petitioner into the need for the jury to "protect community values, preserve civil order, or deter future lawbreaking" was "far too heavy a burden for the [petitioner] to bear" and warrants reversal. As this improper argument infected the trial with

unfairness and violated petitioner's due process rights, a new trial is warranted, particularly in light of the reliance by the state on questionable witness testimony that was also impacted by ineffective assistance of counsel.

B. The solicitor went outside the record and misrepresented the facts surrounding a key state witness' criminal history and improperly vouched for his credibility before the jury.

Maurice Smith was central to the prosecution's case.[7] There was no physical evidence linking petitioner with the crime.[8] There were significant problems with Smith's credibility. He testified at the time of petitioner's trial while being incarcerated for a drug conviction. App. 100, ll. 3-17. Smith told police at the time of the shooting that *he did not know who shot the victim*. App. 122, l. 17 - 123, l. 8. Smith, following a negotiated plea deal with solicitor Barr, changed his story and implicated petitioner as the shooter. App. 122, ll. 17 – 22. When counsel attempted to cross-examine Smith on the full extent of his plea negotiations and the benefits he received, the solicitor objected on the grounds that it "assumes facts not in evidence" and the trial court sustained the objection. App. 127, ll. 2-8.

During her closing remarks, the solicitor told the jury:

> *I* prosecuted Maurice Smith. Maurice Smith came in this court room *he plead guilty and I was standing basically in the same position I'm standing right* now and as I recollect his testimony

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[7] "Maurice Smith saw Palmer point a gun at Victim. Victim put his hands up as if to let Palmer know he did not have a gun. Palmer shot Victim two times and walked away. He then turned around, shot Victim another time as he lay on the ground, and ran off. Smith then heard the familiar squealing sound of Palmer's car." State v. Palmer, 415 S.C. 502, 509, 783 S.E.2d 823, 826 (Ct. App. 2016).

[8] A murder weapon was never located; DNA tests were negative; no gunshot residue was discovered; no trace evidence or latent fingerprints connected petitioner to the crime. App. 261, ll. 1-25. According to the solicitor, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury to not to let the petitioner "walk away." App. 495, ll. 13 – 14.

> when Mr. Ballinger asked him what were you convicted of he said distribution and trafficking. *So this notion that somehow he was trying to curry favor with the state by reducing his charge I would submit to you that's not true. The man did his wrong, he pled guilty straight up and he's serving his sentence he is paying his debt to society* and I'm going to tell you folks, whether Mr. Palmer walks out this courtroom a free man or whether he's sentenced in a cell right next to Maurice Palmer, Maurice Palmer, *I mean Maurice Smith is going to serve his time. He doesn't have at this point anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't.*

App. 488, l. 17-489, l. 7 (emphasis added).

Within a week or two after the trial, solicitor initiated a downward departure order on Smith's behalf due to his substantial assistance in the prosecution of petitioner pursuant to S.C. Code Ann. § 17-25-65 (2010 as amended). App. 674, l. 21 – 675, l. 19; 693, l. 24 – 694, l. 9. In addition, when Smith pled guilty, he was facing multiple indictments, from both Williamsburg and Clarendon counties, ranging in years from 2009 until 2011. App. 664, l. 16 - 669, l. 17. The solicitor allowed Smith to plead to lesser charges, first offense status, and have some of the charges dismissed outright. App. 670, ll. 4-9; 673, ll. 12-24.

The solicitor's factual assertions to the jury that Smith "pled guilty straight up" and "he's serving his sentence" and had "nothing to gain" were inaccurate and solicitor knew they were inaccurate. The solicitor compounded the impact of this misrepresentation by improperly vouching for Smith and by claiming he did not have "anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't." App. 488, l. 25 – 489, l. 7. The solicitor was aware of something for Smith to gain through S.C. Code Ann. § 17-25-65 (2010 as amended), since *she initiated* the downward reduction within a couple of weeks after Smith's testimony.[9] The

[9] "Upon *the state's motion* made within one year of sentencing, the court may reduce a sentence if the defendant . . ." S.C. Code Ann. § 17-25-65 (2010 as amended) (emphasis added).

solicitor then limited trial counsel's cross-examination of Smith by successfully objecting that it "assume[d] facts not in evidence." App. 127, ll. 2–8. The solicitor then went further in bolstering Smith's credibility by improperly vouching for him before the jury.

"Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). "The legal concept of 'vouching' prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury." Id. In the present case, the solicitor told the jury any implication that Smith may be attempting to "curry favor" with the state, *since she was there* when he pled, was "not true." App. 488, ll. 24-25. As a result of this improper vouching, Smith's testimony "carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about [Smith]." State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), rev'd on other grounds and remanded, Kelly v. South Carolina, 534 U.S. 246 (2002). By vouching for Smith, the solicitor invaded the province of the jury. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "Our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime." Chappell v. State, 429 S.C. 68, 81–82, 837 S.E.2d 496, 503 (Ct. App. 2019).

The prejudicial vouching for Smith by the solicitor was compounded by the fact that it was also a misstatement of the facts and by the solicitor's successful limitation on trial counsel's

effort to cross-examine Smith on his plea negotiations. The PCR court erred in finding this "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. Since counsel admitted he was ineffective in controlling the solicitor during the closing argument, and Smith's testimony was central to the case against petitioner, the solicitor's misstatements of facts outside the record and improper vouching warrant a new trial.

C. Additional improper remarks combined to further erode the petitioner's right to a fair trial and justify granting a new trial under the cumulative error doctrine.

The solicitor touched on victim impact and the impact on petitioner's own family as an appeal to passion and prejudice.

> You've got the family of a victim who has lost a loved one in the most tragic way. Not in a way where they've lived a long life and they just die of natural causes and old age like we all hope and pray that God blesses us to do… It's that somebody decided to play God and take the life of a loved one and when you add on the fact that Therris Keels had just reached his 30th birthday it makes it even more tragic. *It's tragic for Mr. Palmer's family too. My heart goes out to his family as well just as Therris had a mom and dad, Mr. Palmer has a mom and a dad and I made a conscientious decision not to ask Mr. Palmer* [petitioner's father] *any question because I think quite frankly his family as the Keels family have lost a lot*.

App. 477, ll. 12 – 25 (emphasis added).

As part of her closing, the solicitor brought the jury the insight of people unrelated to the trial and outside the record to support a conviction of petitioner. This included the outside the record discussions with a close friend who helped provide special insight into the shooting.

> Godly how could somebody be so braze and just to come up and shot somebody with all these people around, what in the world who does that, who does that. How can somebody just be cold blooded like that *and I was talking about the case with a friend of mine and she told me well Kim he wanted an audience and it's like the light went off, the light bulb went off your right.* He was that

> bold and he was that brazen and that bad and that cold blooded because he wanted an audience . . .

App. 480, ll. 12 - 21 (emphasis added).

She used improper hearsay evidence to vouch for one of the conflicting stories told by a key witness, Detrel Mathews, concerning petitioner's access to a .45 caliber handgun.

> Why would the officer have a need to even go and talk to his parole officer. *That's how you know in fact the statement that Detrel Matthews made Wayne McFadden were in fact true* . . .

App. 485, l. 15 - 17 (emphasis added).

The solicitor's referred to the trial speaking the truth, for both the petitioner and prosecution, improperly shifting the burden of proof.

> At the end of the day *everybody in this courtroom* wants what's *fair, what's just, and what's right*. Now -- tell you you know Mr. Ballinger and I don't agree what that is in this case, *but everybody agrees that we want a verdict that speaks the truth.*

App. 462, ll. 10 – 14 (emphasis added). *See* State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding in a charge this language "could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt."). This burden shifting was compounded by the trial judge's admonition to the jury that their role was to search for the truth[10]:

> 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.

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[10] The PCR court's reliance on State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) as insulating the remarks of the trial court and improper argument of counsel is misplaced. As warned in Daniels, this type of language was improper, and the trial court was in error to tell the jury they were there to "search for the truth" and to uphold "fairness" and this error was compounded by the solicitor's closing referring to this same role and duty.

. . .

> The attorneys who are appearing before you are advocates for the parties they represent but first and foremost they are officers of this court. Who are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors in your search for the truth.

App. 79, l. 19 – 80, l. 9.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id. The impact of improper argument is magnified when it is repeated or touches on another area of ineffective assistance of counsel, particularly in a case so dependent on the credibility of witnesses. See Tappeiner v. State, 416 S.C. 239, 254, 785 S.E.2d 471, 478–79 (2016) ("As a result, we find it likely the emotional plea, particularly in conjunction with the solicitor's improper vouching for Victim's credibility, swayed the jurors' view of the facts and resolution of the contradictions in the witnesses' testimonies."). The cumulative impact of the numerous improper arguments of the solicitor, in a case that hinged on the credibility of two questionable witness both touched by improper conduct, warrants a finding that petitioner's right to a fair trial was compromised and that trial counsel was ineffective under Strickland in failing to object to the numerous improper comments of the solicitor during closing.

2. The PCR court erred in finding counsel was effective when counsel failed to object to testimony regarding a fight unconnected to the homicide victim in this case under Rule 404, SCRE, which included an alleged threat by petitioner to kill the unrelated combatant and was the only evidence that placed a gun in petitioner's possession of the caliber used in this case.

Keels was shot with a .45 caliber handgun, but no murder weapon was ever found. App. 734, ll. 2 – 16; 753, ll. 2 – 16. The only connection between petitioner and the weapon used to murder Keels was a fight between petitioner and Dominique McBride that occurred weeks before Keels was murdered. App. 108, ll. 11-19. The state produced two witnesses who testified, without objection by trial counsel, that petitioner dropped a gun during this altercation. One of these witnesses was Smith, whose credibility issues were discussed *supra*. Smith could not identify the type of gun and left the scene of the altercation soon after it started. App. 109, ll. 1–12. The other witness was Detrel Mathews. During his trial testimony, Mathews denied knowing anything about a gun from the incident other than something that may have been a gun fell from petitioner's waist during the altercation. App. 214, l. 15 – 216, l. 24.

The PCR court erroneously determined that, while the state was planting the seeds to impeach Mathews on prior inconsistent statements with this line of questioning, the state did not move to introduce any prior inconsistent statements from Mathews. App. 776, fn. 9. To the contrary, the solicitor impeached Mathews with statements he alleged made to investigator McFadden. App. 315, ll. 11–15. This impeachment testimony included statements about petitioner wanting to shoot the other combatant (Dominique McBride) and that petitioner had a .45 caliber automatic, statements Mathews denied making while testifying under oath at trial at trial. App. 311, ll. 5 – 13; 216, ll. 2 – 20. Without trial counsel's objection, the state was able to introduce evidence that petitioner wanted to shoot and kill a person and placed a weapon of the proper caliber used to kill Keels in petitioner's possession from this unrelated altercation, without a Rule 404, SCRE, inquiry. Petitioner asserted trial counsel's failure to object to this

prior bad act testimony as a ground for relief in his PCR application and testified on this issue at the PCR hearing. App. 571; 645, l. 18 – 646, l. 22.

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. King, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting Rule 404(b), SCRE.). The admission of this type of evidence is particularly prejudicial, as it "fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008). Moreover, if bad act evidence is admitted under Rule 404(b), "the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (citing State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009).

Here, the prior back act was a fight between petitioner and a third-party *not connected to the murder in any way*. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Even if supported by clear and convincing evidence "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

The evidence of this prior bad act was tenuous. A convicted felon, Smith, testified about seeing a gun drop during the fight but was unable to describe the gun and left shortly after the incident began. App. 109, ll. 1-18. Mathews denied seeing the gun under oath at trial and "on

the record" to investigator McFadden during the investigation. App. 212, l. 4 – 217, l. 22. The state's sole connection between this earlier altercation and the murder was the "off the record" statements by Mathews about the gun's caliber to McFadden. App. 310, l. 25 – 311, l. 4; 315, ll. 6 – 15.

The PCR court also erred in finding this line of questioning could not have "materially impacted the jury and affected the outcome of the trial." App. 776. The prejudicial nature is established firmly by how the solicitor used this evidence in closing:

> During this fight .45 caliber pistol falls from his waist, Detrel Matthews picks up the pistol, *who is afraid to give it back to the defendant because he was afraid the defendant would kill Dominique McBride* so he holds it for a few days.

App. 483, ll. 12–17 (emphasis added). It was also the only connection between the petitioner and a .45 caliber handgun. The prejudicial nature of this evidence is apparent.

This issue was raised in the PCR petition and subject to testimony at the PCR hearing. App. 571; 645, l. 18 – 646, l. 22. As there is no factual dispute as to the nature of the prior bad act testimony and no strategic reason for trial counsel not to object to its introduction and allow for a full evaluation of this testimony, outside the presence of the jury, by the trial court, this Court should address the merits of this issue and grant petitioner a new trial.[11]

[11] If this Court declines to address this issue due to the incomplete PCR order on the legal impact of counsel's failure to object under Rule 404, SCRE, a remand would be appropriate for direct findings of fact and conclusions of law on this issue under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

3. The PCR court erred in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFadden concerning petitioner's possession of a gun that matched the caliber used in this case.

As noted, the caliber of the weapon used in the crime (a .45) was only connected to petitioner from the unrelated altercation weeks before the murder.[12] Mathews denied seeing a gun, denied picking up a gun, denied giving it back to petitioner, denied any knowledge of its caliber, and denied telling investigator McFadden anything to the contrary. App. 214, l. 15 – 217, l. 3. As noted, the PCR court erred in determining the state did not move to introduce any prior inconsistent statements from Mathews. App. 776, fn. 9. The PCR court also erred in finding this line of questioning could not have "materially impacted the jury and affected the outcome of the trial." App. 776. While trial counsel did object to the initial questioning of McFadden regarding the out of court statements by Mathews, the trial court overruled the objection following a bench conference.[13] The solicitor then proceeded to impeach Mathews through his prior inconsistent statements provided "off the record" to McFadden. App. 310, l. 25 – 311, l. 4.

This included the fact that the gun Mathews denied he picked up was a .45 caliber pistol. App. 311, ll. 5–13. The solicitor followed with questions to McFadden regarding hearsay conversations with Mathews' federal parole officer to explain Mathews' deception during trial related to his federal probation being revoked if he admitted to holding the gun.

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[12] No evidence connected petitioner to a .45 caliber firearm other than the testimony from investigator McFadden about what Mathews allegedly said off the record. Searches connected with petitioner found .38 caliber ammunition for a .38 pistol petitioner admitted to owning that was in no way connected with the Keels murder. App. 734, ll. 5 - 25; 753, ll. 2 - 16.

[13] The exact basis of the trial court's ruling is not clear in the trial transcript, as trial counsel failed to note the trial court's ruling from the bench conference on the record. App. 721, l. 8 – 723, l. 13.

> Q: What if anything did you try to do to smooth out any problem that Mr. Matthews might of had with his probation officer?
>
> A: First I contacted her by phone she came to came to Kingstree she met with me at the Sheriff's Office. I explained to her what we . . . had a suspect identified we actually had an eye witness there to say he put the murder weapon back into the individual hand. The only problem is by him saying he had possession of a firearm would violate his federal probation.
>
> Q: What were you trying to ask her to do?
>
> A: Work with him as much as he could if he could help us with the murder case.
>
> . . .
>
> Q: Did she agree to do that?
>
> A: No.
>
> Q: Did you tell him that she would not violate him, that she was going to violate him if he put it on record?
>
> A: Yeah I mean I stayed straight with him I told him . . . Detrel I need your help on this murder case *but your probation officer is saying that if you officially paroled make a tape statement while having possession of a firearm she's going to violate you.*

App. 313, l. 25 – 314, l. 24.

This issue is controlled by State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Our Supreme Court cautioned "prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." Id. at 66–67, 810 S.E.2d at 28. The statements from the unknown federal parole officer that Mathews would have his parole revoked and returned to prison if he admitted possessing the gun were hearsay and should have been subject to an objection. The prejudicial impact of this hearsay testimony was emphasized by the solicitor during her closing as she used it to vouch for the statements Mathews allegedly made to McFadden:

> *Parole office says no if he goes on record and he says that he had a gun I'm going to violate, which essentially means Detrel going back to jail.* . . . Now let me tell you this here's how you know that Detrel Matthews had that gun. If it's true when he testified that he never had a gun from Mr. Palmer, why in the world would Wayne McFadden be talking to his parole officer. . . Why would the officer have a need to even go and talk to his parole officer. *That's how you know in fact the statement that Detrel Matthews made Wayne McFadden were in fact true* . . .

App. 484, l. 25 – 485, l. 17 (emphasis added).

Trial counsel did not object to this hearsay testimony about discussions between McFadden and the parole officer. Petitioner asserted this failure to object as a ground in his petition for relief, specifically noting the hearsay nature of obtaining testimony from a federal parole officer to explain why another witness, Mathews, was motivated to change his story. App. 561. Trial counsel's explanation for not objecting was that the trial judge had ruled it was proper impeachment testimony from a sidebar ruling. App. 310, l. 19 – 311, l. 4; 722, l. 1 22. While this appeared to be an effort by counsel to keep out the prior inconsistent statements Mathews allegedly made to McFadden, he failed to object when the hearsay testimony went from what Mathews told McFadden to what the unknown federal probation officer told McFadden. The PCR court erred in failing to specifically rule on this issue. The solicitor compounded trial counsel's error by improperly vouching for the off the record statements of Mathews using the fear of his federal parole revocation as the reason he denied knowing anything about the gun. App. 485, l. 15 – 17. If this Court declines to address this issue due to the incomplete PCR order, a remand would be appropriate for direct findings of fact and conclusions of law on this issue under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

4. The PCR court erred in discounting the issue surrounding Maurice Smith's criminal history on the sole basis that the solicitor denied there was a secret plea deal rather than address the state's obligation to fully disclose Smith's criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he received and could expect to receive by testifying against petitioner.

As noted *supra*, Smith received substantial consideration for his guilty plea. At the PCR hearing, PCR counsel went through the various charges and potential sentences Smith faced. App. 666 – 675. Due to the significant number of charges, across two counties, this took considerable time. By contrast, when Smith testified at trial, trial counsel asked Smith only seven questions regarding his prior criminal record before being interrupted by the solicitor's objection:

> Q: And your current sentence is for drug possession or drug distribution?
> A: Trafficking and possession.
> Q: Trafficking in what?
> A: Crack cocaine.
> Q: And you got a ten year sentence?
> A: Yes.

App. 124, ll. 14-20. This was followed with:

> Q: How much did trafficking carry?
> A: I don't know.
> Q: It's around 25 isn't it? Twenty-five years?
> A: I didn't help the State. If I was going to help the State, it wouldn't have been that. I could have done other things and been home.
> Q: So tell me if I'm wrong you're looking at a 25 year sentence for trafficking in crack, correct?
> A: Yeah if you say.
> Q: Those charges were pending as of February 2012 when you gave your second statement assuming the SLED information is right, correct?
>
> *Ms. Barr: Judge I'd object to the question because it assumes facts not in evidence.*
>
> *The Court: Sustained.*
>
> *Mr. Ballinger: I withdraw that question Your Honor.*

App. 126, l. 18 – 127, l. 8 (emphasis added). Trial counsel asked no further questions regarding Smith's plea history.

Petitioner asserted that the state failed to disclose the extent of Smith's criminal history and plea details. App. 534-537. Petitioner testified at the PCR hearing that the defense was not provided a NCIC report on Smith. App. 653, ll. 5-18. Trial counsel indicated he fully relied on the state to comply with Brady v. Maryland, 373 U.S. 83 (1963) and his Rule 5, SCRCP, motion with no independent investigation of Smith's criminal history. App. 713, ll. 3-23. Trial counsel indicated he was unaware of any plea agreement with Smith in exchange for testifying against petitioner and claimed his "best course of finding information [in] that regard – would have been from cross-examination of Mr. Smith." App. 713, ll. 3-23.

The state had an affirmative obligation to disclose the extent of Smith's charges and plea resolution that occurred before trial. *See* State v. Durant, 430 S.C. 98, 107–08, 844 S.E.2d 49, 54 (2020) (holding the failure to provide information that could be obtained through a NCIC search is a Brady violation."). Trial counsel was entitled to this information and should have obtained it from the state rather than simply relying on it coming out in cross-examination. The solicitor compounded the impact of the failure to fully disclose the extent of Smith's plea bargain by objecting during trial counsel's cross-examination of Smith at trial, incorrectly telling the jury about the nature of the plea deal during closing, and by improperly vouching for Smith, discussed *supra*.

"After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the strength of the State's case, we find the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable

probability that, but for counsel's errors, the result of the trial would have been different.'" Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018). Like counsel in Smalls, trial counsel here had an obligation to effectively cross-examine Smith (and object to the prior bad act). In addition, the state had an obligation to fully inform trial counsel of the extent of the charges Smith faced and the nature of his plea agreement. Either the state failed in the later, or trial counsel failed in the former. This is particularly true in the handling of S.C. Code Ann. § 17-25-65 (2010 as amended). The state failed to disclose any discussions with Smith or his representatives about a downward reduction before trial.[14] Despite this apparent lack of communication before Smith's testimony, the downward departure was initiated by the solicitor within a couple of weeks after trial. Trial counsel asked no questions and made no inquiry of Smith regarding his potential downward departure and the benefits it could provide him.

The solicitor took advantage of trial counsel's ineffective cross-examination of Smith by improperly vouching for Smith and inaccurately informing the jury that Smith pled "straight up" and had "nothing to gain" as discussed *supra.* While the PCR court found the state did not have a "secret plea agreement" in exchange for Smith's testimony, it failed to specifically address whether trial counsel was provided the full extent of Smith's criminal charges and guilty plea in violation of Brady or whether trial counsel's cursory cross-examination of Smith, cut short by objection from the solicitor, was effective assistance of counsel.[15] A remand for direct findings of fact and conclusions of law on this issue would be proper under Fishburne.

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[14] The PCR court found it credible that solicitor had no such discussion due to the testimony she presented some ten years after the event despite the circumstantial evidence of the timing of the downward departure. App. 771.

[15] As noted by PCR counsel regarding the Brady violation claims, petitioner was proceeding under the theory that either the state failed to produce or that trial counsel failed in due diligence to get the information. App. 628.

5. The PCR court erred in finding trial counsel was effective when he failed to request a hearing under *Neil v. Biggers*, 409 U.S. 188 (1972) on the out of court identification of petitioner by Brittany Croskey whose identification was tainted by police misconduct and who was influenced by rumors she heard around town rather than what she observed on the night of the murder.

Croskey identified petitioner based solely on the manner of his walk by seeing a figure, at night from distance for a few seconds. App. 186, l. 22 – 187, l. 24. "I assume it was him because of his walk." App. 198, l. 6. She was unclear on any other details of this figure other than they wore dark clothing. App. 196, l. 22 – 196, l. 10. The idea of an unusual walk as an identifier was fed to Croskey by police investigators after a rumor made her believe petitioner was the shooter.

> Q. Who was the first person to come to your mind *when you looked under that light and told Jeff and them who is that guy walking under that light and what is your answer?*
>
> *A: I didn't have a feeling.*
>
> *Q: Question, at what point in time did you start thinking it could be the Driver*[16]*?*
>
> *A: When people started talking it started being around Greeleyville with people talking about it.*

App. 198, l. 24 – 199, l. 10 (emphasis added). Luckily for the state, the investigator helped Croskey "discover" the walk as a method of connecting petitioner to these rumors.

> Q: Now lets back up a little bit on your statement on page 16 you and Ms. Barr used. *Question, did you notice anything about this person's walk?*.
>
> A: *No ma'am not really.*
>
> Q: Then she asked you and you and Ms. Barr went through this, is there anything that put you in the mind frame that it was the Driver. You say what was your answer?
>
> A: Yes ma'am.

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[16] Croskey indicated she knew petitioner by the name "Driver." App. 180, l. 22 – 181, l. 3.

Q: And the question is*, and that was because of his walk. And your response was?*

A: *Yes ma'am.*

App. 203, l. 19 – 204, l. 4 (emphasis added). At the PCR hearing, trial counsel admitted his investigator was available to also cast doubt on the veracity of Croskey's identification and her inconsistencies. App. 717, l. 21 – 718, l. 6.

Despite having the police provide Croskey with the key element of her identification of petitioner, despite Croskey admitting the influence of rumors she heard around town that petitioner was the shooter before the identification, and despite the fact he could call an investigator to testify as to Croskey's confusion, trial counsel did not request a Biggers hearing.[17] Trial counsel made this decision since it "was not a photo lineup" type case. App. 724, ll. 6 - 15. The PCR court erred in ruling that trial counsel had a valid strategy in not allowing the trial court the opportunity to properly vet Croskey's tainted identification since it was unlikely a Biggers hearing would have resulted in suppression. App. 772 - 773.

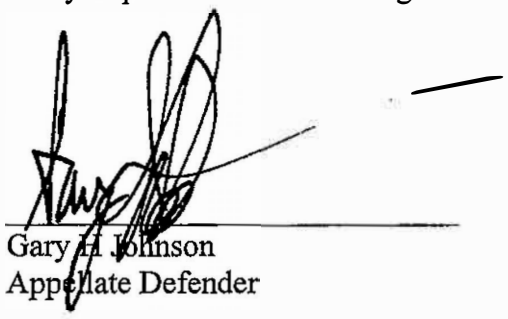
"The purpose of an in camera hearing when the State offers identification witnesses is for the trial court to decide whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Gibbs v. State, 403 S.C. 484, 493, 744 S.E.2d 170, 174 (2013). Once a tainted out of court identification has been shown, as was clear in this instance, the trial court must evaluate to determine if the identification was "nevertheless so reliable that no substantial likelihood of misidentification existed." Id. at 493, 744 S.E.2d at175.

[17] Neil v. Biggers, 409 U.S. 188 (1972).

Had counsel been effective, the trial court would properly have ruled that the out of court identification was unduly suggestive since the witness testified about the suspect's unique walk only after that characteristic was supplied to her by investigators and she admitted she was influenced more by "rumors" that petitioner was the shooter than what she saw the night of the shooting. The PCR court found it credible that Croskey's statements were "all over the place" which supported the need for the in camera review by the trial court. App. 771. Depriving the trial court of the opportunity to fully vet the identification to verify it complied with due process was ineffective assistance of counsel under Strickland and warrants a new trial.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of October, 2023.