

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Nov 27 2023**

CERTIORARI TO CHARLESTON COUNTY  
Kristi L. Harrington, Trial Judge  
Jennifer B. McCoy, PCR Judge

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S.C. SUPREME COURT

Appellate Case No. 2023-000741

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KING CONYERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

### **Petitioner's Questions**

- I. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to call Petitioner's alibi witness.
- II. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to investigate and prepare for trial regarding the telephone evidence presented at trial, specifically, failing to present evidence that Petitioner was not the owner or user of the phone alleged at trial.
- III. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to the State's closing argument.
- IV. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to communicate with Petitioner and review evidence.
- V. Whether the PCR court erred in concluding that Petitioner is not entitled to relief based on newly discovered evidence.

### **Respondent's Counterstatement of Questions**

- I. Does probative evidence support the PCR court's finding that counsel was not ineffective for failing to call Petitioner's alibi witness when the PCR Court found credible counsel and the solicitor's testimony that the State would have called a rebuttal witness to refute the alibi, and the purported alibi did not preclude Petitioner from traveling to McClellanville to participate in the murder?
- II. Does probative evidence support the PCR court's finding that Petitioner failed to prove counsel was ineffective for failing to investigate and prepare for trial the cellphone evidence when counsel articulated a valid reason for not further investigating ownership of the phone, and Petitioner did not enter any evidence to show what counsel would have uncovered upon a further investigation?
- III. Did the PCR court properly find counsel was not ineffective for not objecting to the State's closing argument when the closing argument was not improper, and any alleged improper comment did not so infect the trial with unfairness as to violate due process?
- IV. Does probative evidence support the PCR court's finding that Petitioner did not prove counsel was ineffective for failing to communicate and review evidence with Petitioner when counsel credibly testified about the evidence he reviewed with Petitioner, Petitioner's testimony itself established that Petitioner had discussed the evidence with counsel, and Petitioner failed to set forth what additional evidence counsel failed to discuss that would have reasonably changed the outcome of trial?

- V. Did the PCR court properly find Petitioner is not entitled to relief based on newly discovered evidence when Belton's testimony did not provide an alibi for Petitioner, and Petitioner did not enter any admissible evidence of Mason's purported testimony?

## STATEMENT OF THE CASE

### *Procedural History*

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In November 2014, the Charleston County Grand Jury indicted Petitioner for murder (2014-GS-10-6484), first-degree burglary (2014-GS-10-6485), and possession of a firearm during the commission of a violent crime (2014-GS-10-6486). On November 2, 2015, Petitioner proceeded to a jury trial before the Honorable Kristi L. Harrington. Christopher L. Murphy, Esquire, represented Petitioner, and Assistant Solicitors Jennifer K. Shealy and Daniel Cooper prosecuted the case. The jury found Petitioner guilty, and Judge Harrington sentenced him concurrently to life for murder and first-degree burglary, and five years for the weapon charge.

Petitioner filed a timely notice of appeal, which Appellate Defender David Alexander perfected by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed pursuant to Anders.<sup>1</sup> The remittitur was sent January 26, 2018.

On February 1, 2018, Petitioner filed this application for post-conviction relief (PCR). On December 8, 2021, and September 16, 2022, an evidentiary hearing convened before the Honorable Jennifer B. McCoy. Following the hearing, Judge McCoy issued an order denying relief and dismissing the application.

### *Pertinent Trial Testimony*

Petitioner's charges stem from the fatal shooting of Melvin Simmons, Jr. (Victim) on July 10, 2010. During trial, the State presented testimony from co-defendants Troy Mason and Mario

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<sup>1</sup> While his direct appeal was pending, Petitioner filed a pro se motion for a new trial pursuant to Rule 29(b), SCRCrimP. The State moved to dismiss, citing his pending appeal.

Caldwell. According to Mason, he and Caldwell drove from Charleston to Charlotte the evening before the murder to pick up “Finger,” whom he identified as Petitioner’s co-defendant Jeremiah Belton. (App. 250, 253-54). Thereafter, they picked up Curtis Delaney (“Crime”), then drove to Columbia and picked up “Bez.”<sup>2</sup> (App. 254, 256). The five men returned to Charleston and went to a house off Dorchester Road, where Bez discussed robbing someone he had dealt with. (App. 258-60). Mason testified he, Caldwell, Belton, Delaney, and Bez drove to a house in McClellanville. (App. 262). They entered the home with guns; once inside, Mason heard shooting. (App. 263-64). Mason was shot during the home invasion and later went to the hospital. (App. 266, 270). Mason admitted he initially told investigators he was shot in Red Bank—a story he and Caldwell came up with before Mason went to the hospital. (App. 270-71). Mason later turned himself in and implicated Caldwell, Belton, and Bez. (App. 272-73).

Caldwell similarly testified he and Mason drove to Charlotte to pick up Belton and Delaney. (App. 487-88). Caldwell stated Belton then drove to Columbia, where they picked up Bez. (App. 480, 491-93). He testified he had never met Delaney or Bez before. (App. 480, 489). Caldwell stated they returned to Charleston and stopped at “The Hub”; at that time, Belton met up with two other men that Caldwell did not know. (App. 496-97). Caldwell testified Bez discussed robbing someone. (App. 502). Thereafter, Caldwell, Mason, Bez, and Delaney drove to a house in McClellanville, and Belton rode with the other two men. (App. 503-06). The seven men met outside the house with guns. (App. 511-12). Caldwell testified Delaney, Mason, Belton, and Petitioner went inside; Caldwell heard gunshots but never made it inside. (App. 512). He stated Delaney was shot and left at the scene, where he later died. (App. 516-17). Mason was also shot, and Caldwell drove him to his mother’s house. (App. 513, 519-20).

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<sup>2</sup> Another witness identified Petitioner as Bez.

Constance Manigault testified she was dating Delaney in March of 2010. (App. 430-31). While dating Delaney, she met Petitioner, who was introduced to her as Bez. (App. 432-33). Manigault stated she entered Bez's phone number—which ended in 9516—into her phone contact list. (App. 433). According to Manigault, Delaney called her from Bez's phone at 2:09 a.m. on July 10, 2010. (App. 436). Manigault called Bez's phone later that morning looking for Delaney. (App. 437-38). After learning Delaney was dead, she called Bez's number again. (App. 438-39). She continued,

And Bez returned my phone call at 11:29 that morning and I told him, you know, . . . Crime is dead, and he said yes. He said he was crying all day Saturday. And I asked him who Curtis was with. He said he can't tell me because of the people was mixed up in some other stuff. And he also said that he doesn't want to be involved. I said, you're already involved because you know who he was with. I said you're going to tell me who he was with. But he continued saying no. He was saying . . . telling you who these people are won't bring Curtis back. I ask him . . . what was the number Crime called him from, but he said he had erased all his . . . call log because his girlfriend likes to go through this phone.

(App. 439-40).

In addition to the foregoing, the State presented testimony from Willis Walker, who was qualified over objection as an expert in call-detail analysis. (App. 896-917). According to Walker, the number ending in 9516 was registered as "prepaid customer" without a subscriber name. (App. 925). He stated the 9516 phone used cell phone towers in the West Columbia area on July 8-9. (App. 951-53). On July 10, the phone used towers near Orangeburg between 12:21 a.m. and 12:58 a.m. (App. 953-54). Between 2:48 and 2:59 a.m., the phone used towers in the Charleston area. (App. 955). Between 3:17 and 3:29 a.m., the phone used towers near the Mount Pleasant area. (App. 957). At 5:20 a.m., the phone used a tower near Trident Hospital in the Charleston area. (App. 962). At 5:26-5:27 a.m., the phone used a tower in the Goose Creek area. (App. 962-63).

At 5:52 a.m., the phone used a tower in the North Charleston area. (App. 963). At 7:34 a.m., the phone used a tower in the Orangeburg area. (App. 964). Finally, at 8:21 a.m., the phone began using a tower in West Columbia, and continued using that tower throughout the day on July 10. (App. 9640-65).

In addition to testifying to cell-tower mapping, Walker testified the 9516 number had several calls with Manigault's number, including calls at 2:09 a.m. and 12:29 p.m. on July 10. (App. 941-44). Likewise, the 9516 number had twenty-two calls with the phone associated with Belton between July 8-10, including calls at 11:16 and 11:41 p.m. on July 9; a call at 2:43 a.m. on July 10; and five calls between 5:31 and 5:36 a.m. on July 10. (App. 946-48).

## STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

- I. **Probative evidence supports the PCR court's finding that counsel was not ineffective for failing to call Petitioner's alibi witness when the PCR Court found credible counsel and the solicitor's testimony that the State would have called a rebuttal witness to refute the alibi, and the purported alibi did not preclude Petitioner from traveling to McClellanville to participate in the murder.**

Petitioner asserts trial counsel was ineffective for not calling Petitioner's girlfriend Vondayna Brown as an alibi witness. He contends counsel spoke to Brown and filed a notice of an alibi defense but failed to subpoena her or request a continuance when she did not attend trial. However, the PCR court found credible trial counsel's and the solicitor's testimony that Brown's testimony would have opened the door to the State calling Brown's sister to refute the alibi. Likewise, the PCR court found not credible Brown's and Petitioner's testimony that Petitioner was with her at her niece's birthday party the evening of the murder. Based on these credibility findings, counsel's decision to not move for a continuance when Brown did not appear at trial was reasonable under prevailing professional norms. Further, it is not reasonably likely Brown's testimony would have changed the outcome of trial. Thus, probative evidence supports the PCR court's denial of relief.

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 v. Washington, 466 U.S. 668, 687-88 (1984). A PCR applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "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).

Here, the PCR court found credible trial counsel's and the solicitor's testimony that if Brown had testified, the State would call Brown's sister as a rebuttal witness to contradict Brown's testimony that Petitioner was with her at her niece's birthday party. (App. 2606-07, 2677, 2679-81). These findings are supported by probative evidence, and this Court should defer to the PCR court's credibility findings. (App. 224-26). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court"). Specifically, trial counsel credibly testified he spoke to Brown's sister, who "was adamant [Petitioner] was not at that birthday party." (App. 2606). Counsel stated he planned to call Brown as a witness prior to talking to Brown's sister, but after speaking with the sister and "eyeball[ing] her and hear[ing] her story, there was no way [he] was calling anybody else to claim . . . these folks were at the birthday party." (App. 2607). Counsel explained, "[K]nowing that the sister was gonna come in and say that Ms. Brown and [Petitioner] are lying about this, there was no need [to request a continuance]. I didn't have any heartburn about her not coming up and testifying about this." (App. 2607). Likewise, the PCR court found not credible Petitioner's testimony and Brown's testimony that Petitioner was with Brown at the birthday party the night of the murder. (App. 2712). Based on the foregoing testimony and the court's credibility findings, the PCR court properly found counsel articulated a valid reason for not requesting a continuance to procure Brown's testimony, and Petitioner did not prove counsel was deficient.

Further, it is not reasonably likely Brown's testimony would have changed the outcome of trial. Initially, this Court should defer to the PCR court's credibility finding regarding Petitioner's and Brown's testimony since the PCR court had the opportunity to observe the demeanor of each

witness at the PCR hearing. See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (providing appellate courts “defer to the PCR court's credibility findings as to witnesses who testified before the PCR court”); Foye, 335 S.C. at 589, 518 S.E.2d at 267 (“Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses.”).

Further, Brown’s testimony did not establish an alibi for the time of the murder. Brown testified Petitioner was with her at a child’s birthday party around 5:00 p.m. on July 10—the afternoon *after* the murder. (App. 2575-76). Even if true, the cell tower evidence showed the phone linked to Petitioner was in the West Columbia area on July 8-9; the Orangeburg area around 12:56 a.m. on July 10; the Charleston area between 2:48 and 2:59 a.m.; the Mount Pleasant area between 3:17 and 3:29 a.m.; the Goose Creek area around 5:26 a.m.; the North Charleston area around 5:52 a.m.; the Orangeburg area around 7:34 a.m.; and back in the West Columbia area around 8:21 a.m.<sup>3</sup> (App. 2315-2327). Based on the timeline for the murder, the birthday party would not have precluded Petitioner from traveling to McClellanville to participate in the murder. Thus, Brown’s testimony did not establish a viable alibi.

Based on the foregoing, Petitioner’s reliance on Weldon v. State, 436 S.C. 69, 870 S.E.2d 183 (2021) is misplaced. In Weldon, the Court of Appeals determined no evidence supported the PCR court’s finding that counsel articulated a valid strategic reason for not calling alibi witnesses when counsel (1) “agreed with the State’s suggestion that he *may* have declined to call the witnesses because the State *might* have then called rebuttal witnesses to challenge the alibi testimony,” (2) wanted to retain the last closing argument, and (3) “repeatedly testified he did not know why he chose not to call the witnesses.” Id. at 83, 870 S.E.2d at 190 (emphasis added).

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<sup>3</sup> Contrary to Petitioner’s assertion, the cell phone expert did not testify the phone linked to Petitioner began in the Charleston area or travelled to the Charlotte area. (PWC 9; App. 2315-27).

Here, however, counsel and the solicitor credibly testify that the State had Brown's sister available as a rebuttal witness to contradict any testimony that Petitioner was at the birthday party. This is vastly different from Weldon, where the possibility of a rebuttal witness was mere speculation. Based on credible testimony that Brown's sister would have contradicted testimony that Petitioner was at the birthday party, calling Brown as a witness to testify to that fact would have undermined Petitioner's credibility to the jury. Because (1) counsel articulated a valid reason for not calling Brown (or moving for a continuance to procure Brown's testimony) and (2) it is not reasonably likely the outcome would have been different had Brown testified—especially in light of her sister's expected rebuttal testimony—Petitioner did not prove deficiency or prejudice. Thus, the PCR court properly denied this claim.<sup>4</sup>

**II. Probative evidence supports the PCR court's finding that Petitioner failed to prove counsel was ineffective for failing to investigate and prepare for trial the cellphone evidence when counsel articulated a valid reason for not further investigating ownership of the phone, and Petitioner did not enter evidence showing what counsel would have uncovered upon further investigation.**

Petitioner contends counsel was ineffective for not investigating and preparing for trial regarding telephone evidence presented, specifically evidence that Petitioner was not the owner or user of the phone linked to him at trial (the 9516 number). (Pet. 8-11). He contends trial counsel's testimony on this issue was general and did not demonstrate he did any investigation or preparation for trial regarding this issue. Although Petitioner bears the burden of proof, he neglected to enter any additional evidence counsel would have discovered upon a further investigation. Thus, the PCR court properly found Petitioner did not overcome the presumption that counsel was effective.

At the PCR hearing, Petitioner recalled that trial counsel told him the State had "some

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<sup>4</sup> Petitioner's reliance on his co-defendant Belton receiving post-conviction relief based on his attorney's failure to call an alibi witness is likewise misplaced, especially when the purported alibis are not the same.

cellphone numbers, none linking to [Petitioner].” (PCR 70). He testified he lived in Columbia at the time of the murder and did not have an “843” number.<sup>5</sup> (App. 2639-40). Petitioner stated he told counsel to look through that phone to see if that number had contacted any of Petitioner’s family members or his girlfriend. (App. 2643-44). Petitioner agreed Manigault testified at trial that Petitioner used the phone but maintained he did not know Manigault. (App. 2646).

Brown testified she was not aware that Petitioner had a phone ending in 9516. She stated she owned an Android phone that she shared with Petitioner; that number did not end in 9516.

Counsel recalled the State had a phone that it alleged Petitioner used the night of the murder, but Petitioner denied it was his. (App. 2608). However, counsel explained ownership of the phone wasn’t the issue because the State’s evidence indicated Petitioner had that phone and was using it to send texts. (App. 2608-09). He averred there was “very little evidence” that the phone belonged to Petitioner. (App. 2597).

Petitioner did not meet his burden of overcoming the presumption that counsel was effective in his investigation of the phone evidence. In support of his claim, Petitioner merely avers (1) Brown could have testified Petitioner did not own a phone ending in 9516 and (2) counsel should have further investigated the call log of the 9516 number. However, as trial counsel testified and the PCR court found, ownership of the phone wasn’t the primary issue; rather, the issue was who used the phone the night of the murder.<sup>6</sup> Thus, it is not reasonably likely the outcome would have been different had Brown testified to the jury that Petitioner did not own a

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<sup>5</sup> The number the State linked to Petitioner began with 843 and ended with 9516.

<sup>6</sup> In linking the 9516 number to Petitioner, the State relied on Manigault’s testimony that she entered the 9516 number in her phone as “Bez” (whom she identified at trial as Petitioner); Delany contacted her from that number the night of the murder; and she spoke to Bez on that number the next day about Delaney’s death. (Tr. 429, 431-36). Probative evidence supports the PCR court’s finding that counsel effectively cross-examined Manigault about her identification of Petitioner as Bez. Specifically, counsel elicited testimony that Manigault had only met Bez once before and she could not recall when she entered Bez’s number in her phone. (Tr. 438-40).

phone with a number ending in 9516.<sup>7</sup> Further, and critically, Petitioner did not enter any evidence at the PCR hearing about what the call log of the 9516 phone would have revealed and thus did not prove prejudice. Petitioner's claims were based on mere speculation about what the call log *might* have shown. Thus, Petitioner did not meet his burden of proving deficiency or prejudice, and the PCR court properly denied this claim.

**III. The PCR court properly found counsel was not ineffective for not objecting to the State's closing argument when the closing argument was not improper, and any alleged improper comment did not so infect the trial with unfairness as to violate due process.**

Petitioner contends the PCR court erred in finding counsel was not ineffective for not objecting to the State's closing argument. Specifically, he contends comments by the solicitor suggested to the jury the solicitor's personal impression that Petitioner was guilty. Petitioner further contends counsel did not articulate a valid strategy for not objecting. However, contrary to Petitioner's assertion, the solicitor's comments were not improper. Further, these comments did not so infect the trial with unfairness as to violate due process. Thus, the PCR court properly determined counsel was not ineffective for not objecting.

"To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial." Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). In determining whether an improper comment prejudiced a defendant, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

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<sup>7</sup> Notably, Petitioner testified to the jury that the phone was not his. (App. 1070, 1073). Likewise, Manigault testified Petitioner told her he had erased the contacts on his phone because his girlfriend "like[d] to go through his phone." (App. 439-40)

In Berger v. United States, 295 U.S. 78, 87-88 (1935), the United States Supreme Court found the following comments improper:

I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules.

....

But, oh, [criminal defense lawyers] can twist the questions, they can sit up in their offices and devise ways to pass counterfeit money; 'but don't let the Government touch me, that is unfair; please leave my client alone.

Likewise, in United States v. Young, 470 U.S. 1, 5-6 (1985), the United States Supreme Court found the following statements improper:

I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. . . . If we are allowed to give our personal impressions since it was asked of me.

....

I don't know what you call that, I call it fraud.

You can look at the evidence and you can remember the testimony, you remember what [the witnesses] said and what [respondent] admitted they said. I think it's a fraud.

....

I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.

In Fortune, 428 S.C. at 547, 837 S.E.2d at 38, our Supreme Court found the following comments improper:

“My job is to present the truth,” and . . . “if you look in the ... Code of Laws ... [I] have to say what the truth is.” “On the other hand,” the prosecutor told the jury, “the defense attorneys' jobs are to manipulate the truth. Their job is to shroud the truth. Their job is [to] confuse jurors. Their job is to do whatever they have to -- without regard for the truth.” The prosecutor explained that if he—the prosecutor—believes “somebody else did the crime,” then he must “dismiss it.” “And [if] I know the person has done something that I think the facts show they're guilty of, then I can't [dismiss] it. I have to go forward with it.”

Finally, in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), our Supreme Court examined the following from the solicitor’s argument during the penalty phase of a capital trial:

(1) crying numerous times throughout the argument; (2) telling the jury “we will kick the baby some more” if they returned a life sentence; (3) dehumanizing Appellant (“I don't even call him a person”); (4) threatening the jury (“it will be on your heads if he kills someone else [during his life sentence in prison]”); (5) declaring an “open season on babies;” (6) telling the jury he “expects” the death penalty; and (7) enacting a funeral procession complete with a black shroud covering the baby's crib.

The Court concluded that although “[t]he first four alleged mistakes [were] permissible arguments because they were based on the record and reasonable inferences from it,” the remaining three arguments improperly inflamed the jury or ignored precedent that prohibits a solicitor from imposing his or her personal beliefs. *Id.* at 223 & n.6, 641 S.E.2d at 881 & n.6.

Unlike the statements that were condemned in Berger, Young, Fortune, and Northcutt, the solicitor’s statements here did not convey the solicitor’s personal impression, suggest the solicitor had knowledge outside the jury’s purview, or denigrate defense counsel. In context, the solicitor was discussing the testimony of Mason and Caldwell and the anti-snitch code. Far from improper, this was the solicitor’s duty. *Cf. State v. Busse*, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) (“[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, as previously explained, doing so is one of the fundamental

responsibilities of a lawyer. The deputy solicitor was arguing the importance of facts in evidence to the jury's determination of the victim's credibility.”). These statements were not improper. See Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (“A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.”). Because they were not improper, counsels’ reason for not objecting—that he did not believe an objection would be successful—was reasonable within prevailing professional norms, and the PCR court properly found Petitioner did not prove deficiency.

Further, the solicitor’s comments did not “so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.” See Brown, 383 S.C. at 515-16, 680 S.E.2d at 914-15 (“Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”). The solicitor’s comments must be considered in the context of the nearly twenty-page closing argument. Overall, this argument did not amount to a due process violation, it is not reasonably likely the outcome would have been different if counsel *had* objected, and Petitioner thus failed to prove prejudice. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor’s improper comments—which included statements such as “He shouldn’t be out of his cell unless he has a leash on him” and “I wish that I could see him sitting here with no face, blown away by a shotgun”—did not “so infect the trial with unfairness as to make the resulting conviction a denial of due process”).

**IV. Probative evidence supports the PCR court’s finding that Petitioner did not prove counsel was ineffective for failing to communicate and review evidence with Petitioner when counsel credibly testified about the evidence he reviewed with Petitioner, Petitioner’s testimony established that Petitioner discussed the evidence with trial counsel, and Petitioner failed to set forth what additional evidence counsel failed to discuss that would have reasonably changed the outcome of trial.**

Petitioner asserts the PCR court erred in finding counsel was not ineffective for failing to communicate with Petitioner and review evidence. Specifically, Petitioner avers counsel only testified in generalities about his typical practice and did not “testify to any specific details about what he remembered doing in Petitioner’s case or reference any notes he kept from his representation of Petitioner.” (Pet. 16). Contrary to this assertion, however, counsel *did* testify to specific details about the discovery in Petitioner’s case. Additionally, Petitioner’s own testimony demonstrated that trial counsel discussed discovery with him. Thus, probative evidence supports the PCR court’s finding that counsel was not deficient in this regard. Further, Petitioner did not set forth at the PCR hearing what evidence would have proved the 9516 number was not used by him and thus did not prove prejudice.

At the PCR hearing, Petitioner testified he never received “a motion of discovery.” However, he recalled that trial counsel told him two of his co-defendants would testify against him and the State had “some cellphone numbers, none linking to [Petitioner].” (App. 2632).

Trial counsel stated he typically sends multiple letters to clients explaining the State’s evidence and generally provides clients as much discovery as he can. In this case, counsel recalled receiving “boxes of documents.” Counsel explained “[a] lot of it was just cell phone records from all those folks who didn’t have anything to do with it, so [he] wouldn’t have given [Petitioner] those, just because they wouldn’t have made any sense.” He stated he would not have sent all the boxes to Petitioner, but he would have sent Petitioner the most pertinent stuff. (App. 2600-02).

The PCR court found credible trial counsel's testimony that he communicated with Petitioner through phone calls and mail about the State's evidence and provided Petitioner the most pertinent discovery, and probative evidence supports this finding. Specifically, in addition to testifying about his normal practice of communicating with clients about discovery, counsel specifically recalled "boxes of documents," which included cell phone records. (App. 2601). Further, Petitioner himself recalled discussing his co-defendants' testimony and cellphone records with counsel. (App. 2632). Thus, probative evidence supports the PCR court's finding that counsel's discussions with Petitioner about his discovery were reasonable under prevailing professional norms, and Petitioner failed to prove deficiency.

Further, Petitioner failed to set forth what *additional* discovery he believes counsel should have discussed with him, and how discussing that alleged additional discovery would have changed the outcome of this trial. Although Petitioner generally testified counsel should have looked through the 9516 phone to see who it had contacted, Petitioner did not submit any evidence at the PCR hearing (other than self-serving speculation) of what those call logs would have actually shown. Petitioner likewise did not set forth any other discovery that counsel failed to discuss with him that reasonably would have changed the outcome of trial. Thus, Petitioner has not shown prejudice, and this claim is denied.

**V. The PCR court properly found Petitioner is not entitled to relief based on newly discovered evidence when Belton's testimony was not material to Petitioner's guilt or innocence and would not have changed the outcome of trial, and Petitioner did not enter any admissible evidence of Mason's purported testimony.**

Petitioner contends the PCR court erred in concluding Petitioner was not entitled to relief based on newly-discovered evidence. Specifically, he contends Belton's testimony was material because it contradicted the State's version of events, and Belton was unavailable at trial because

he was Petitioner's co-defendant who invoked his Fifth Amendment right against incrimination. Likewise, he contends the Court should have granted him a new trial based on Mason's recantation testimony, and the Court erred in finding Mason's affidavit and testimony from Belton's PCR hearing was inadmissible hearsay.<sup>8</sup> However, the PCR court did not abuse its discretion in finding Mason's affidavit and testimony from Belton's trial were inadmissible hearsay. Likewise, the PCR court properly found Belton's testimony was not material to Petitioner's guilt or innocence. Thus, the PCR court properly denied relief on this ground.

An applicant may institute a PCR action if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice". S.C. Code Ann. § 17-27-20(A)(4). To warrant a new trial, the applicant must show the newly-discovered evidence

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

*The PCR court properly concluded Belton's testimony was not material*

At the PCR hearing, Belton—Petitioner's co-defendant—testified he was also convicted of these charges, and he had an alibi witness that his lawyer did not call. Belton stated that during his PCR hearing, he testified he was not present at the crime scene. When asked if he had any evidence regarding whether Petitioner was at the crime scene, Belton initially stated, "Not at no crime scene." He then testified he was not with Petitioner. Belton testified he traveled from

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<sup>8</sup> Mason invoked his right against self-incrimination and refused to testify at Petitioner's PCR hearing.

Charlotte to Columbia to Charleston the night of the murder and was with “the individuals who were at the crime scene prior to their going to the crime scene,” but Petitioner was not with his group. (App. 2589-92).

The PCR court correctly found Belton’s testimony did not meet the threshold for newly-discovered evidence. Notably, Belton testified he was *not* at the crime scene and *not* with Petitioner. Thus, Belton could not offer any testimony as to whether *Petitioner* was at the crime scene. Based on Belton’s testimony that he was not with Petitioner, any alibi witness Belton may have had is not germane to the issue of whether *Petitioner* was at the crime scene. Thus, the PCR court properly found Belton’s testimony would not have changed the outcome of Petitioner’s trial and was not material to Petitioner’s guilt or innocence.

*The PCR court did not abuse its discretion in excluding Mason’s affidavit and prior testimony*

At the PCR hearing, Petitioner called Mason as a witness, and Mason asserted his Fifth Amendment right against incrimination and refused to testify. (App. 2664). In response, Petitioner moved to enter a statement<sup>9</sup> from Mason, Mason’s testimony from Belton’s PCR hearing, and the circuit court order granting Belton’s PCR application. The State objected to the admission of Mason’s affidavit and testimony from Belton’s PCR hearing, asserting it was hearsay and not admissible under Rule 804, SCRE. The State further contended that at the time of Belton’s PCR hearing, it did not have notice that it would need to cross-examine Mason about anything related to Petitioner’s case. The PCR court found Mason’s statements inadmissible.<sup>10</sup>

The PCR court did not abuse its discretion in finding Mason’s statement and testimony from Belton’s PCR hearing were not admissible. Specifically, the PCR court properly found they

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<sup>9</sup> This statement was not notarized.

<sup>10</sup> Based on the PCR court’s finding that any alibi Belton may have had would not be germane to the issue of whether Petitioner was at the crime scene, the PCR court properly found the order granting Belton post-conviction relief was not relevant to Petitioner’s PCR proceeding.

did not meet the Rule 804(b)(1), SCRE, exception to hearsay. First, under the plain language of Rule 804(b)(1), Mason’s written statement was not admissible because it was not “[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law.” Rule 804(b)(1), SCRE.

Further, the PCR court did not abuse its discretion in finding Mason’s testimony from Belton’s PCR proceeding was not admissible under Rule 804(b)(1) because the State did not have “an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” *Id.* At the time of Belton’s PCR hearing, there was no indication that Petitioner would seek to introduce or use Mason as an alibi witness. In Petitioner’s PCR application, filed February 1, 2018, Petitioner did not raise any allegations involving Mason. The State did not have notice that Petitioner would proceed on any allegations of newly-discovered evidence from Mason’s testimony until Petitioner filed an amended application on November 29, 2021—approximately one week before Petitioner’s evidentiary hearing. The testimony Petitioner seeks to admit was obtained during Belton’s evidentiary hearing on January 20, 2020. At that time, Petitioner had not amended his PCR application to alert the State to elicit testimony from Mason regarding Petitioner. Any cross-examination of Mason regarding Petitioner thus would have required clairvoyance from the State. The State did not have a reason to cross-examine Mason regarding Petitioner during Belton’s PCR hearing.<sup>11</sup> Thus, the PCR court did not abuse its discretion in finding Mason’s testimony from Belton’s PCR hearing inadmissible under Rule 804(b)(1). In the absence of any testimony from Mason, Petitioner did not meet his burden of proving newly-discovered evidence, and the PCR court properly denied relief on this claim.

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<sup>11</sup> Even if Petitioner *had* amended his application prior to Belton’s hearing, cross-examination regarding Petitioner would not have been relevant at Belton’s evidentiary hearing.

**CONCLUSION**

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 27<sup>th</sup> day of November, 2023