

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO WILLIAMSBURG COUNTY
William Jeffrey Young, Trial Judge
Edward W. Miller, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2023-000040

MARC ANTHONY PALMER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

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INDEX

INDEX.....i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....6

ARGUMENT.....7

 I. The PCR court properly concluded counsel was not ineffective for not objecting during the solicitor’s closing argument when (1) counsel testified he did not see a basis to object and thus was not deficient, (2) the solicitor’s argument did not amount to a Golden Rule argument, (3) the solicitor’s argument did not mischaracterize the evidence, (4) the search for the truth language occurred pretrial and did not prejudice Petitioner, and (5) the remaining portions of the argument Petitioner relies on were not raised or ruled upon and are not preserved.....7

 II. Petitioner’s arguments in questions two and three were not ruled upon by the PCR court, and Fishburne does not support a remand here where the PCR court’s order is detailed and complete.....13

 III. Probative evidence supports the PCR court’s finding that there was no “secret deal” between Smith and the State, and any issue regarding Smith’s NCIC report or counsel’s cross-examination of Smith is not preserved.....19

 IV. The PCR court properly found counsel was not ineffective for failing to request a Neil v. Biggers hearing when the identification did not result from an unnecessary and unduly suggestive police procedure, and even if it did, it was so reliable that no substantial likelihood of misidentification existed.....22

CONCLUSION.....24

ISSUE PRESENTED

Petitioner's Issues

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 the numerous improper and prejudicial statements made by the solicitor during her closing?
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 when the 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 McFaddin 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 Maruce Smiths' 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 Smiths' criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he receive 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?

Respondent's Counterstatement of Issues

- I. Did the PCR court properly conclude counsel was not ineffective for not objecting during the solicitor's closing argument when (1) counsel testified he did not see a basis to object and thus was not deficient, (2) the solicitor's argument did not amount to a Golden Rule argument, (3) the solicitor's argument did not mischaracterize evidence, (4) the search for the truth language occurred pretrial and did not prejudice Petitioner, and (5) the remaining portions of the arguments Petitioner relies on were not raised or ruled upon and are not preserved.
- II. Are Petitioner's arguments in questions two and three preserved, and should the Court remand pursuant to Fishburne when the PCR court's order is detailed and complete?

III. Does probative evidence support the PCR court's finding that there was no "secret deal" between Smith and the State, and are Petitioner's allegations related to Smith's NCIC report or counsel's cross-examination of Smith preserved?

IV. Did the PCR court properly find counsel was not ineffective for failing to request a Neil v. Biggers hearing when the identification did not result from an unnecessary and unduly suggestive police procedure, and even if it did, it was so reliable that no substantial likelihood of misidentification existed?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In May 2011, the Williamsburg County Grand Jury indicted Petitioner 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, Petitioner proceeded to a jury trial before the Honorable William Jeffery Young. Guy Ballinger, Esquire, represented Petitioner, and Assistant Solicitor Kimberly Barr prosecuted the case. Petitioner was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for the weapon charge.

Petitioner 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. Petitioner filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent January 4, 2018.

On October 29, 2018, Petitioner filed an application for post-conviction relief (PCR). On November 1, 2022, an evidentiary hearing convened before the Honorable Edward W. Miller. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On January 13, 2023, Judge Miller issued an order denying relief and dismissing Petitioner's application with prejudice.

Trial

On October 28, 2010, Therris Keels (Victim) was shot in the head and in the abdomen. (App. 165). At trial, eyewitness Maurice Smith testified he observed Victim with Joseph Sabb¹ on the evening of the shooting. (App. 113-15). He testified Petitioner approached Victim; Victim put his hands up as Petitioner pointed a gun and shot Victim; and Petitioner shot Victim again after Victim fell. (App. 114-115). Petitioner then crossed the road and shot Victim a third time before running off. (App. 116). Although Smith did not see Petitioner's Dodge Neon that night, he heard its distinctive squealing sound shortly after the shooting. (App. 119-20).

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

Wesley Walker testified he saw Victim with Sabb the night of the shooting, which occurred between 10:00 and 10:30 p.m. (App. 135, 137). He testified he did not see Victim with a gun that night. (App. 139). Walker stated he saw the shooter reach into his pocket, pull out a gun, and shoot Victim twice. (App. 139). He stated the shooter had a ponytail and puffed hair—similar to the way Petitioner sometimes wore his hair. (App. 140).

Investigator Wayne McFadden recovered surveillance video from a gas station near the shooting. On the video, a vehicle that Petitioner later identified as his vehicle passed the gas station near the time of the shooting. (App. 317-25, 354-55).

¹ Sabb's nickname was "TT."

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

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

SLED Agent Mark Creech testified he and two investigators interviewed Petitioner but were unable to corroborate his whereabouts between 10:10 p.m. and 3:00 a.m. the night of the shooting. (App. 262-75). Investigator McFadden testified he attempted to verify Petitioner's alibi. (App. 305-08). He reviewed surveillance videos from a gas station where Petitioner claimed to be but did not see Petitioner's vehicle in the footage. (App. 308-09).

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. The PCR court properly concluded counsel was not ineffective for not objecting during the solicitor’s closing argument when (1) counsel testified he did not see a basis to object and thus was not deficient, (2) the solicitor’s argument did not amount to a Golden Rule argument, (3) the solicitor’s argument did not mischaracterize the evidence, (4) the search for the truth language occurred pretrial and did not prejudice Petitioner, and (5) the remaining portions of the arguments Petitioner relies on were not raised or ruled upon and are not preserved.

Petitioner first contends the PCR court erred in not finding counsel ineffective for not objecting to improper comments by the solicitor. In doing so, however, Petitioner relies on multiple portions of the transcript that were not presented to nor ruled upon by the PCR judge, making them unpreserved.² Petitioner likewise does *not* challenge the court’s rulings on several portions of the transcript that *were* presented to and ruled upon by the PCR court, making the rulings on those portions of the solicitor’s argument law of the case. As set forth below, the PCR court properly denied relief on the preserved rulings that are being challenged by Petitioner.³

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). To prove ineffective assistance of

² Petitioner actually acknowledges this in his Petition but attempts to skirt the issue by arguing this case should be remanded pursuant to Fishburn v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). As set forth herein, however, this order accurately addresses the numerous issues that were *actually raised* and is distinguishable from Fishburne.

³ Petitioner incorrectly posits that the PCR court “noted numerous areas of concern from the solicitor’s closing argument.” (Pet. 4). Rather, the order set forth the portions of the closing argument that Petitioner questioned counsel about and/or raised to the PCR court at the hearing. (App. 776-780). In setting forth these portions of the closing argument, the PCR court was merely noting the issues raised by Petitioner—not making any finding that these arguments were improper. This is evident by language such as “At the evidentiary hearing, Petitioner questioned trial counsel about several portions of the State’s closing argument” (App. 776); “Petitioner asked counsel whether the following constituted a personal attack” (App. 776); “Petitioner asked counsel whether the following constituted improper bolstering” (App. 777); “Petitioner asked counsel whether the following constituted pitting” (App. 777); and “Petitioner asked counsel if the following was an improper golden rule argument.” (App. 779). Likewise, at no point in the order—which specifically addressed the six portions of the solicitor’s closing argument that Petitioner actually raised—does the court find that a comment was improper. (App. 776-80). Rather, the Court determined “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” (App. 778); and “This court . . . finds the foregoing did not amount to a Golden Rule argument.” (App. 779). It strains credibility to assert the PCR court “noted several areas of concern” when the Court did not find any of the solicitor’s comments improper.

counsel, a petitioner 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 received 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.

a. Counsel testified he did not see a basis to object and thus was not deficient.

Much of Petitioner’s argument focuses on his contention that counsel was deficient because he believed he could not object during closing argument. (Pet. 4). Although counsel improperly averred he could not object *during* argument, he clarified he would have objected post-argument if he believed anything was objectionable. (App. 729). Critically, counsel did not raise any objection post-argument, supporting his PCR testimony that he did not see a basis to object.⁴ (App. 729-33). Thus, even if he had an improper understanding about *when* he could object, his failure to object was not deficient.

⁴ As discussed below, counsel *did* agree an argument raised by Petitioner “could be viewed” as a Golden Rule argument. (App. 733). However, counsel did not otherwise agree that anything was objectionable, explaining, “[Petitioner] and I disagree on what’s objectionable and what’s simply he doesn’t like it ‘cause he doesn’t think it helps his case. But just because he doesn’t like the closing doesn’t make it objectionable.” (App. 729).

Petitioner’s contention that counsel “was *admittedly ineffective*” is misplaced. (Pet. 5). Although counsel’s belief about *when* he could object may have been inaccurate, Petitioner still bears the burden of showing *what* counsel should have object to in order to prove deficiency. In other words, if there is no basis to object, then counsel’s failure to object would not be deficient—even if counsel mistakenly believed he could not object. Further—and critically—Petitioner must show both deficiency *and* prejudice to prove ineffective assistance of counsel. As set forth below, Petitioner did not meet his burden.

b. The PCR court properly found the solicitor’s argument did not amount to a Golden Rule argument.

At the evidentiary hearing, Petitioner questioned counsel about the following:

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). When asked if it was an improper Golden Rule argument, PCR counsel agreed it “could be viewed in that fashion.” (App. 733). However, the PCR court concluded it did not amount to a Golden Rule argument. The PCR court’s ruling in this regard was proper.

“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.

Here, the argument did not ask the jurors to put themselves in the place of the victims or the parties and thus did not amount to a Golden Rule Argument. See State v. Harris, 382 S.C. 107, 122, 674 S.E.2d 532, 540 (Ct. App. 2009) (“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.”). Petitioner failed to set forth any other reason or basis that trial counsel should have objected to this portion of the argument and thus failed to prove deficiency.

Likewise, the PCR court properly found that even if the foregoing argument was objectionable, it 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.”); 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”). Based on the foregoing, the PCR court properly found Petitioner failed to prove prejudice.

c. The PCR court properly found the solicitor did not mischaracterize evidence.

At the hearing, Petitioner questioned counsel about the following from the State's closing:

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. 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 freeman 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, 725). As part of his theory that the State had a "secret deal" with Smith, Petitioner asserted the foregoing was a mischaracterization of the evidence.⁵

The PCR court properly found the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object. See Harris, 382 S.C. at 120, 674 S.E.2d at 539 (providing statements made during a closing argument must be viewed "in the context of the entire record"). At trial, Smith testified he was serving a ten-year non-violent sentence for a drug charge. (App. 100). He testified he pled guilty and was sentenced on September 13, 2012. (App. 100, 126). On cross-examination, counsel questioned Smith about whether he identified Petitioner as the shooter to curry favor with the State. (App. 121-26). Based on the foregoing, the solicitor's comment was a reasonable inference from the facts presented and was proper to rebut the implication that Smith provided the statement in exchange for a deal with the state. Thus, the PCR court properly found Petitioner did not prove deficiency for not objecting here.

⁵ Petitioner argues for the first time on appeal that this portion of the argument constituted improper vouching; at the PCR hearing, this questioning focused on his belief that this was mischaracterization of the evidence. (App. 725-28). Notwithstanding this, this argument does not constitute improper vouching.

Likewise, the PCR court properly found Petitioner did not show an objection would have changed the outcome of trial and thus did not prove prejudice. Overall this 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.”). Thus, the PCR court properly found Petitioner did not prove prejudice.

d. The PCR court properly found counsel was not ineffective for not objecting to pretrial search for the truth language.

The PCR court properly concluded Petitioner did not prove counsel was ineffective for not objecting to pretrial search for the truth language. Although the Supreme Court of South Carolina recently instructed trial courts to avoid instructing the jury that its job is to search for the truth, that case was not heard until June 15, 2017—more than four years after Petitioner’s trial. State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). At the time of Petitioner’s trial, State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), was controlling. In Aleksey, the Supreme Court of South Carolina 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 Aleksey).

The comment here was made at the beginning of trial and not as part of the reasonable doubt or circumstantial evidence charges. Thus, the comment 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, Petitioner did not show show prejudice.

e. The remainder of Petitioner’s argument is not preserved.

Petitioner points to several other portions of the solicitor’s closing argument that were simply not raised at the PCR hearing or addressed by the PCR court in its final order. (Pet. 10-12). Thus, any issue related to these portions of the closing argument are not preserved. Likewise, Petitioner raises for the first time the cumulative error doctrine, which is also not preserved. Finally, Petitioner does not address on appeal other rulings made by the PCR court related to the solicitor’s closing argument, making them law of the case.

II. Petitioner’s arguments in questions two and three were not ruled upon by the PCR court, and Fishburne does not support a remand here where the PCR court’s order is detailed and complete.

In question two, Petitioner contends counsel was ineffective for failing to object to improper Rule 404(b), SCRE, evidence regarding a prior fight, a threat, and a gun. (Pet. 13-15). In question three, he contends counsel was ineffective for failing to object to hearsay testimony from Investigator McFadden related to a conversation with a federal parole officer. (Pet. 16-18). However, these issues were not ruled on by the PCR court and thus are not preserved. Further, because the order adequately addressed the issues *actually raised*, a remand pursuant to Fishburn is not proper.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). To meet the basic requirements of issue preservation, “[t]he issue must be (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient

specificity.” State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004).

In Mangal v. State, the Supreme Court of South Carolina reversed the Court of Appeals’ remand of an unpreserved issue to the PCR court. 421 S.C. 85, 89-90, 805 S.E.2d 568, 570 (2017). There, no written amendment was filed after PCR counsel was appointed. Id. at 90, 805 S.E.2d at 570. At the hearing, PCR counsel did not mention that Petitioner would proceed on an improper bolstering allegation. During the hearing, however, counsel questioned Petitioner about this claim, and the State briefly crossed counsel about it. Id. at 90, 805 S.E.2d at 570-71. At the conclusion of the hearing, PCR counsel raised the improper bolstering claim; however, the PCR court did not address it in its final order. Id. at 90, 805 S.E.2d at 571. Petitioner filed a Rule 59(e), SCRCP motion, which was denied. Id. at 90-91, 805 S.E.2d at 571.

On appeal, the Court of Appeals remanded for the PCR court to consider the improper bolstering allegation. Id. at 91, 805 S.E.2d at 571. However, the Supreme Court of South Carolina reversed the Court of Appeals, finding the PCR court acted in its discretion in not considering the improper bolstering issue when (1) the allegation was not mentioned in the original application or set forth in any amendment; (2) PCR counsel did not raise the claim at the beginning of the hearing; (3) PCR counsel did not inform the court this allegation would be raised when counsel questioned trial counsel about improper bolstering; and (4) when PCR counsel referenced this allegation, the allegation was not made with specificity. Id. at 92, 805 S.E.2d at 571-72. The Supreme Court concluded this was “not an appropriate case in which to excuse [Petitioner] from his procedural default.” Id. at 100-01, 805 S.E.2d at 576.

More recently, however, the Supreme Court of South Carolina remanded a PCR action for the Court to address an issue that was raised but not ruled upon even when counsel failed to file a Rule 59(e) motion. Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). There, the petitioner

amended his PCR application before the hearing to raise two issues, and counsel elicited testimony on both issues at the hearing. 427 S.C. at 510, 832 S.E.2d at 586. However, the PCR court failed to address one of the issues in its final order. *Id.* at 510-12, 832 S.E.2d at 586-87. Although the petitioner did not file a Rule 59(e) motion requesting a ruling on that issue, the Supreme Court concluded this procedural shortcoming did not prevent it from remanding the case. *Id.* at 516, 832 S.E.2d at 589. In so doing, however, the Court reiterated that all “parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.” *Id.* at 516, 832 S.E.2d at 589-90.

a. The PCR court did not rule on whether counsel was ineffective for failing to object to Rule 404(b) evidence, and Petitioner did not raise this issue with sufficient specificity to warrant a remand.

Petitioner argues counsel was ineffective for not objecting under Rule 404(b), SCRE, to testimony about a fight, which included an alleged threat by Petitioner and was the only evidence putting a gun in Petitioner’s hand. (Pet. 13). Initially, Petitioner himself concedes this argument is not preserved: “If this Court declines to address [question two] due to the incomplete PCR order on the legal impact of counsels’ failure to object under Rule 404, SCRE, a remand would be appropriate” (Pet. 15 n. 11). Petitioner attempts to circumvent preservation requirements by positing the PCR court’s order is incomplete. Far from incomplete, however, the PCR court’s order addressed with specificity all the issues actually raised by Petitioner at the hearing. This is vastly different than the situation in Fishburne, where the petitioner raised only two issues and the PCR court addressed only one.

Here, Petitioner filed an eighty-five page pro se application. (App. 525-609). Petitioner did not file an amended application. At the start of the hearing, the parties set forth the claims

Petitioner was proceeding on: “counsel failed to object to Brady violations,^[6] failed to move to suppress admission of unreliable identification evidence, failed to make proper objections and motions, failed to object to solicitor’s improper comments during closing argument, failed to place all sidebar discussions on the record[,] and made harmful arguments against his and Brittnay Croskey’s testimony.”⁷ (App. 627-28). In the context of failure to object (other than related to the solicitor’s closing argument), Petitioner questioned counsel about why he did not object to the following portions of the transcript: the court’s “search for truth language” in opening comments (App. 79; 719);⁸ alleged hearsay from Smith about Victim’s gesture (App. 115, 719-21);⁹ a sidebar where the objection was not placed on the record (App. 311, 721-23);¹⁰ and Mathews’ testimony about a conversation with Investigator McFaddin (App. 216-17, 723-25).¹¹ During closing argument, Petitioner argued counsel was ineffective for failing to (1) object to the State’s closing argument, (2) investigate/obtain gas station videos and Croskey’s alleged prior statement, (3) object to hearsay testimony, and (4) move to suppress Croskey’s testimony pursuant to Biggers. (App. 755-56). Nothing about this testimony or argument put the Court on notice that Petitioner was proceeding on an issue related to prior bad act evidence.

Petitioner’s only testimony about “bad act evidence” was confusing at best and did not put the Court or the State on notice that Petitioner was proceeding on any issue related to Matthews’

⁶ Petitioner alternately raised a claim of prosecutorial misconduct related to the alleged Brady violation, which the PCR court found he did not prove.

⁷ Although this list was relayed by counsel for Respondent, it was based on prior conversations the undersigned had with PCR counsel about the issues that would be raised. Further, PCR counsel had an opportunity to correct the record if he believed the list of issues was incomplete.

⁸ This was addressed in the PCR court’s order. (App. 773-74).

⁹ This was addressed in the PCR court’s order. (App. 774-75).

¹⁰ This was addressed in the PCR court’s order. (App. 780).

¹¹ This was raised in the context of whether it was proper impeachment testimony and was addressed in the PCR courts’ order. (App. 775-76).

testimony that petitioner wanted to shoot Dominique McBride¹² or Petitioner had a .45 caliber automatic (Pet. 13):

Q. Now—okay. You had some concerns that there was some bad acts testimony that came into this case?

A. Yes, sir.

Q. And what was that?

A. Oh, it was, it was a lot. **It was from Wayne McFaddin.**

Q. When did it—

A. **Maurice Smith.**

Q. What did it cent—what did it center on?

A. Wayne McFadden brought in testimony of an alleged murder weapon. Wayne McFadden kept—said that he—a confidential informant.

Q. Now let me back you up.

A. They—

Q. What was this—what was this bad act, you know? You were saying that they brought in prejudicial information—

A. Of me and—of me and a—of me having a fight with another guy in the neighborhood.

Q. And how much before this—the incident at trial? How much before wat that? Was that the night before or was that—

A. The—of the—

Q. What's the time frame between this fight that you're talking about here and the shooting?

A. The fight actually happened in, I wanna say September, September. It was the night of the Greelyville, Williamsburg County, Williamsburg County game.

Q. Okay, so—all right. So it was a couple of months before or at least—

A. Probably about a month, a month before, maybe longer. I think—no, probably about, I wanna say September 3rd if I'm not mistaken. I wanna say September 3rd. You know, no one really knew when the fight, like, you know what I'm saying, like the actual date,—

Q. Okay, all right. I just want—

A. —but we have to go back in football records—

Q. I just wanted to get to that.

A. —and schedules. All right.

¹² The referenced transcript pages do *not* include testimony that Petitioner wanted to shoot the other combatant. When asked “Did you ever at any point and time tell [Investigator McFaddin] that you would not give the pistol back to [Petitioner] because he threatened to shoot Mr. McBride,” Mathews responded, “No ma’am.” (App. 216). Investigator McFaddin was not questioned about this threat and did not testify to it. (App. 311).

(App. 645-47, emphasis added).

In his petition, Petitioner's argument related to prior bad act testimony centers on his contention that it was the only evidence connecting Petitioner to the same caliber handgun that was used in the murder. (Pet. 13-15). However, *nothing* presented at the PCR hearing put the Court on notice that Petitioner was alleging counsel should have raised a 404(b) objection to Mathews' testimony. Petitioner himself specifically referenced testimony by Investigator McFaddin and Smith when recounting what bad act evidence he believed should have been objected to.¹³ Thus, any argument related to a 404(b) objection to Mathews' testimony was not raised at all during the PCR hearing and is not preserved.

Respondent concedes Petitioner raised an issue related to 404(b) evidence in his eighty-five-page pro se application. (App. 571). However, this issue was not clearly raised at the PCR hearing in a manner sufficient to alert the Court and the State that Petitioner was going forward on this issue. Although Petitioner raised several portions of the transcript that he contends should have been objected to, he did not specifically reference Smith's testimony at page 118 of the transcript. (App. 719-25, 755-56). Further, *nothing* was raised at the hearing regarding a 404(b) objection to Mathews' testimony, and Petitioner's testimony on this issue was vague and non-specific. Finally, counsel did not file a Rule 59(e) motion to request a ruling on this issue. This issue is simply not preserved, nor was it raised specifically and sufficiently enough to put the Court on notice that it was an issue. Thus, remanding this case pursuant to Fishburne would create an exception that would swallow preservation requirements.

¹³ Although Petitioner raised an issue related to Mathews' testimony at pages 216-17, it was not raised in the context of improper bad act evidence. (App. 723-25).

b. The PCR court did not rule on whether counsel was ineffective for failing to object to Investigator McFaddin’s testimony regarding statements by a parole officer, and Petitioner did not raise this issue with sufficient specificity to warrant a remand.

Petitioner contends counsel was ineffective for not objecting when Investigator McFaddin testified about a conversation with Matthews’ parole officer. (Pet. 16-18). He concedes this issue is not preserved but posits the PCR court erred in not addressing it: “The PCR court erred in failing to specifically rule on this issue.” (Pet. 18). However, this issue was not raised at the hearing; thus, the PCR court did not err in not ruling on it.¹⁴ It strains credibility to suggest a court should rule on an issue that was not raised at the hearing. Because this issue was not addressed at all at the hearing, a remand to address this issue would create an exception that would swallow preservation requirements.

III. Probative evidence supports the PCR court’s finding that there was no “secret deal” between Smith and the State, and any issue regarding Smith’s NCIC report or counsel’s cross-examination of Smith is not preserved.

Petitioner focused much of his argument at the PCR hearing on his allegation that the State had a “secret deal” with Smith, who identified Petitioner as the shooter at trial despite initially telling law enforcement he could not identify the shooter. This issue was specifically addressed in the PCR court’s order and is supported by probative evidence. (App. 771). Notably the PCR court found credible the solicitor’s testimony that she did not have a deal with Smith at the time Smith plead guilty, and if she had, she would have asked the court to defer sentencing until after Petitioner’s trial. (App. 771). This Court should defer to this credibility finding. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 (“Where matters of credibility are involved, this Court gives great

¹⁴ Notably, Petitioner does not set forth any portion of the PCR hearing where this issue was allegedly raised. (Pet. 16-18). Petitioner’s argument on this issue in his pro se application encompasses merely one small paragraph of an eighty-five-page application. Given an applicant’s burden of proof, it was incumbent upon him to specifically raise this issue at the PCR hearing.

deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses.”). Based on this finding—which is supported by the record (App. 693-94)—Petitioner did not prove a “secret deal” the State had with Smith, and this allegation patently lacks merit.

Petitioner misconstrues the evidence when he posits, “[T]he downward departure [of Smith’s sentence] was initiated by the solicitor within a couple of weeks after trial.” (Pet. 21). Contrary to this assertion, the solicitor testified that Smith’s attorney “contacted me or the Clarendon County solicitor’s office and asked that he—that he intended to file a motion for a downward departure.”¹⁵ (App. 675). She reiterated she did not discuss a sentence reduction with Smith’s attorney prior to his sentencing. (App. 675). This testimony does not show the solicitor requested the downward reduction. Rather, it shows Smith’s attorney reached out to the State after Petitioner’s trial to request a sentence reduction. The solicitor’s testimony that she would have requested the State defer Smith’s sentencing had she had an agreement with him prior to Petitioner’s trial—something that is common when co-defendants or other witnesses testify at a trial—further supports the credibility of the solicitor’s testimony that she did not have a secret deal with Smith prior to Petitioner’s trial.

To get around how patently meritless this claim is, Petitioner again attempts to frame the PCR court’s order as “incomplete” and asks this Court to remand for the PCR court to consider

¹⁵ Petitioner’s assertion that the solicitor initiated the downward reduction is not supported. Petitioner relies on the following:

Q. And in this case can you clarify when di the lawyer contact you or when did Maruce Smtih contact you about requesting a downward modification, or I guess he was going to request it. But when did he reach out to you about that?

A. I would say maybe a week or two after the trial was concluded.

Q. After the trial.

A. If not, if not longer.

Q. Okay. But it was not before the trial?

A. Correct.

(App. 693-94). It simply strains credibility to suggest that the foregoing is evidence that the solicitor initiated the downward reduction.

whether counsel was ineffective and/or the State violated Brady by not disclosing Smith’s NCIC report, and whether counsel’s cross-examination of Smith was ineffective. Again, these issues were not raised at the PCR hearing. In support of his argument related to the NCIC record, Petitioner references the following statement he made during his testimony:

Why I believe that there was a deal is because I have a copy of the general sessions tracking sheet that says that one of his charges was dismissed as part of a plea agreement. I couldn’t get it from Williamsburg County. I had to get it from Clarendon County.

(App. 653). When asked, “[A]nd you were never made aware that there was some kind of deal in place, right?”, Petitioner responded, “We didn’t even get a NCIC report.” (App. 653). This testimony was elicited in the context of Petitioner’s argument that the State had a secret plea deal with Smith—which *was* addressed in the PCR court’s order. It strains credibility to suggest the foregoing testimony constituted an additional allegation that counsel was ineffective for not obtaining it and/or the State violated Brady by not disclosing it.¹⁶

Regarding counsel’s cross-examination of Smith, Petitioner points to PCR counsel’s cross-examination of the solicitor and contrasts it with counsel’s cross-examination of Smith at trial. (Pet. 19). However, PCR counsel’s questioning of the solicitor here was an attempt to obtain information about the “secret deal” Petitioner alleged the State had with Smith. It was *not* done to illustrate how counsel should have conducted cross-examination—especially when the solicitor herself was not even a witness at trial. Nothing at the hearing put the Court on notice that Petitioner was proceeding on a claim related to counsels’ cross-examination of Smith.¹⁷ Thus, a remand to

¹⁶ Even if this issue *was* adequately raised—which Respondent disputes—Petitioner did not attempt to introduce the report into evidence, leaving the Court to merely speculate as to what information it contained and whether it would have aided counsel’s cross-examination or shown the existence of a “secret deal.” PCR counsel’s failure to enter this report is further evidence that the report itself (whether it should have been obtained or disclosed) was not an issue that was raised at the PCR hearing. The Court must consider the context in which the testimony was presented; here, it was presented as part of Petitioner’s effort to establish a “secret deal” between Smith and the State.

¹⁷ Petitioner likewise does not set forth *where* he raised any issue related to cross-examination in his eighty-five-page pro se application.

address these issues would create an exception that would swallow preservation requirements.

IV. The PCR court properly found counsel was not ineffective for failing to request a Neil v. Biggers hearing when the identification did not result from an unnecessary and unduly suggestive police procedure, and even if it did, it was so reliable that no substantial likelihood of misidentification existed.

During the PCR hearing, Petitioner questioned trial counsel about why he did not move to suppress Croskey's identification of him at trial under Neil v. Biggers. This PCR court properly found Petitioner did not prove 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.”

The PCR court properly found counsel articulated a valid reason for not raising a Biggers issue. Specifically, counsel testified he did not believe a Biggers argument would be meritorious. (App. 714). Although he noted it was not a lineup situation, he clarified, “I understand that it doesn't necessarily have to be a photo lineup out-of-court to invoke those considerations.” (App. 714). He agreed he could have filed a Biggers motion but concluded it would not have any merit based on Croskey's testimony that she knew Petitioner. (App. 714).

Based on Croskey's trial testimony, counsel's assessment that a Biggers hearing would not be meritorious was reasonable under prevailing professional norms. At trial, Croskey testified she had known Petitioner 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 Petitioner'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 Petitioner 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 Petitioner, whom she had known for about a year. The foregoing does not show Croskey identified Petitioner based on an unnecessary and unduly suggestive police procedure. Thus, the PCR court properly concluded counsel was not deficient.

This PCR court further properly found counsel articulated a valid strategy in attempting to undermine Croskey’s identification of Petitioner by highlighting on cross-examination inconsistencies with Croskey’s trial testimony and her initial statement to police. Specifically, counsel elicited testimony that Croskey initially “didn’t have a feeling” about who the shooter was but later determined it could be Petitioner after “people started talking” about the shooting. (Tr. 198-99). Due to the relative weakness of a Biggers argument, counsel articulated a valid strategy for undermining Croskey’s identification of Petitioner through cross-examination instead and thus was not deficient.

Finally, based on Croskey’s testimony that she was familiar with Petitioner, and based on the lack of any evidence that she identified Petitioner through an unduly suggestive lineup or show up, the PCR court properly found it is not reasonably likely Croskey’s testimony would have been suppressed based on Biggers. Thus, Petitioner did not prove prejudice.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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ATTORNEYS FOR THE RESPONDENT

This 4th day of March, 2024

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Mar 04 2024

S.C. SUPREME COURT

On Petition for Writ of Certiorari
to Williamsburg County
William Jeffrey Young, Trial Judge
Edward W. Miller, PCR Judge

Appellate Case No. 2023-000040

MARC ANTHONY PALMER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

Pursuant to Rule 262, SCACR, as amended on May 6, 2022, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari in the above-referenced case has been served upon opposing counsel at his primary e-mail address as listed in the Attorney Information System:

Gary Johnson
ghjohnson@sccid.sc.gov

This 4th day of March, 2024.

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