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**Mar 14 2024**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

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MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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## ARGUMENTS IN REPLY

1. The numerous improper arguments of the solicitor were before the PCR court and properly preserved for review by this Court, including the inflammatory language concerning destroying the courthouse and improper vouching of witnesses.

Rather than address the propriety of the solicitor's improper closing argument, the state's Return sweeps the numerous improper remarks into the basket of not properly preserved. Return to Petition 7, 13. The state then picked and selected certain areas of the improper argument to address on the merits.

This may be, in part, an acknowledgement that it was improper to tie the conviction of Petitioner to not disappointing the trial judge and the need to destroy the courthouse unless a conviction was returned. App. 495, ll. 4 - 17. It may be, in fact, an acknowledgment that a solicitor that vouches for the veracity of a convicted felon and goes outside the record to bolster a felon's testimony before a jury has crossed the line. App. 488, l. 17 – 489, l. 7.

As noted in the Petition for Certiorari, these improper arguments were raised in the original PCR application.<sup>1</sup> App. 592 - 599. Moreover, the PCR court's order specifically recites several of the inflammatory and improper arguments. App. 776 – 779. The state's Return to the PCR application acknowledged the assertion of improper vouching for witness Smith.<sup>2</sup> App. 617. Trial counsel was cross-examined about the solicitor's inaccurate assertions that Smith plead straight up and was serving his time. App. 725, l. 15 – 727, l. 17. Trial counsel was cross-examined about the state's closing argument that bolstered and vouched for witnesses. App. 731,

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<sup>1</sup> Evidently for the state, the length and detail of Petitioner's original PCR application was in fact a problem and not a virtue. Return to Petition p. 18.

<sup>2</sup>“Applicant also asserts the State acted improperly when it vouched for Smith's credibility during its closing argument and asserted there was no plea agreement with Smith.” App. 617.

l. 4 – 732, l. 21. Counsel for Petitioner, in summation to the PCR court, referred to the inflammatory final statements about burning down the courthouse.

And clearly that golden rule argument at the end went way overboard as far as telling -- having the jury sort of inflaming their passions to make a ruling based on something that's not in the record. 'You know, if you' re gonna let this happen, if you' re gonna let vigilante happen, you might as well burn down all the courthouses.' That was inappropriate remark that should have been objected. I don't think that trial counsel's basis for not objecting to it is legitimate.

App. 754, l. 23 – 755, l. 3. This mirrored the cross-examination of trial counsel about the need to be sure a jury does not decided matters based upon passion and prejudice when questioned about the destruction of the courthouse argument. App. 732, l. 22 – 733, l. 15.

Trial counsel admitted he did not believe he was allowed to object to the numerous improper arguments. App. 729, ll. 1 – 8. The improper arguments were either directly cited by the PCR court in its Order of Dismissal, argued before the PCR court, cited in the PCR application, subject to testimony, or acknowledged by the state in its Return. The arguments raised in the first issue presented in the Petitioner for Certiorari are properly preserved and certiorari on this issue should be granted.

2. The improper prior bad acts testimony and the related improper hearsay testimony concerning a federal parole violation as the basis for the witness changing his story concerning a fight between Petitioner and another individual unrelated to the crime charged that allowed the introduction of critical evidence against Petitioner was properly raised before the PCR court and are preserved either for review or remand.

The state's argument that these two issues are not properly preserved relies heavily on Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). Petitioner concedes that a review by this Court *requires the issue to have been raised in the context of the PCR process* for appellate review as dictated by Mangal. However, this Court recognized the harsh impact of permitting "a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019); *see also* Love v. State, 428 S.C. 231, 239–40, 834 S.E.2d 196, 200 (2019) ("There are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims." (*quoting Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017))).

Petitioner's assertion that counsel was ineffective in failing to object to "prior bad acts" testimony that connected him to a weapon of the appropriate caliber used in the murder through witnesses Mathews and McFadden was presented in the PCR application. App. 571. Petitioner presented testimony on the issue during the PCR hearing.<sup>3</sup> App. 645, l. 18 – 646, l. 12. Trial counsel was questioned about the sidebar that occurred during this phase of trial and why

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<sup>3</sup>The state quotes this exact testimony but claims it is confusing. Return to Petition p. 16 - 17. The state's confusion is likely centered on its continued refusal to acknowledge that McFadden was called by the state to refute the denials by Mathews about the gun and Petitioner's desire to shoot someone. App. 312, l. 1 – 313, l. 13; 315, ll. 2 – 15.

he failed to continue his objections during this line of questioning. App. 722, l. 1 – 725, l. 4. The PCR court’s order addressed this area of testimony, but just as the state did in its Return to the PCR application and before in its Return to the Petition for Certiorari before this Court, misconstrued the testimony provided by Mathews as being “non-material” since Mathews denied making the incriminating statements. App. 776. This, of course, ignores the impeachment testimony offered by McFadden relating Mathews’ “off the record” admissions of the existence of the gun, the fact that it was .45 caliber, that Mathews would not return it to Petitioner since he believed Petitioner wanted to shoot his adversary, and that the .45 was later returned to Petitioner. App. 313, ll. 1 -24; 315, ll. 6 – 15.

Likewise, the issue concerning the hearsay evidence of the federal parole revocation of a key witness is likewise preserved for either review or remand since it was raised in the PCR application. App. 561. The Order addressed the issue in part, but simply claimed the hearsay testimony “could set the State up to introduce a prior inconsistent statement” and that trial counsel’s explanation “that he does not raise every technical objection if the testimony being elicited is not material.” App. 776. The Order, as does the state before this Court in its Return to Petition for Certiorari, ignores the fact that the state did in fact impeach Mathews through McFadden and used this improper hearsay to help explain the changing story. App. 313, l. 25 – 314, l. 24.

The arguments raised in the second issue presented in the Petitioner for Certiorari are properly preserved and certiorari on these issues should be granted. If this Court feels the incomplete nature of the PCR order prevents such a review, a remand under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) would be appropriate since the preservation issue is found in the Order of Dismissal, and not based upon abandonment by the PCR applicant.

3. The state ignores the impact of S.C. Code Ann. § 17-25-65 (2010 as amended) in arguing that the solicitor did not request a downward departure in response to witness Smith's testimony at trial.

In response to the handling by the state and trial counsel of witness Smith, the state asserts that the finding of fact that there was not secret deal somehow negates the fact the solicitor did in fact move for a downward departure on Smith's behalf. The state ignores that, under S.C. Code Ann. § 17-25-65 (2010 as amended), only the solicitor may file a motion for downward departure. While the PCR court found the solicitor credible when she denied having an agreement with Smith in advance of his testimony, the state has conflated that finding to negate the solicitor's role in Smith's subsequent, and very timely, downward departure.

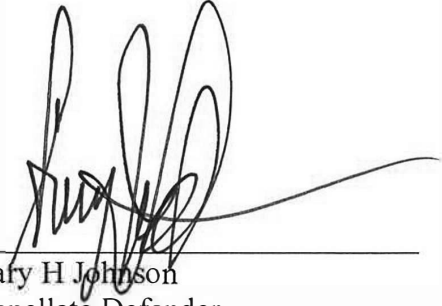
The problems surrounding Smith's testimony were numerous. Petitioner alleged an existing agreement to reduce Smith's sentence and the state's failure to provide complete discovery regarding Smith's criminal convictions before trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). App. 534-537; 653, ll. 5-18. Trial counsel indicated he fully relied on the state to comply with his Brady and Rule 5, SCRPC. App. 713, ll. 3-23.

The state had an affirmative obligation to disclose the extent of Smith's charges and plea resolution that occurred before trial. *See State v. Durant*, 430 S.C. 98, 107-08, 844 S.E.2d 49, 54 (2020) (holding the failure to provide information that could be obtained through a NCIC search is a *Brady* violation."). The PCR court's order focused solely on the "secret" deal testimony. App. 770. This issue is therefore preserved since it was raised in the PCR application and subject to extensive testimony during the PCR hearing. The only issue concerning preservation concerns the extent of the order, which falls under the guidance of Fishburne v.

State, 427 S.C. 505, 832 S.E.2d 584 (2019) if this Court feels the record is incomplete for appellate review.

**CONCLUSION**

Based upon the foregoing reasons and those contained in the Petition for Certiorari, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.

A handwritten signature in black ink, appearing to read "Gary H. Johnson", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

Gary H. Johnson  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2024.