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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from
Allendale County
Honorable Perry M. Buckner, IV, Trial Judge
Honorable Robert J. Bonds, PCR Judge

Appellate Case No. 2024-001082

LAPARIS FLOWERS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION
FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to object to improper closing arguments by the State?

II. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to object to improper "truth seeking" language used by the Court and the State at trial?

III. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to investigate and present an alibi defense at trial?

IV. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to introduce the audio and video recorded statements of the complaining witness identifying Petitioner in order to provide context and clarity regarding the improper and highly suggestive tactics used in obtaining the statements?

V. Whether the PCR Court erred in finding trial counsel was not ineffective for failing to sufficiently object, on the record, to the use of the jury instruction containing language that permitted malice to be inferred from the use of a deadly weapon?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the PCR court properly found counsel was not ineffective for not objecting to the State's closing argument when (a) the argument about Brandon Lewis was not improper vouching and (b) the mere passing statement did not so infect the trial with unfairness as to violate due process?

II. Whether the PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to truth-seeking language when (a) as a matter of law, the language did not prejudice Petitioner, and (b) Petitioner did not point to any caselaw prohibiting attorneys from using truth-seeking language and thus did not prove deficiency from counsel's failure to object to the solicitor's truth-seeking language?

III. Whether probative evidence supports the PCR court's finding that counsel was not ineffective for not presenting an alibi defense when (a) probative evidence supports the finding that counsel was not deficient and (b) based on the testimony and the credibility findings, Petitioner did not prove prejudice?

IV. Whether the PCR court properly found counsel was not ineffective for not introducing recorded statements when (a) counsel articulated a valid strategy and (b) Petitioner failed to establish a legal basis for admitting the videos?

V. Whether the PCR court properly found counsel was not ineffective for not objecting to the inferred malice charge when at the time of Petitioner's trial and under the facts of this case, the charge was proper?

PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections serving an aggregate fifty-year sentence. In July 2015, the Allendale County Grand Jury indicted Petitioner for murder (2014-GS-03-00229); three counts of attempted murder (2014-GS-03-231, -232, -233); and possession of a weapon during the commission of a violent crime (2014-GS-03-00234). On January 8, 2018, Petitioner proceeded to a jury trial before the Honorable Perry M. Buckner, IV. Joshua Koger, Jr. represented Petitioner, and Assistant Solicitors Tameaka Legette and Brian Hollen prosecuted the case. The jury convicted Petitioner as indicted, and Judge Buckner sentenced him to concurrent terms of forty-five years for murder and thirty years for each charge of attempted murder, and a consecutive term of five years for the weapon charge.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Taylor D. Gilliam through the filing of an Anders brief. The Court of Appeals dismissed the appeal pursuant to Anders. Petitioner filed a petition for rehearing en banc, which was denied. Thereafter, he filed a petition for writ of certiorari in the South Carolina Supreme Court, which was dismissed pursuant to State v. Lyles. The remittitur was sent September 25, 2020.

On October 19, 2020, Petitioner timely filed this application for post-conviction relief (PCR). On March 14, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Petitioner was present and represented by E. Charles Grose, Jr., Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On October 11, 2023, Judge Bonds issued an order denying relief. Petitioner filed a Motion for Reconsideration, which was denied.

Summary of Trial Testimony

At trial, Deputy Jim Evans testified he responded to a shots-fired call at the Lobster House nightclub around 3:00 a.m. on December 6, 2014; when he arrived, he spoke with security, who

indicated they had not received any reports of gunfire. About fifteen or twenty minutes later, Deputy Evans responded to another shots-fired call—this time on Barton Road. When he arrived, he noticed a green vehicle against a tree with a crowd of people gathered around; the driver and rear passenger were unresponsive. (Tr. 181-83, 189). According to medical personnel, victim Russell Smart passed away before reaching the hospital and victim Tyquin Charlton suffered life-threatening injuries from a gunshot wound in the jaw. (Tr. 204-05, 211-12). Brandon Lewis, who was in the vehicle with Smart and Charlton, was treated for a gunshot wound to his arm. (Tr. 214).

Charlton testified Petitioner was the shooter. Charlton stated he was at the Lobster House that evening and left with Smart, Jarrell Murray, and Lewis. (Tr. 246-49). Charlton testified they were at Pinewood Apartments when Petitioner—whom he knew pretty well—pulled up "driver's door to driver's door" in a white Alero; said "Y'all trying to flex on my little cousin"; and began shooting. (Tr. 250, 254-556, 260-61). Charlton identified Petitioner as the shooter to law enforcement and selected Petitioner from a photo-lineup. (Tr. 260-61, 264). Murray likewise testified that Petitioner—whom he had known "quite a while"—was the shooter. (Tr. 279-86). Murray also identified Petitioner from a photo lineup. (Tr. 290). Although Lewis identified Petitioner as the shooter to Captain Quatique Manor and Lieutenant Matt Brown, at trial he claimed he did not know the shooter. (Tr. 307-08, 314-18, 412-14, 417).

Captain Quatique Manor testified he obtained surveillance videos from the Lobster House that showed Petitioner entering a white Oldsmobile, "maybe an Alero." (Tr. 308-13). Agent Haley Nelson processed the white Alero and found paperwork with Petitioner and his mother's name. (Tr. 371-74). Tyler Sturkie, an expert in trace evidence, determined the Alero contained gunshot residue. (Tr. 375, 477-80). The State also presented evidence that Alexandre Gray and Jaquavian Williams had been arguing at the Lobster House that evening. (Tr. 219-21, 237). Gray's girlfriend,

Tracy Roberts, testified Williams contacted her later that evening looking for Gray, and she told him Gray was at Pinewood Apartments. (Tr. 221). Additionally, the State presented evidence that Gray had been in Smart's car but got out when Charlton got in. (Tr. 250, 298-302). Finally, the State presented evidence that Williams and Petitioner were cousins, which the State used to support its theory of Petitioner's motive. (Tr. 224, 552).

STANDARD OF REVIEW

The standard of review for PCR 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 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 found counsel was not ineffective for not objecting to the State's closing argument when (a) the solicitor's argument about Brandon Lewis was based on evidence presented and was not improper vouching, and (b) the solicitor's mere passing statement did not so infect the trial with unfairness as to violate due process.

Petitioner contends the PCR court erred in finding trial counsel was not ineffective for failing to object to improper closing arguments by the State. Specifically, he contends the solicitor's comment, "It is not my intent to prosecute an innocent man," was improper, and counsel was ineffective for not objecting. Petitioner further asserts counsel was ineffective for not objecting to testimony regarding the "snitching code" as improper vouching for Lewis. However, the PCR court properly found the solicitor's comments about the "snitching code" did not constitute improper vouching, and counsel thus was not ineffective for not objecting. The PCR court further properly found the solicitor's passing comment about not prosecuting an innocent man did not so infect the trial with unfairness as to violate due process.

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 received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

"A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). ***"[A] prosecutor is expected to comment on the credibility of the witnesses*** when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer." State v. Busse, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) (emphasis added). "A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial." Id. at 109, 886 S.E. 2d at 211.

"Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." Id. "The legal concept of "vouching" prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury. Id.; see also State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony.").

"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." Vasquez, 388 S.C. at 458, 698 S.E.2d at 566. 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). "On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id.

a. The solicitor's argument about Brandon Lewis did not constitute improper vouching because it was based on evidence presented and reasonable inferences from the evidence.

During closing argument, the solicitor argued,

> Let us talk about Brandon. Where is Brandon Lewis? Yeah, yeah. Brandon Lewis walked in here, y'all, and Brandon Lewis, I hated to embarrass Brandon Lewis, he came in here in shackles. I couldn't hide from you that Brandon Lewis is in Federal prison. Brandon Lewis is an inmate, has been there since 2015, he said. He will be there until 2021. He is going back there to Federal prison. Yes, he is.
>
> What did Brandon Lewis tell you? "I know LaParis Flowers. I have known LaParis Flowers for years. I saw him that night."
>
> Pat Pat shot into the car. LaParis Flowers shot. I was shot in the arm. The bullet removed.
>
> Let's talk about the inmate, the snitching, the code. It's a code. It is a code, he is sitting in prison. He has to go back. He has to go back. And because he had to go back there, he can't sit in here and identify a man and then he would have to go back and tell the boys. He has to go back to the prison. Surely they are going to ask him what he did.
>
> He had to know that. Man, I didn't do anything, man, I didn't, man, I—that is what the inmate Brandon Lewis came in here and did. That is what he did. But look at this. That goes back to what he's already said, before he was an inmate, when it was fresh on his mind, when he cried.

> Now, I've never been a man. Know many men. My daddy, my brother, strong men. Strong willed black men. Stand up. Large men. I don't see the men in my family cry unless it is very, very deep.
>
> You had another black man, a man that come in here and told you that he went to see Brandon Lewis, before he got to be—before he came. You know, code, snitch, you know, he broke down and cried when we asked him about Russell.
>
> When he asked him about Russell, and what did Brandon Lewis tell him? He told Detective Manor it was LaParis Flowers who shot. It was LaParis Flowers.
>
> And then, again, on December 6th, he said it again two times, to Lieutenant Brown from SLED. He didn't really want to, but he did. And then, the third time he identified him in the photo line-up. That is three times. That is three identifications. That is three.
>
> This right here, this is Brandon Lewis's identification. That is the third one, y'all. That's the third identification of Brandon Lewis. There separate identifications, all of the same man, LaParis Flowers.

(App. 561-63). The PCR court properly found the foregoing did not constitute improper vouching and thus was not objectionable.

Here, the solicitor's arguments about Lewis were reasonable inferences from evidence presented at trial and not improper vouching. Specifically, although Lewis denied knowing the shooter during his testimony, Officer Quatizue Manor and Lieutenant Charles Brown testified that Lewis identified Petitioner as the shooter during an interview. (App. 318-21, 415-17). Officer Manor explained Lewis cried before identifying Petitioner, shut down, later identified Petitioner again, and selected him from a photographic lineup. (App. 318-21). Likewise, Lieutenant Brown testified Lewis selected Petitioner from a lineup and appeared hesitant and scared about making the identification. (App. 419-21, 426-27). Lewis himself testified about being in prison and that he did not want to testify at trial. (App. 301-02). Based on the foregoing, it was reasonable for the solicitor to infer Lewis may have been afraid to testify Petitioner was the shooter because of what

other prisoners would think. Further, because this argument was based on evidence and reasonable inferences from evidence, it did not constitute improper vouching. See Busse, 439 S.C. at 111, 886 S.E.2d at 212 ("A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."). Thus, the PCR court properly found counsel was not deficient for not objecting to this argument.

b. The solicitor's mere passing statement did not so infect the trial with unfairness as to violate due process.

The PCR court properly found the solicitor's mere, passing statement "We do not prosecute the innocent, only the guilty" did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Initially, an improper statement, in and of itself, does not warrant reversal unless it so infects the trial with unfairness as to violate due process. In Darden, 477 U.S. 168 (1986), the United States Supreme Court concluded that although the solicitor's references to the capital defendant as "an animal" whose head he wished had been blown off were improper, they did not so infect the trial with unfairness as to violate due process. 477 U.S. at 168. If the solicitor's egregious statements in Darden did not violate due process, then the solicitor's mere passing statement here, in context, did not violate due process.

In support of this argument, Petitioner relies on Fortune v. State, where the Supreme Court of South Carolina found the following argument improper and prejudicial:

> [W]e both have jobs here. My job is to present the truth. In fact if you look in the South Carolina Code of Laws which mandates what a solicitor's job is we can't be like a normal attorney is.
>
> A normal lawyer has to advocate on behalf of his client. But on the other hand the Solicitor can't. We have to say what the truth is.
> . . . .
>
> And what that means is that we have something in law that [is] called

> nolle prosse, and [to] nolle prosse a person that has been indicted for a crime or charged with a crime. After further investigation somebody else did the crime where you can dismiss it and nolle prosse is the notif[ication] in which we dismiss the case.
>
> And [if] I know the person has done something that I think the facts show they're guilty of, then I can't nolle prosse it. I have to go forward with it. And as I said my job is to show the truth. On the other hand, 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 -- to get a not guilty verdict.

428 S.C. at 551, 837 S.E.2d at 40.

Here, unlike the extensive improper comments in Fortune, the solicitor's comment, "It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty," (App. 556) took up less than three lines of a twenty-three page closing argument. (App. 449-72). In context, this mere passing statement did not violate due process. See Fortune 428 S.C. at 550, 837 S.E.2d at 40 (***"Improper comments do not automatically require reversal if they are not prejudicial to the defendant***. On appeal, ***the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record*** . . . .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." (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (emphasis added)).

As part of her closing argument, the solicitor reminded the jury of Petitioner's presumption of innocence (App. 555) and the State's burden of proof (App. 556). The solicitor then recounted, in over twenty pages, the evidence showing the State had met its burden. In context, the mere passing statement at the beginning of this argument did not so infect the trial with unfairness as to violate due process.

Further, the trial judge properly charged the jury on the presumption of innocence and the State's burden of proof. (App. 596-98). The judge likewise properly instructed the jury that it was to consider only the law as charged by the judge. (App. 598-600). Thus, unlike the situation in Fortune (where the trial judge's curative instruction exacerbated rather than cured the improper language), the jury here was properly instructed by the trial court. Fortune, 428 S.C. at 560, 837 S.E.2d at 45. In other words, the judge's charge cured any harm rather than compounding it. Based on the foregoing, the solicitor's comment here, unlike the extensive comments in Fortune, did not so infect the trial with unfairness as to violate due process.

Finally, assuming *arguendo* the solicitor's comment about the snitching code was improper (which the State does NOT concede), that statement, in context, did not so infect the trial with unfairness as to violate due process. Although the solicitor's argument related to Lewis was more than a mere passing statement, the solicitor's *comment* about the snitching code was brief and conclusory. Specifically, the solicitor stated, "Let's talk about the inmate, the snitching, the code. It's a code. It is a code, and he is sitting in prison." (App. 562). The solicitor did not define "snitching" or explain the code. Rather—consistent with evidence that Lewis was in prison and was afraid when he identified Petitioner to police—the solicitor argued, "He has to go back. He has to go back. And because he had to go back there, he can't sit in here and identify a man and then he would have to go back and tell the boys. He has to go back to prison. Surely they are going to ask him what he did." (App. 562). This argument was a reasonable inference based on the evidence and not objectionable. Further, the comment about the snitching code was too conclusory to infect the trial with unfairness as to violate due process. Thus, the PCR court properly found Petitioner did not prove prejudice.

II. The PCR court properly found Petitioner did not prove counsel was ineffective for failing to object to truth-seeking language when (a) as a matter of law, the truth-seeking language did not prejudice Petitioner because it was not charged in conjunction with the reasonable doubt charge or the circumstantial evidence charge, and (b) Petitioner did not point to any caselaw that prohibits attorneys from using truth-seeking language and thus did not prove deficiency from counsel's failure to object to the solicitor's truth-seeking language.

Petitioner next contends the PCR court erred in finding trial counsel was not ineffective for not objecting to "truth seeking" language by the trial court and the solicitor. However, the PCR court properly found that under the controlling caselaw, the truth-seeking language did not prejudice Petitioner because it was not charged in conjunction with the reasonable doubt charge or the circumstantial evidence charge. Thus, as a matter of law, Petitioner cannot show prejudice. Further, Petitioner has not pointed to any caselaw that prohibits *attorneys* from using truth-seeking language and thus did not meet his burden of proving deficiency from counsel's failure to object to truth-seeking language by the solicitor.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), the South Carolina Supreme Court found that although truth-seeking language by the trial court was not appropriate, it did not shift the burden of proof or prejudice the defendant. There, the trial court instructed the jury,

> Obviously you do not determine the truth or falsity of a matter by counting up the number of witnesses who may have testified on one side or the other.
>
> Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is to seek the truth, to seek the truth regardless of from what source that truth may be derived.
>
> Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

Id. at 26, 538 S.E.2d at 251. In examining this issue, the Aleksey Court concluded,

> There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of witnesses. The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof.

Id. (footnote omitted)).

In State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), the South Carolina Supreme Court found the court's preliminary comments using truth-seeking language were erroneous, but they did not prejudice the defendant because "they were a mere statement to the jury and not a charge on the law," and they "were not linked to either the reasonable doubt or the circumstantial evidence charges." In affirming, however, the Court "agree[d] with Appellant that a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." Id.

a. As a matter of law, the comments did prejudice Petitioner because the truth-seeking language was not charged in conjunction with the reasonable doubt charge or the circumstantial evidence charge.

The PCR court properly found Petitioner did not prove prejudice because, as a matter of law, the truth-seeking comments were not prejudicial. Under Beaty, the trial court's pretrial truth-seeking comments were not prejudicial. See id. Further, under Aleksey, the truth-seeking language was not prejudicial because it was not given in conjunction with the reasonable doubt or circumstantial evidence charges. Thus, as a matter of law, the truth-seeking language here did not shift the burden of proof or constitute reversible error, and Petitioner cannot demonstrate prejudice from counsels' failure to object. See Beaty, 423 S.C. at 33, 813 S.E.2d at 506 ("In Aleksey, we found there was no reversible error because the "seek the truth" language was charged in conjunction with the credibility of witnesses charge, and not with either the reasonable doubt or

circumstantial evidence charges.").

In fact, even in Beaty—which Petitioner relies exclusively on in arguing this language was improper—the South Carolina Supreme Court found the improper truth-seeking comments by the trial court did not prejudice the defendant. See Beaty, 423 S.C. at 32-34, 813 S.E.2d at 505-06 (2018) (affirming the conviction and finding defendant not prejudiced by court's pretrial truth-seeking comments when these comments "were a mere statement to the jury and not a charge on the law" and "the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges"). Thus, the PCR court properly found, as a matter of law, that Petitioner did not prove prejudice.

b. Petitioner has not pointed to any caselaw that prohibits attorneys from using truth-seeking language; thus, Petitioner did not prove deficiency from counsel's failure to object to the solicitor's truth-seeking language.

The PCR court properly found that Petitioner did not set forth any law at the time of Petitioner's trial that prohibited ***attorneys*** from using truth-seeking language. Although Aleksey and Beaty found such language improper by ***courts***, it did not prohibit attorneys from making such arguments. See Aleksey, 343 S.C. at 27, 538 S.E.2d at 251 ("[W]e have urged ***trial courts*** to avoid using any 'seek language when charging jurors on either reasonable doubt or circumstantial evidence . . . . (emphasis added)); Beaty, 423 S.C. at 34, 813 S.E.2d at 506 ("[A] ***trial judge*** should refrain from informing the jury . . . that its role is to search for the truth, or to find the true facts, or to render a just verdict." (emphasis added)); see also State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("[W]e instruct the ***trial judge*** to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties." (emphasis added)). Because the role of an attorney as an advocate is different than the role of a judge, there are arguments that are proper for an attorney that would be improper for a judge to

charge or comment upon. Although it is improper for ***judges*** to use truth-seeking language, Petitioner has not pointed to any law that indicates it is improper for attorneys to use truth-seeking language. In fact, PCR counsel's questions on this issue all related to whether appellate courts had prohibited *judges* from using truth-seeking language—not whether appellate courts had prohibited attorneys from using truth-seeking language.[1] (App. 807-09). Petitioner likewise did not point to any cases that prohibit attorneys from using truth-seeking language in his petition to this Court. Thus, Petitioner has not met his burden of proving deficiency from counsel's failure to object to the solicitor's truth-seeking language. Cf. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se."). Likewise, under Aleksey and Beaty, as set forth above, Petitioner—as a matter of law—cannot show prejudice. Thus, the PCR court properly denied this claim.

III. The PCR court properly found counsel was not ineffective for not presenting an alibi defense when (a) probative evidence supports the PCR court's finding that counsel was not deficient and (b) based on the testimony presented and the PCR court's credibility findings, the PCR court properly found Petitioner did not prove prejudice.

Petitioner contends the PCR court erred in finding counsel was not ineffective for not investigating and presenting an alibi defense. However, probative evidence supports the PCR

[1] Petitioner's assertion that the State conceded the *solicitor's* truth-seeking language was improper is taken out of context and incorrect. At the PCR hearing, the State argued, "Regarding truth-seeking language, the State acknowledges that Beaty did exist at the time of this trial. So there was a directive from our courts at that time to stop using this truth seeking language." This statement was merely intended to convey to the PCR court that although Beaty was published after Petitioner's trial, a prior version of Beaty existed at the time of Petitioner's trial. Critically, this summary statement did not go into the nuance of *who* the opinion prohibited from using the truth-seeking language, and the State has not conceded that Beaty prohibits *attorneys* from using truth-seeking language. Further, Beaty itself is the best source for what it intended, and the plain language of Beaty admonishes trial courts—*not attorneys*—from using truth-seeking language.

court's finding that counsel was not deficient for not further investigating and presenting an alibi defense. Further, the PCR court properly found Jaquavian Williams and Kimberly Williams did not create an alibi for Petitioner, and Petitioner was not prejudiced by counsel's failure to call them as witnesses. Finally, the PCR court—which was in a better position to judge demeanor and credibility—found Nix's and Petitioner's self-serving testimony not credible, and this Court should defer to those findings.

At the PCR hearing, Petitioner denied being at Pinewood Apartments at the time of the shooting. He acknowledged being at the Lobster House and testified he left with his brother Antron Williams between 2:00 and 2:42 a.m. He stated his girlfriend Kendall Nix left at the same time he did in a separate car. He explained,

> I was right behind Kendall Nix, as well as her cousin. We just was in separate cars, I was right behind them, and we ended up at—at Ashley's house. And I ended up giving the keys to my brother, and I got in the car with Kendall Nix.

Petitioner stated he was driving his mother's white Alero, which he gave to his brother. Thereafter, Petitioner testified he rode with Nix to their home in North Augusta. Petitioner testified the following day Nix received phone calls from people indicating a white car was involved in the shooting and those people "might have said I had something to do with it." He testified he went to the Police Department that day and provided an alibi, and they did not arrest him at that time.

Petitioner entered statements from Nix and his cousins Kimberly Williams and Jaquavian Williams. Petitioner stated he spoke with trial counsel about presenting an alibi defense, but counsel did not contact the witnesses or present them at trial. On cross-examination, Petitioner acknowledged police found gunshot residue in the car he was driving that night. When asked whether he asked anyone to clean the car, he replied, "My brother, he stated that I left a towel for him to clean the car, but I never left a towel for him to clean the car."

Nix testified she was at the Lobster House that evening, she left and went to "Ashley's" house, and Petitioner left behind her with "Tron." When asked what happened when she arrived at Ashley's house, Nix testified, "Tron went inside, got my phone charger. . . . I left my clothes there, came back to the car, [Petitioner's brother] came, asked [Petitioner] can he hold the car, can he get some money from her, and that was it." She stated she and Petitioner then drove to North Augusta. Nix testified she did not go to Pinewood Apartments that evening. Although she initially testified she never spoke with trial counsel or interacted with him, she later acknowledged meeting him at a fast-food restaurant to provide payment. ***Nix admitted she did not tell trial counsel she could provide an alibi for Petitioner.***

Nix initially testified she left the Lobster House around 2:00 a.m. After reviewing her statement, she testified she told law enforcement she left round 2:42 a.m. She stated Petitioner left the Lobster House at the same time she did, "was right behind [her] at Ashley's house," and they left together to go to North Augusta.[2]

Jaquavian, Petitioner's cousin, recalled seeing Petitioner and Nix at the Lobster House that night. He stated Petitioner and Nix left while Jaquavian was still at the club, and he did not see Petitioner after Petitioner left the club. Likewise, Jaquavian's mother Kimberly recalled seeing Petitioner and Nix at the club, but she testified they left after learning their son was acting cranky. Kimberly testified she did not see them after they left the club, she did not know if they left together or separately, and she did not see Petitioner again that night.

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[2] In her supplemental statement to police, which was signed at 7:12 pm on December 7, 2014, Nix stated,

> After leaving the club around 2:42 am, I went and drop my cousin and her stepsister off. Stayed there ***and 10 mins later LaParis pull up*** and drop Tron off, he then gave Chavis the keys and we went back to North Augusta. He then said he tired of everybody lien [sic] and if something happen take care of his child. This is the correction to my first statement.

(emphasis added). This was entered into evidence at the PCR hearing as part of Exhibit 2.

a. Probative evidence supports the PCR court's finding that counsel was not deficient for not investigating or presenting an alibi.

Although Petitioner testified he spoke with counsel about presenting an alibi, trial counsel ***did not recall Petitioner mentioning an alibi defense. Likewise, trial counsel believed he met Nix on more than one occasion and stated she never mentioned being with Petitioner that night.*** Counsel recalled seeing Jaquavian and Kimberly's statements in discovery but stated Petitioner never asked him to speak to them. He agreed he did not interview Nix, Kimberly, or Jaquavian.

Here, where the evidence is conflicting, this Court should defer to the PCR court's credibility findings. See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) ("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."). The PCR court found credible trial counsel's testimony that Petitioner never raised an alibi defense, Petitioner never asked him to speak to the witnesses, and Nix did not mention being with Petitioner that night.[3] The PCR court likewise found not credible Petitioner's testimony that he told counsel he had an alibi. Based on the foregoing testimony and credibility findings, probative evidence supports the PCR court's finding that counsel was not deficient for not further investigating and presenting an alibi defense. See Strickland, 466 U.S. at 691("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.").

Further, the PCR court further properly found the witness statements were insufficient to put counsel on notice of a potential alibi defense. (Supp. App. 8-10). In fact, Kimberly's statement

[3] In fact, Nix herself admitted she did not tell counsel she could provide an alibi for Petitioner despite meeting him to provide payment on Petitioner's behalf.

indicated two friends called her the day after the shooting and told her Petitioner "was shooting somebody in Pinewood Apartments." (Supp. App. 8). Jaquavian and Kimberly's PCR testimony likewise did not create an alibi; although they acknowledged seeing Petitioner at the Lobster House that night, they both stated they did not see him after he left. Here, where the shooting did not occur at the Lobster House, and Jaquavian and Kimberly's testimony did not place Petitioner at the Lobster House at the time of the shooting, their testimony did not create an alibi. Thus, counsel was not deficient for not further investing and pursuing an alibi defense related to them.

Further, Nix's statement to police indicated she left the club around 2:42 a.m., and Petitioner arrived at the home she went to *ten minutes later*. (Supp. App. 5, 7). Based on counsel's testimony (which the PCR court found credible) that Allendale is not a big city, "so you could probably get to any point of Allendale within five to ten minutes"; the ten-minute gap of time in Nix's statement where she was not with Petitioner; and the fact Nix never told counsel she could provide an alibi for Petitioner, counsel's failure to further investigate her as an alibi witness was reasonable under prevailing professional norms and not deficient. Thus, the PCR court properly found Petitioner did not prove deficiency.

b. Based on the testimony presented and the PCR court's credibility findings, the PCR court properly found Petitioner did not prove prejudice.

The PCR court properly found the testimony of Kimberly and Jaquavian did not create an alibi defense. Kimberly and Jaquavian both testified they did not see Petitioner after he left the Lobster House that morning—making their testimony insufficient to establish an alibi. Thus, Petitioner did not prove prejudice from counsel's failure to call them as alibi witnesses at trial

Further, the PCR court, who had the opportunity to view Petitioner's and Nix's testimony at the PCR hearing, found their testimony concerning an alibi to be self-serving and not credible, and this Court should defer to that credibility finding. Critically, although Nix testified Petitioner

followed her when she left the club, in a supplemental statement signed the same night as her original statement, she indicated she "drop[ed her] cousin and her stepsister off, stayed there ***and 10 minutes later [Petitioner] pull[ed] up*** and drop[ped] Tron off." (Supp. App. 7). This statement contradicted her PCR testimony that Petitioner was "right behind me at Ashley's house"—lending evidentiary support (though not required for a credibility finding) to the PCR court's finding that she was not credible. The PCR court further correctly found that based on the evidence presented at trial—including three witness identifications and evidence of gunshot residue in the car Petitioner admitted he was driving—it was not reasonably likely the outcome would have been different had Petitioner presented the alibi defense he presented at the PCR hearing. Thus, Petitioner did not prove prejudice.

IV. The PCR court properly found counsel was not ineffective for not introducing video recordings of witness statements when (a) counsel articulated a valid strategy for not introducing the videos and thus was not deficient and (b) Petitioner failed to establish a legal basis for admitting the videos and thus did not prove prejudice.

Petitioner contends counsel was ineffective for not introducing into evidence video recordings of Lewis, Murray, and Charleton to show "improper and highly suggestive tactics used in obtaining the statements."[4] However, the PCR court properly found counsel articulated a valid strategy in not admitting the videos in that he impeached the witnesses through cross-examination and wanted to preserve the right to last-closing argument. Further, Petitioner did not set forth a legal basis under which the videos would have been admitted at trial. Thus, Petitioner did not prove

[4] The PCR court did not consider whether counsel was ineffective for not attempting to enter *Lewis's* recorded interview, and although Petitioner filed a Motion to Reconsider, he did not raise the Court's failure to address this issue in his Motion—leaving it unpreserved. Further, it strains credibility to suggest counsel was ineffective for not attempting to enter Lewis's recorded statement wherein he implicated Petitioner as the shooter when Lewis himself did not identify Petitioner as the shooter at trial.

deficiency or prejudice.

> ***Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless*** the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, ***if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.***

Rule 613(b), SCRE (emphasis added).

a. Counsel articulated a valid strategy for not introducing the videos and thus was not deficient.

At the PCR hearing, counsel testified extensively about his cross-examination of the witnesses and his attempt to impeach them. He further testified that had he introduced the videos, he would have lost the last-closing argument—which he discussed with Petitioner. Based on the forgoing testimony—which the PCR court found credible—the PCR court properly found counsel articulated a valid strategy of impeaching the witnesses through cross-examination. Further, based on the transcript, the PCR court properly found counsel effectively cross-examined Lewis, Carleton and Murray, and his performance in this regard was reasonable under prevailing professional norms. (Tr. 266-73, 276, 291-97). Thus, probative evidence supports the PCR court's finding that Petitioner did not prove deficiency.

b. Petitioner failed to establish a legal basis for admitting the videos and thus did not prove prejudice.

It is Petitioner's burden to prove his claims, and part of that burden includes establishing that evidence he believes should have been admitted was in fact admissible. However, Petitioner did not set forth a legal basis for the admissibility of these videos. Specifically, Petitioner did not point to what portion of the recordings could have been used to impeach Carleton or Murray or

what statements Carleton and Murry denied making—which would have led to the admissibility of the recordings under the Rules of Evidence.[5] See Rule 613(b), SCRE ("[I]f a witness admits making the prior statement, extrinsic evidenced that the prior statement was made is inadmissible."). Petitioner thus did not meet his burden of showing the videos would have been admitted, and the PCR court properly found he did not prove prejudice.

V. The PCR court properly found counsel was not ineffective for not objecting to the inferred malice charge because at the time of Petitioner's trial and under the facts of this case, the charge was proper. Further, although Petitioner's argument that the PCR court should have applied Belcher is unpreserved, the PCR court properly applied the law that existed at trial because Strickland and its progeny require courts to analyze counsel's conduct under the law that existed at the time of trial, and Burdette itself states it does not apply to PCR.

Although an instruction that malice can be inferred from the use of a deadly weapon is no longer good law in South Carolina, the case prohibiting this charge came out *after* Petitioner's trial. See State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019) ("A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.").[6] At the time of Petitioner's trial, courts could give this charge as long as no evidence existed that would reduce, mitigate, excuse, or justify the homicide. See State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) ("[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill)

[5] Admittedly, Lewis denied at trial knowing who the shooter was, although he implicated Petitioner as the shooter to law enforcement. Respondent submits it is not reasonably likely having Lewis's recorded video *wherein he implicated Petitioner as the shooter* would have led to Petitioner's acquittal. Respondent further submits it would have been patently unreasonable for trial counsel to seek to introduce Lewis's video at trial.

[6] The Burdette court acknowledged it was overruling precedent and found its ruling "will not apply to convictions challenged on post-conviction relief." 427 S.C. at 505, 832 S.E.2d at 583.

caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." overruled by Burdette, 427 S.C. at 490, 832 S.E.2d at 575)). ***Here, no evidence was presented that would reduce, mitigate, excuse, or justify this homicide, making this charge proper at the time of Petitioner's trial.*** Because this charge was proper at the time of trial and under these facts, the PCR court properly found counsel was not deficient.

In arguing that the PCR court erred, ***Petitioner asks this Court to do what is prohibited by Strickland and its progeny—find counsel ineffective for failing to anticipate changes in the law.*** However, under Strickland and its progeny, counsel's actions must be measured under the law that existed at the time of trial. See Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("[W]e do not require attorneys to be clairvoyant in anticipating changes to the law . . ."); Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("[R]easonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."). Critically, ***it would be reversible error for a PCR court to find counsel ineffective based on law that did not exist at the time of trial.*** See Teamer, 416 S.C. at 183, 786 S.E.2d at 115 ("[T]he PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se."). The PCR court properly applied the law that existed at the time of trial in concluding counsel was not ineffective.[7] This is even more true because ***Burdette itself states it does not apply to PCR***. See Burdette, 427

[7] Petitioner's attempt to create a new duty that would require trial lawyers to "remain aware of cases presently pending before" appellate courts was likewise not raised to the PCR court and is not preserved. Notwithstanding this, such a duty does not exist, and an appeal from the denial of PCR is not the proper venue for creating a new duty. Cf. Pantovich v. State, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019) ("***Fundamentally, a collateral review proceeding is ill-suited for announcing a new rule of substantive law*** pertaining to an underlying trial; appellate courts are to do so only in the rarest of circumstances. This is especially true in a retrospective PCR analysis under Strickland, which seeks to determine whether counsel was ineffective at the time of the alleged error."(internal footnotes omitted)).

S.C. at 505, 832 S.E.2d at 583 (2019) ("[T]oday's ruling will not apply to convictions challenged on post-conviction relief."). Based on the foregoing, the PCR court properly applied the law that existed at the time of trial in finding counsel was not deficient.

CONCLUSION

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

Respectfully Submitted,

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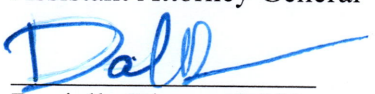

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This 27th day of January, 2024.