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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-001223

Maurice Anthony Odom,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

1. Did the PCR court err in determining that Petitioner failed to prove he was prejudiced by trial counsel's deficient performance where Petitioner declined to testify in his own defense because trial counsel incorrectly advised Petitioner that if he testified at trial the State would be able to impeach him with prior convictions that were outside of the ten year time limit imposed by Rule 609 when the State had not served trial counsel with written notice of their intent to use the remote in time convictions?

2. Did the PCR court err in finding trial counsel provided effective representation where counsel failed to object to numerous improper statements made by the solicitor during opening and closing arguments which improperly vouched for the State's witnesses and commented on Petitioner's right to remain silent?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Petitioner failed to meet his burden of proving that he was prejudiced by Counsel's advising him the State would seek to impeach him with his prior convictions if he testified at trial, where, at the evidentiary hearing, Petitioner did not show what his testimony would have been if he had testified at trial.

2. The PCR court correctly found Counsel was not ineffective for failing to object to certain statements made by the Solicitor during opening and closing arguments because the Solicitor's statements were not improper.

STATEMENT OF THE CASE

Just after 2:43 a.m. on November 11, 2011, Deputy Nick Moye of the Laurens County Sheriff's Office heard a security alarm going off as he drove by a BP gas station and convenience store located on Highway 72 in Clinton, South Carolina, a short distance away from an exit off of Interstate 26.[1] (App. p. 75; pp. 78–79; p. 93; p. 263). Upon hearing the alarm, Deputy Moye notified dispatch of what he had heard, learned the store's security company had just reported the alarm to law enforcement, and drove towards the store to investigate. (App. pp. 76–77). As he approached the store, he observed one of the store's side windows had been shattered, and, when he drove closer, he saw a man climb out of the broken window and flee towards the back of the store. (App. pp. 81–84; p. 90). In response, Deputy Moye pursued the fleeing man but was unable to apprehend him before the man escaped into a wooded area directly behind the store. (App. pp. 83–84). The deputy then returned to the store, secured the scene, and waited for other officers to arrive. (App. p. 83).

Shortly thereafter, numerous law enforcement officers arrived at the scene along with Hardik Patel, the owner of the store, and his brother, Ramesh Patel. (App. p. 84; pp. 91–94). Once the store was secured, the Patels looked inside, discovered substantial damage to the store, and found merchandise scattered all over the store's floor. (App. p. 83). They then reviewed the surveillance footage captured by the store's security system and observed two masked burglars smash one of the store's windows with a rock, enter the store, and fill black trash bags with cartons of cigarettes along with money from a cash register drawer. (App. pp. 102–04; pp. 111–13).

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[1] The store's hours of operation were 8:00 a.m. to 10:00 p.m. (App. p. 92).

Additionally, they observed one of the burglars smash the store's office's mirrored window, enter the office, and steal more cigarettes and money from inside. (App. p. 104; p. 107). The brothers then took an inventory of the money and goods gathered by the burglars during the break-in; it was determined that those items had a cumulative value of over $5,000. (App. pp. 113–14; pp. 122–23).

Meanwhile, the investigating officers attempted to locate the suspects involved in the burglary and found a black Chrysler 300 parked nearby along the eastbound side of Interstate 26 a short distance away from an exit ramp. (App. p. 264; p. 268). Officer Tyrone Goggins of the Clinton Department of Public Safety then responded to the vehicle's location, verified the vehicle had not been there long due to the fact its engine was still warm, and learned the vehicle was registered to Petitioner Maurice Anthony Odom at an address in Wilmington, North Carolina. (App. p. 261; pp. 264–65; p. 267). In response, Officer Goggins asked another officer to remain in position to watch the vehicle while he confirmed there were no other vehicles parked along Interstate 26 in that area. (App. pp. 268–70; p. 272). After verifying Petitioner's vehicle was the only vehicle in the area, Officer Goggins returned to the store, requested assistance from a State Law Enforcement Division ("SLED") tracking team, met with the victims, reviewed the surveillance footage of the incident, and inspected the scene. (App. pp. 272–80). During his inspection, the officer located the burglars' abandoned trash bags, which were filled with cartons of cigarettes from the store, along with a rock on the floor of the store's office. (App. p. 171; pp. 278–80). Officer Goggins then collected the rock as evidence and returned the stolen property to the Patels after it was inventoried. (App. p. 114; p. 278; pp. 281–82).

Shortly thereafter, at approximately 5:00 a.m., members of the SLED tracking unit, including Senior Agent Reid Creswell, arrived at the scene of the incident. (App. pp. 188–90; p.

193; p. 202; p. 215; p. 237; p. 251). Upon arriving, Senior Agent Creswell was advised of the specific location where the suspect entered the wooded area behind the store after the break-in and verified the suspect's trail had not been contaminated by anyone else entering the woods. (App. pp. 208–09; p. 216; p. 237). He then deployed Judy, a bloodhound-bluetick hound mixed-breed dog trained in tracking human scents, at a neutral location near where the suspect entered the wooded area and followed her into the woods. (App. pp. 191–92; pp. 207–08; p. 239). Shortly after Judy entered the wooded area, she indicated she had picked up a scent and began tracking the scent through the woods. (App. pp. 218–19; pp. 240–41). As Senior Agent Creswell followed Judy through the woods, he personally observed signs of environmental disturbances confirming a person had recently fled along the path Judy was tracking and eventually began observing footprints. (App. p. 219; p. 242; pp. 246–47). As they continued along the trail, Judy led Senior Agent Creswell to a location near Interstate 26 where the footprints the agent had observed converged with another set of footprints. (App. p. 222; pp. 243–46). Judy then led Senior Agent Creswell to a location along Interstate 26 directly across from where Petitioner's car had been parked a short time earlier before she lost the suspect's scent.[2] (App. p. 212; p. 214; p. 222; pp. 248–49). However, by that time, Petitioner's car was no longer present because someone had removed it from its position along the side of Interstate 26 when the officer who had been asked to maintain surveillance of the car failed to do so during the time period the tracking team was following the suspect's trial. (App. pp. 286–87).

Subsequently, on November 18, 2011, Officer Goggins drove to an address he found for

[2] During trial, Senior Agent Creswell explained vehicles rapidly travelling along Interstate 26 would have dissipated the scent that had been left there by the suspect, which explained why Judy lost the trail at that location. (App. pp. 211–12; pp. 223–24; p. 247).

Petitioner in Barnwell, South Carolina, in an attempt to speak with him about the incident and see if his vehicle was at that address. (App. pp. 290–91). After arriving at Petitioner's address, Officer Goggins was unable to locate Petitioner. (App. p. 292). However, he found Petitioner's vehicle parked there and verified it was the same vehicle that had been parked along Interstate 26 at the time of the incident. (App. pp. 297–98). Furthermore, the officer located Christopher Mixon at that location, and Mixon was taken into custody based on outstanding warrants for his arrest. (App. p. 292). Thereafter, Officer Goggins spoke with Mixon, Mixon inculpated himself and Petitioner in the burglary of the BP gas station and convenience store on the date of the incident, and Petitioner was arrested for his crimes. (App. p. 181; p. 296). Petitioner was then indicted for second-degree burglary, grand larceny, and conspiracy, and he proceeded to trial. (App. p. 13; Indictments).

Mixon testified for the prosecution and recounted the details of his and Petitioner's roles in the incident. (App. pp. 153–54). Specifically, Mixon stated Petitioner drove the two of them to the BP gas station and convenience store located on Highway 72 on November 11, 2011, they dropped off a rock Petitioner had brought with them at the store, and Petitioner then drove them away from the store and parked his vehicle along the side of Interstate 26. (App. pp. 155–59). After that, Mixon indicated the two of them walked back to the store, Petitioner smashed one of the store's windows with the rock, an alarm went off, and they climbed through the window and began loading the store's tobacco products into some trash bags they had brought along with them. (App. pp. 160–63; p. 165). Shortly after that, Mixon testified he saw a police officer arrive at the store, Petitioner also saw the officer, and Petitioner quickly fled back out of the broken window and away from the scene. (App. pp. 166–67). After Petitioner fled, Mixon stated he ran across the street from the store, went into the woods, and began making his way back to Petitioner's

vehicle. (App. pp. 167–68). Roughly two hours later, Mixon testified he met back up with Petitioner and the two of them fled from the area in Petitioner's car. (App. pp. 169–70). Mixon stated he then received some money from Petitioner for his participation in the break-in, returned home, and was arrested some time later. (App. pp. 170–71).

Officer Goggins testified about his investigation into the burglary, which led to Petitioner's arrest. (App. pp. 261–98). During his testimony, Officer Goggins confirmed to the jury Petitioner's car was parked along Interstate 26 at the time of the incident and its engine was still warm at that time. (App. pp. 264–68). Additionally, the officer stated someone removed the car from the area during the search for the burglars at a time when no officers were watching the vehicle, and he noted the SLED tracking team tracked the suspect who fled through the woods to a location in close proximity to where Petitioner's car had been parked. (App. pp. 268–69; pp. 286–88). Furthermore, Officer Goggins noted Petitioner's vehicle was later found at Petitioner's home in Barnwell just a few days after the incident in the same area where he located Petitioner's accomplice in the crimes. (App. pp. 288–93; pp. 297–98).

Petitioner was indicted at the February 2012 term of the Laurens County Grand Jury for burglary (2012-GS-30-311), criminal conspiracy (2012-GS-30-314), and grand larceny (2012-GS-30-317). Eli Wiygul, Esquire ("Counsel"), represented him. Deputy Solicitors Warren Mowry and C. Dale Scott prosecuted the case. On June 9–11, 2014, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker, after which he was found guilty as indicted. Petitioner was sentenced to imprisonment for fifteen years for burglary (second degree, violent), five years for criminal conspiracy, and five years for grand larceny. All sentences were to run concurrently.

Petitioner appealed, and the South Carolina Court of Appeals affirmed Petitioner's conviction by an unpublished opinion. *State v. Odom*, Op. No 2015-UP-561 (Ct. App. filed Dec.

23, 2015). The remittitur was sent January 8, 2016.

Petitioner filed an application for post-conviction relief on March 17, 2016, and an amended application on January 8, 2021. Respondent filed a return on March 30, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened before the Honorable J. Mark Hayes, II, circuit court judge, via the WebEx virtual courtroom platform on January 26, 2021. The PCR court denied and dismissed the application with prejudice on August 9, 2021. Petitioner filed a motion for reconsideration on August 12, 2021, and a virtual hearing was held on June 22, 2022. On August 19, 2022, the PCR court denied Petitioner's motion for reconsideration.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Jessica M. Saxon, Esquire, Petitioner filed a petition for writ of certiorari on March 29, 2023. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR court correctly found Petitioner failed to meet his burden of proving that he was prejudiced by Counsel's advising him the State would seek to impeach him with his prior convictions if he testified at trial, where, at the evidentiary hearing, Petitioner did not show what his testimony would have been if he had testified at trial.

Petitioner argues the PCR court erred in finding no prejudice from Counsel's advice that the State would seek to impeach him with his prior convictions, which induced Petitioner not to testify at his trial. However, the burden was on Petitioner to establish, at the evidentiary hearing, what his testimony at trial would have been but for Counsel's advice. The PCR court correctly found Petitioner failed to meet that burden.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its

"reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003); *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. A PCR applicant cannot prove he was prejudiced by not being able to present testimony during his trial unless he offers that testimony at the PCR hearing. *Dempsey v. State*, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Mere speculation as to what testimony would have been presented at trial cannot satisfy the applicant's burden of showing prejudice. *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). The applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

Petitioner argues Counsel was ineffective for advising him that the State would attempt to impeach him with evidence of his prior convictions for burglary and criminal sexual conduct if he testified at his trial. He contends this advice was deficient because those convictions were outside the ten-year time limit imposed by Rule 609, SCRE, and the State did not provide written notice of its intent to use the convictions against him as required by the Rule. Petitioner further contends Counsel's advice prejudiced him because, based on that advice, he chose not to testify at trial.

Petitioner's argument is meritless because, as the PCR court found, Petitioner never presented what his testimony would have been had he chosen to testify. *See, e.g.*, *Dempsey*, 363 S.C. at 365, 610 S.E.2d at 814. Without any showing by Petitioner as to what his testimony at trial would have been, the PCR court could only speculate on the content of Petitioner's testimony and the effect it would have had on the outcome of his case. *See Glover*, 318 S.C. at 499, 458 S.E.2d at 540. Therefore, the PCR court correctly found Petitioner failed to meet his burden of proof as to the prejudice prong of his ineffective assistance claim.[3]

Petitioner now claims he *did* present evidence at the PCR hearing of what his testimony would have been had he testified at trial: both he and Counsel testified that Petitioner discussed with Counsel his theory that Mixon and another unknown individual used his car without his knowledge to commit the burglary. However, this evidence was only mentioned during the PCR hearing in the context of whether Counsel properly challenged Petitioner's ownership of the car, *not* the context of what Petitioner would have testified to if he had taken the stand at trial. (App.

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[3] Because the lack of prejudice was dispositive, the PCR court declined to reach the deficiency prong, citing *Strickland*, 466 U.S. 668 (1984) (holding, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.).

p. 538, lines 6–17; p.574, line 25–p.577, line 6). What a criminal defendant discusses privately with Counsel is not the same thing as what a defendant would testify to at trial.

Furthermore, this argument—that Petitioner would have testified consistently with what he told Counsel about Mixon's use of the car without his knowledge—was never presented to the PCR court, even in Petitioner's motion for reconsideration. In that motion, Petitioner merely states that "Petitioner wanted to testify. . . . Petitioner has every incentive to tell his story to the jury . . . . And this Court has no reason to believe that the Petitioner would have confessed his guilt during his testimony." (App. pp.670–71). Although Petitioner claimed he wanted to "tell his story," he did not attempt to articulate *what his story would have been.*

Petitioner also did not make this argument at the hearing on Petitioner's motion for reconsideration. Instead, Petitioner merely argued he would have denied the charges: "the Attorney General is complaining about we don't know what my client's testimony would have been. I am just thinking, are you kidding. Three words, I didn't do it. That was what the testimony was going to be." (App. p. 707, lines 16–20). In fact, Petitioner openly invited the PCR court to speculate on what Petitioner's testimony would have been: "I didn't do it and then you can extrapolate from that. This guy is making this stuff up about me, whatever reason. But, again, it all boils down to I didn't do it." (App. p. 707, lines 22–24). The PCR court correctly declined this invitation.[4]

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[4] Petitioner repeatedly states that the only evidence connecting Petitioner to the burglary was Mixon's testimony. This is not accurate—a key piece of evidence was the fact that the burglars' trail led to the part of I-26 where Petitioner's car was parked. (App. pp. 246–49; pp. 287–88). In addition, Mixon—who was undisputedly one of the burglars—was apprehended at Petitioner's house, while the car was parked nearby. (App. pp. 292; pp. 296–98). In the face of this evidence, plus Mixon's testimony, there is not a substantial likelihood that the result of the proceeding would have been different had Petitioner presented his self-serving testimony that "I didn't do it."

Finally, although the PCR court did not reach the merits of the deficiency prong, the State argues as an additional affirming ground that Counsel's warning to Petitioner that the State intended to impeach him with his prior convictions was not deficient. While the convictions were outside the ten-year period imposed by Rule 609(b), SCRE, that does not render evidence of the convictions inadmissible; the trial court could still have allowed the State to use the convictions if it determined that the probative value of the evidence substantially outweighed its prejudicial effect. *See* Rule 609(b), SCRE. And although the Rule requires the proponent of the evidence to give "sufficient advance written notice," the court of appeals has held that the purpose of this requirement is satisfied as long as there is no unfair surprise to the other party. *See State v. Colf*, 332 S.C. 313, 321, 504 S.E.2d 360, 363–64 (Ct. App. 1998) (holding Rule 609(b), SCRE, does not require reversal when evidence of convictions more than ten years old is admitted without advance written notice, as long as the defense had actual knowledge of the State's intent), *citing U.S. v. Sloman*, 909 F.2d 176, 180 (6th Cir. 1990) (interpreting the identical federal Rule 609(b) and holding that, because the purpose of the notice provision is to prevent surprise, the defendant's actual knowledge of the prosecution's intent to use an older conviction removed all prejudice). In this case, it is undisputed that Counsel had advance notice of the State's intent to impeach Petitioner with evidence of his prior convictions. It was not professionally unreasonable for Counsel to caution Petitioner about this, rather than relying on the evidence being ruled inadmissible based solely on technical non-compliance with the written notice requirement—a requirement that our appellate courts have excused where, as in this case, the defense clearly knew about the State's plan to use the prior convictions. *See Colf*, 332 S.C. at 321, 504 S.E.2d at 363–64.

For these reasons, the decision of the PCR court was not erroneous. The State asks that this Court affirm the decision of the PCR court.

II. The PCR court correctly found Counsel was not ineffective for failing to object to certain statements made by the Solicitor during opening and closing arguments because the Solicitor's statements were not improper.

Petitioner argues Counsel was ineffective for failing to object to certain statements made by the Solicitor during opening and closing arguments. Specifically, Petitioner contends the Solicitor vouched for the credibility of Mixon and Officer Goggins. Petitioner also contends that the Solicitor commented on Petitioner's exercise of the right to remain silent by saying the defense had access to Mixon's interview with law enforcement but chose not to introduce it, which the Solicitor argued defeated the claim that Mixon's statements in the interview were inconsistent with his testimony at trial. Finally, Petitioner argues the Solicitor again commented on Petitioner's silence by referring to Mixon's testimony as uncontradicted. Petitioner claims the PCR court erred in finding Counsel was not ineffective for failing to object to these arguments.

This claim is without merit. The PCR court correctly found that none of the challenged arguments made by the Solicitor were improper; therefore, Counsel could not have been ineffective for failing to object to them.

Vouching

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). "If a

Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "Vouching" occurs when a solicitor makes explicit personal assurances or indicates that testimony not presented to the jury supports the testimony; this is improper because it invades the province of the jury and places the government' s prestige behind the witness. *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (*citing Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)).

Regarding Mixon, Petitioner argues the Solicitor vouched for Mixon when he said Mixon "is before you with no promises, no rewards, no hope for anything like that. He is simply here to tell you the truth[5] and I believe you will find him in spite of his criminal record to be a credible witness." (App. p. 73, lines 10–14). Immediately before the Solicitor said this, he acknowledged that "Christopher Mixon has been convicted of several burglaries. You will hear about those. He is a convicted felon." (App. p. 73, lines 8–10). In context, this argument was not vouching; the Solicitor went on to question Mixon and elicit from him that he was not testifying in exchange for dismissal of any charges. (App. pp. 186–87). The Solicitor's argument—that Mixon was credible because he was not motivated to testify by the hope of obtaining leniency for his pending charges—was based on a permissible inference from the record, not on personal assurances or on evidence not presented to the jury. Therefore, it was not vouching.[6]

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[5] Notably, the Solicitor had asked Mixon during redirect examination whether he was testifying "because you want to see the charges go away or because what you're saying is the truth?" Counsel objected on the ground of bolstering. The trial court overruled the objection. The Solicitor repeated the question, and Mixon testified, "It's the truth, sir." (App.p.186, line 15–p.187, line 7).

[6] Far from "invading the province of the jury," the Solicitor, in his closing argument, reminded the jurors that it was their job to decide whether Mixon was credible or not: "Should you believe him? That's the question you're going to have to ask. . . . All I'm asking you to do is consider whether or not his testimony is worthy of your belief." (App. p. 333, lines 6–10).

Nor did the Solicitor vouch for Officer Goggins when he characterized him as a "good, experienced, capable police officer and investigator as his sixteen years would document." (App. p. 339, lines 1–3). Petitioner has taken this comment out of context as well: immediately before making this statement, the Solicitor said, "Law enforcement officers are human and they're fallible. They might miss something." (App. p. 338, lines 24–25). Immediately *after* he praised Officer Goggins, the Solicitor acknowledged that the State's case was not perfect because the officer tasked with surveilling Odom's car left his post, allowing the burglars to get away. (App. p. 339, lines 4–10). In context, it is apparent that the Solicitor was acknowledging the *fallibility* of the law enforcement officers involved in the investigation. The purpose of the Solicitor's praise for Officer Goggins' ability and experience was to "soften the blow" of his acknowledgement that law enforcement's surveillance of Petitioner's car had been sloppy. Moreover, the Solicitor's comment was manifestly based on the record—Officer Goggins testified he had sixteen years of experience in law enforcement. (App. p. 261). Therefore, the PCR court correctly found that the Solicitor's comments did not constitute vouching. [7]

Comment on Petitioner's Silence

A criminal defendant has the right to remain silent, and the exercise of that right may not be used against him. *Doyle v. Ohio*, 426 U.S. 610 (1976). The constitution forbids a prosecutor to argue that the silence of the accused is evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). A solicitor must not comment, either directly or indirectly, on a defendant's silence,

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[7] Furthermore, Petitioner does not dispute anything that Officer Goggins testified to. Therefore, even if the Solicitor's praise for Officer Goggins could be construed as vouching for his credibility, it could not have prejudiced Petitioner's case—Officer Goggins' credibility has never been in question.

failure to testify, or failure to present a defense. *McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000).

Petitioner argues the Solicitor commented on his right to remain silent in three ways: first, by claiming "we would have heard about it" if there had been any inconsistencies between Mixon's statements when he was interviewed by law enforcement and his testimony at trial; second, by arguing there was no evidence for any alternative scenario other than the one proposed by Mixon; and third, by describing Mixon's testimony as "uncontradicted."

Regarding the first contention, the Solicitor was referring to Counsel's suggestion that Mixon's statement to police was inconsistent with his trial testimony. Counsel had cross-examined Mixon about statements he made during his police interview, but Mixon claimed he could not remember what he said in his interview. (App. p. 181). It was not improper for the Solicitor to point out that Counsel had failed to show any inconsistencies in Mixon's account, when Counsel herself put Mixon's prior statements at issue.

Similarly, it was not improper for the Solicitor to point out that there was no evidence for any scenario, other than the one presented by Mixon. Counsel's questioning of Mixon was part of her overall strategy to discredit Mixon's testimony that Petitioner was involved in the planning and execution of the burglary. In her opening statement to the jury, Counsel acknowledged that the burglary happened but denied that Petitioner was involved: "Mr. Mixon said it happened with Mr. Odom. We say it did not. That's what this case comes down to." Throughout trial, it was clear that the theory of the defense was that Mixon and another individual had committed the crime and attempted to frame Petitioner. This was confirmed in Counsel's closing argument, where she attempted to propose an alternative scenario:

> You want an alternative scenario? I'll give you one. Mr. Mixon is a young neighbor of Mr. Odom with access to his vehicle, uses his

> vehicle to go rob this place, . . . He takes the car. He goes and commits the burglaries, he sees the cops, he knows the car's been identified, he gets arrested on outstanding warrants, he points the finger.

(App. pp. 343–44). The State was entitled to address the theory of the defense in its closing argument. Where the defense suggests a theory, it is not an improper comment on the accused's silence for a prosecutor to criticize the lack of evidence for that theory. *See, e.g.*, *U.S. v. Jones*, 471 F.3d 535, 543 (4th Cir. 2006) (holding a prosecutor's argument—"If they had real evidence, don't you think they would have presented it to you?"—was not a comment on the defendant's failure to testify, where the prosecutor was merely criticizing the defense's failure to substantiate the alternative factual scenario proposed by defense counsel in closing argument); *U.S. v. Sandstrom*, 594 F.3d 634, 660–64 (8th Cir. 2010) (holding it was not improper for a prosecutor to argue that "not a single alternative motive has been supplied," other than the racial motive proposed by the prosecution, where that argument was a response to defense counsel's attempt to counter the evidence of racial animus).

Finally, regarding Petitioner's contention that the Solicitor improperly called Mixon's testimony "uncontradicted," the PCR court correctly found that the Solicitor's statement was not a comment on Petitioner's silence. *See State v. Stroman*, 281 S.C. 508, 513–14, 316 S.E.2d 395, 399 (1984) (holding solicitor's allusion to the fact the defendant had not attempted to contradict evidence identifying his fingerprint found at the crime scene was not an improper comment on the defendant's silence). *See, e.g.*, 23A C.J.S. *Criminal Procedure and Rights of the Accused* § 1762 ("Generally, it is not improper for the prosecuting attorney to remark that testimony for the prosecution is unexplained or uncontradicted . . . ."); *Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify*, 14 A.L.R.3d 723 ("It is generally held that a statement by the prosecuting

attorney to the effect that the evidence for the state is uncontradicted or undenied is not a violation . . . .").

Petitioner relies on *State v. Sweet*, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000), for the proposition that, "[w]here the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify." In that case, the solicitor argued to the jury that *only* the defendant could rebut the testimony of the State's witnesses, so his subsequent statement that there "isn't any testimony that conflicts" with the State's witnesses was clearly a reference to the defendant's failure to testify, and not merely a comment on the evidence. *Id.* The present case is materially distinguishable from *Sweet*; in this case, the Solicitor never claimed that *only* Petitioner could rebut Mixon's testimony. On the contrary, the Solicitor acknowledged that Mixon's statement to law enforcement could have contradicted his testimony, if Counsel had been able to point to any inconsistencies between that statement and Mixon's testimony. The PCR court found that, "[i]n this case, the solicitor did not directly mention Applicant's failure to testify or claim that only Applicant could contradict Mixon's testimony." Therefore, the PCR court correctly found the Solicitor's statements were not improper and, consequently, Counsel was not ineffective for failing to object to them.

For all of these reasons, Petitioner has not shown that the decision of the PCR court was error. Accordingly, this Court should affirm the decision of the PCR court.

CONCLUSION

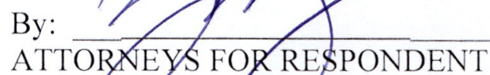
For the foregoing reasons, this Court should affirm the decision of the PCR court.

Respectfully submitted,

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General



By: ______________________
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 5, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-001223

Maurice A. Odom,

Petitioner,

v.

State of South Carolina,

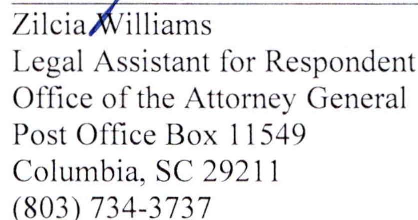
Respondent.

PROOF OF SERVICE

I, Zilcia Williams, certify that I have served one copy of the Brief of Respondent on Jessica M. Saxon, Esquire, counsel of record for Petitioner, by electronic mail to the e-mail address listed for counsel in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire
jsaxon@sccid.sc.gov

This 5th day of May, 2025.



Zilcia Williams
Legal Assistant for Respondent
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

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May 05 2025
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

May 5, 2025

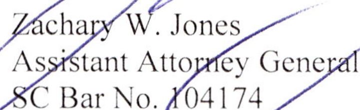
The Honorable Jenny A. Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
(via e-filing only - ctappfilings@sccourts.org)

Re: **Maurice A. Odom v. State of South Carolina**
Appellate Case No.: 2022-001223

Dear Ms. Kitchings,

Enclosed please find the original Brief of Respondent in the above-captioned case, for filing in your office. If there is anything additional needed regarding this matter, please let me know.

Sincerely,



Zachary W. Jones
Assistant Attorney General
SC Bar No. 104174

ZWJ/zew
Enclosure

cc: Jessica M. Saxon, Counsel for Petitioner *(via e-mail only)*

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