STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Williamsburg County
Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE No. 2023-000040

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Petitioner's Issue

Did the PCR court err in finding counsel was ineffective when counsel admitted that he did not believe the court rules allowed him to object to the numerous improper and prejudicial statements made by the solicitor during her closing argument?

Respondent's Counterstatement of Issue

Did the PCR court properly find trial counsel was not ineffective for failing to object to the solicitor's closing argument when (a) counsel testified he did not see a basis to object and thus was not deficient, (b) the solicitor's argument did not amount to a Golden Rule argument, (c) the solicitor's argument did not mischaracterize evidence, (d) Petitioner did not prove counsel was ineffective for not objecting to arguments related to the defendant cutting his hair, (e) Petitioner did not prove counsel was ineffective for not objecting to arguments related to Detrel Matthews, (f) the remaining portions of the arguments Petitioner relies on were not raised to the PCR court and should not be considered for the first time on appeal, and (g) the solicitor's argument did not so infect the trial with unfairness as to violate due process?

STATEMENT OF THE CASE

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections serving a life sentence. In May 2011, the Williamsburg County Grand Jury indicted Petitioner for murder and possession of a weapon during a violent crime (2011-GS-45-0095). These charges arose from the fatal shooting of Therris Keels on October 27, 2010.

On March 11-14, 2013, Petitioner proceeded to a jury trial before the Honorable William Jeffery Young. Guy Ballinger, Esquire, represented Petitioner, and Assistant Solicitor Kimberly Barr prosecuted the case. Petitioner was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for the weapon charge.

Petitioner filed a direct appeal, which was perfected by Ryan L. Beasley, Esquire, and Chief Appellate Defender Robert M. Dudek. The Court of Appeals issued an opinion vacating the five-year sentence for the weapon charge pursuant to section 16-23-490(A) of the South Carolina Code but affirming all other issues on the merits. Petitioner filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent January 4, 2018.

On October 29, 2018, Petitioner filed an application for post-conviction relief (PCR). On November 1, 2022, an evidentiary hearing convened before the Honorable Edward W. Miller. Petitioner was present and represented by James K. Falk, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. On January 13, 2023, Judge Miller issued an order denying relief and dismissing Petitioner's application with prejudice. Petitioner filed this petition for a writ of certiorari raising five issues. On April 16, 2025, this Court issued an order granting certiorari on Question one but denying certiorari as to Questions 2, 3, 4, and 5.

Trial

On October 28, 2010, Therris Keels (Victim) was shot in the head and in the abdomen. (App. 165). At trial, eyewitness Maurice Smith testified he observed Victim with Joseph Sabb[1] on the evening of the shooting. (App. 113-15). Smith, who witnessed the shooting, described it as follows: Petitioner approached Victim; Victim put his hands up as Petitioner pointed a gun and shot Victim; and Petitioner shot Victim again after Victim fell. (App. 114-115). Petitioner then crossed the road and shot Victim a third time before running off. (App. 116). Although Smith did not see Petitioner's Dodge Neon that night, he heard its distinctive squealing sound shortly after the shooting. (App. 119-20).

Brittney Croskey recalled seeing both Petitioner and Victim earlier that evening. (App. 185-86). Croskey testified she later saw Victim with his hands up and heard a gunshot. (App. 188). She then heard a second shot before Victim fell to the ground. (App. 188-89). Croskey observed the shooter stand over Victim and shoot him again. (App. 188-89). Prior to the shooting, she recalled seeing someone pacing back and forth under a streetlight. (App. 187). Croskey noted the person walked in a similar manner as Petitioner. (App. 187-88). She likewise acknowledged telling others shortly after the shooting that Petitioner was the shooter. (App. 192).

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

Investigator Wayne McFadden recovered surveillance video from a gas station near the

[1] Sabb's nickname was "TT."

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

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

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

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

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be 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).

ARGUMENTS

The PCR court properly found trial counsel was not ineffective for failing to object to the solicitor's closing argument when (a) counsel testified he did not see a basis to object and thus was not deficient, (b) the solicitor's argument did not amount to a Golden Rule argument, (c) the solicitor's argument did not mischaracterize evidence, (d) Petitioner did not prove counsel was ineffective for not objecting to arguments related to the defendant cutting his hair, (e) Petitioner did not prove counsel was ineffective for not objecting to arguments related to Detrel Matthews, (f) the remaining portions of the arguments Petitioner relies on were not raised to the PCR court and should not be considered for the first time on appeal, and (g) the solicitor's argument did not so infect the trial with unfairness as to violate due process.

Petitioner contends the PCR court erred in not finding counsel ineffective for not objecting to improper comments by the solicitor. In doing so, however, Petitioner relies on multiple portions of the argument that were not presented to or ruled upon by the PCR judge, making them unpreserved.[2] Petitioner likewise does *not* challenge the court's rulings on several portions of the transcript that *were* presented to and ruled upon by the PCR court, making the rulings on those portions of the solicitor's argument law of the case. As set forth below, the PCR court properly denied relief on the preserved rulings that are being challenged by Petitioner on appeal. Further, the arguments Petitioner raises for the first time on appeal lack merit and did not so infect the trial with unfairness as to violate due process.

In a PCR action, an applicant bears the burden of proving the allegations. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To prove ineffective assistance of counsel, a petitioner must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland

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

v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813. "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." Watson v. State, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. An applicant must overcome this presumption to received relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland, 466 U.S. at 687–88; Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. "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." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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." Id.

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

Much of Petitioner's argument focuses on his contention that counsel was deficient because he believed he could not object during closing argument. (Pet. Br. 4). Although counsel improperly averred he could not object during argument, he clarified he would have objected post-argument if he believed anything was objectionable. (App. 729). Critically, counsel did not raise any objection post-argument, supporting his PCR testimony that he did not see a basis to object. (App. 729-33). Thus, even if he had an improper understanding about whether he could object, his failure to object here was not deficient when there was nothing to object to.

Further, Petitioner is interjecting an improper standard for measuring deficiency. Specifically, Petitioner contends, "As counsel was *admittedly ineffective* in understanding his rule during closing, the only question for this Court to resolve is whether the solicitor's closing stepped over the line and infected the trial with unfairness." (Pet. Br. 7). However, even if counsel admitted deficiency—which did not occur here[3]—Strickland still requires the Court to objectively review the record to see if, in fact, the statements were objectionable, and whether counsel's failure to object fell below prevailing professional norms. Strickland, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). In other words, it would be error for the Court to rely only on counsel's post-hoc testimony about his performance. See Harrington v. Richter, 562 U.S. 86, 109-10 (2011) ("After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. **Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.**" (emphasis added)). Ultimately, the Court must determine whether there was a legitimate objection to make—not simply whether counsel properly understood he could object during closing argument. Further, even if there was a valid objection, the Court is still tasked with determining prejudice—or whether the solicitor's statements "so infected the trial with unfairness as to violate due process." Humphries, 351 S.C. at 373, 570 S.E.2d at 166.

[3] Petitioner's contention that counsel was "admittedly ineffective" lacks support. (Br. 5). Although counsel agreed an argument raised by Petitioner "*could* be viewed" (emphasis added) as a Golden Rule argument, he did not otherwise agree that anything was objectionable, explaining, "[Petitioner] and I disagree on what's objectionable and what's simply he doesn't like it 'cause he doesn't think it helps his case. But just because he doesn't like the closing doesn't make it objectionable." (App. 729, 733).

Finally, Petitioner incorrectly posits that the PCR court "noted numerous areas of concern from the solicitor's closing argument." (Pet. Br. 5). Rather, the order set forth the portions of the closing argument that Petitioner raised to the PCR court at the hearing. (App. 776-780). In setting forth these portions of the closing argument, the PCR court was merely noting the issues raised by Petitioner—not making any finding that these arguments were improper.[4] It is disingenuous to assert that the PCR court addressing the allegations Petitioner raised—as it must do under section 17-27-80 of the South Carolina Code—suggested the court shared Petitioner's "concerns." Ultimately, as the PCR court correctly found, Petitioner did not point to an objectionable portion of the closing argument and thus did not prove deficiency.

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

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

> He committed a cold blooded, ruthless murder and at some point if we're going to just lie down and surrender our community to this type of street justice then it's time for all of us to hand our hats up. We might as well go home. Judge Young might as well retire his robe. I might as well quit this job and just do only private practice and we might as well quit blowing our money away destroy that courthouse across the street because we don't need it. If the defendant can come in here and kill somebody in cold blood and walk away with because [sic] he had the presence of mind to throw away the evidence. Then we might as well and we all say that we're

[4] This is evident by language such as "At the evidentiary hearing, Petitioner questioned trial counsel about several portions of the State's closing argument" (App. 776); "Petitioner asked counsel whether the following constituted a personal attack" (App. 776); "Petitioner asked counsel whether the following constituted improper bolstering" (App. 777); "Petitioner asked counsel whether the following constituted pitting" (App. 777); and "Petitioner asked counsel if the following was an improper golden rule argument." (App. 779). Likewise, at no point in the order—which specifically addressed the six portions of the solicitor's closing argument that Petitioner actually raised—does the court find that a comment was improper. (App. 776-80). Rather, the Court determined "Based on its review of the transcript, this Court agrees the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object" (App. 778); and "This court . . . finds the foregoing did not amount to a Golden Rule argument." (App. 779).

> done. I employ you all not to do that and I employ you all to return a guilty verdict.

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

"The Golden Rule Argument is one that suggests to the jurors they put themselves in the shoes of one of the parties." State v. Rice, 375 S.C. 302, 334, 652 S.E.2d 409, 425 (Ct.App.2007). "In the criminal arena, such an argument is generally improper because it asks the jurors to place themselves in the victim's place." Id. "Such an argument tends to destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id.

Here, the argument did not ask the jurors to put themselves in the place of the victim or speak up for the victim and thus did not amount to a Golden Rule Argument. See State v. Harris, 382 S.C. 107, 122, 674 S.E.2d 532, 540 (Ct. App. 2009) ("In the present case, reviewing the closing argument in the context of the entire record, the State did not make a Golden Rule Argument. Simply put, the State did not ask or suggest to the jury that they place themselves in the shoes of the victims."). Unlike Bown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009), the solicitor here did not implore the jury to "speak up" for the victim or tell the jury she was there to protect the victim.[5]

[5] In Brown, the South Carolina Supreme Court found the following argument improper:

> I embrace my burden because I represent the State of South Carolina. And I think someone said at the beginning of this trial this is trying to protect the rights of people. Well, I tell you what. I'm here to protect the innocent. **I'm here to protect [child victim]** a four-year-old child now. Three-year-old little child at that time. And I am the last person that you're going to hear speak up for her.

Likewise, unlike State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997), the solicitor here did not reference in closing argument a damaging statement that was not in evidence.[6] Neither of these cases—relied on by Petitioner in his brief (Pet. Br. 8)—support the proposition that the foregoing amounted to an objectionable Golden Rule Argument. At the PCR hearing, Petitioner failed to set forth any other basis that trial counsel should have objected to this portion of the argument and thus failed to prove deficiency.

On appeal, Petitioner asserts the foregoing was improper *not* because it amounted to a Golden Rule Argument (the argument that was clearly raised at the PCR hearing, App. 754) but rather because it urged jurors to convict based on protecting community values. (Pet. 8). In fact, Petitioner implicitly concedes this argument is not preserved by acknowledging "[t]he PCR court focused solely on whether this portion of the closing violated the 'golden rule' argument prohibition." (Pet. Br. 8). Here, where the argument Petitioner now makes was not clearly presented to the PCR court, this Court should not consider it for the first time on appeal.[7] See Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) ("[W]e are not abandoning the general rule that *issues must be raised to*, and ruled on by, the post-conviction judge to be preserved for

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> So, **I ask you, when you go back in that jury room, you speak up for [child victim].** We can never put her back to where she was before this abuse occurred. But we can make sure that the perpetrator is punished. **So when you go back in that jury room to deliberate, ladies and gentlemen, speak up for [child victim].**

383 S.C. at 511–12, 680 S.E.2d at 912 (emphasis added).

[6] In Huggins, the solicitor referenced a statement the defendant's brother made to police wherein he "stated [the defendant] told him she knew of a way to kill Victim" and described how it could be done. Id. at 106-07, 481 S.E.2d at 116. However, that statement was not entered into evidence, nor did the defendant's brother testify. Id.

[7] Should this Court consider this argument properly raised, the proper remedy would be a remand for the PCR court to consider it. However, Respondent maintains that Petitioner—who had the burden of proof—did not clearly raise this argument to the PCR court.

appellate review." (emphasis added)); Fishburne, 427 S.C. at 505, 832 S.E.2d at (2019) (noting the validity of the State's preservation argument but taking the extraordinary action of remanding for the PCR court to consider an issue *that was raised to the court* but not ruled upon).

On the merits, the foregoing was not improper argument. See, e.g., State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) ("So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, *he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict.*"(emphasis added) (quoting 23A.C.J.S. Criminal Law §1107)); id. at 91, 212 S.E.2d at 590 (finding solicitor's arguments "to the effect that this jury is obligated to serve notice on others and what they do in this case will serve as a deterrent to others" and "if they turn every man loose simply because you are afraid of convicting an innocent man, you're not doing your job" did not warrant reversal); State v. Cain, 297 S.C. 497, 508, 377 S.E.2d 556, 562 (1988) (finding solicitor's argument that "a death penalty verdict would send a message to surrounding counties that '[y]ou don't do that [murder] in Chesterfield County without paying the price'" "did not rise to the level of arousing juror passion or prejudice").

Further, the case Petitioner relies on—State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (Ct. App)–is vastly distinguishable. In Liberte, the solicitor argued the reasonable doubt standard was

being used as a sword:

> Ladies and gentlemen, I want to ask you right now to listen to the judge's instructions about reasonable doubt, and ask yourselves is it being used as a sword to attack law and order, to attack law enforcement, to attack people who are trying to keep drugs off our streets?

336 S.C. at 652, 521 S.E.2d at 746. Clearly, the language in Liberte language was objectionable because the State's burden of proof is the foundation of our criminal justice system. Here, the solicitor's argument did not in any way seek to lessen the State's burden of proof. Petitioner has not pointed to any other cases—either at the hearing or on appeal—that supports his contention that the solicitor's argument here was objectionable. Thus, he has not met his burden.

Finally, the PCR court properly found that even if the foregoing argument was objectionable, it did not "infect the trial with unfairness as to make the resulting conviction a denial of due process." See Humphries, 351 S.C. at 373, 570 S.E.2d at 166 ("The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."); id. ("Improper comments during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument."). At trial, two eyewitnesses identified Petitioner as the shooter. Petitioner himself testified and admitted he was at the scene that evening. (App. 347-57). Notwithstanding this, Petitioner initially lied to police and providing a false alibi. (App. 305-09, 374-76). Based on Petitioner's shifting story and the fact that two eyewitnesses identified him as the shooter, the foregoing passing statement in a nineteen-page closing argument did so infect the trial with unfairness as to violate due process. See Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no

face, blown away by a shotgun"—did **not** "so infect the trial with unfairness as to make the resulting conviction a denial of due process."). Thus, the PCR court properly found Petitioner failed to prove prejudice.

c. The PCR court properly found the solicitor did not mischaracterize evidence related to Maurice Smith.

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

> I prosecuted Maurice Smith. Maurice Smith came in this court room he pled guilty and I was standing basically in the same position I'm standing right now and as I recollect his testimony when Mr. Ballinger asked him what were you convicted of he said distribution and trafficking. So this notion that somehow he was trying to curry favor with the State by reducing his charge I would submit to you that's not true. The man did his wrong, he pled guilty straight up and he's serving his sentence he is paying his debt to society and I'm going to tell you folks, whether Mr. Palmer walks out this courtroom a freeman or whether he's sentenced in a cell right next to Maurice Palmer, Maurice Palmer, I mean Maurice Smith is going to serve his time. He doesn't have at this point anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't.

(App. 488, 725). As part of his theory that the State had a "secret deal" with Smith, Petitioner asserted the foregoing was a mischaracterization of the evidence.

i. The argument was based on evidence presented.

The PCR court properly found the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object. See Harris, 382 S.C. at 120, 674 S.E.2d at 539 (providing statements made during a closing argument must be viewed "in the context of the entire record"). At trial, Smith testified he was serving a ten-year non-violent sentence for a drug charge. (App. 100). He testified he pled guilty and was sentenced on September 13, 2012. (App. 100, 126). On cross-examination, counsel questioned Smith about whether he identified Petitioner as the shooter to curry favor with the State. (App. 121-26). Based on the foregoing, the solicitor's comment was a reasonable inference from the facts presented and was proper to rebut the

implication that Smith provided the statement in exchange for a deal with the State. Thus, the PCR court properly found Petitioner did not prove deficiency for not objecting here.

Petitioner's argument that the solicitor's statement was false hinges on events that occurred after trial. This argument ignores the fact that the PCR court denied Petitioner's allegation of prosecutorial misconduct related to this "secret deal" and found credible the solicitor's testimony that she did not have any type of deal with Smith. (App. 771). This argument likewise ignores the fact that this Court denied certiorari on this very issue—leaving intact the PCR court's ruling that Petitioner did not prove a "secret deal." In light of this, it is disingenuous to continue to assert the existence of a secret deal that somehow made the solicitor's closing argument false or misleading. As set forth herein, the solicitor's argument was supported by evidence presented at trial and thus there was no valid basis to object.[8]

ii. The vouching argument is not preserved and also lacks merit.

At the PCR hearing, Petitioner's questioning related to this portion of the closing argument focused on his belief that this was mischaracterization of the evidence. (App. 725-28). Now, for the first time on appeal, Petitioner argues that this portion of the argument constituted improper vouching. Because this argument was not presented to the PCR court, it should not be considered on appeal. See, e.g., Pruitt, 310 S.C. at 255, 423 S.E.2d at 128 ("[W]e are not abandoning the general rule that *issues must be raised to*, and ruled on by, the post-conviction judge to be preserved for appellate review." (emphasis added)); Fishburne, 427 S.C. at 505, 832 S.E.2d at 584 (noting the validity of the State's preservation argument but taking the extraordinary action of remanding for the PCR court to consider an issue *that was raised to the court* but not ruled upon).

[8] Clearly counsel cannot be deficient for not objecting and arguing a statement is inaccurate based on events that had not even occurred at the time of trial.

On the merits, this argument does not constitute improper vouching. "A prosecutor improperly vouches for a witness'[s] credibility and places the government's prestige behind a witness by making explicit personal assurances[] or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). Here, the solicitor was not making an explicit personal assurance of Smith's veracity; rather, in an attempt to rebut the defense argument that Smith was testifying against Petitioner to curry favor with the State, she merely pointed out that Smith had already pled guilty and was serving time. Further, as the PCR court properly found, the solicitor's argument here was based on reasonable inferences from the record (specifically Smith's testimony that he pled guilty and was in prison, App.) and did not indicate to the jury that the solicitor had information outside the jury's purview that supported Smith's veracity.

The solicitor's use of first-person here likewise did not constitute improper vouching. As recognized by the Supreme Court of South Carolina, "as a practical matter it is impossible for a lawyer to eliminate the first person from their courtroom advocacy." State v. Busse, 439 S.C. 104, 112, 886 S.E.2d 208, 212 (2023). Thus, prevailing professional norms do not require defense attorneys to object every time the word "I" is uttered by a solicitor. The critical question, when determining whether the argument is objectionable, is whether the foregoing constituted improper vouching by "making explicit personal assurances[] or indicating that information not presented to the jury supports the testimony." Vaughn, 362 S.C. at 169, 607 S.E.2d at 75. As explained, the solicitor's argument here did not.[9]

[9] "The phrase 'I submit to you that,' without more, does not constitute vouching." United States v. Walker, 155 F.3d 180, 188 (3rd Cir. 1998), cited with approval by State v. Kelly, 343 S.C. 350, 368–69, 540 S.E.2d 851, 860 (2001), rev'd and remanded on other grounds by Kelly v. South Carolina, 534 U.S. 246 (2002); see also United States v. Bernal-Benitez, 594 F.3d 1303, 1315–16 (11th Cir. 2010) (prosecutor's comment "I submit to you, as I said before, the informant is being

Finally, Petitioner's reliance on Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025) is wholly misplaced. In Washington, this Court found objectionable the following:

> *I submit to you [Victim] was wholly credible*. That she's only capable of telling the truth. *She's not capable of carrying on a lie to that degree for that long*. A child just isn't capable of doing that. And they tried to crack her under the pressure. They have cross-examination ... they question her and question her until she cracks and they catch her in a lie. They couldn't do it. *And a child will fold under a cross-examination because they're not capable of lying to that degree and to that extent* and her story was consistent.

445 S.C. at 238, 911 S.E.2d at 538 (emphasis in original). (Ct. App. 2025). Unlike the solicitor in Washington, the solicitor here did not argue Smith was incapable of lying, nor did she argue a class of persons was incapable of lying. Rather, the foregoing was a valid argument—the type that is argued in almost every criminal trial involving a testifying codefendant. Because evidence that Smith was incarcerated and serving a sentence was before the jury, the foregoing did not constitute improper vouching, and there was no basis to object.

iii. The argument did not so infect the trial with unfairness as to violate due process.

Finally, the PCR court properly found Petitioner did not show an objection would have changed the outcome of trial and thus did not prove prejudice. Overall this arguments did not "so

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perfectly honest about everything in this case" was not improper because "the prosecutor was simply urging the jury to draw certain conclusions from the evidence rather than interjecting his personal views on the evidence or the defendants' guilt."); United States v. Bentley, 561 F.3d 803, 811–12 (8th Cir. 2009) (phrases like "we know" and "I submit" are discouraged, but they are not improper when used to marshal the evidence presented at trial and summarize the government's case against the defendant); United States v. Eltayib, 88 F.3d 157, 173 (2d Cir. 1996) ("[T]he phrase 'I submit' expresses not a personal belief but a contention, an argument, which, after all, is what a summation to the jury is meant to be. The well-advised prosecutor will sidestep all uses of the pronoun 'I,' but we conclude that the phrase 'I submit' is not improper in these circumstances."); United States v. Necoechea, 986 F.2d 1273, 1279 (9th Cir. 1993) (prosecutor's comment "I submit to you, ladies and gentlemen, that she's not lying. I submit to you that she's telling the truth" was not vouching because such comments "do not imply that the government is assuring [the witness's] veracity, and do not reflect the prosecutor's personal beliefs.").

infect[] the trial with unfairness as to make the resulting conviction a denial of due process." See Humphries, 351 S.C. at 373, 570 S.E.2d at 166 ("The relevant question is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."); id. ("Improper comments during closing arguments do not require reversal if the appellant fails to prove he or she did not receive a fair trial because of the alleged improper argument."). This portion of the argument related only to the credibility of Smith's testimony. In addition to Smith, however, the State had another eyewitness—Brittany Croskey—who identified Petitioner as the shooter. Based on the eyewitness identification, Petitioner's own admission of being at the scene, and Petitioner's shifting story about that night, the foregoing argument—even if objectionable (which the State maintains it is NOT)—did not so infect the trial with unfairness as to violate due process. Thus, the PCR court properly found Petitioner did not prove prejudice.

d. The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to arguments related to the defendant cutting his hair.

In its final order, the PCR court found Petitioner did not prove counsel was ineffective for not objecting to the following:

> And folks when I talked about the defendant cutting his hair, I wasn't talking about it because I thought he was trying to conceal evidence on his hair. I was talking about it because he is trying to present an image of you of a person he is not. You know he comes into this courtroom he wants to portray himself as conscientious, studies, and you know he hits all the high marks. Young man not married check, no children check, college student check, clean cut check, nice suit check, nice tie check, shiny shoes check. He wants to create the best possible impression on this jury but it's a lie. The image that you saw in this courtroom this week folks that's a lie and just like he tole me when I'm asking him questions, don't get it twisted.

(App. 478-79). The PCR court properly found Petitioner did not meet his burden of proof in this regard. Critically, at the PCR hearing, Petitioner did not set forth a valid objection counsel should

have made to the foregoing. For the first time on appeal, Petitioner contends the foregoing was objectionable under Major v. Alverson, 183 S.C. 123, 190 S.E.2d 449 (1937), State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (2000), reversed on other grounds by State v. Blurton, 352 S.C. 203, 573 S.E.2d 802 (2002), and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Although this argument should not be considered because it was not ruled upon by the PCR court (and Petitioner did not file a motion to reconsider raising this issue), these cases are distinguishable. In Major, the Court found calling a witness a "bare faced liar" was an abusive epithet that warranted reversal. Likewise, in Blurton, the Court found it improper for the solicitor to accuse the defendant of lying. Unlike Major and Blurton, the solicitor here did not call Petitioner a liar. Further, Day is vastly distinguishable because it dealt with the solicitor referencing the defendant's nickname of "Outlaw" excessively during closing argument.

Finally—and critically—the PCR court properly found the passing comment here did not so infect the trial with unfairness as to violate due process. See Blurton, 342 S.C. at 512, 537 S.E.2d at 297 (finding it was improper for the solicitor to call the defendant a liar but those improper comments, alone, did not warrant reversal).

e. The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to arguments related to Detrel Matthews.

The PCR court properly found Petitioner did not prove counsel was ineffective for not objecting to the following as improper vouching:

> Now let me tell you this here's how you know that Detrel Matthews had that gun. If it's true when he teistifed that he never had a gun from Mr. Palmer, why in the world would Wayne McFaddin be talking to his parole officer. I mean if the only thing he told Wayne because we have to assume at this point that Wayne McFaddin just pulled that back out the sky somewhere, but if he never told Wayn McFadden that he took .45 caliber pistol form the defendant and gave it back to him a couple of days before the victim was murdered why in the world would his parole even come up. Why would the

> officer have a need to even go and talk to his parole officer. That's how you know inf act the statement that Detrel Matthews made Wayne McFadden were in fact true . . . .

(App. 485). The foregoing was a reasonable inference from the evidence and did not constitute improper vouching. See Busse, 439 S.C. at 109, 886 S.E.2d at 211 ("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."). Here, the State presented evidence that Matthews told Investigator McFaddin a .45 caliber gun fell out of Petitioner's pants during a prior altercation, Matthews picked up the gun but later returned it to Petitioner, Matthews was on parole, and Investigator McFaddin spoke to Matthews' parole officer about the situation. (App. 309-11, 313-14).[10] Because the argument was based on evidence and reasonable inferences from evidence, the PCR court properly found it did not constitute improper vouching. Likewise, the foregoing did not so infect the trial with unfairness as to violate due process.

f. This Court should not consider the remainder of Petitioner's argument because it was not presented to the PCR court.

Petitioner points to additional portions of the solicitor's closing argument that were not raised at the PCR hearing (and thus not addressed by the PCR court in its final order). (Pet. Br. 14-17). Because these arguments were not presented to the PCR court, they should not be considered on appeal. See, e.g., Pruitt, 310 S.C. at 255, 423 S.E.2d at 128 ("[W]e are not abandoning the general rule that *issues must be raised to*, and ruled on by, the post-conviction judge to be preserved for appellate review." (emphasis added)); Fishburne, 427 S.C. at 505, 832 S.E.2d at 584 (noting the validity of the State's preservation argument but taking the extraordinary action of remanding

[10] The statement was properly introduced through Investigator McFaddin after Matthews denied making the statement. (App. 216-17). See Rule 613, SCRE.

for the PCR court to consider an issue *that was raised to the court* but not ruled upon). Likewise, Petitioner raises for the first time the cumulative error doctrine, which is also not preserved and should not be considered by this Court.

Initially, Petitioner contends for the first time on appeal that portions of the solicitor's closing argument were objectionable because she used truth-seeking language. Although the PCR court considered and properly concluded counsel was not ineffective for not objecting to *pretrial* search for the truth language by the Court[11] (App. 773-74), Petitioner did not raise any argument related to the solicitor's use of truth-seeking language or the word "truth" during closing argument. Because this argument was not raised to the PCR court, it should not be considered on appeal.[12]

For the first time on appeal, Petitioner takes issue with the following:

> Ladies and gentlemen I whenever I prosecute a case particularly a murder case. It weighs on me because there is so much at stake and it's inevitably you have a tragedy on both sides. You've got the family of a victim who has lost a loved one in the most tragic way. Not in a way where they've lived a long life and they just die of natural causes and old age like we all hope and pray that God blesses us to do. It's not in some kind of accident or illness or anything along that line. Its' that somebody decided to play God and take the life of

[11] See State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (finding 'seek the truth' language did not shift the burden of proof because it was not charged with either the reasonable doubt or circumstantial evidence charges).

[12] Further, any argument that counsel should have objected to this language during the solicitor's closing argument patently lacks merit. Although the Supreme Court of South Carolina has instructed *trial courts* (not attorneys) to avoid instructing the jury that its job is to search for the truth, that case was not heard until June 15, 2017—more than four years after Petitioner's trial. State v. Beatty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Further, although trial courts have been cautioned *judges* against using "truth" language, Petitioner has not pointed to any case that prohibits the use of such language by attorneys. Cf. State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582–83 (2019) ("Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record. . . . It is axiomatic that some matters appropriate for jury argument are not proper for charging." (internal quotation mark omitted)).

> a loved one and when you add on the fact that Therris Keels had just reached his 30th birthday it makes it even more tragic. It's tragic for Mr. Palmer's family too. My heart goes out to his family as well just as Therris had a mom and dad, Mr. Palmer has a mom and a dad and I made a conscientious decision not to ask Mr. Palmer any question because I think quite frankly his family as the Keels family have lost a lot.

(App. 277). Petitioner has pointed to no caselaw that prohibits the foregoing and thus has not met his burden of proving this language was objectionable. Further, it is disingenuous to assert that evoking sympathy for Petitioner's family somehow prejudiced him. In context, the solicitor considered both the victim's family and Petitioner's family equally, and this argument did not so infect the trial with unfairness as to violate due process.

Finally, Petitioner finds fault with the following for the first time on appeal:

> Godly how could somebody be so braze and just come up and shot somebody with all these people around, what in the world who does that, who does that. How can somebody just be cold blooded like that *and I was talking about the case with a friend of mine and she told me well Kim he wanted an audience and it's like the light bulb went off, the light bulb went off your right.* He was bold and he was that brazen and that bad and that cold blooded because he wanted an audience.

(App. 480, emphasis added by Petitioner). The portion Petitioner highlighted about the solicitor talking with a friend who suggested this idea to her is absolutely immaterial to the outcome of this case, and it would have been ridiculous for counsel to object here. The remainder of the foregoing—that Petitioner acted bold and brazen because he wanted an audience—was a reasonable inference from the evidence presented about the shooting itself and thus was not objectionable.

g. Petitioner has not shown any of these arguments violated due process.

In considering prejudice, Petitioner seeks to have the Court analyze the cumulative effect of *all* of the arguments he raised—many for the first time on appeal. However, in determining

whether any statement violated due process, the Court must first determine (1) whether the argument was actually raised to the PCR court and (2) whether Petitioner has met his burden in showing a valid objection (and thus deficiency by trial counsel). Petitioner has not met his burden.

Further, in Darden v Wainwright, 477 U.S. 168 (1986), the United State Supreme Court concluded that several improper arguments by the solicitor did NOT violate due process. These arguments included repeatedly referring to the defendant as an animal and making statements such as:

> "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." Id., at 16. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. **I wish that I could see him sitting here with no face, blown away by a shotgun.**" Id., at 20. "I wish someone had walked in the back door and blown his head off at that point." Ibid. "He fired in the boy's back, number five, saving one. Didn't get a chance to use it. **I wish he had used it on himself**." Id., at 28. "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." Id., at 29. "[D]on't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." Id., at 31.

Darden, 477 U.S. at 181 n. 12 (emphasis added). Clearly, the solicitor's statements here did not rise to the level of egregiousness as the solicitor in Darden. If the foregoing did not violate due process, then the solicitor here likewise did not violate due process.

CONCLUSION

Based on the foregoing, this Court should affirm the PCR court's finding that Petitioner failed to prove trial counsel was ineffective for not objecting to the solicitor's closing argument.

Respectfully Submitted,

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This 15TH day of September, 2025.