

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**S.C. SUPREME COURT**

APPEAL FROM CLARENDON COUNTY  
Court of Common Pleas

The Honorable Grace Gilcrist Knie, Circuit Court Judge

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Appellate Case No. 2025-000405  
Lower Case No. 2018-CP-14-00233

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Jonathan C. Newman #362601,

Petitioner,

v.

State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Did the PCR Court err in finding Trial Counsel provided effective assistance when Counsel failed to object when the Trial Court improperly instructed the jury during its opening remarks that a trial is a “search for the truth”, that the attorneys are officers of the court to help the jury “in [their] search for the truth”, and that the jury is seeking to “reach a fair and just verdict” and “render a true and just verdict”?
- II. Did the PCR Court err in finding Trial Counsel provided effective assistance when Counsel failed to object to the Prosecutor’s comments during opening statement that referenced the Trial Court’s remarks reminding the jury that this is a “search for the truth” and closing argument that the jury “reach a verdict that speaks the truth”?
- III. Did the PCR Court err in finding Trial Counsel provided effective assistance when counsel failed to object to the Prosecutor’s comments during opening statement that “my job as an Assistant Solicitor is to represent the interest of this community to represent your interest” and “to seek justice”?
- IV. The PCR Court erred in finding Trial Counsel provided effective assistance when Counsel failed to object to the Co-Defendant’s testimony that Petitioner had previously assaulted him and other people?

## STATEMENT OF THE CASE

### *Indictment*

On February 27, 2014, the Clarendon County Grand Jury indicted Petitioner for murder and burglary, first degree. (2013-GS-14-0293). (App. 600 – 601).

### *Joint Trial*

On January 6, 2015, Petitioner proceeded to a joint trial before the Honorable W. Jeffrey Young and a jury. (App. 5). Eleazer Carter represented Petitioner, Jonathan Newman; Harry Devoe represented the co-defendant, Letroy Samuels; and Solicitor Ernest Finney and Assistant Solicitor Christopher Durant prosecuted the case on behalf of the State.

Relevant to this appeal, the Trial Court made the following statements to the jury at the beginning of the trial without objection from Trial Counsel:

This is a real trial which is a fundamental part of our democracy and *it is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive. . . . Ladies and gentlemen the attorneys . . . are officers of this court who are sworn to uphold the integrity and the fairness of our judicial system and to help you in your search for the truth. . . . Ladies and gentlemen remember you just took an oath a few minutes ago to listen to the evidence in this case and reach a fair and just verdict. . . . You will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict.*

(App. 10 – 17) (emphasis added).

Notably, the Prosecutor made the following comments during opening statement without objection from Trial Counsel:

I work here in Clarendon County and *my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina. The Supreme Court has said that our job as prosecutors is not to just seek convictions but to ensure that justice is reached, to seek justice, and make no mistake about it that is your goal. Justice is the goal in*

this case and that is what the Judge just told you a few minutes ago. *He told that your job was to, was to render a verdict that speaks justice. That this was search for the truth and that is what it is.* The burden is on the State in this case to prove the evidence of the crimes charged beyond a reasonable doubt.

(App. 18, lines 7-23) (emphasis added). The Prosecutor also made the following comments during closing argument without objection from Trial Counsel:

We believe that you were directly suited to hear this case and that you use your common sense based upon your life experiences to analyze the evidence in this case and *reach a verdict that speaks the truth*, that makes sense. . . . *The verdict comes from the Latin word Veredictum, which means to speak the truth. Judge Young told you in his opening remarks that this was to assert the truth, make no mistake about it, that is your job to find the truth . . . Go back there and consider what you've heard this week and rendered (sic) a verdict that speaks the truth.* Thank you.

(App 432; 439) (emphasis added).

Additionally, the following exchange occurred during cross-examination of the co-defendant, Letroy Samuels, without objection from Trial Counsel:

Q: And is it not true that you are afraid of [Petitioner].

A: I will not say afraid. I would say more cautious.

Q: Ok why are you cautious?

A: Because I have seen him hit some people and I know he is a fighter?

Q: He has hit you before has he not?

A: Yes he has.

(App. 387, lines 12-19).

On January 6, 2015, the jury found Petitioner guilty as charged. The Trial Court imposed a concurrent sentence of thirty-five (35) years imprisonment for the murder conviction and thirty (30) years imprisonment on the burglary conviction. (App. 603 – 604). Petitioner filed a timely notice of appeal. (App. 573 – 574).

### ***Direct Appeal***

On May 27, 2016, Chief Appellate Defender Robert Dudek filed an *Anders* brief, submitting that the appeal is without legal merit to warrant a new trial. *See Anders v. California*, 386 U.S. 738 (1967). (App. 605 – 621). The South Carolina Court of Appeals dismissed the appeal on April 5, 2017. (Appellate Case No. 2015-000091). *State v. Newman*, 2017-UP-140 (S.C. Ct. App. filed April 5, 2017). (App. 575 – 576). The Court of Appeals issued the Remittitur on April 28, 2017. (App. 577).

### ***PCR Applications and Return***

On June 11, 2018, Petitioner filed an application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of counsel and requesting a hearing to present evidence in support of equitable tolling of the statute of limitations. (App. 578 – 587). Petitioner subsequently filed his first amended PCR application on July 5, 2019, raising additional allegations of ineffective assistance of trial and appellate counsel. (App. 588 – 636).

On February 10, 2020, Respondent filed a Return and Motion to Dismiss. (App. 637 – 644). Petitioner filed a Reply Brief and Motion to Deny Respondent’s Proposed Order on March 5, 2020. (App. 645 - 703). The Honorable Kristi Curtis issued an Order on March 19, 2020, to schedule a limited hearing to address the Respondent’s motion to dismiss. (App. 704). The parties appeared before the Honorable Edward W. Miller on the motion to dismiss on November 2, 2022. After hearing testimony and arguments from counsel, Judge Miller denied the Respondent’s motion and ordered Respondent to schedule an evidentiary hearing on the merits of the PCR allegations.

On October 24, 2023, Petitioner filed a second amended PCR application, raising the following allegations of ineffective assistance of trial and appellate counsel relevant to this appeal:

1. Trial Counsel failed to move for a mistrial and/or a curative instruction when Applicant’s co-defendant testified that Applicant was violent, had previously

assaulted him and other people, and that he was afraid of Applicant. At a minimum, Trial Counsel should have objected to this inadmissible propensity evidence where its probative value is substantially outweighed by its prejudicial effect.

2. Trial Counsel failed to object when the Trial Court improperly told the jury that a trial is a "search for the truth" and that the jury is seeking to "reach a fair and just verdict" during the Court's opening remarks. *See State v. Alesky*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Beaty*, 423 S.C. 26, 813, S.E.2d 502 (2018).
3. Trial Counsel failed to object when the Prosecutor referenced the Trial Court's statement that "this was a search for the truth".
4. Trial Counsel failed to object when the Prosecutor improperly stated, "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest."
5. Trial Counsel failed to object when the Prosecutor told the jury to "reach a verdict that speaks the truth" during his closing argument.

(App. 708 – 717).

### ***PCR Evidentiary Hearing***

On July 25, 2024, Petitioner appeared before the Honorable Grace Gilcrist Knie for an evidentiary hearing to address the allegations of ineffective assistance of counsel. (App. 718). Dayne Phillips represented Petitioner, and Assistant Attorney General T. Cruise Mitchell represented the Respondent. Trial Counsel Carter, Appellate Counsel Dudek, former Assistant Solicitor Christopher Durant, and Petitioner testified at the evidentiary hearing.

### ***Trial Counsel Eleazer Carter***

At the hearing, Trial Counsel testified regarding his strategy, preparation, and recollections of the trial. (App. 769 – 829). Relevant to this appeal, Counsel maintained that he did not believe the “search for the truth language” used by the Trial Court or Prosecutor was objectionable. (App. 784 – 787). However, Counsel admitted that he was not aware of the specific case law on this issue and acknowledged that he did not have a strategic reason for failing to object.

Notably, Trial Counsel admitted that he probably should have objected to the testimony that Petitioner had “hit people before”. (App. 796 – 798). However, although Counsel testified that he did not have any recollection of a strategic reason for failing to object, Counsel claimed that he did not want to draw attention to the prejudicial testimony. (App. 800, lines 3-11).

### ***Request for Proposed Orders***

At the conclusion of the hearing, this Court instructed the parties to submit proposed orders for the Court’s review and consideration. (App. 846, lines 2-4).

### ***Order of Dismissal***

On October 7, 2024, the PCR Court filed an Order of Dismissal, finding Petitioner’s “claims to be without merit.” (App. 848 – 880). Relevant to this appeal, the PCR Court specifically denied the following allegations of ineffective assistance of counsel: (1) “Failure to Object to “Searching for the Truth” Language”, (2) “Failure to Object to Prosecutor’s Opening Statement and Closing Argument”, and (3) “Failure to Object to Prior Bad Act Evidence”.

### ***“Failure to Object to ‘Searching for the Truth’ Language”***

As to the allegation that Trial Counsel provided ineffective assistance of counsel for “fail[ing] to object when the Trial Court improperly told the jury that a trial is a ‘search for the truth’ and that the jury is seeking to ‘reach and fair and just verdict’ during the Court’s opening remarks”, the PCR Court found that “Counsel was not deficient in failing to object to these remarks as they were proper under case law that existed at the time of [Petitioner’s] trial.” (App. 859). The PCR Court also found that Petitioner failed to prove prejudice because “the trial court gave an accurate definition of reasonable doubt in its opening statement and in its charge to the jury rendering any alleged error harmless.” (App. 859).

***“Failure to Object to Prosecutor’s Opening Statement and Closing Argument”***

As to the allegation that Trial Counsel provided ineffective assistance of counsel for failing to object to the Prosecutor’s comments during opening statement and closing argument, the PCR Court found that Counsel was not deficient for failing to object to the Prosecutor’s comments during opening statement that “this is a search for the truth” and closing argument when he requested that the jury “reach a verdict that speaks the truth.” (App. 860). The PCR Court also found that Petitioner failed to prove prejudice because “the trial court gave an accurate definition of reasonable doubt” and “the Solicitor informed the jury in his closing that beyond a reasonable doubt ‘means the State must submit its case so that you are firmly convinced of the defendant’s guilty (sic).’” (App. 860). The PCR Court further found that “any improper comment by the Solicitor was cured by the Trial Court’s instruction to the jury.” (App. 860).

Furthermore, the PCR Court found that Counsel was not deficient for failing to object to the Prosecutor’s comment during opening statement that his job “is to represent the interest of this community to represent your interest and is to represent the interest of the State of South Carolina.” (App. 861). The PCR Court found that “the Solicitor’s remarks in his opening statement proper and not objectionable”; and therefore, “Counsel was not deficient in failing to object.” (App. 861). The PCR Court also found that Petitioner failed to prove prejudice because “the Solicitor emphasized the requirement that the State must prove its case beyond a reasonable doubt using only the evidence presented at trial.” (App. 861).

***“Failure to Object to Prior Bad Act Evidence”***

As to the allegation that Trial Counsel provided ineffective assistance of counsel for failing to object and move for a mistrial and/or curative instruction “when [Petitioner’s] co-defendant testified that [Petitioner] was violent, had assaulted him and other people, and that he was afraid of

[Petitioner]”, the PCR Court noted that “clearly admissible testimony, which [was] far more damaging to [Petitioner’s] defense than the alleged prior bad act testimony, was presented directly after the alleged inadmissible statement” and found that “based on the totality of Samuels testimony, which was crippling for [Petitioner’s] defense, [Petitioner] has failed to prove there was a reasonable probability the result would have been different had Counsel objected to the alleged inadmissible prior bad act evidence.” (App. 866).

***Motion to Alter or Amend and Hearing***

On October 10, 2024, PCR Counsel filed a motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (App. 881 – 917).

On January 31, 2025, the parties appeared before the PCR Court via Webex for a virtual hearing on the motion to alter or amend judgment. (App. 918). After hearing arguments from counsel, the PCR Court stated, “I am going to review everything again” and “issue an order in writing”. (App. 928, lines 12-13).

***Order Denying Reconsideration***

On February 14, 2025, the PCR Court filed an Order denying the Motion to Alter or Amend, finding “the Court is unable to discovery any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.” (App. 931 – 933).

***Relief Sought***

On March 3, 2025, Petitioner filed a Notice of Appeal. (App. 934 – 935). Petitioner now seeks a writ of certiorari for this Court to review the denial of his PCR application.

## STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, an applicant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). “First, an [applicant] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, an applicant must prove that “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” when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

As to appellate review “[i]n a PCR case, this Court will uphold the PCR court’s factual findings if there is any evidence of probative value in the record to support them.” *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), reh’g denied, (June 12, 2018). “However, this Court gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo.” *Id.* (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

## ARGUMENT

- I. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE BECAUSE COUNSEL FAILED TO OBJECT WHEN THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY DURING ITS OPENING REMARKS THAT A TRIAL IS A “SEARCH FOR THE TRUTH”, THAT THE ATTORNEYS ARE OFFICERS OF THE COURT TO HELP THE JURY “IN [THEIR] SEARCH FOR THE TRUTH”, AND THAT THE JURY IS SEEKING TO “REACH A FAIR AND JUST VERDICT” AND “RENDER A TRUE AND JUST VERDICT”.**

### *Law*

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court held that jury instructions on reasonable doubt which also charge the jury to “seek the truth” or “search for the truth” run the risk of unconstitutionally shifting the burden of proof to the defendant. The Court also 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. *Id.* at 27–29, 538 S.E.2d at 251–53.

In *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), the Majority held:

Although the issue is not preserved, we 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. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the “all parties involved” in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

*Id.* at 256, 737 S.E.2d at 474.

In a concurring opinion, former Chief Justice Toal explained:

As a final note, although no constitutional error occurred, the trial court's inappropriate statements in this case came close to jeopardizing the legitimacy of the trial. Judges and juries are

critical actors in our judicial system. Jurors are sworn to declare the facts of the case as they are proved from the evidence placed before them. 50A C.J.S. Juries § 1 (2004). The very term “jury” connotes a deliberative body of persons. *Id.* A judge sits as a public officer, who presides over, conducts, and administers the law by virtue of the office, and does so cloaked in judicial authority. *Id.* Judges § 7 (2004). Judges and juries are not, as this trial judge put it, “in it together.” While their functions may act as a complement to one another, it is erroneous to imply that they somehow work hand in hand, and any blurring of their roles serves as an unnecessary and improper distraction.

Judicial instructions to the jury in a criminal case that “whatever verdict you reach will represent truth and justice for all parties,” that “we must see to it that the trial is fair and the verdict is just” and that you and I are “in it together,” may seem at first blush to be simply harmless phrases intended to put the jury at ease and portray the judge as a “regular guy.” However, the constitutional framework governing criminal trials is a highly technical body of law developed by the United States Supreme Court and by state courts operating under the Supreme Court's guidance. It is inappropriate to jeopardize the constitutionality of a trial by instructing the jury in this way.

It is critical that jurors understand the proper application of the reasonable doubt standard. That standard does not charge the jury with ensuring justice for all of the parties. Justice Pleicones correctly notes that this language could result in jurors substituting concepts of justice or fairness for the State's constitutional duty to prove guilt beyond a reasonable doubt. Thus, I join the Justice Pleicones's admonition to the trial court to restrict his jury instructions to matters of law, and refrain from issuing instructions which run the risk of depriving defendants of their right to a fair trial.

*Id.* at 263–64, 737 S.E.2d at 480.

In *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), our Supreme Court “instruct[ed] trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State’s burden of proof in a criminal case. Such language includes, but is not limited to, any language suggesting to the jury that its task is to “search for the truth” or to find “true facts,” or that the jury should render a ‘just verdict.’”

## *Trial*

In this case, the Trial Court made the following improper statement to the jury at the beginning of the trial without objection from Trial Counsel:

This is a real trial which is a fundamental part of our democracy and *it is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive. . . . Ladies and gentlemen the attorneys . . . are officers of this court who are sworn to uphold the integrity and the fairness of our judicial system and to help you in your search for the truth. . . . Ladies and gentlemen remember you just took an oath a few minutes ago to listen to the evidence in this case and reach a fair and just verdict. . . . You will then be in a position to determine what the true facts are and to apply the law to those facts and thus render a true and just verdict.*

(App. 10 – 17) (emphasis added).

Notably, the Prosecutor made the following improper comments during opening statement without objection from Trial Counsel:

I work here in Clarendon County and *my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina. The Supreme Court has said that our job as prosecutors is not to just seek convictions but to ensure that justice is reached, to seek justice, and make no mistake about it that is your goal. Justice is the goal in this case and that is what the Judge just told you a few minutes ago. He told that your job was to, was to render a verdict that speaks justice. That this was search for the truth and that is what it is. The burden is on the State in this case to prove the evidence of the crimes charged beyond a reasonable doubt.*

(App. 18, lines 7-23) (emphasis added). The Prosecutor also made the following improper comments during closing argument without objection from Trial Counsel:

We believe that you were directly suited to hear this case and that you use your common sense based upon your life experiences to analyze the evidence in this case and *reach a verdict that speaks the truth, that makes sense. . . . The verdict comes from the Latin word Veredictum, which means to speak the truth. Judge Young told you in his opening remarks that this was to assert the truth, make no mistake about it, that is your job*

*to find the truth . . . Go back there and consider what you've heard this week and rendered (sic) a verdict that speaks the truth.* Thank you.

(App. 432; 438) (emphasis added).

### ***PCR Hearing***

At the PCR hearing, Trial Counsel maintained that he did not believe the “search for the truth language” used by the Trial Court or Prosecutor was objectionable. (App. 785 – 787). However, Counsel admitted that he was not aware of the specific case law on this issue and acknowledged that he did not have a strategic reason for failing to object.

### ***Deficient Performance***

In this case, the PCR Court erroneously found that “Counsel was not deficient in failing to object to these remarks as they were proper under case law that existed at the time of [Petitioner’s] trial.” (App. 859). *See generally* *Aleksey*, 343 S.C. 20, 538 S.E.2d 248; *Daniels*, 401 S.C. 251, 737 S.E.2d 473. Trial Counsel’s performance was deficient, as it fell below an objective standard of reasonableness “under prevailing professional norms” by failing to object when the Trial Court improperly instructed the jury during its opening remarks that a trial is a “search for the truth”, that the attorneys are officers of the court to help the jury “in [their] search for the truth”, and that the jury is seeking to “reach a fair and just verdict” and “render a true and just verdict”. (App. 10 – 17). *See Strickland*, 466 U.S. at 687-88.

### ***Prejudice***

The PCR Court also erred in finding that Petitioner failed to prove prejudice because “the Trial Court gave an accurate definition of reasonable doubt in its opening statement and in its charge to the jury rendering any alleged error harmless.” (App. 859). Trial Counsel’s deficient performance adversely affected Petitioner’s right to a fair trial because the Prosecutor’s improper comments during opening statement and closing argument reiterated and highlighted the Court’s

improper comments that unconstitutionally shifted the burden of proof. Accordingly, Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

### ***Ineffective Assistance of Counsel***

Therefore, the PCR Court erred in finding Trial Counsel provided effective assistance when counsel failed to object when the trial court improperly instructed the jury during its opening remarks that a trial is a "search for the truth", that the attorneys are officers of the court to help the jury "in your search for the truth", and that the jury is seeking to "reach a fair and just verdict" and "render a true and just verdict". *See Strickland*, 466 U.S. 668.

## **II. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE BECAUSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S COMMENTS DURING OPENING STATEMENT THAT REFERENCED THE TRIAL COURT'S REMARKS REMINDING THE JURY THAT THIS IS A "SEARCH FOR THE TRUTH" AND CLOSING ARGUMENT THAT THE JURY "REACH A VERDICT THAT SPEAKS THE TRUTH".**

### ***Law***

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, an applicant must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668.

### ***Deficient Performance***

In this case, the PCR Court erroneously found that Counsel was not deficient for failing to object to the Prosecutor's comments during opening statement that "this is a search for the truth" and closing argument when he requested that the jury "reach a verdict that speaks the truth." (App. 859 – 860). *See generally Aleksey*, 343 S.C. 20, 538 S.E.2d 248; *Daniels*, 401 S.C. 251, 737 S.E.2d 473. Trial Counsel's performance was deficient, as it fell below an objective standard of

reasonableness “under prevailing professional norms” by failing to object to the Prosecutor’s comments during opening statement that referenced the Trial Court’s remarks reminding the jury that this is a “search for the truth” and closing argument that the jury “reach a verdict that speaks the truth.” (App. 860). *See Strickland*, 466 U.S. at 687-88.

### ***Prejudice***

The PCR Court also erred in finding that Petitioner failed to prove prejudice because “the trial court gave an accurate definition of reasonable doubt” and “the Solicitor informed the jury in his closing that beyond a reasonable doubt ‘means the State must submit its case so that you are firmly convinced of the defendant’s guilty (sic).’” (App. 860). The PCR Court also erred in finding that “any improper comment by the Solicitor was cured by the Trial Court’s instruction to the jury.” (App. 860).

Specifically, Trial Counsel’s deficient performance adversely affected Petitioner’s right to a fair trial because the Prosecutor’s improper comments during opening statement corroborated the Trial Court’s improper comments and enhanced the unfair prejudice created by shifting the burden of proof. Accordingly, Trial Counsel’s deficient performance prejudiced Applicant because it “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

### ***Ineffective Assistance of Counsel***

Therefore, the PCR Court erred in finding Trial Counsel provided effective assistance when Counsel failed to object to the Prosecutor’s comments during opening statement that referenced the Trial Court’s remarks reminding the jury that this is a “search for the truth” and closing argument that the jury “reach a verdict that speaks the truth”. *See Strickland*, 466 U.S.

668.

**III. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE BECAUSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR’S COMMENTS DURING OPENING STATEMENT THAT “MY JOB AS AN ASSISTANT SOLICITOR IS TO REPRESENT THE INTEREST OF THIS COMMUNITY TO REPRESENT YOUR INTEREST” AND “TO SEEK JUSTICE”.**

***Law***

In *State v. Liberte*, 336 S.C. 648, 521 S.E.2d 744 (Ct. App. 1999), our Court of Appeals held,

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

*Id.* (citation omitted).

In *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939), our Supreme Court held that a Solicitor “is a quasi judicial officer, and . . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law”.

***Trial***

At trial, the Prosecutor made the following comments during opening statement without objection from Trial Counsel:

I work here in Clarendon County and *my job as an Assistant Solicitor is to represent the interest of this community to represent your interest*, and is to represent the interest of the state of South Carolina. The Supreme Court has said that our job as prosecutors is not to just seek convictions but *to ensure that justice is reached, to seek justice*,

and *make no mistake about it that is your goal. Justice is the goal* in this case and that is what the Judge just told you a few minutes ago.

(App. 18) (emphasis added).

### ***Deficient Performance***

In this case, the PCR Court erroneously found that Counsel was not deficient for failing to object to the Prosecutor's comment during opening statement that his job "is to represent the interest of this community to represent your interest and is to represent the interest of the State of South Carolina." (App. 861). *See generally Liberte*, 336 S.C. 648, 521 S.E.2d 744; *McGill*, 191 S.C. 1, 3 S.E.2d at 261. Specifically, the PCR Court erred in finding that "the Solicitor's remarks in his opening statement proper and not objectionable." (App. 861). Trial Counsel's performance was deficient, as it fell below an objective standard of reasonableness "under prevailing professional norms" because the Prosecutor improperly informed the jury that he represents their interests in the community and that his job is to seek justice. *See Strickland*, 466 U.S. at 687-88. Specifically,

### ***Prejudice***

The PCR Court also erred in finding that Petitioner failed to prove prejudice because "the Solicitor emphasized the requirement that the State must prove its case beyond a reasonable doubt using only the evidence presented at trial." (App. 861). The Prosecutor's reference to the State's burden of proof did not overcome the prejudice created by this improper comment coupled with the Prosecutor's additional improper comments that unconstitutionally shifted the burden of proof. Accordingly, Trial Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

### *Ineffective Assistance of Counsel*

Therefore, the PCR Court erred in finding Trial Counsel provided effective assistance when counsel failed to object to the prosecutor's comments during opening statement that "my job as an Assistant Solicitor is to represent the interest of this community to represent your interest, and is to represent the interest of the state of South Carolina." *See Strickland*, 466 U.S. 668.

#### **IV. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE BECAUSE COUNSEL FAILED TO OBJECT TO CO-DEFENDANT'S TESTIMONY THAT PETITIONER HAD PREVIOUSLY ASSAULTED HIM AND OTHER PEOPLE.**

### *Law*

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith on a particular occasion . . . It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(a) and (b), SCRE; *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, alleged prior bad acts that are not the subject of conviction must be proved by clear and convincing evidence. *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998).

"Further, even though the evidence falls within a *Lyle* exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Brooks*, 341 S.C. 57, 533 S.E.2d 325 (2000); *See* Rule 403, SCRE. The danger of unfair prejudice is enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Prior bad act evidence “is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (footnote omitted).

### ***Trial***

At trial, the following exchange occurred during cross-examination of the co-defendant, Letroy Samuels, without objection from Trial Counsel:

Q: And is it not true that you are afraid of Jonathan Newman.

A: I will not say afraid. I would say more cautious.

Q: Ok why are you cautious?

A: Because I have seen him hit some people and I know he is a fighter?

Q: He has hit you before has he not?

A: Yes he has.

(App. 387, lines 12-19).

### ***PCR Hearing***

Notably, Trial Counsel admitted that he probably should have objected to the testimony that Petitioner had “hit people before”. (App. 796 – 798). However, although Counsel testified that he did not have any recollection of a strategic reason for failing to object, Counsel claimed that he did not want to draw attention to the prejudicial testimony. (App. 800, lines 3-11).

### ***Deficient Performance***

In this case, the PCR Court failed to properly address Trial Counsel’s deficient performance by erroneously noting that “clearly admissible testimony, which [was] far more damaging to [Petitioner’s] defense than the alleged prior bad act testimony, was presented directly

after the alleged inadmissible statement.” (App. 867). Trial Counsel’s performance was deficient, as it fell below an objective standard of reasonableness “under prevailing professional norms” because the State elicited unfairly prejudicial prior bad act character evidence when the propensity evidence was not *res gestae*, was “strikingly similar” to the one for which Petitioner is being tried, was not a result of a criminal conviction, and was not proven by clear and convincing evidence. *See Gore*, 283 S.C. at 121, 322 S.E.2d at 13 (finding the danger of unfair prejudice is enhanced when the prior bad act is “strikingly similar” to the one for which the appellant is being tried); *See Strickland*, 466 U.S. at 687-88. Notably, the probative value of this evidence is substantially outweighed by the danger of the unfair prejudice to Petitioner. *See Rule 403, SCRE*.

### ***Prejudice***

The PCR Court also erred in finding “based on the totality of Samuels testimony, which was crippling for [Petitioner’s] defense, [Petitioner] has failed to prove there was a reasonable probability the result would have been different had Counsel objected to the alleged inadmissible prior bad act evidence.” (App. 867). Trial counsel’s deficient performance adversely affected Petitioner’s right to a fair trial because Co-Defendant Samuels implicated Petitioner in the murder, and this inadmissible and unfairly prejudicial propensity evidence corroborated the State’s theory that Petitioner is dangerous, physically assaulted him and other people by hitting them, and struck the fatal blow on the Decedent. Accordingly, Trial Counsel’s deficient performance prejudiced Applicant because it “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

***Ineffective Assistance of Counsel***

Therefore, the PCR Court erred in finding Trial Counsel provided effective assistance when Counsel failed to object to the Co-Defendant's testimony that Petitioner had previously assaulted him and other people. *See Strickland*, 466 U.S. 668.

## CONCLUSION

Based on the foregoing reasons, Petitioner Jonathan Newman respectfully requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

s/ Dayne Phillips

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