STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to the Court of Appeals
Appeal from Williamsburg County
Edward W. Miller, Circuit Court Judge

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MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Opinion No. 2026-UP-142 (S.C. Ct. App. Filed March 25, 2026)

APPELLATE CASE NO. 2023-000040

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 13, 2026.

## QUESTIONS PRESENTED

I. Solicitor Kimberly Barr's final words to the jury provide a sample of her closing argument's prejudicial nature: "Judge Young [might] as well retire his robe. I [might] as well quit this job and just do only private practice and [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 he had the presence of mind to throw away the evidence. Then we [might] as well and we all say that we're done. I [implore] you all not to do that and I [implore] you all to return a guilty verdict, thank you."[1] App. 495, ll. 8-17. At the PCR hearing, trial counsel testified that he believed he was prevented from objecting during the state's closing argument by the rules. App. 729, ll. 1 – 8.

Did the Court of Appeals properly apply this Court's precedent in finding a lack of prejudice despite numerous improper arguments by the state in a case that lacked substantial evidence of guilt not tainted by ineffective assistance of counsel?

II. Should our appellate courts rely upon evidence tainted by ineffective assistance of counsel in determining a lack of prejudice from acknowledged ineffective assistance of counsel under *Strickland v. Washington*[2]?

III. Did the Court of Appeals err in failing to address the cumulative impact of the numerous improper arguments of the solicitor during closing that, when coupled with trial counsel's belief that it was improper to object and interrupt the state's closing argument, slides the scale in favor of finding prejudice?

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[1] The trial transcript reflects the word "mine" rather than [might] and "employ" rather than [implore].

[2] 466 U.S. 668 (1984).

## STATEMENT OF THE CASE

Petitioner was indicted and charged with murdering Therris Keels and possessing a weapon during the commission of a violent crime. App. 521-22. The case was tried before a jury and the Honorable W. Jeff. Young on March 11 to 14, 2013. At trial, petitioner was represented by Guy Ballinger and Kimberly Barr represented the state. App. 1. In the words of solicitor Barr, the murder case against petitioner was built on circumstantial evidence and two witnesses who identified petitioner as the shooter: Maurice Smith and Brittany Croskey. App. 337, ll. 2-16. To bolster the case against petitioner, solicitor Barr argued before the jury that the trial judge should retire and the courthouse should be destroyed if the jury failed to convict petitioner.

> [Petitioner] 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 [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 he had the presence of mind to throw away the evidence. Then we [might] as well and we all say that we're done. I [implore] you all not to do that and I [implore] you all to return a guilty verdict, thank you.

App. 495, ll. 4-17 (emphasis added). Trial counsel made no objection to any portion of the state's closing statement.

After conviction on direct appeal, the South Carolina Court of Appeals vacated the sentence on the gun charge but affirmed the conviction for murder.[3] State v. Palmer, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016). Petitioner filed his application for relief asserting multiple reasons to question the fairness of his trial, including prosecutorial misconduct and ineffective

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[3] Following a guilty verdict, the trial court sentenced petitioner to life, with five years consecutive for the weapon charge. App. 518, ll. 9–20.

assistance of counsel. An evidentiary hearing was held on November 1, 2022, before the Honorable Edward W. Miller. James Falk represented petitioner and Danielle Dixon appeared on behalf of the state. App. 624. Petitioner testified as did trial counsel, Ballinger, and solicitor Barr. The PCR court denied relief by order of dismissal dated January 3, 2023. App. 761. During the PCR hearing, when asked about why he failed to object during the state's closing argument, Ballinger indicated his belief that the rules prohibited him from objecting and that, if the argument had been improper, he would have addressed it after the argument with the trial judge.

> If I believe they crossed the line, I raise it post-argument. I mean, again, I think the criminal rules prevent an objection while the solicitor is arguing. I *mean, I think the criminal rule says shall not interrupt opposing counsel.*

App. 729, ll. 1-6 (emphasis added).

Despite the numerous areas of improper argument noted in its order (some of which the Court of Appeals cited in its decision), the PCR court ruled the solicitor's arguments "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. The PCR court found trial counsel was effective and denied relief. App. 761.

Petitioner sought certiorari review from this Court, asserting five grounds for review, including the improper argument of the state and trial counsel's claim that the rules prohibited him from objecting. Supp. App. 1. This Court transferred the matter to the Court of Appeals. The Court of Appeals granted the petition for certiorari to review on the sole issue surrounding trial counsel's effectiveness related to the state's closing argument. Supp. App. 67.

Despite the improper nature of the state's closing argument (which the Court of Appeals cited in part) and trial counsel's assertion that the rules prohibited him from objecting during the state's closing, the Court of Appeals maintained confidence in the outcome of petitioner's trial because "there were three eyewitnesses to the events, even if the credibility of two was in

question."[4] Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026). The one witness whose credibility was not in issue, Levar Wesley Walker, testified that he could not identify the shooter (App. 159, ll. 3 – 5) even if there was a hairstyle similarity between the shooter and petitioner. App. 139, l. 23 – 141, l. 4. The Court of Appeals also relied upon the testimony, itself infected with ineffective assistance of counsel, elicited during trial of a connection between petitioner and a .45 caliber handgun since .45 caliber shell casings were recovered from the scene of the shooting.[5] The Court of Appeals also noted surveillance video captured petitioner's car in the vicinity of the shooting at about the same time the 9-1-1 call was made. The shooting happened as Keels was leaving a large party, where numerous people (including petitioner) attended. App. 185, l. 2 – 187, l. 24; 218, l. 13 – 221, l. 20.

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[4] Petitioner alleged ineffective assistance of counsel regarding the testimony of both Sydney Crosby and Maurice Smith. Supp. App. 1 (Issue 4 and 5). The Court of Appeals denied certiorari on those grounds but did acknowledge their "credibility" was in issue in its opinion.

[5] No .45 caliber handgun was ever found or introduced during trial. Solicitor Barr argued in her closing that the lack of physical evidence connecting petitioner to the shooting was actually a reason to convict him, an argument the Court of Appeals apparently accepts. App. 495, ll. 13 – 14.

## ARGUMENTS

I. The Court of Appeals improperly applied this Court's precedent in finding a lack of prejudice despite numerous improper arguments by the state in a case that lacked substantial evidence of guilt not tainted by ineffective assistance of counsel.

A. How the Court of Appeals ruled on counsel's ineffectiveness.

In its opinion, the Court of Appeals properly rejected the PCR court's determination that trial counsel was not ineffective despite his belief that the "rules" prevented him from objecting during the state's closing argument. "Here, we find counsel's failure to object based on his belief that the rules prohibited him from objecting during the solicitor's argument constituted deficient performance." Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026). The Court of Appeals also properly rejected the PCR court's holding that the improper arguments of solicitor Barr were "a reasonable summation based on the evidence presented, and counsel had no basis to object." App. 778. "In addition, we find the PCR court erred in relying on counsel's testimony that he believed the solicitor's statements to be mere summations of the evidence." Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026).

In making its ruling, the Court of Appeals cited *some* of the improper arguments of the solicitor during her closing. The Court of Appeals did reference the solicitor's tying the judge to the need for a guilty verdict (Judge Young [might] as well retire his robe), forcing the solicitor to give up prosecuting cases if the jury failed to convict (I [might] as well quit this job and just do only private practice) and destroying the courthouse and giving up as a society if a conviction was not returned ([might] as well quit blowing our money away destroy that courthouse across the street because we don't need it). App. 495, ll. 4-17. The Court of Appeals cited *some* of the solicitor's comments on bolstering and the solicitor's comments on petitioner's appearance during trial portraying a lie. Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026).

However, the Court of Appeals failed to include numerous other improper remarks in its analysis, including the improper bolstering and going outside the record by the solicitor concerning the state's star witness, Maurice Smith. During her closing remarks, the solicitor told the jury:

> *I* prosecuted Maurice Smith. Maurice Smith came in this court room *he plead 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 free man 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, l. 17-489, l. 7 (emphasis added).[6] Not only was this argument misleading, outside the record, and improper vouching, it centered on bolstering the only witness who directly implicated petitioner in the murder.[7] The Court of Appeals, in finding trial counsel was ineffective due to his improper belief that he was not allowed to object during the state's closing, omitted any discussion of the impact on the improper bolstering and vouching for Smith as the *only* direct witness connecting petitioner with the murder.

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[6] Within a week or two after the trial, solicitor initiated a downward departure order on Smith's behalf due to his substantial assistance in the prosecution of petitioner pursuant to S.C. Code Ann. § 17-25-65 (2010 as amended). App. 674, l. 21 – 675, l. 19; 693, l. 24 – 694, l. 9. In addition, when Smith pled guilty, he was facing multiple indictments, from both Williamsburg and Clarendon counties, ranging in years from 2009 until 2011. App. 664, l. 16 - 669, l. 17. The solicitor allowed Smith to plead to lesser charges, first offense status, and have some of the charges dismissed outright. App. 670, ll. 4-9; 673, ll. 12-24.

[7] The other two eyewitnesses who testified connected the assailant to petitioner through his "walk" (Britanny Croskey) or through the assailant's hair style (Levar Walker). App. 139, l. 23 – 141, l. 4; 159, ll. 3 – 5 (Walker); 187, ll. 15 – 24; 203, l. 19 – 204, l. 11 (Croskey).

Despite the clearly objectionable and prejudicial nature of the state's closing argument, trial counsel's complete misunderstanding of the need to object allowed the jury to convict petitioner based upon improper reasons in violation of due process. *See* Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (holding even when trial counsel articulates some valid strategy for failing to object to improper closing, such strategy will not be found valid in the face of the "evident impropriety of the solicitor's remarks"); Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it."); Berger v. United States, 295 U.S. 78, 88 (1935)("[W]hile [solicitor] may strike hard blows, [solicitor] is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

B. Despite finding counsel ineffective and noting some aspects of the state's closing argument, the Court of Appeals found a lack of prejudice.

The Court of Appeals found a lack of prejudice since, in its opinion, there was "no reasonable probability the result of the trial would have been different had counsel objected to the solicitor's statements." Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026). The Court of Appeals made this finding despite a complete lack of physical evidence connecting petitioner to the murder. No murder weapon was ever found. App. 734, ll. 2 – 16; 753, ll. 2 – 16. DNA tests were negative; no gunshot residue was discovered; no trace evidence or latent fingerprints connected petitioner to the crime. App. 261, ll. 1-25. In fact, according to the solicitor during trial, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury not to let the petitioner "walk away." App. 495,

ll. 13 – 14. In addition, the Court of Appeals pointedly ignored other segments of the solicitor's closing argument that directly impacted petitioner's right to a fair trial. The most glaring omission was the pointed effort by the Court of Appeals to ignore the improper bolstering and vouching of the state's key witness, Maurice Smith.[8] The solicitor's effort to bolster the credibility of Smith during closing not only crossed the line into improper vouching, *it also went outside the record of trial and mislead the jury.*

In place of forensic evidence or a confession, the Court of Appeals relied upon sketchy eye-witness testimony (either infected by ineffective assistance of counsel, as discussed *infra*, or based upon physical characteristics rather than direct identification) and petitioner's general presence in the area of a crime (during a neighborhood party with a number of participants) as overriding the impact of trial counsel's ineffectiveness. This portion of the Court of Appeals decision is a direct rejection of this Court's precedent in the proper evaluation of prejudice in relation to a finding of ineffective assistance of counsel.

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), this Court established the proper evaluation of reviewing prejudice in the face of clear ineffective assistance of counsel cases. "As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors. When potentially strong evidence such as the fingerprint and Green's identification is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." Id, 422 S.C. at 194, 810 S.E.2d at 846. Here, the Court of Appeals rejected the guidance of this Court in Smalls and focused on evidence that was circumstantial in nature (petitioner's physical presence in the area of the crime,

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[8] In its opinion, the Court of Appeals acknowledged Smith's credibility was in issue but failed to address the impact of the state's bolstering of that credibility during the state's closing argument, only noting that there were "three eyewitnesses to the events, even if the credibility of two was in question." Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026).

witness testimony that he shared some physical characteristics with the shooter, and a single true eye-witness whose credibility was an issue and whose testimony was infected with ineffective assistance of counsel). The Court of Appeals also ignored this Court's guidance in weighing the evidence "with the specific impact of counsel's errors." Smalls, 422 S.C. at 194, 810 S.E.2d at 846. In light of the *significant impact on trial counsel's admitted ineffectiveness*, rather than weighing the lack of direct evidence not impacted by ineffective assistance of counsel in favor of finding prejudice, the Court of Appeals reached into circumstantial evidence and questionable witness testimony to excuse trial counsel's ineffectiveness.

This effort to excuse ineffective assistance of counsel behind a finding of a lack of prejudice is in direct contradiction to this Court's guidance on how the Court of Appeals and, importantly, the PCR courts should evaluate prejudice when faced with clear ineffective assistance of counsel.

> *Simmons* and *Smith* illustrate the proper consideration of the strength of the State's case in the PCR court's analysis of prejudice: it is one significant factor the court must consider—along with the specific impact of counsel's error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice. In this case, however, neither the PCR court nor the court of appeals appears to have considered the specific impact of counsel's error. Rather, both courts used what they considered "overwhelming evidence of guilt" as a categorical bar that precluded a finding of prejudice, without the necessity of separately considering the impact of counsel's error.

Smalls, 422 S.C. 174 at190, 810 S.E.2d at 844 (2018) (referencing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998) and Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007)). It is clear based upon the decision of the Court of Appeals and the PCR court in evaluating the lack of overwhelming evidence of guilt in the face of clear ineffective assistance of counsel, that the lower courts in this state have not applied the guidance in Smalls.

Based solely on improperly connecting petitioner's conviction with the trial judge (Judge Young [might] as well retire his robe), the solicitor's continued ability to represent the state in future criminal trials (I [might] as well quit this job and just do only private practice) and the destruction of the criminal justice system and giving up on society ([might] as well quit blowing our money away destroy that courthouse across the street because we don't need it), this Court should reverse the Court of Appeal's flawed prejudice analysis and remand this matter for a new trial. App. 495, ll. 4-17. "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." State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999) (quoting United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984)).

However, that portion of the solicitor's closing was not the only portion that should have concerned the Court of Appeals and should concern this Court. Critically, the Court of Appeals was selective in the aspects of the state's improper argument that it chose to address in finding a lack of prejudice. In ignoring other aspects of the state's closing, the Court of Appeals further improperly balanced the impact of trial counsel's errors under Smalls. The vouching and bolstering of the Maurice Smith was the most glaring example of the Court of Appeals' effort to ignore how impactful trial counsel's ineffective assistance was on the outcome of trial.

Maurice Smith was central to the prosecution's case.[9] However, the state was faced with significant problems with Smith's credibility. He testified at the time of petitioner's trial while

[9] "Maurice Smith saw Palmer point a gun at Victim. Victim put his hands up as if to let Palmer know he did not have a gun. Palmer shot Victim two times and walked away. He then turned around, shot Victim another time as he lay on the ground, and ran off. Smith then heard the

being incarcerated for a drug conviction. App. 100, ll. 3-17. Smith told police at the time of the shooting that *he did not know who shot the victim*. App. 122, l. 17 - 123, l. 8. Smith, following a negotiated plea deal with solicitor Barr, changed his story and implicated petitioner as the shooter. App. 122, ll. 17 – 22. When counsel attempted to cross-examine Smith on the full extent of his plea negotiations and the benefits he received, the solicitor objected on the grounds that it "assumes facts not in evidence" and the trial court sustained the objection. App. 127, ll. 2-8.

To bolster and vouch for the veracity of Smith during her closing remarks, solicitor Barr told the jury:

> *I* prosecuted Maurice Smith. Maurice Smith came in this court room *he plead 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* <u>*straight up*</u> *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 free man 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, l. 17-489, l. 7 (emphasis added).

Despite this misleading assertion to the jury that Smith had nothing to gain, within a week or two after the trial, solicitor initiated a downward departure order on Smith's behalf due to his substantial assistance in the prosecution of petitioner pursuant to S.C. Code Ann. § 17-25-65 (2010 as amended). App. 674, l. 21 – 675, l. 19; 693, l. 24 – 694, l. 9. In addition, when Smith

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familiar squealing sound of Palmer's car." <u>State v. Palmer</u>, 415 S.C. 502, 509, 783 S.E.2d 823, 826 (Ct. App. 2016).

pled guilty, he was facing multiple indictments, from both Williamsburg and Clarendon counties, ranging in years from 2009 until 2011. App. 664, l. 16 - 669, l. 17. Solicitor Barr allowed Smith to plead to lesser charges, first offense status, and have some of the charges dismissed outright. App. 670, ll. 4-9; 673, ll. 12-24. This was clearly not a "straight up" plea but one that was negotiated with substantial reductions favoring Smith.

By completely ignoring this aspect of the state's closing, the Court of Appeals improperly titled the scales in evaluating prejudice. This effort by the Court of Appeals to avoid addressing the impact of improper vouching and bolstering of a key witness can be contrasted with this Court's opinions dealing with the same scenario. In Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), this Court specifically addressed the impact of the state's improper effort to vouch for its key witness at trial in the PCR setting.

> As to the prejudicial impact of the failure to object, we find that prejudice clearly flowed from counsel's error. In the instant case, Ethridge was the State's key witness, and therefore his credibility was crucial to the government's case. Indeed, because Gilchrist essentially presented a "mere presence" defense, believing Ethridge was the only way the jury could convict Gilchrist.

Id., 350 S.C. at 228, 565 S.E.2d at 285. Like in Gilchrist whose defense admitted his presence in the area of the crime, in this case petitioner was "merely present" in the vicinity of the murder. Like in Gilchrist, whose guilt depended on the credibility of witnesses, in the present case a lack of physical evidence connected petitioner to the murder and his guilt depended on the credibility of Smith and the jury's belief that he had a unique walk (Crosbey) and hairstyle (Walker).

Here, as in Gilchrist, the solicitor intentionally went outside the record, misled the jury, and placed the weight of her office and status as a prosecutor on the scales in vouching for Smith. Rather than address the impact of this improper bolstering as part of the prejudice

analysis, the Court of Appeals selectively ignored this aspect of the state's improper closing argument.

"Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). "The legal concept of 'vouching' prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury." Id. In the present case, the solicitor told the jury any implication that Smith may be attempting to "curry favor" with the state, *since she was there* when he pled, was "not true." App. 488, ll. 24-25. As a result of this improper vouching, Smith's testimony "carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about [Smith]." State v. Kelly, 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), rev'd on other grounds and remanded, Kelly v. South Carolina, 534 U.S. 246 (2002). By vouching for Smith, the solicitor invaded the province of the jury. "Our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime." Chappell v. State, 429 S.C. 68, 81–82, 837 S.E.2d 496, 503 (Ct. App. 2019).

This Court should grant the petition and reverse the Court of Appeals' effort to excuse clearly incompetent representation through a flawed prejudice analysis. In light of the effort by the PCR court *and the Court of Appeals* to improperly apply the prejudice analysis this Court has provided in Smalls, this Court should reiterate to the lower courts in this state the appropriate manner of evaluating prejudice in the face of clearly ineffective assistance of counsel.

II. The Court of Appeals improperly relied upon evidence tainted by ineffective assistance of counsel in determining a lack of prejudice from acknowledged ineffective assistance of counsel under *Strickland v. Washington*.

In evaluating the evidence of guilt in determining a lack of prejudice, the Court of Appeals improperly relied upon evidence that was itself tainted by ineffective assistance of counsel. In its view of the "overwhelming nature" of the evidence against petitioner, the Court of Appeals relied upon the following.

> As to the evidence, there were three eyewitnesses to the events, even if the credibility of two was in question. Levar Wesley Walker testified the shooter wore a "ponytail puffed up with hair," which Walker had seen Palmer wear. Witnesses, including Detrel Matthews, testified to previous animosity between the victim and Palmer. There was also evidence of an altercation between Palmer and another person during which Palmer purportedly had a gun. Matthews also reported during an interview that his brother had returned a .45 caliber handgun to Palmer before the shooting. In addition, .45 caliber shell casings were recovered from the scene of the shooting. Also, surveillance video from a business close to the shooting showed Palmer's greenish-colored Neon, missing a hubcap, on the road at about the same time the 9-1-1 call was made. Changing his story from his initial statement, Palmer admitted it was his vehicle.

Palmer v. State, No. 2023-000040, (S.C. Ct. App. Mar. 25, 2026).

As noted *supra*, missing from this recitation is an admission of guilt or any forensic evidence connecting petitioner to the murder. Moreover, some aspects of guilt relied upon by the Court of Appeals were tainted by aspects of ineffective assistance of counsel and should not have been used as a basis of finding a lack of prejudice. *See* Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018) ("When potentially strong evidence such as the fingerprint and Green's identification is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice.").

The "evidence" connecting petitioner to a .45 caliber firearm a few weeks before the murder was itself compromised by ineffective assistance of counsel. The caliber of the weapon used in the crime (a .45) was only connected to petitioner from an unrelated altercation weeks before the murder.[10] At trial, Mathews denied seeing a gun, denied picking up a gun, denied giving it back to petitioner, denied any knowledge of its caliber, and denied telling investigator McFadden anything to the contrary. App. 214, l. 15 – 217, l. 3.

The solicitor followed with questions to McFadden regarding hearsay conversations with Mathews' federal probation officer to explain Mathews' change in story at trial.

> Q: What if anything did you try to do to smooth out any problem that Mr. Matthews might of had with his probation officer?
>
> A: First I contacted her by phone she came to came to Kingstree she met with me at the Sheriff's Office. I explained to her what we . . . had a suspect identified we actually had an eye witness there to say he put the murder weapon back into the individual hand. The only problem is by him saying he had possession of a firearm would violate his federal probation.
>
> Q: What were you trying to ask her to do?
>
> A: Work with him as much as he could if he could help us with the murder case.
>
> . . .
>
> Q: Did she agree to do that?
>
> A: No.
>
> Q: Did you tell him that she would not violate him, that she was going to violate him if he put it on record?

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[10] No evidence connected petitioner to a .45 caliber firearm other than the testimony from investigator Wayne McFadden about what Detrel Mathews allegedly said off the record. Searches connected with petitioner found .38 caliber ammunition for a .38 pistol petitioner admitted to owning that was in no way connected with the Keels murder. App. 734, ll. 5 - 25; 753, ll. 2 - 16.

> A: Yeah I mean I stayed straight with him I told him . . . Detrel I need your help on this murder case *but your probation officer is saying that if you officially paroled make a tape statement while having possession of a firearm she's going to violate you.*

App. 313, l. 25 – 314, l. 24.[11]

The prejudicial impact of this hearsay testimony was emphasized by the solicitor during her closing as she used it to vouch for the statements Mathews allegedly made to McFadden:

> *Parole office says no if he goes on record and he says that he had a gun I'm going to violate, which essentially means Detrel going back to jail.* . . . Now let me tell you this here's how you know that Detrel Matthews had that gun. If it's true when he testified that he never had a gun from Mr. Palmer, why in the world would Wayne McFadden be talking to his parole officer. . . Why would the officer have a need to even go and talk to his parole officer. *That's how you know in fact the statement that Detrel Matthews made Wayne McFadden were in fact true . . .*

App. 484, l. 25 – 485, l. 17 (emphasis added).

Rather than discount the connection between petitioner and a .45 caliber handgun since it was infected by ineffective assistance of counsel, the Court of Appeals relied upon that connection as a basis for finding overwhelming evidence of guilt. It is inherently improper and a clear departure from the guidance of Smalls to deny certiorari on an aspect of ineffective assistance of counsel and then rely upon that evidence as forming "overwhelming" evidence of guilt to excuse other aspects of trial counsel's ineffective representation. This Court should grant review and reject this selective approach to granting certiorari to insulate aspects of trial

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[11] Trial counsel's failure to object to the hearsay testimony regarding the federal parole agent was asserted as a basis for Certiorari but the Court of Appeals declined to grant certiorari on this aspect of trial counsel's representation. Supp. App. 1 (Issue 3). This error of trial counsel was compounded by his failure to object to the use of this federal parole violation to bolster McFadden's version of the Mathews statement.

counsel's ineffective representation then use evidence tainted by that ineffectiveness to form an overwhelming evidence of guilt analysis.

III. The Court of Appeals erred in failing to address the cumulative impact of the numerous improper arguments of the solicitor during closing that, when coupled with trial counsel's belief that it was improper to object and interrupt the state's closing argument, slides the scale in favor of finding prejudice.

As noted *supra*, the Court of Appeals quoted selective portions of the state's closing argument in addressing trial counsel's ineffectiveness. In his Petition for Certiorari, Brief of Petitioner, and Petition for Rehearing, petitioner urged the Court of Appeals to consider the cumulative impact of the state's closing argument on petitioner's right to a fair trial.

The "cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). A party asserting cumulative error "must demonstrate more than error in order to qualify for reversal on this ground. Instead, the errors must adversely affect his right to a fair trial." State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)(finding the facts of the case did not support a finding that cumulative errors, including incidental mention of polygraph and improper ruling on shoplifting charges for impeachment, warranted reversal).

Here, the impact of the state's improper argument is magnified when it is repeated or touches on another area of ineffective assistance of counsel, particularly in a case so dependent on the credibility of witnesses. See Tappeiner v. State, 416 S.C. 239, 254, 785 S.E.2d 471, 478–79 (2016) ("As a result, we find it likely the emotional plea, particularly in conjunction with the

solicitor's improper vouching for Victim's credibility, swayed the jurors' view of the facts and resolution of the contradictions in the witnesses' testimonies."). The cumulative impact of the numerous improper arguments of the solicitor, in a case that hinged on the credibility of questionable witnesses touched by other allegations of ineffective assistance of counsel, warrants a finding that petitioner's right to a fair trial was compromised under Strickland so that confidence in the outcome of the conviction should be rejected and petitioner granted a new trial. This Court has instructed the lower courts in this state to consider the cumulative impact on a state's closing argument that cross the line into improper vouching and rely upon emotion and information outside the record. Tappeiner, 416 S.C. at 253–54, 785 S.E.2d at 478.

Here, the solicitor improperly tied conviction of petitioner to the general health and safety of society. "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." State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999) (quoting United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984)). The solicitor improperly vouched for and bolstered the state's key witness by both misleading the jury and going outside the record. "Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). The state relied upon improper hearsay testimony to bolster one version of a witness' testimony over another. "It is improper for a judge or a prosecutor to bolster a witness's credibility by stating to the jury his or her view that the witness is likely being truthful." State v. Reyes, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020).

The solicitor's continual use of the first person "I" in improperly vouching for Smith added an additional element of error concerning vouching. As this Court noted in Busse:

> [T]he State should not inject the personal views or opinions of its representative as to the credibility of a witness into the jury's thought process. In Kelly, we stated the State's use of the first person was "perhaps not technically vouching," but it raised the second of two concerns associated with vouching. 343 S.C. at 369, 540 S.E.2d at 860. That concern is "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."

Busse, 439 S.C. at 111–12, 886 S.E.2d at 212.

Due to the repeated nature of the solicitor's improper argument, the Court of Appeals should have applied a cumulative error analysis to slide the scale in favor of finding prejudice particularly in light of the admitted nature of trial counsel's ineffectiveness. Rather than acknowledge the lack of overwhelming evidence of guilt and the over-the-top nature of the state's improper closing argument, the Court of Appeals selectively referred to portions of the closing in isolation. This approach has been specifically rejected by this Court in Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016).

This Court should grant review and hold that the cumulative error doctrine, *coupled with a significant error of trial counsel in believing he was prevented from objecting during the state's closing*, slides the scales in favor of finding prejudice absent overwhelming evidence of guilt, such as a confession or strong physical evidence such as DNA.

## CONCLUSION

Both the Court of Appeals and the PCR court found a lack of prejudice despite the lack of confession, physical evidence, or DNA or other forensic evidence on a case built on the credibility of one eyewitness, who the state improperly vouched for and bolstered, along with circumstantial evidence also impacted by ineffective assistance of counsel. This Court should grant review and remind the lower courts of this state regarding the appropriate application of the prejudice component of Strickland v. Washington when impacted by significant and admitted ineffective assistance of counsel as outlined by this Court in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Respectfully Submitted,

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This 12th day of June, 2026.