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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

SUPPLEMENTAL APPENDIX

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ISSUES PRESENTED

1. Did the PCR court err in finding counsel was effective 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?

2. Did the PCR court err in finding counsel was effective when counsel failed to object to testimony regarding a fight unconnected to the homicide victim in this case under Rule 404, SCRE, which included an alleged threat by petitioner to kill the unrelated combatant and was the only evidence that placed a gun in petitioner's possession of the caliber used in this case?

3. Did the PCR court err in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFadden concerning petitioner's possession of a gun that matched the caliber used in this case?

4. Did the PCR court err in discounting the issue surrounding Maurice Smith's criminal history on the sole basis that the solicitor denied there was a secret plea deal rather than address the state's obligation to fully disclose Smith's criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he received and could expect to receive by testifying against petitioner?

5. Did the PCR court err in finding trial counsel was effective when he failed to request a hearing under Neil v. Biggers, 409 U.S. 188 (1972) on the out of court identification of petitioner by Brittany Croskey whose identification was tainted by police misconduct and who was influenced by rumors she heard around town rather than what she observed on the night of the murder?

STATEMENT

In the words of solicitor Kimberly Barr, the murder case against petitioner Marc Palmer was built on circumstantial evidence and two witnesses who identified petitioner as the shooter: Maurice Smith and Brittany Croskey.[1] App. 337, ll. 2-16. The testimony of both these key witnesses was impacted by ineffective assistance of counsel and state misconduct as discussed *infra*.

Smith was a convicted felon and testified following a plea bargain on unrelated charges that reduced some charges and dismissed others. App. 692, l. 2 – 693, l. 13. Within two weeks after testifying, Smith received further consideration from the solicitor when she initiated a downward departure of his sentence due to his substantial help against petitioner. App. 652, ll. 15-24. The solicitor misrepresented Smith's guilty plea and sentencing to the jury. App. 488, l. 17 - 489, l. 7. The solicitor cut off trial counsel's cross-examination of Smith regarding his plea negotiations by objecting that it assumed "facts not in evidence" and the trial court sustained the objection.[2] App. 127, ll. 2-8.

Croskey indicated she could not identify the shooter until the police officer who interviewed her suggested that the suspect's unusual walk would help jog her memory, after which she identified the shadowy figure she saw from a distance as petitioner based solely upon his walk. App. 187, ll. 15 – 24; 203, l. 19 – 204, l. 11. Trial counsel elected not to attempt to suppress the tainted identification since he did not believe it fell under Neil v. Biggers, 409 U.S. 188 (1972) since it "was not a photo lineup." App. 724, ll. 6–15.

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[1] Petitioner was indicted and charged with murdering Therris Keels and possessing a weapon during the commission of a violent crime. App. 521-22.

[2] 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 Barr represented the state. App. 1.

Part of the circumstantial evidence presented at trial was a fight between petitioner and an individual unconnected to the Keels murder that happened weeks before the crime, which included an alleged threat by petitioner to kill the unrelated combatant. App. 315, ll. 11 – 15. This prior altercation was also the only connection between petitioner and the alleged murder weapon. Trial counsel did not contest the admission of this prior bad act testimony under Rule 404, SCRE.

During her closing argument, the solicitor interjected information not in the record and vouched for witnesses. App. 488, ll. 16-21. She appealed directly to passion and prejudice as a basis for finding petitioner guilty, going so far as to include disappointing the trial judge and destroying our system of justice if a conviction was not returned. App. 495, ll. 4-17. Trial counsel made no objection during the closing argument, believing under the rules he was not allowed to object. App. 729, ll. 1-8.

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 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.

This petition for certiorari follows.

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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.

ARGUMENT

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

1. The PCR court erred in finding counsel was effective 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.

In the present case, the PCR court noted *numerous* areas of concern from the solicitor's closing argument. App. 776-779. The fact the trial counsel did not object a single time during these instances was explained by his *admitted lack of understanding* of his obligation to object and his belief that the "rules" prohibited him from objecting.[4] App. 729, ll. 1-8. Despite the numerous areas of improper argument noted in the order, the PCR court ruled the solicitor's argument "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. This holding is neither supported by the record nor an accurate

[4] "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.

legal conclusion.[5] As counsel was *admittedly ineffective* in understanding his role 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.[6]

A. The solicitor urged conviction of petition to avoid disappointing the trial judge and destroying the symbols of our criminal justice system including her office and the courthouse.

The solicitor's final words to the jury focused on the dangers of "street justice" and included the following admonition:

> [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. By tying a finding of "not guilty" to the rejection and destruction her own office as solicitor, the trial judge's robes as symbols of his office of impartiality, the courthouse

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[5] "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." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "[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." Berger v. United States, 295 U.S. 78, 88 (1935).

[6] It is "incumbent" for "trial counsel to object to the solicitor's" improper closing arguments. Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). As noted in Brown, even when trial counsel articulates some valid strategy for failing to object to improper closing (as opposed to the clear misunderstanding of the law trial counsel claimed here), such strategy will not be found valid in the face of the "evident impropriety of the solicitor's remarks." Id.

itself as a symbol of justice, and "surrendering" the community at large to criminals are clear efforts to push the jury to render its verdict, not on the shaky and contradictory statements of the witnesses produced at trial, but on an improper basis.

The PCR court focused solely on whether this portion of the closing violated the "golden rule" argument prohibition, finding it did not specifically request that jurors put themselves in the "shoes of one of the parties." App. 779. While the PCR court concentrated on whether this technically violated the "golden rule" prohibition, it failed to consider the reason the "golden rule" argument is prohibited in the first instance: it "impermissibly appeal[s] to the passion of the jurors by asking them to 'speak up' for [the] victim." Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009); *see also* State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (holding a new trial should be granted when the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). Rather than relying on the evidence presented at trial, the solicitor placed a "parade of horribles" before the jury should they not render a guilty verdict. The solicitor implored the jury to not let that parade happen. App. 495, ll. 15-17.

"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)). As in Liberte, wrapping the conviction of petitioner into the need for the jury to "protect community values, preserve civil order, or deter future lawbreaking" was "far too heavy a burden for the [petitioner] to bear" and warrants reversal. As this improper argument infected the trial with

unfairness and violated petitioner's due process rights, a new trial is warranted, particularly in light of the reliance by the state on questionable witness testimony that was also impacted by ineffective assistance of counsel.

B. The solicitor went outside the record and misrepresented the facts surrounding a key state witness' criminal history and improperly vouched for his credibility before the jury.

Maurice Smith was central to the prosecution's case.[7] There was no physical evidence linking petitioner with the crime.[8] There were significant problems with Smith's credibility. He testified at the time of petitioner's trial while 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.

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

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

[8] A murder weapon was never located; 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. According to the solicitor, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury to not to let the petitioner "walk away." App. 495, ll. 13 – 14.

> 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).

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.

The solicitor's factual assertions to the jury that Smith "pled guilty straight up" and "he's serving his sentence" and had "nothing to gain" were inaccurate and solicitor knew they were inaccurate. The solicitor compounded the impact of this misrepresentation by improperly vouching for Smith and by claiming he did not have "anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't." App. 488, l. 25 – 489, l. 7. The solicitor was aware of something for Smith to gain through S.C. Code Ann. § 17-25-65 (2010 as amended), since *she initiated* the downward reduction within a couple of weeks after Smith's testimony.[9] The

[9] "Upon *the state's motion* made within one year of sentencing, the court may reduce a sentence if the defendant . . ." S.C. Code Ann. § 17-25-65 (2010 as amended) (emphasis added).

solicitor then limited trial counsel's cross-examination of Smith by successfully objecting that it "assume[d] facts not in evidence." App. 127, ll. 2–8. The solicitor then went further in bolstering Smith's credibility by improperly vouching for him before the jury.

"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. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "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).

The prejudicial vouching for Smith by the solicitor was compounded by the fact that it was also a misstatement of the facts and by the solicitor's successful limitation on trial counsel's

effort to cross-examine Smith on his plea negotiations. The PCR court erred in finding this "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. Since counsel admitted he was ineffective in controlling the solicitor during the closing argument, and Smith's testimony was central to the case against petitioner, the solicitor's misstatements of facts outside the record and improper vouching warrant a new trial.

C. Additional improper remarks combined to further erode the petitioner's right to a fair trial and justify granting a new trial under the cumulative error doctrine.

The solicitor touched on victim impact and the impact on petitioner's own family as an appeal to passion and prejudice.

> 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 that somebody decided to play God and take the life of 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* [petitioner's father] *any question because I think quite frankly his family as the Keels family have lost a lot*.

App. 477, ll. 12 – 25 (emphasis added).

As part of her closing, the solicitor brought the jury the insight of people unrelated to the trial and outside the record to support a conviction of petitioner. This included the outside the record discussions with a close friend who helped provide special insight into the shooting.

> Godly how could somebody be so braze and just to 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 went off, the light bulb went off your right.* He was that

> bold and he was that brazen and that bad and that cold blooded because he wanted an audience . . .

App. 480, ll. 12 - 21 (emphasis added).

She used improper hearsay evidence to vouch for one of the conflicting stories told by a key witness, Detrel Mathews, concerning petitioner's access to a .45 caliber handgun.

> 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. 485, l. 15 - 17 (emphasis added).

The solicitor's referred to the trial speaking the truth, for both the petitioner and prosecution, improperly shifting the burden of proof.

> At the end of the day *everybody in this courtroom* wants what's *fair, what's just, and what's right*. Now -- tell you you know Mr. Ballinger and I don't agree what that is in this case, *but everybody agrees that we want a verdict that speaks the truth.*

App. 462, ll. 10 – 14 (emphasis added). *See* State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding in a charge this language "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."). This burden shifting was compounded by the trial judge's admonition to the jury that their role was to search for the truth[10]:

> This is a real trial which is a fundamental part of our democracy and it's a search for the truth in an effort to make sure that justice is done. Searching for the truth and insuring that justice is done is often deliberate, repetitive, and slow.

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[10] The PCR court's reliance on State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) as insulating the remarks of the trial court and improper argument of counsel is misplaced. As warned in Daniels, this type of language was improper, and the trial court was in error to tell the jury they were there to "search for the truth" and to uphold "fairness" and this error was compounded by the solicitor's closing referring to this same role and duty.

> . . .
>
> The attorneys who are appearing before you are advocates for the parties they represent but first and foremost they are officers of this court. Who are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors in your search for the truth.

App. 79, l. 19 – 80, l. 9.

"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). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id. The impact of 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 two questionable witness both touched by improper conduct, warrants a finding that petitioner's right to a fair trial was compromised and that trial counsel was ineffective under Strickland in failing to object to the numerous improper comments of the solicitor during closing.

2. The PCR court erred in finding counsel was effective when counsel failed to object to testimony regarding a fight unconnected to the homicide victim in this case under Rule 404, SCRE, which included an alleged threat by petitioner to kill the unrelated combatant and was the only evidence that placed a gun in petitioner's possession of the caliber used in this case.

Keels was shot with a .45 caliber handgun, but no murder weapon was ever found. App. 734, ll. 2 – 16; 753, ll. 2 – 16. The only connection between petitioner and the weapon used to murder Keels was a fight between petitioner and Dominique McBride that occurred weeks before Keels was murdered. App. 108, ll. 11-19. The state produced two witnesses who testified, without objection by trial counsel, that petitioner dropped a gun during this altercation. One of these witnesses was Smith, whose credibility issues were discussed *supra*. Smith could not identify the type of gun and left the scene of the altercation soon after it started. App. 109, ll. 1–12. The other witness was Detrel Mathews. During his trial testimony, Mathews denied knowing anything about a gun from the incident other than something that may have been a gun fell from petitioner's waist during the altercation. App. 214, l. 15 – 216, l. 24.

The PCR court erroneously determined that, while the state was planting the seeds to impeach Mathews on prior inconsistent statements with this line of questioning, the state did not move to introduce any prior inconsistent statements from Mathews. App. 776, fn. 9. To the contrary, the solicitor impeached Mathews with statements he alleged made to investigator McFadden. App. 315, ll. 11–15. This impeachment testimony included statements about petitioner wanting to shoot the other combatant (Dominique McBride) and that petitioner had a .45 caliber automatic, statements Mathews denied making while testifying under oath at trial at trial. App. 311, ll. 5 – 13; 216, ll. 2 – 20. Without trial counsel's objection, the state was able to introduce evidence that petitioner wanted to shoot and kill a person and placed a weapon of the proper caliber used to kill Keels in petitioner's possession from this unrelated altercation, without a Rule 404, SCRE, inquiry. Petitioner asserted trial counsel's failure to object to this

prior bad act testimony as a ground for relief in his PCR application and testified on this issue at the PCR hearing. App. 571; 645, l. 18 – 646, l. 22.

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. King, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting Rule 404(b), SCRE.). The admission of this type of evidence is particularly prejudicial, as it "fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008). Moreover, if bad act evidence is admitted under Rule 404(b), "the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (citing State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009).

Here, the prior back act was a fight between petitioner and a third-party *not connected to the murder in any way*. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Even if supported by clear and convincing evidence "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

The evidence of this prior bad act was tenuous. A convicted felon, Smith, testified about seeing a gun drop during the fight but was unable to describe the gun and left shortly after the incident began. App. 109, ll. 1-18. Mathews denied seeing the gun under oath at trial and "on

the record" to investigator McFadden during the investigation. App. 212, l. 4 – 217, l. 22. The state's sole connection between this earlier altercation and the murder was the "off the record" statements by Mathews about the gun's caliber to McFadden. App. 310, l. 25 – 311, l. 4; 315, ll. 6 – 15.

The PCR court also erred in finding this line of questioning could not have "materially impacted the jury and affected the outcome of the trial." App. 776. The prejudicial nature is established firmly by how the solicitor used this evidence in closing:

> During this fight .45 caliber pistol falls from his waist, Detrel Matthews picks up the pistol, *who is afraid to give it back to the defendant because he was afraid the defendant would kill Dominique McBride* so he holds it for a few days.

App. 483, ll. 12–17 (emphasis added). It was also the only connection between the petitioner and a .45 caliber handgun. The prejudicial nature of this evidence is apparent.

This issue was raised in the PCR petition and subject to testimony at the PCR hearing. App. 571; 645, l. 18 – 646, l. 22. As there is no factual dispute as to the nature of the prior bad act testimony and no strategic reason for trial counsel not to object to its introduction and allow for a full evaluation of this testimony, outside the presence of the jury, by the trial court, this Court should address the merits of this issue and grant petitioner a new trial.[11]

[11] If this Court declines to address this issue due to the incomplete PCR order on the legal impact of counsel's failure to object under Rule 404, SCRE, a remand would be appropriate for direct findings of fact and conclusions of law on this issue under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

3. The PCR court erred in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFadden concerning petitioner's possession of a gun that matched the caliber used in this case.

As noted, the caliber of the weapon used in the crime (a .45) was only connected to petitioner from the unrelated altercation weeks before the murder.[12] 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. As noted, the PCR court erred in determining the state did not move to introduce any prior inconsistent statements from Mathews. App. 776, fn. 9. The PCR court also erred in finding this line of questioning could not have "materially impacted the jury and affected the outcome of the trial." App. 776. While trial counsel did object to the initial questioning of McFadden regarding the out of court statements by Mathews, the trial court overruled the objection following a bench conference.[13] The solicitor then proceeded to impeach Mathews through his prior inconsistent statements provided "off the record" to McFadden. App. 310, l. 25 – 311, l. 4.

This included the fact that the gun Mathews denied he picked up was a .45 caliber pistol. App. 311, ll. 5–13. The solicitor followed with questions to McFadden regarding hearsay conversations with Mathews' federal parole officer to explain Mathews' deception during trial related to his federal probation being revoked if he admitted to holding the gun.

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[12] No evidence connected petitioner to a .45 caliber firearm other than the testimony from investigator McFadden about what 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.

[13] The exact basis of the trial court's ruling is not clear in the trial transcript, as trial counsel failed to note the trial court's ruling from the bench conference on the record. App. 721, l. 8 – 723, l. 13.

> 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?
>
> 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.

This issue is controlled by State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Our Supreme Court cautioned "prosecutors against using 'investigative information' as it appears this is an attempt to circumvent the rules against hearsay." Id. at 66–67, 810 S.E.2d at 28. The statements from the unknown federal parole officer that Mathews would have his parole revoked and returned to prison if he admitted possessing the gun were hearsay and should have been subject to an objection. 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).

Trial counsel did not object to this hearsay testimony about discussions between McFadden and the parole officer. Petitioner asserted this failure to object as a ground in his petition for relief, specifically noting the hearsay nature of obtaining testimony from a federal parole officer to explain why another witness, Mathews, was motivated to change his story. App. 561. Trial counsel's explanation for not objecting was that the trial judge had ruled it was proper impeachment testimony from a sidebar ruling. App. 310, l. 19 – 311, l. 4; 722, l. 1 22. While this appeared to be an effort by counsel to keep out the prior inconsistent statements Mathews allegedly made to McFadden, he failed to object when the hearsay testimony went from what Mathews told McFadden to what the unknown federal probation officer told McFadden. The PCR court erred in failing to specifically rule on this issue. The solicitor compounded trial counsel's error by improperly vouching for the off the record statements of Mathews using the fear of his federal parole revocation as the reason he denied knowing anything about the gun. App. 485, l. 15 – 17. If this Court declines to address this issue due to the incomplete PCR order, a remand would be appropriate for direct findings of fact and conclusions of law on this issue under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

4. The PCR court erred in discounting the issue surrounding Maurice Smith's criminal history on the sole basis that the solicitor denied there was a secret plea deal rather than address the state's obligation to fully disclose Smith's criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he received and could expect to receive by testifying against petitioner.

As noted *supra*, Smith received substantial consideration for his guilty plea. At the PCR hearing, PCR counsel went through the various charges and potential sentences Smith faced. App. 666 – 675. Due to the significant number of charges, across two counties, this took considerable time. By contrast, when Smith testified at trial, trial counsel asked Smith only seven questions regarding his prior criminal record before being interrupted by the solicitor's objection:

> Q: And your current sentence is for drug possession or drug distribution?
> A: Trafficking and possession.
> Q: Trafficking in what?
> A: Crack cocaine.
> Q: And you got a ten year sentence?
> A: Yes.

App. 124, ll. 14-20. This was followed with:

> Q: How much did trafficking carry?
> A: I don't know.
> Q: It's around 25 isn't it? Twenty-five years?
> A: I didn't help the State. If I was going to help the State, it wouldn't have been that. I could have done other things and been home.
> Q: So tell me if I'm wrong you're looking at a 25 year sentence for trafficking in crack, correct?
> A: Yeah if you say.
> Q: Those charges were pending as of February 2012 when you gave your second statement assuming the SLED information is right, correct?
>
> *Ms. Barr: Judge I'd object to the question because it assumes facts not in evidence.*
>
> *The Court: Sustained.*
>
> *Mr. Ballinger: I withdraw that question Your Honor.*

App. 126, l. 18 – 127, l. 8 (emphasis added). Trial counsel asked no further questions regarding Smith's plea history.

Petitioner asserted that the state failed to disclose the extent of Smith's criminal history and plea details. App. 534-537. Petitioner testified at the PCR hearing that the defense was not provided a NCIC report on Smith. App. 653, ll. 5-18. Trial counsel indicated he fully relied on the state to comply with Brady v. Maryland, 373 U.S. 83 (1963) and his Rule 5, SCRCP, motion with no independent investigation of Smith's criminal history. App. 713, ll. 3-23. Trial counsel indicated he was unaware of any plea agreement with Smith in exchange for testifying against petitioner and claimed his "best course of finding information [in] that regard – would have been from cross-examination of Mr. Smith." App. 713, ll. 3-23.

The state had an affirmative obligation to disclose the extent of Smith's charges and plea resolution that occurred before trial. *See* State v. Durant, 430 S.C. 98, 107–08, 844 S.E.2d 49, 54 (2020) (holding the failure to provide information that could be obtained through a NCIC search is a Brady violation."). Trial counsel was entitled to this information and should have obtained it from the state rather than simply relying on it coming out in cross-examination. The solicitor compounded the impact of the failure to fully disclose the extent of Smith's plea bargain by objecting during trial counsel's cross-examination of Smith at trial, incorrectly telling the jury about the nature of the plea deal during closing, and by improperly vouching for Smith, discussed *supra*.

"After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the strength of the State's case, we find the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable

probability that, but for counsel's errors, the result of the trial would have been different.'" Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018). Like counsel in Smalls, trial counsel here had an obligation to effectively cross-examine Smith (and object to the prior bad act). In addition, the state had an obligation to fully inform trial counsel of the extent of the charges Smith faced and the nature of his plea agreement. Either the state failed in the later, or trial counsel failed in the former. This is particularly true in the handling of S.C. Code Ann. § 17-25-65 (2010 as amended). The state failed to disclose any discussions with Smith or his representatives about a downward reduction before trial.[14] Despite this apparent lack of communication before Smith's testimony, the downward departure was initiated by the solicitor within a couple of weeks after trial. Trial counsel asked no questions and made no inquiry of Smith regarding his potential downward departure and the benefits it could provide him.

The solicitor took advantage of trial counsel's ineffective cross-examination of Smith by improperly vouching for Smith and inaccurately informing the jury that Smith pled "straight up" and had "nothing to gain" as discussed *supra.* While the PCR court found the state did not have a "secret plea agreement" in exchange for Smith's testimony, it failed to specifically address whether trial counsel was provided the full extent of Smith's criminal charges and guilty plea in violation of Brady or whether trial counsel's cursory cross-examination of Smith, cut short by objection from the solicitor, was effective assistance of counsel.[15] A remand for direct findings of fact and conclusions of law on this issue would be proper under Fishburne.

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[14] The PCR court found it credible that solicitor had no such discussion due to the testimony she presented some ten years after the event despite the circumstantial evidence of the timing of the downward departure. App. 771.

[15] As noted by PCR counsel regarding the Brady violation claims, petitioner was proceeding under the theory that either the state failed to produce or that trial counsel failed in due diligence to get the information. App. 628.

5. The PCR court erred in finding trial counsel was effective when he failed to request a hearing under *Neil v. Biggers*, 409 U.S. 188 (1972) on the out of court identification of petitioner by Brittany Croskey whose identification was tainted by police misconduct and who was influenced by rumors she heard around town rather than what she observed on the night of the murder.

Croskey identified petitioner based solely on the manner of his walk by seeing a figure, at night from distance for a few seconds. App. 186, l. 22 – 187, l. 24. "I assume it was him because of his walk." App. 198, l. 6. She was unclear on any other details of this figure other than they wore dark clothing. App. 196, l. 22 – 196, l. 10. The idea of an unusual walk as an identifier was fed to Croskey by police investigators after a rumor made her believe petitioner was the shooter.

> Q. Who was the first person to come to your mind *when you looked under that light and told Jeff and them who is that guy walking under that light and what is your answer?*
>
> *A: I didn't have a feeling.*
>
> *Q: Question, at what point in time did you start thinking it could be the Driver*[16]*?*
>
> *A: When people started talking it started being around Greeleyville with people talking about it.*

App. 198, l. 24 – 199, l. 10 (emphasis added). Luckily for the state, the investigator helped Croskey "discover" the walk as a method of connecting petitioner to these rumors.

> Q: Now lets back up a little bit on your statement on page 16 you and Ms. Barr used. *Question, did you notice anything about this person's walk?*.
>
> A: *No ma'am not really.*
>
> Q: Then she asked you and you and Ms. Barr went through this, is there anything that put you in the mind frame that it was the Driver. You say what was your answer?
>
> A: Yes ma'am.

---

[16] Croskey indicated she knew petitioner by the name "Driver." App. 180, l. 22 – 181, l. 3.

> Q: And the question is*, and that was because of his walk. And your response was?*
>
> A: *Yes ma'am.*

App. 203, l. 19 – 204, l. 4 (emphasis added). At the PCR hearing, trial counsel admitted his investigator was available to also cast doubt on the veracity of Croskey's identification and her inconsistencies. App. 717, l. 21 – 718, l. 6.

Despite having the police provide Croskey with the key element of her identification of petitioner, despite Croskey admitting the influence of rumors she heard around town that petitioner was the shooter before the identification, and despite the fact he could call an investigator to testify as to Croskey's confusion, trial counsel did not request a Biggers hearing.[17] Trial counsel made this decision since it "was not a photo lineup" type case. App. 724, ll. 6 - 15. The PCR court erred in ruling that trial counsel had a valid strategy in not allowing the trial court the opportunity to properly vet Croskey's tainted identification since it was unlikely a Biggers hearing would have resulted in suppression. App. 772 - 773.

"The purpose of an in camera hearing when the State offers identification witnesses is for the trial court to decide whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification." Gibbs v. State, 403 S.C. 484, 493, 744 S.E.2d 170, 174 (2013). Once a tainted out of court identification has been shown, as was clear in this instance, the trial court must evaluate to determine if the identification was "nevertheless so reliable that no substantial likelihood of misidentification existed." Id. at 493, 744 S.E.2d at175.

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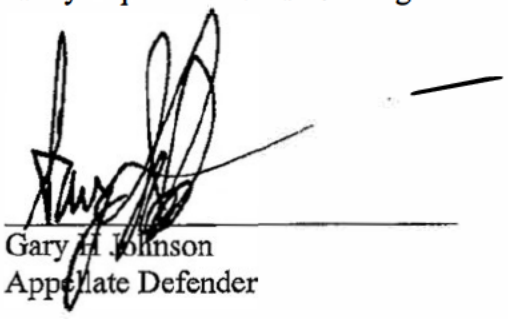
[17] Neil v. Biggers, 409 U.S. 188 (1972).

Had counsel been effective, the trial court would properly have ruled that the out of court identification was unduly suggestive since the witness testified about the suspect's unique walk only after that characteristic was supplied to her by investigators and she admitted she was influenced more by "rumors" that petitioner was the shooter than what she saw the night of the shooting. The PCR court found it credible that Croskey's statements were "all over the place" which supported the need for the in camera review by the trial court. App. 771. Depriving the trial court of the opportunity to fully vet the identification to verify it complied with due process was ineffective assistance of counsel under Strickland and warrants a new trial.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of October, 2023.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

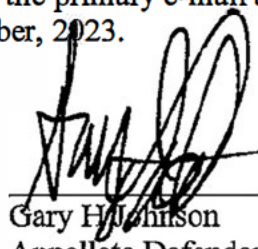
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and Appendix in the above-referenced case has been served upon Zachary W. Jones, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 20th day of October, 2023.



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ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
William Jeffrey Young, Trial Judge
Edward W. Miller, PCR Judge

Appellate Case No. 2023-000040

MARC ANTHONY PALMER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION
FOR A WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Petitioner's Issues

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

2. Did the PCR court err in finding counsel was effective when counsel failed to object to testimony regarding a fight unconnected to the homicide when the victim in this case under Rule 404, SCRE, which included an alleged threat by petitioner to kill the unrelated combatant and was the only evidence that placed a gun in petitioner's possession of the caliber used in this case?

3. Did the PCR court err in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFaddin concerning petitioner's possession f a gun that matched the caliber used in this case?

4. Did the PCR court err in discounting the issue surrounding Maruce Smiths' criminal history on the sole basis that the solicitor denied there was a secret plea deal rather than address the state's obligation to fully disclose Smiths' criminal history and trial counsel's duty to effectively cross-examine Smith on the benefits he receive and could expect to receive by testifying against Petitioner?

5. Did the PCR court err in finding trial counsel was effective when he failed to request a hearing under Neil v. Biggers, 409 U.S. 188 (1972) on the out of court identification of Petitioner by Brittany Croskey whose identification was tainted by police misconduct and who was influenced by rumors she heard around town rather than what she observed on the night of the murder?

Respondent's Counterstatement of Issues

I. Did the PCR court properly conclude counsel was not ineffective for not objecting during the solicitor's closing argument when (1) counsel testified he did not see a basis to object and thus was not deficient, (2) the solicitor's argument did not amount to a Golden Rule argument, (3) the solicitor's argument did not mischaracterize evidence, (4) the search for the truth language occurred pretrial and did not prejudice Petitioner, and (5) the remaining portions of the arguments Petitioner relies on were not raised or ruled upon and are not preserved.

II. Are Petitioner's arguments in questions two and three preserved, and should the Court remand pursuant to Fishburne when the PCR court's order is detailed and complete?

III. Does probative evidence support the PCR court's finding that there was no "secret deal" between Smith and the State, and are Petitioner's allegations related to Smith's NCIC report or counsel's cross-examination of Smith preserved?

IV. Did the PCR court properly find counsel was not ineffective for failing to request a Neil v. Biggers hearing when the identification did not result from an unnecessary and unduly suggestive police procedure, and even if it did, it was so reliable that no substantial likelihood of misidentification existed?

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.

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). He testified 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).

Wesley Walker testified he saw Victim with Sabb the night of the shooting, which occurred between 10:00 and 10:30 p.m. (App. 135, 137). He testified he did not see Victim with a gun that night. (App. 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 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).

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

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 arguing 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 testified he attempted to verify Petitioner's alibi. (App. 305-08). He reviewed surveillance videos from a gas station where Petitioner claimed to be but did not see Petitioner's vehicle in the footage. (App. 308-09).

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 are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court properly concluded counsel was not ineffective for not objecting during the solicitor's closing argument when (1) counsel testified he did not see a basis to object and thus was not deficient, (2) the solicitor's argument did not amount to a Golden Rule argument, (3) the solicitor's argument did not mischaracterize the evidence, (4) the search for the truth language occurred pretrial and did not prejudice Petitioner, and (5) the remaining portions of the arguments Petitioner relies on were not raised or ruled upon and are not preserved.

Petitioner first 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 transcript that were not presented to nor 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.[3]

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

[2] Petitioner actually acknowledges this in his Petition but attempts 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.

[3] Petitioner incorrectly posits that the PCR court "noted numerous areas of concern from the solicitor's closing argument." (Pet. 4). Rather, the order set forth the portions of the closing argument that Petitioner questioned counsel about and/or 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. 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). It strains credibility to assert the PCR court "noted several areas of concern" when the Court did not find any of the solicitor's comments improper.

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 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.

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. 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.[4] (App. 729-33). Thus, even if he had an improper understanding about *when* he could object, his failure to object was not deficient.

[4] As discussed below, counsel *did* agree an argument raised by Petitioner "could be viewed" as a Golden Rule argument. (App. 733). However, counsel 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).

Petitioner's contention that counsel "was *admittedly ineffective*" is misplaced. (Pet. 5). Although counsel's belief about *when* he could object may have been inaccurate, Petitioner still bears the burden of showing *what* counsel should have object to in order to prove deficiency. In other words, if there is no basis to object, then counsel's failure to object would not be deficient—even if counsel mistakenly believed he could not object. Further—and critically—Petitioner must show both deficiency *and* prejudice to prove ineffective assistance of counsel. As set forth below, Petitioner did not meet his burden.

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 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 victims or the parties 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."). Petitioner failed to set forth any other reason or basis that trial counsel should have objected to this portion of the argument and thus failed to prove deficiency.

Likewise, 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," and it is not reasonably likely any objection would have changed the outcome. See id. ("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."); 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"). Based on the foregoing, the PCR court properly found Petitioner failed to prove prejudice.

c. The PCR court properly found the solicitor did not mischaracterize evidence.

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.[5]

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.

[5] Petitioner argues for the first time on appeal that this portion of the argument constituted improper vouching; at the PCR hearing, this questioning focused on his belief that this was mischaracterization of the evidence. (App. 725-28). Notwithstanding this, this argument does not constitute improper vouching.

Likewise, 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 infect[] the trial with unfairness as to make the resulting conviction a denial of due process." See id. ("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."). Thus, the PCR court properly found Petitioner did not prove prejudice.

d. The PCR court properly found counsel was not ineffective for not objecting to pretrial search for the truth language.

The PCR court properly concluded Petitioner did not prove counsel was ineffective for not objecting to pretrial search for the truth language. Although the Supreme Court of South Carolina recently instructed trial courts 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). At the time of Petitioner's trial, State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), was controlling. In Aleksey, the Supreme Court of South Carolina found "no reversible error because the 'seek the truth' language was charged in conjunction with the credibility of the witnesses charge, and not with either the reasonable doubt or circumstantial evidence charges." Beatty, 423 S.C. at 33, 813 S.E.2d at 506 (citing Aleksey).

The comment here was made at the beginning of trial and not as part of the reasonable doubt or circumstantial evidence charges. Thus, the comment did not constitute reversible error. Trial counsel is not charged with foreseeing the later change in the law and thus was not deficient for not objecting. 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."). Likewise, because this statement did not constitute reversible error, Petitioner did not show show prejudice.

e. The remainder of Petitioner's argument is not preserved.

Petitioner points to several other portions of the solicitor's closing argument that were simply not raised at the PCR hearing or addressed by the PCR court in its final order. (Pet. 10-12). Thus, any issue related to these portions of the closing argument are not preserved. Likewise, Petitioner raises for the first time the cumulative error doctrine, which is also not preserved. Finally, Petitioner does not address on appeal other rulings made by the PCR court related to the solicitor's closing argument, making them law of the case.

II. Petitioner's arguments in questions two and three were not ruled upon by the PCR court, and Fishburne does not support a remand here where the PCR court's order is detailed and complete.

In question two, Petitioner contends counsel was ineffective for failing to object to improper Rule 404(b), SCRE, evidence regarding a prior fight, a threat, and a gun. (Pet. 13-15). In question three, he contends counsel was ineffective for failing to object to hearsay testimony from Investigator McFadden related to a conversation with a federal parole officer. (Pet. 16-18). However, these issues were not ruled on by the PCR court and thus are not preserved. Further, because the order adequately addressed the issues *actually raised,* a remand pursuant to Fishburn is not proper.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). To meet the basic requirements of issue preservation, "[t]he issue must be (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient

specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004).

In Mangal v. State, the Supreme Court of South Carolina reversed the Court of Appeals' remand of an unpreserved issue to the PCR court. 421 S.C. 85, 89-90, 805 S.E.2d 568, 570 (2017). There, no written amendment was filed after PCR counsel was appointed. Id. at 90, 805 S.E.2d at 570. At the hearing, PCR counsel did not mention that Petitioner would proceed on an improper bolstering allegation. During the hearing, however, counsel questioned Petitioner about this claim, and the State briefly crossed counsel about it. Id. at 90, 805 S.E.2d at 570-71. At the conclusion of the hearing, PCR counsel raised the improper bolstering claim; however, the PCR court did not address it in its final order. Id. at 90, 805 S.E.2d at 571. Petitioner filed a Rule 59(e), SCRCP motion, which was denied. Id. at 90-91, 805 S.E.2d at 571.

On appeal, the Court of Appeals remanded for the PCR court to consider the improper bolstering allegation. Id. at 91, 805 S.E.2d at 571. However, the Supreme Court of South Carolina reversed the Court of Appeals, finding the PCR court acted in its discretion in not considering the improper bolstering issue when (1) the allegation was not mentioned in the original application or set forth in any amendment; (2) PCR counsel did not raise the claim at the beginning of the hearing; (3) PCR counsel did not inform the court this allegation would be raised when counsel questioned trial counsel about improper bolstering; and (4) when PCR counsel referenced this allegation, the allegation was not made with specificity. Id. at 92, 805 S.E.2d at 571-72. The Supreme Court concluded this was "not an appropriate case in which to excuse [Petitioner] from his procedural default." Id. at 100-01, 805 S.E.2d at 576.

More recently, however, the Supreme Court of South Carolian remanded a PCR action for the Court to address an issue that was raised but not ruled upon even when counsel failed to file a Ruel 59(e) motion. Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). There, the petitioner

amended his PCR application before the hearing to raise two issues, and counsel elicited testimony on both issues at the hearing. 427 S.C. at 510, 832 S.E.2d at 586. However, the PCR court failed to address one of the issues in its final order. Id. at 510-12, 832 S.E.2d at 586-87. Although the petitioner did not file a Rule 59(e) motion requesting a ruling on that issue, the Supreme Court concluded this procedural shortcoming did not prevent it from remanding the case. Id. at 516, 832 S.E.2d at 589. In so doing, however, the Court reiterated that all "parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues." Id. at 516, 832 S.E.2d at 589-90.

a. The PCR court did not rule on whether counsel was ineffective for failing to object to Rule 404(b) evidence, and Petitioner did not raise this issue with sufficient specificity to warrant a remand.

Petitioner argues counsel was ineffective for not objecting under Rule 404(b), SCRE, to testimony about a fight, which included an alleged threat by Petitioner and was the only evidence putting a gun in Petitioner's hand. (Pet. 13). Initially, Petitioner himself concedes this argument is not preserved: "If this Court declines to address [question two] due to the incomplete PCR order on the legal impact of counsels' failure to object under Rule 404, SCRE, a remand would be appropriate . . . ." (Pet. 15 n. 11). Petitioner attempts to circumvent preservation requirements by positing the PCR court's order is incomplete. Far from incomplete, however, the PCR court's order addressed with specificity all the issues actually raised by Petitioner at the hearing. This is vastly different than the situation in Fishburne, where the petitioner raised only two issues and the PCR court addressed only one.

Here, Petitioner filed an eighty-five page pro se application. (App. 525-609). Petitioner did not file an amended application. At the start of the hearing, the parties set forth the claims

Petitioner was proceeding on: "counsel failed to object to Brady violations,[6] failed to move to suppress admission of unreliable identification evidence, failed to make proper objections and motions, failed to object to solicitor's improper comments during closing argument, failed to place all sidebar discussions on the record[,] and made harmful arguments against his and Brittnay Croskey's testimony."[7] (App. 627-28). In the context of failure to object (other than related to the solicitor's closing argument), Petitioner questioned counsel about why he did not object to the following portions of the transcript: the court's "search for truth language" in opening comments (App. 79; 719);[8] alleged hearsay from Smith about Victim's gesture (App. 115, 719-21);[9] a sidebar where the objection was not placed on the record (App. 311, 721-23);[10] and Mathews' testimony about a conversation with Investigator McFaddin (App. 216-17, 723-25).[11] During closing argument, Petitioner argued counsel was ineffective for failing to (1) object to the State's closing argument, (2) investigate/obtain gas station videos and Croskey's alleged prior statement, (3) object to hearsay testimony, and (4) move to suppress Croskey's testimony pursuant to Biggers. (App. 755-56). Nothing about this testimony or argument put the Court on notice that Petitioner was proceeding on an issue related to prior bad act evidence.

Petitioner's only testimony about "bad act evidence" was confusing at best and did not put the Court or the State on notice that Petitioner was proceeding on any issue related to Matthews'

[6] Petitioner alternately raised a claim of prosecutorial misconduct related to the alleged Brady violation, which the PCR court found he did not prove.
[7] Although this list was relayed by counsel for Respondent, it was based on prior conversations the undersigned had with PCR counsel about the issues that would be raised. Further, PCR counsel had an opportunity to correct the record if he believed the list of issues was incomplete.
[8] This was addressed in the PCR court's order. (App. 773-74).
[9] This was addressed in the PCR court's order. (App. 774-75).
[10] This was addressed in the PCR court's order. (App. 780).
[11] This was raised in the context of whether it was proper impeachment testimony and was addressed in the PCR courts' order. (App. 775-76).

testimony that petitioner wanted to shoot Dominique McBride[12] or Petitioner had a .45 caliber automatic (Pet. 13):

> Q. Now—okay. You had some concerns that there was some bad acts testimony that came into this case?
> A. Yes, sir.
> Q. And what was that?
> A. Oh, it was, it was a lot. **It was from Wayne McFaddin.**
> Q. When did it—
> A. **Maurice Smith.**
> Q. What did it cent—what did it center on?
> A. Wayne McFadden brought in testimony of an alleged murder weapon. Wayne McFadden kept—said that he—a confidential informant.
> Q. Now let me back you up.
> A. They—
> Q. What was this—what was this bad act, you know? You were saying that they brought in prejudicial information—
> A. Of me and—of me and a—of me having a fight with another guy in the neighborhood.
> Q. And how much before this—the incident at trial? How much before wat that? Was that the night before or was that—
> A. The—of the—
> Q. What's the time frame between this fight that you're talking about here and the shooting?
> A. The fight actually happened in, I wanna say September, September. It was the night of the Greelyville, Williamsburg County, Williamsburg County game.
> Q. Okay, so—all right. So it was a couple of months before or at least—
> A. Probably about a month, a month before, maybe longer. I think—no, probably about, I wanna say September 3rd if I'm not mistaken. I wanna say September 3rd. You know, no one really knew when the fight, like, you know what I'm saying, like the actual date,—
> Q. Okay, all right. I just want—
> A. —but we have to go back in football records—
> Q. I just wanted to get to that.
> A. —and schedules. All right.

[12] The referenced transcript pages do *not* include testimony that Petitioner wanted to shoot the other combatant. When asked "Did you ever at any point and time tell [Investigator McFaddin] that you would not give the pistol back to [Petitioner] because he threatened to shoot Mr. McBride," Mathews responded, "No ma'am." (App. 216). Investigator McFaddin was not questioned about this threat and did not testify to it. (App. 311).

(App. 645-47, emphasis added).

In his petition, Petitioner's argument related to prior bad act testimony centers on his contention that it was the only evidence connecting Petitioner to the same caliber handgun that was used in the murder. (Pet. 13-15). However, *nothing* presented at the PCR hearing put the Court on notice that Petitioner was alleging counsel should have raised a 404(b) objection to Mathews' testimony. Petitioner himself specifically referenced testimony by Investigator McFaddin and Smith when recounting what bad act evidence he believed should have been objected to.[13] Thus, any argument related to a 404(b) objection to Mathews' testimony was not raised at all during the PCR hearing and is not preserved.

Respondent concedes Petitioner raised an issue related to 404(b) evidence in his eighty-five-page pro se application. (App. 571). However, this issue was not clearly raised at the PCR hearing in a manner sufficient to alert the Court and the State that Petitioner was going forward on this issue. Although Petitioner raised several portions of the transcript that he contends should have been objected to, he did not specifically reference Smith's testimony at page 118 of the transcript. (App. 719-25, 755-56). Further, *nothing* was raised at the hearing regarding a 404(b) objection to Mathews' testimony, and Petitioner's testimony on this issue was vague and non-specific. Finally, counsel did not file a Rule 59(e) motion to request a ruling on this issue. This issue is simply not preserved, nor was it raised specifically and sufficiently enough to put the Court on notice that it was an issue. Thus, remanding this case pursuant to Fishburne would create an exception that would swallow preservation requirements.

[13] Although Petitioner raised an issue related to Mathews' testimony at pages 216-17, it was not raised in the context of improper bad act evidence. (App. 723-25).

b. The PCR court did not rule on whether counsel was ineffective for failing to object to Investigator McFaddin's testimony regarding statements by a parole officer, and Petitioner did not raise this issue with sufficient specificity to warrant a remand.

Petitioner contends counsel was ineffective for not objecting when Investigator McFaddin testified about a conversation with Matthews' parole officer. (Pet. 16-18). He concedes this issue is not preserved but posits the PCR court erred in not addressing it: "The PCR court erred in failing to specifically rule on this issue." (Pet. 18). However, this issue was not raised at the hearing; thus, the PCR court did not err in not ruling on it.[14] It strains credibility to suggest a court should rule on an issue that was not raised at the hearing. Because this issue was not addressed at all at the hearing, a remand to address this issue would create an exception that would swallow preservations requirements.

III. Probative evidence supports the PCR court's finding that there was no "secret deal" between Smith and the State, and any issue regarding Smith's NCIC report or counsel's cross-examination of Smith is not preserved.

Petitioner focused much of his argument at the PCR hearing on his allegation that the State had a "secret deal" with Smith, who identified Petitioner as the shooter at trial despite initially telling law enforcement he could not identify the shooter. This issue was specifically addressed in the PCR court's order and is supported by probative evidence. (App. 771). Notably the PCR court found credible the solicitor's testimony that she did not have a deal with Smith at the time Smith plead guilty, and if she had, she would have asked the court to defer sentencing until after Petitioner's trial. (App. 771). This Court should defer to this credibility finding. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 ("Where matters of credibility are involved, this Court gives great

[14] Notably, Petitioner does not set forth any portion of the PCR hearing where this issue was allegedly raised. (Pet. 16-18). Petitioner's argument on this issue in his pro se application encompasses merely one small paragraph of an eighty-five-page application. Given an applicant's burden of proof, it was incumbent upon him to specifically raise this issue at the PCR hearing.

deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses."). Based on this finding—which is supported by the record (App. 693-94)—Petitioner did not prove a "secret deal" the State had with Smith, and this allegation patently lacks merit.

Petitioner misconstrues the evidence when he posits, "[T]he downward departure [of Smith's sentence] was initiated by the solicitor within a couple of weeks after trial." (Pet. 21). Contrary to this assertion, the solicitor testified that Smith's attorney "contacted me or the Clarendon County solicitor's office and asked that he—that he intended to file a motion for a downward departure."[15] (App. 675). She reiterated she did not discuss a sentence reduction with Smith's attorney prior to his sentencing. (App. 675). This testimony does not show the solicitor requested the downward reduction. Rather, it shows Smith's attorney reached out to the State after Petitioner's trial to request a sentence reduction. The solicitor's testimony that she would have requested the State defer Smith's sentencing had she had an agreement with him prior to Petitioner's trial—something that is common when co-defendants or other witnesses testify at a trial—further supports the credibility of the solicitor's testimony that she did not have a secret deal with Smith prior to Petitioner's trial.

To get around how patently meritless this claim is, Petitioner again attempts to frame the PCR court's order as "incomplete" and asks this Court to remand for the PCR court to consider

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[15] Petitioner's assertion that the solicitor initiated the downward reduction is not supported. Petitioner relies on the following:

> Q. And in this case can you clarify when di the lawyer contact you or when did Maruce Smtih contact you about requesting a downward modification, or I guess he was going to request it. But when did he reach out to you about that?
> A. I would say maybe a week or two after the trial was concluded.
> Q. After the trial.
> A. If not, if not longer.
> Q. Okay. But it was not before the trial?
> A. Correct.

(App. 693-94). It simply strains credibility to suggest that the foregoing is evidence that the solicitor initated the downward reduction.

whether counsel was ineffective and/or the State violated Brady by not disclosing Smith's NCIC report, and whether counsel's cross-examination of Smith was ineffective. Again, these issues were not raised at the PCR hearing. In support of his argument related to the NCIC record, Petitioner references the following statement he made during his testimony:

> Why I believe that there was a deal is because I have a copy of the general sessions tracking sheet that says that one of his charges was dismissed as part of a plea agreement. I couldn't get it from Williamsburg County. I had to get it from Clarendon County.

(App. 653). When asked, "[A]nd you were never made aware that there was some kind of deal in place, right?", Petitioner responded, "We didn't even get a NCIC report." (App. 653). This testimony was elicited in the context of Petitioner's argument that the State had a secret plea deal with Smith—which *was* addressed in the PCR court's order. It strains credibility to suggest the foregoing testimony constituted an additional allegation that counsel was ineffective for not obtaining it and/or the State violated Brady by not disclosing it.[16]

Regarding counsel's cross-examination of Smith, Petitioner points to PCR counsel's cross-examination of the solicitor and contrasts it with counsel's cross-examination of Smith at trial. (Pet. 19). However, PCR counsel's questioning of the solicitor here was an attempt to obtain information about the "secret deal" Petitioner alleged the State had with Smith. It was *not* done to illustrate how counsel should have conducted cross-examination—especially when the solicitor herself was not even a witness at trial. Nothing at the hearing put the Court on notice that Petitioner was proceeding on a claim related to counsels' cross-examination of Smith.[17] Thus, a remand to

[16] Even if this issue *was* adequately raised—which Respondent disputes—Petitioner did not attempt to introduce the report into evidence, leaving the Court to merely speculate as to what information it contained and whether it would have aided counsel's cross-examination or shown the existence of a "secret deal." PCR counsel's failure to enter this report is further evidence that the report itself (whether it should have been obtained or disclosed) was not an issue that was raised at the PCR hearing. The Court must consider the context in which the testimony was presented; here, it was presented as part of Petitioner's effort to establish a "secret deal" between Smith and the State.

[17] Petitioner likewise does not set forth *where* he raised any issue related to cross-examination in his eighty-five-page pro se application.

address these issues would create an exception that would swallow preservations requirements.

IV. The PCR court properly found counsel was not ineffective for failing to request a Neil v. Biggers hearing when the identification did not result from an unnecessary and unduly suggestive police procedure, and even if it did, it was so reliable that no substantial likelihood of misidentification existed.

During the PCR hearing, Petitioner questioned trial counsel about why he did not move to suppress Croskey's identification of him at trial under Neil v. Biggers. This PCR court properly found Petitioner did not prove counsel was ineffective for not requesting a Biggers hearing.

"In *Neil v. Biggers*, the United States Supreme Court set forth a two-pronged inquiry to determine whether due process requires suppression of an eyewitness identification." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012). "Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

The PCR court properly found counsel articulated a valid reason for not raising a Biggers issue. Specifically, counsel testified he did not believe a Biggers argument would be meritorious. (App. 714). Although he noted it was not a lineup situation, he clarified, "I understand that it doesn't necessarily have to be a photo lineup out-of-court to invoke those considerations." (App. 714). He agreed he could have filed a Biggers motion but concluded it would not have any merit based on Croskey's testimony that she knew Petitioner. (App. 714).

Based on Croskey's trial testimony, counsel's assessment that a Biggers hearing would not be meritorious was reasonable under prevailing professional norms. At trial, Croskey testified she had known Petitioner for about a year prior to the shooting and had seen him around town at different places, including seeing him three or four times at "the shop" where the shooting occurred. (Tr. 180-82). Croskey was also familiar with Petitioner's car—a Dodge Neon—and his

walk, which she described as "tip toe kind of" and "noticeable [if] you knew it." (Tr. 182, 188). No evidence shows Croskey identified Petitioner as the shooter based on a line-up or show up; rather, her testimony reflects she spoke to police after witnessing the shooting and indicated the shooter walked in a similar manner as Petitioner, whom she had known for about a year. The foregoing does not show Croskey identified Petitioner based on an unnecessary and unduly suggestive police procedure. Thus, the PCR court properly concluded counsel was not deficient.

This PCR court further properly found counsel articulated a valid strategy in attempting to undermine Croskey's identification of Petitioner by highlighting on cross-examination inconsistencies with Croskey's trial testimony and her initial statement to police. Specifically, counsel elicited testimony that Croskey initially "didn't have a feeling" about who the shooter was but later determined it could be Petitioner after "people started talking" about the shooting. (Tr. 198-99). Due to the relative weakness of a Biggers argument, counsel articulated a valid strategy for undermining Croskey's identification of Petitioner through cross-examination instead and thus was not deficient.

Finally, based on Croskey's testimony that she was familiar with Petitioner, and based on the lack of any evidence that she identified Petitioner through an unduly suggestive lineup or show up, the PCR court properly found it is not reasonably likely Croskey's testimony would have been suppressed based on Biggers. Thus, Petitioner did not prove prejudice.

CONCLUSION

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

Respectfully Submitted,

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Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

s/Danielle Dixon
Assistant Attorney General

ATTORNEYS FOR THE RESPONDENT

This 4th day of March, 2024

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari
to Williamsburg County
William Jeffrey Young, Trial Judge
Edward W. Miller, PCR Judge

Appellate Case No. 2023-000040

MARC ANTHONY PALMER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

Pursuant to Rule 262, SCACR, as amended on May 6, 2022, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari in the above-referenced case has been served upon opposing counsel at his primary e-mail address as listed in the Attorney Information System:

Gary Johnson
[redacted]@sccid.sc.gov

This 4th day of March, 2024.

s/Danielle Dixon
Danielle Dixon
Assistant Attorney General

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
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ATTORNEY FOR PETITIONER

INDEX

ARGUMENTS IN REPLY

1. The numerous improper arguments of the solicitor were before the PCR court and properly preserved for review by this Court, including the inflammatory language concerning destroying the courthouse and improper vouching of witnesses.

Rather than address the propriety of the solicitor's improper closing argument, the state's Return sweeps the numerous improper remarks into the basket of not properly preserved. Return to Petition 7, 13. The state then picked and selected certain areas of the improper argument to address on the merits.

This may be, in part, an acknowledgement that it was improper to tie the conviction of Petitioner to not disappointing the trial judge and the need to destroy the courthouse unless a conviction was returned. App. 495, ll. 4 - 17. It may be, in pact, an acknowledgment that a solicitor that vouches for the veracity of a convicted felon and goes outside the record to bolster a felon's testimony before a jury has crossed the line. App. 488, l. 17 – 489, l. 7.

As noted in the Petition for Certiorari, these improper arguments were raised in the original PCR application.[1] App. 592 - 599. Moreover, the PCR court's order specifically recites several of the inflammatory and improper arguments. App. 776 – 779. The state's Return to the PCR application acknowledged the assertion of improper vouching for witness Smith.[2] App. 617. Trial counsel was cross-examined about the solicitor's inaccurate assertions that Smith plead straight up and was serving his time. App. 725, l. 15 – 727, l. 17. Trial counsel was cross-examined about the state's closing argument that bolstered and vouched for witnesses. App. 731,

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[1] Evidently for the state, the length and detail of Petitioner's original PCR application was in fact a problem and not a virtue. Return to Petition p. 18.

[2] "Applicant also asserts the State acted improperly when it vouched for Smith's credibility during its closing argument and asserted there was no plea agreement with Smith." App. 617.

l. 4 – 732, l. 21. Counsel for Petitioner, in summation to the PCR court, referred to the inflammatory final statements about burning down the courthouse.

> And clearly that golden rule argument at the end went way overboard as far as telling -- having the jury sort of inflaming their passions to make a ruling based on something that's not in the record. 'You know, if you' re gonna let this happen, if you' re gonna let vigilante happen, you might as well burn down all the courthouses.' That was inappropriate remark that should have been objected. I don't think that trial counsel's basis for not objecting to it is legitimate.

App. 754, l. 23 – 755, l. 3. This mirrored the cross-examination of trial counsel about the need to be sure a jury does not decided matters based upon passion and prejudice when questioned about the destruction of the courthouse argument. App. 732, l. 22 – 733, l. 15.

Trial counsel admitted he did not believe he was allowed to object to the numerous improper arguments. App. 729, ll. 1 – 8. The improper arguments were either directly cited by the PCR court in its Order of Dismissal, argued before the PCR court, cited in the PCR application, subject to testimony, or acknowledged by the state in its Return. The arguments raised in the first issue presented in the Petitioner for Certiorari are properly preserved and certiorari on this issue should be granted.

2. The improper prior bad acts testimony and the related improper hearsay testimony concerning a federal parole violation as the basis for the witness changing his story concerning a fight between Petitioner and another individual unrelated to the crime charged that allowed the introduction of critical evidence against Petitioner was properly raised before the PCR court and are preserved either for review or remand.

The state's argument that these two issues are not properly preserved relies heavily on Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). Petitioner concedes that a review by this Court *requires the issue to have been raised in the context of the PCR process* for appellate review as dictated by Mangal. However, this Court recognized the harsh impact of permitting "a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019); *see also* Love v. State, 428 S.C. 231, 239–40, 834 S.E.2d 196, 200 (2019) ("There are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims." (*quoting* Mangal v. State, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017))).

Petitioner's assertion that counsel was ineffective in failing to object to "prior bad acts" testimony that connected him to a weapon of the appropriate caliber used in the murder through witnesses Mathews and McFadden was presented in the PCR application. App. 571. Petitioner presented testimony on the issue during the PCR hearing.[3] App. 645, l. 18 – 646, l. 12. Trial counsel was questioned about the sidebar that occurred during this phase of trial and why

[3]The state quotes this exact testimony but claims it is confusing. Return to Petition p. 16 - 17. The state's confusion is likely centered on its continued refusal to acknowledge that McFadden was called by the state to refute the denials by Mathews about the gun and Petitioner's desire to shoot someone. App. 312, l. 1 – 313, l. 13; 315, ll. 2 – 15.

he failed to continue his objections during this line of questioning. App. 722, l. 1 – 725, l. 4. The PCR court's order addressed this area of testimony, but just as the state did in its Return to the PCR application and before in its Return to the Petition for Certiorari before this Court, misconstrued the testimony provided by Mathews as being "non-material" since Mathews denied making the incriminating statements. App. 776. This, of course, ignores the impeachment testimony offered by McFadden relating Mathews' "off the record" admissions of the existence of the gun, the fact that it was .45 caliber, that Mathews would not return it to Petitioner since he believed Petitioner wanted to shoot his adversary, and that the .45 was later returned to Petitioner. App. 313, ll. 1 -24; 315, ll. 6 – 15.

Likewise, the issue concerning the hearsay evidence of the federal parole revocation of a key witness is likewise preserved for either review or remand since it was raised in the PCR application. App. 561. The Order addressed the issue in part, but simply claimed the hearsay testimony "could set the State up to introduce a prior inconsistent statement" and that trial counsel's explanation "that he does not raise every technical objection if the testimony being elicited is not material." App. 776. The Order, as does the state before this Court in its Return to Petition for Certiorari, ignores the fact that the state did in fact impeach Mathews through McFadden and used this improper hearsay to help explain the changing story. App. 313, l. 25 – 314, l. 24.

The arguments raised in the second issue presented in the Petitioner for Certiorari are properly preserved and certiorari on these issues should be granted. If this Court feels the incomplete nature of the PCR order prevents such a review, a remand under Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) would be appropriate since the preservation issue is found in the Order of Dismissal, and not based upon abandonment by the PCR applicant.

3. The state ignores the impact of S.C. Code Ann. § 17-25-65 (2010 as amended) in arguing that the solicitor did not request a downward departure in response to witness Smith's testimony at trial.

In response to the handling by the state and trial counsel of witness Smith, the state asserts that the finding of fact that there was not secret deal somehow negates the fact the solicitor did in fact move for a downward departure on Smith's behalf. The state ignores that, under S.C. Code Ann. § 17-25-65 (2010 as amended), only the solicitor may file a motion for downward departure. While the PCR court found the solicitor credible when she denied having an agreement with Smith in advance of his testimony, the state has conflated that finding to negate the solicitor's role in Smith's subsequent, and very timely, downward departure.

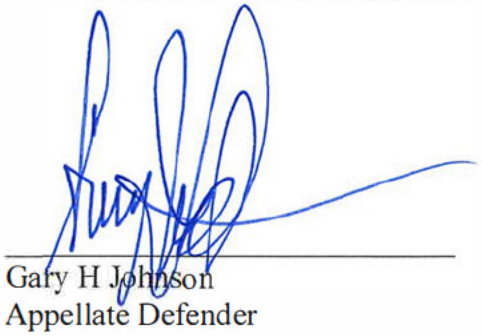
The problems surrounding Smith's testimony were numerous. Petitioner alleged an existing agreement to reduce Smith's sentence and the state's failure to provide complete discovery regarding Smith's criminal convictions before trial in violation of Brady v. Maryland, 373 U.S. 83 (1963). App. 534-537; 653, ll. 5-18. Trial counsel indicated he fully relied on the state to comply with his Brady and Rule 5, SCRCP. App. 713, ll. 3-23.

The state had an affirmative obligation to disclose the extent of Smith's charges and plea resolution that occurred before trial. *See* State v. Durant, 430 S.C. 98, 107–08, 844 S.E.2d 49, 54 (2020) (holding the failure to provide information that could be obtained through a NCIC search is a *Brady* violation."). The PCR court's order focused solely on the "secret" deal testimony. App. 770. This issue is therefore preserved since it was raised in the PCR application and subject to extensive testimony during the PCR hearing. The only issue concerning preservation concerns the extent of the order, which falls under the guidance of Fishburne v.

State, 427 S.C. 505, 832 S.E.2d 584 (2019) if this Court feels the record is incomplete for appellate review.

CONCLUSION

Based upon the foregoing reasons and those contained in the Petition for Certiorari, Petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of March, 2024.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Reply to Return to Petition for Writ of Certiorari in the above-referenced case has been served upon Danielle E Dixon, Esquire at the primary e-mail address listed in the Attorney Information System (AIS), this 14th day of March, 2024.

Gary H Johnson
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

The Supreme Court of South Carolina

Marc Anthony Palmer, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000040

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction relief appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
March 20, 2024

cc: Danielle Dixon
Gary Howard Johnson, II
The Honorable Jenny A. Kitchings

The South Carolina Court of Appeals

Marc Anthony Palmer, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000040

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted as to Petitioner's Question 1 but denied as to Questions 2, 3, 4, and 5. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

cc:
Danielle Dixon, Esquire
Gary Howard Johnson, II, Esquire
Donald J. Zelenka, Esquire
The Honorable Edward D. Miller

FILED
Apr 16 2025

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 PETITIONER

GARY H JOHNSON
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR court err in finding counsel was effective 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?

STATEMENT

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. Smith was a convicted felon and testified following a plea bargain on unrelated charges that reduced some charges and dismissed others. App. 692, l. 2 – 693, l. 13. Within two weeks after testifying, Smith received further consideration from the solicitor when she initiated a downward departure of his sentence due to his substantial help against petitioner. App. 652, ll. 15-24. Croskey's testimony was equally problematic, as she could not identify the shooter until the police officer who interviewed her suggested that the suspect's unusual walk would help jog her memory, after which she identified the shadowy figure she saw from a distance as petitioner based solely upon his walk.[1] App. 187, ll. 15 – 24; 203, l. 19 – 204, l. 11.

A murder weapon was never located; 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. According to the solicitor, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury to not let him "walk away." App. 495, ll. 13 – 14.

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[1] Trial counsel elected not to attempt to suppress the tainted identification since he did not believe it fell under Neil v. Biggers, 409 U.S. 188 (1972) since it "was not a photo lineup." App. 724, ll. 6–15.

During her closing argument, the solicitor interjected information not in the record and vouched for witnesses. App. 488, ll. 16-21. She appealed directly to passion and prejudice as a basis for finding petitioner guilty, going so far as to include disappointing the trial judge and destroying our system of justice if a conviction was not returned. App. 495, ll. 4-17. Trial counsel made no objection during the closing argument, believing under the rules he was not allowed to object. App. 729, ll. 1-8.

After conviction on direct appeal, the South Carolina Court of Appeals vacated the sentence on the gun charge but affirmed the conviction for murder.[2] 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 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.

This Court granted the petition for certiorari to review the decision of the PCR court on the sole issue surrounding trial counsel's effectiveness related to the state's closing argument, and this Brief of Petitioner follows.[3]

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

[3] Petitioner's petition for certiorari raised five issues connected to his conviction.

STANDARD OF REVIEW

The standard for appellate review in PCR cases "depends on the specific issue" raised to the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The reviewing court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. However, "[q]uestions of law are reviewed *de novo*, and [this Court] will reverse the PCR court's decision when it is controlled by an error of law." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Wiggins v. Smith, 539 U.S. 510, 521(2003). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. Concerning prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

ARGUMENT

The PCR court erred in finding counsel was effective 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.

A. How the issue was raised at PCR.

In the present case, the PCR court noted *numerous* areas of concern from the solicitor's closing argument. App. 776-779. The fact the trial counsel did not object a single time during these instances was explained by his *admitted lack of understanding* of his obligation to object and his belief that the "rules" prohibited him from objecting. App. 729, ll. 1-8.

When asked why he elected not to object during the state's closing argument, trial counsel testified that:

> 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).[4] Contrary to trial counsel's belief that he was not allowed to object during the solicitor's closing argument, it is "incumbent" for "trial counsel to object to the solicitor's" improper closing arguments. Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). As noted in Brown, even when trial counsel articulates some valid strategy for failing to object to improper closing (as opposed to the clear misunderstanding of the law trial counsel claimed here), such strategy will not be found valid in the face of the "evident impropriety of the solicitor's remarks." Id.

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[4] Having failed to object due the "rules" trial counsel also made no "post-argument" objection to the solicitor's closing arguments.

In arguing trial counsel was ineffective, PCR counsel summarized the problems surrounding the closing argument:

> I have some of my biggest problems in this case with the failure to object to the closing argument. You know, clearly, the solicitor's not supposed to be pitting one witness against the other in closing argument which she was clearly doing when she's talking about TT's testimony and trying to reconcile how you can reconcile that testimony with Mr. Palmer's testimony. And clearly that golden rule argument at the end went way overboard as far as telling -- having the jury sort of inflaming their passions to make a ruling based on something that's not in the record. You know, if you' re gonna let this happen, if you' re gonna let vigilante happen, you might as well burn down all the courthouses. That was inappropriate remark that should have been objected. I don't think that trial counsel's basis for not objecting to it is legitimate. I think -- I think the case law in South Carolina is that you have to wake a contemporaneous objection on -- if you have an objection to something in the closing argument, you have to wake a contemporaneous objection; and the failure to make a contemporaneous objection is not -- you know, you got to do it during the argument so it can get fixed during the argument. His rule -- his decision not to was wade, you know, I don't like to object or was objecting too much, that still does not justify allowing the jury the last thing the jury hears some prejudicial arguments.

App. 754, l. 12 – 755, l. 15.

B. How the PCR Court ruled on the issue.

Despite the numerous areas of improper argument noted in its order, the PCR court ruled the solicitor's argument "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. This holding is neither supported by the record nor an accurate legal conclusion.

"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." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160,

166 (2002). "[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." Berger v. United States, 295 U.S. 78, 88 (1935).

It is "incumbent" for "trial counsel to object to the solicitor's" improper closing arguments. Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009). As noted in Brown, even when trial counsel articulates some valid strategy for failing to object to improper closing (as opposed to the clear misunderstanding of the law trial counsel claimed here), such strategy will not be found valid in the face of the "evident impropriety of the solicitor's remarks." Id. Here, counsel claimed he understood the rules prohibited objecting during the closing. As counsel was *admittedly ineffective* in understanding his role 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. The PCR court's finding that there was no basis for objection and that the solicitor's argument was a reasonable summation based on the evidence presented is not supported by the evidence.

C. The state's closing crossed the line between zealous advocacy and improper argument on numerous grounds.

The solicitor urged conviction of petitioner to avoid disappointing the trial judge and destroying the symbols of our criminal justice system including her office and the courthouse.

The solicitor's final words to the jury focused on the dangers of "street justice" and included the following admonition:

> [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. By tying a finding of "not guilty" to the rejection and destruction her own office as solicitor, the trial judge's robes as symbols of his office of impartiality, the courthouse itself as a symbol of justice, and "surrendering" the community at large to criminals are clear efforts to push the jury to render its verdict, not on the shaky and contradictory statements of the witnesses produced at trial, but on an improper basis.

The PCR court focused solely on whether this portion of the closing violated the "golden rule" argument prohibition, finding it did not specifically request that jurors put themselves in the "shoes of one of the parties." App. 779. While the PCR court concentrated on whether this technically violated the "golden rule" prohibition, it failed to consider the reason the "golden rule" argument is prohibited in the first instance: it "impermissibly appeal[s] to the passion of the jurors by asking them to 'speak up' for [the] victim." Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009); *see also* State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (holding a new trial should be granted when the "prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). Rather than relying on the evidence presented at trial, the solicitor placed a "parade of horribles" before the jury should they not render a guilty verdict. The solicitor implored the jury to not let that parade happen. App. 495, ll. 15-17.

"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)). As in Liberte, wrapping the conviction of petitioner into the need for the jury to "protect community values, preserve civil order, or deter future lawbreaking" was "far too heavy a burden for the [petitioner] to bear" and warrants reversal. As this improper argument infected the trial with unfairness and violated petitioner's due process rights, a new trial is warranted, particularly in light of the reliance by the state on questionable witness testimony that was also impacted by ineffective assistance of counsel.

The solicitor went outside the record and misrepresented the facts surrounding a key state witness' criminal history and improperly vouched for his credibility before the jury.

Maurice Smith was central to the prosecution's case.[5] There was no physical evidence linking petitioner with the crime.[6] There were significant problems with Smith's credibility. He testified at the time of petitioner's trial while 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,

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

6 A murder weapon was never located; 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. According to the solicitor, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury to not to let the petitioner "walk away." App. 495, ll. 13 – 14.

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.

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).

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.

The solicitor's factual assertions to the jury that Smith "pled guilty straight up" and "he's serving his sentence" and had "nothing to gain" were inaccurate and solicitor knew they were inaccurate. The solicitor compounded the impact of this misrepresentation by improperly vouching for Smith and by claiming he did not have "anything to gain or to lose by saying Marc Palmer was the shooter if he wasn't." App. 488, l. 25 – 489, l. 7. The solicitor was aware of

something for Smith to gain through S.C. Code Ann. § 17-25-65 (2010 as amended), since *she initiated* the downward reduction within a couple of weeks after Smith's testimony.[7] The solicitor then limited trial counsel's cross-examination of Smith by successfully objecting that it "assume[d] facts not in evidence." App. 127, ll. 2–8. The solicitor then went further in bolstering Smith's credibility by improperly vouching for him before the jury.

"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. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). "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

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[7] "Upon *the state's motion* made within one year of sentencing, the court may reduce a sentence if the defendant . . ." S.C. Code Ann. § 17-25-65 (2010 as amended) (emphasis added).

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 has recently addressed a solicitor's improper vouching for a witness. In Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025), the solicitor told the jury why they should believe the testimony of the minor victim:

> 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.

Id., 445 S.C. at 238, 911 S.E.2d at 538. As in the present case, trial counsel claimed that they did not see the solicitor as vouching and the PCR court agreed, ruling that "the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record." Id., 445 S.C. at 239–40, 911 S.E.2d at 539.

This Court reversed, noting:

> Additionally, "[i]t 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). "Credibility is a determination for the jury." Id. at 404, 853 S.E.2d at 339. Moreover, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "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).

Washington, 445 S.C. at 241, 911 S.E.2d at 540.

In Washington, the solicitor's comments were "clearly improper vouching" and were "broad, unsubstantiated claims unrelated to anything raised during the trial." Id., 445 S.C. at 242, 911 S.E.2d at 540.

The solicitor's continual use of the first person "I" in improperly vouching for Smith adds an additional element of error here. As the Supreme Court recently noted in State v. Busse, 439 S.C. 104, 886 S.E.2d 208 (2023):

> [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.

In this case, the solicitor told the jury she had personal experience and knowledge of Smith based upon her past prosecution of him and based upon that knowledge Smith was being both truthful and had nothing to hide or gain. App. 488, l. 17-489, l. 7. The PCR court erred in finding this "a reasonable summation based on the evidence presented" and that trial counsel had "no basis to object." App. 778. Here, the solicitor improperly vouched for Smith and went outside the record in doing so, departing even further from her role as a zealous advocate than the solicitor in Washington.

The solicitor improperly described petitioner's appearance and traits as a lie.

The solicitor made direct comments regarding petitioner altering his appearance to portray a "lie" to the jury.

> 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 to 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 told me when I'm asking him questions, don't get it twisted.

App. 478, l. 11 – 479, l. 7 (emphasis added).

Our Supreme Court has long warned solicitors of the dangers of calling witnesses liars. *See* Major v. Alverson, 183 S.C. 123, 190 S.E. 449, 450 (1937) (noting that an attorney "can offer no excuse for stating to [the jury], in so many words, that the litigant was a liar, or a 'bare faced liar.'"); State v. Blurton, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), reversed on other grounds, 352 S.C. 203, 573 S.E.2d 802 (2002) ("Our supreme court has previously held it is improper to call a party a liar in closing argument.").

This type of argument crosses the line and blurs the line a prosecutor is supposed to walk between zealous advocacy and ensuring justice is done.

> That is because a "prosecutor's obligation to desist from the use of pejorative language and inflammatory rhetoric is every bit as solemn as his obligation to attempt to bring the guilty to account." *Rodriguez-Estrada*, 877 F.2d at 159. Such statements can threaten the fairness of a trial, since, when a prosecutor "directly accus[es] a defendant of lying ... jurors could believe the government has knowledge outside the evidence about the defendant's veracity." *United States v. Garcia*, 818 F.2d 136, 144 (1st Cir. 1987).

United States v. Saad, 888 F.3d 561, 569 (1st Cir. 2018).

This type of argument is akin to attaching a person's nickname as a mechanism to influence the jury's perception of the accused. In State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), the solicitor referred to the defendant's nickname (outlaw) excessively during closing to portray defendant as someone who was accustomed to deluding law enforcement, and someone who was proud of his notoriety as an outlaw. Id., 341 S.C. at 423, 535 S.E.2d at 438.

Additional improper remarks combined to further erode the petitioner's right to a fair trial and justify granting a new trial.

The solicitor touched on victim impact and the impact on petitioner's own family as an appeal to passion and prejudice.

> 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 that somebody decided to play God and take the life of 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* [petitioner's father] *any question because I think quite frankly his family as the Keels family have lost a lot.*

App. 477, ll. 12 – 25 (emphasis added).

As part of her closing, the solicitor brought the jury the insight of people unrelated to the trial and outside the record to support a conviction of petitioner. This included the outside the record discussions with a close friend who helped provide special insight into the shooting.

> Godly how could somebody be so braze and just to 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 went off, the light bulb went off your right.* He was that

> bold and he was that brazen and that bad and that cold blooded because he wanted an audience . . .

App. 480, ll. 12 - 21 (emphasis added).

The solicitor vouched for witnesses regarding the conflicting stories told by Detrel Mathews concerning petitioner's access to a .45 caliber handgun.[8] At trial, Mathews denied seeing a gun from this earlier altercation at trial. App. App. 214, l. 15 – 216, l. 24. The state impeached this testimony by calling investigator Wayne McFadden who claimed Mathews had made a prior inconsistent statement and identified petitioner as having a .45 caliber handgun at the time and was afraid to hand the gun back to petitioner out of fear petitioner would kill Keels. App. App. 315, ll. 11–15.

> 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. I mean if the only thing he told Wayne because we have to assume at this point that Wayne McFadden just pulled that back out the sky somewhere, but if he never told Wayne McFadden that he took .45 caliber pistol from 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. 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. 485, l. 6 - 17 (emphasis added).

The solicitor referred to the trial speaking the truth, for both the petitioner and prosecution, improperly shifting the burden of proof.

> At the end of the day *everybody in this courtroom* wants what's *fair, what's just, and what's right.* Now -- tell you you know Mr.

---

[8] Keels was shot with a .45 caliber handgun, but no murder weapon was ever found. App. 734, ll. 2 – 16; 753, ll. 2 – 16. The only connection between petitioner and the caliber of weapon used to murder Keels was a fight between petitioner and Dominique McBride that occurred weeks before Keels was murdered. App. 108, ll. 11-19.

> Ballinger and I don't agree what that is in this case, *but everybody agrees that we want a verdict that speaks the truth.*

App. 462, ll. 10 – 14 (emphasis added). *See* State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding in a charge this language "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."). This burden shifting was compounded by the trial judge's admonition to the jury that their role was to search for the truth[9]:

> This is a real trial which is a fundamental part of our democracy and it's a search for the truth in an effort to make sure that justice is done. Searching for the truth and insuring that justice is done is often deliberate, repetitive, and slow.
> . . .
>
> The attorneys who are appearing before you are advocates for the parties they represent but first and foremost they are officers of this court. Who are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors in your search for the truth.

App. 79, l. 19 – 80, l. 9.

These additional improper arguments comments infected the trial with "unfairness as to make the resulting conviction a denial of due process." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). In addition, 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). "An appellant

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9 The PCR court's reliance on State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) as insulating the remarks of the trial court and improper argument of counsel is misplaced. As warned in Daniels, this type of language was improper, and the trial court was in error to tell the jury they were there to "search for the truth" and to uphold "fairness" and this error was compounded by the solicitor's closing referring to this same role and duty.

must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id. The impact of 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 two questionable witness both touched by improper conduct, warrants a finding that petitioner's right to a fair trial was compromised and that trial counsel was ineffective under Strickland in failing to object to the numerous improper comments of the solicitor during closing.

D. Prejudice.

In the words of the solicitor, the strength of her case was a lack of evidence. She warned the jury not to allow "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." App. 495, ll. 12 – 14. The evidence presented by the state showed petitioner's car was in the area of the shooting. App. 316, ll. 10 – 16; 319, l. 17 – 323, l. 19. The state presented evidence of prior difficulties between Keels and petitioner. App. 108, ll. 11-19.

However, the state lacked a murder weapon, DNA, fingerprints, or gun shot residue evidence. App. 261, ll. 1-25. The state presented two witnesses who identified petitioner as the shooter: Smith and Croskey. Smith's credibility and the solicitor's improper vouching during

closing argument highlight the impact of trial counsel's ineffectiveness. *See* Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018) ("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.").

This leaves only Croskey. Croskey identified petitioner based solely on the manner of his walk after seeing a figure, at night, from distance, for a few seconds. App. 186, l. 22 – 187, l. 24. "I assume it was him because of his walk." App. 198, l. 6. She was unclear on any other details of this shadowy figure other than they wore dark clothing. App. 196, l. 22 – 196, l. 10. The idea of an unusual walk as an identifier was fed to Croskey by police investigators after a rumor made her believe petitioner was the shooter.

> Q. Who was the first person to come to your mind *when you looked under that light and told Jeff and them who is that guy walking under that light and what is your answer?*
>
> *A: I didn't have a feeling.*
>
> *Q: Question, at what point in time did you start thinking it could be the Driver*[10]*?*
>
> *A: When people started talking it started being around Greeleyville with people talking about it.*

App. 198, l. 24 – 199, l. 10 (emphasis added). Despite Croskey being influenced by word around Greeleyville about the identity of the shooter and an inability to initially identify the figure, the investigators helped Croskey "discover" the walk as a method of connecting petitioner to these rumors.

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[10] Croskey indicated she knew petitioner by the name "Driver." App. 180, l. 22 – 181, l. 3.

> Q: Now lets back up a little bit on your statement on page 16 you and Ms. Barr used. *Question, did you notice anything about this person's walk?.*
>
> A: *No ma'am not really.*
>
> Q: Then she asked you and you and Ms. Barr went through this, is there anything that put you in the mind frame that it was the Driver. You say what was your answer?
>
> A: Yes ma'am.
>
> Q: And the question is, *and that was because of his walk. And your response was?*
>
> A: *Yes ma'am.*

App. 203, l. 19 – 204, l. 4 (emphasis added).[11]

This sole witness identification, balanced against the numerous improper arguments of the solicitor during closing argument in a case the solicitor herself admitted was based upon credibility, is insufficiently strong to remove the taint of counsel's ineffective representation. Even the PCR court found Croskey's statements were "all over the place." App. 771. "After balancing trial counsel's errors—failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun—against our perception of the strength of the State's case, we find the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" Smalls v. State, 422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018).

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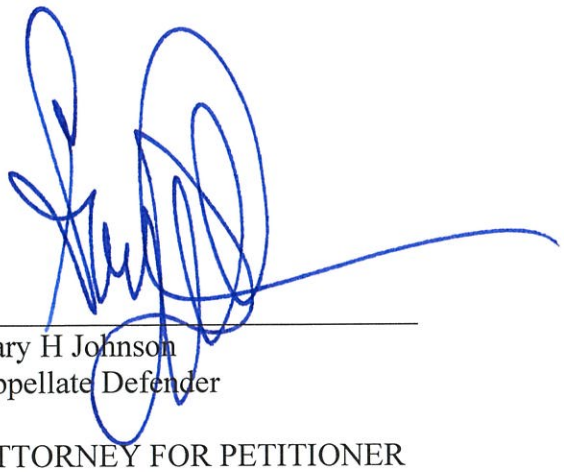
[11] Despite having the police provide Croskey with the key element of her identification of petitioner, despite Croskey admitting the influence of rumors she heard around town that petitioner was the shooter before the identification, trial counsel made this decision not to seek a Neil v. Biggers, 409 U.S. 188 (1972) determination of the admissibility of this identification since it "was not a photo lineup" type case. App. 724, ll. 6 - 15.

CONCLUSION

The solicitor's closing argument infected petitioner's trial with "unfairness as to make the resulting conviction a denial of due process." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). Trial counsel admitted ineffectiveness when he claimed to understand the rules prohibited him from objecting during closing statements. In light of the number and nature of the improper arguments of the solicitor, counsel's ineffective performance "undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). ""[T]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. This court should reverse the PCR court and remand this matter to the Williamsburg County Court of General Sessions for a new trial.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of May, 2025.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

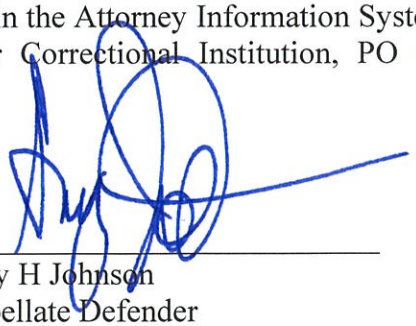
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Danielle E Dixon, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Marc Anthony Palmer, #354634, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of May, 2025.



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marc Anthony Palmer, Petitioner, v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000040

Appeal From Williamsburg County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2026-UP-142
Submitted February 3, 2026 – Filed March 25, 2026

AFFIRMED

Appellate Defender Gary Howard Johnson, II, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Danielle Dixon, all of Columbia, for Respondent.

PER CURIAM: We issued a writ of certiorari to review the circuit court's denial of post-conviction relief (PCR) to Marc Anthony Palmer. Palmer argues the court erred by finding (1) counsel was effective despite failing to object during the

solicitor's closing argument and (2) no prejudice to Palmer because the outcome of the trial would not have been changed if counsel had objected. We affirm, finding even if counsel was ineffective, Palmer failed to prove resulting prejudice.

FACTS

Palmer was convicted of murder and possession of a weapon during the commission of a violent crime and sentenced to life in prison for murder, plus five years for possession of a weapon during the commission of a violent crime, to be served consecutively. He appealed and this court affirmed the convictions but vacated the sentence for possession of a weapon during the commission of a violent crime. *State v. Palmer*, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016). Palmer petitioned for certiorari raising multiple issues. This court granted the petition solely on the first issue: whether the PCR court erred in denying relief on the issue of counsel's failure to object to the solicitor's closing argument.

In his petition, Palmer raised more than twenty objectionable statements made by the solicitor during her closing arguments. Palmer's PCR counsel raised numerous statements made by the solicitor during the hearing on the petition, including the following:

Personal attack against Palmer and calling him a liar:

> [W]hen I talked about [Palmer] 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 to you of a person he is not. You know he comes into this courtroom[, and] he wants to portray himself as conscientious, studi[ou]s, 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 told me when I'm asking him questions, don't get it twisted. Ladies and gentlemen[,] you all cannot get it twisted because . . . the person that you see in the courtroom is not the same individual who in his

> private life . . . took a .45 caliber pistol and loaded . . . bullets into the victim[']s body.
>
> * * *
>
> [I]t was amusing to watch because on direct testimony when [Palmer is] being questioned about his lawyer[,] I'm sitting there[,] and I was looking at him[,] and so he's sitting in this witness chair and he's done all the good things a witness is suppose[d] to do. He turns around in his chair, he's talking appropriately, sound[s] very intelligent, he's making good eye contact with the jurors, he's hitting all the high marks now. He ain't no dumb fella by any means, he's not as smart as he thinks he is, but he ain't [a] dumb fella by no stretch of the imagination. So he gets up and he wants to present this image to you of who he wants you to believe he is, but the image and his reality are conflicting because they're not the same.

Bolstering the credibility of witnesses:

> I got somebody that puts the murder weapon in [Palmer's] hand[;] can you please just not violate this guy if he comes forward and he tells me the truth[?]
>
> I would submit to you that there is something incredibly liberating about prison and I know that sounds ironic . . . but when you go to prison and you're doing your time[,] . . . it kind of allows you to get it off your chest . . . .
>
> Here is where I think it's so important and why I would submit to you that he is believable.

Golden Rule Argument:

> He committed a cold blooded, ruthless murder[,] and at some point[,] if we're going to just lie down and

> surrender ou[r] community to this type of street justice[,] then it's time for all of us to han[g] our hats up. We mi[ght] as well go home. Judge Young mi[ght] as well retire his robe. I mi[ght] as well quit this job and just do only private practice and we mi[ght] as well quit blowing our money away [and] destroy that courthouse across the street because we don't need it. If [Palmer] can come in here and kill somebody in cold blood and walk away . . . because he had the presence of mind to throw away the evidence. . . . [W]e mi[ght] as well . . . all say that we're done. I [implore] you all not to do that . . . .

When questioned during the PCR hearing why he did not object, Palmer's counsel testified that he would raise objections to a closing argument "post-argument. 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." During cross-examination, trial counsel testified he viewed the solicitor's statements as "summation[s] of the evidence."

The PCR court considered these statements, and other allegedly objectionable statements, made by the solicitor during closing arguments. The court found counsel was not ineffective for failing to object based on counsel's testimony that he believed the statements were "reasonable summation[s] based on the evidence presented," and as to the solicitor's alleged Golden Rule Argument, the court found the solicitor's argument did not "ask the juror[s] to put themselves in the place of the victims." Thus, the court found the solicitor did not make a Golden Rule Argument. The court found that even if counsel was ineffective for failing to object, Palmer failed to prove any resulting prejudice. Accordingly, the court denied and dismissed the application for PCR.

STANDARD OF REVIEW

"In [PCR] proceedings, the burden of proof is on the applicant to prove the allegations in his application." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). "We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "We review questions of law de novo, with no deference to trial courts." *Id.* at 180–81, 810 S.E.2d at 839.

LAW/ANALYSIS

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) counsel was deficient and (2) counsel's deficiency prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id*. at 700. "[The appellate c]ourt gives great deference to a PCR judge's findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

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. *See Smalls*, 422 S.C. at 181, 810 S.E.2d at 840 ("To prove trial counsel's performance was deficient, an applicant must show 'counsel's representation fell below an objective standard of reasonableness.'" (quoting *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005))). Failure to preserve an issue for appellate review may be deemed deficient performance. *See Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (finding trial counsel was deficient for failing to adequately preserve an issue for appeal). 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. Here, counsel admitted during cross-examination that the Golden Rule Argument allegation could be viewed as such. He further admitted the impropriety of pitting witnesses against each other and arguing facts not in the record. We find the PCR court erred in finding counsel was not ineffective.[1]

We next turn to the prejudice prong of a claim of ineffective assistance of counsel. Palmer argues the solicitor's statements were prejudicial because the State lacked a murder weapon, DNA, fingerprints, and gunshot residue. In addition, Palmer

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[1] We agree with the State that many of the issues raised in Palmer's petition and brief are not preserved. However, our review of the preserved issues convinces us counsel was ineffective.

argues the two witnesses who identified him were biased, improperly bolstered in their testimony, or influenced in their identification by police investigators.[2]

Establishing ineffective assistance of counsel also requires an applicant to show "counsel's deficient performance prejudiced the applicant's case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (citing *Strickland*, 466 U.S. at 687). To establish prejudice, a "PCR applicant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Bennett v. State*, 383 S.C. 303, 309–10, 680 S.E.2d 273, 276 (2009) (quoting *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. To make this determination, an appellate court reviews the improper argument in the context of the entire record, including whether there is overwhelming evidence of the defendant's guilt. *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

After our review of the record, we find no reasonable probability the result of the trial would have been different had counsel objected to the solicitor's statements. "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." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Here, the trial court instructed the jury that it was "the sole and the exclusive judge[] of the facts in a case" and that it was the jury's "duty to determine the effect, . . . the weight, and the truth of the evidence during [the] trial." Although the court did not specifically instruct the jury after closing arguments that counsel's arguments are not evidence, it instructed the jury during opening instructions, "[Y]our purpose is to determine the facts in this case. You are to determine the facts from the testimony that you'll hear from the witness stand and any other evidence that is introduced here in court." The court also stated in opening instructions, "Let me remind you that what the attorneys tell you during their opening statements is not evidence in this case."

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[2] Maurice Smith was facing numerous charges and, after changing his story regarding the events here, he received a plea deal, implicated Palmer at trial, and received a downward sentencing recommendation after testifying against Palmer. The trial court sustained the State's objection to Palmer's attempt to cross-examine Smith on the plea negotiations and benefits he received. Palmer alleges Britney Croskey identified Palmer based solely on his manner of walking, which was an idea allegedly influenced by the police officer who interviewed her.

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. We find the result of the trial would not have been different absent counsel's ineffectiveness; thus, we find Palmer failed to establish prejudice. *See Strickland*, 466 U.S. at 696 (describing prejudice to require "that the decision reached would reasonably likely have been different absent the errors").

CONCLUSION

For the foregoing reason, the PCR court's ruling is

AFFIRMED.[3]

THOMAS, MCDONALD, and TURNER, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

Appeal from Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2026-UP-142
Submitted February 3, 2026-Filed March 25, 2026

PETITION FOR REHEARING

On March 25, 2026, this Court issued an unpublished decision in connection with the above referenced matter finding error in the lower court's ruling that counsel was not ineffective in failing to object during numerous instances of improper argument during the state's closing argument but finding a lack of prejudice under Strickland v. Washington, 466 U.S. 668 (1984). Pursuant to Rule 221(a), SCACR, petitioner requests that this Court grant rehearing because this Court's opinion on the weight of the evidence presented during trial, some of which was infected by instances of ineffective assistance of counsel which this Court failed to address in the original

petition for certiorari, excuses clear ineffective assistance of counsel and the state's encouragement to the jury to convict petitioner through a closing argument that was riddled with improper comments.

This Court's opinion accepts the proposition that a trial counsel who does not believe he has the power to object during a solicitor's closing argument is ineffective. "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). This Court's opinion properly rejects the assertion by the PCR court that the solicitor's comments were not objectionable and were a "reasonable summation based on the evidence presented, and counsel had no basis to object." App. 778.

This Court's opinion, however, fails to address the nature and extent of the solicitor's comments other than noting several quotes from the argument. For example, while this Court's opinion quotes the solicitor's appealed to improper motives for conviction[1], the opinion fails to address the prejudicial impact or legal reasons why such argument is improper. "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

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[1] The solicitor's argument concerning the dangers of "street justice":

[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).

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)). Liberte is particularly instructive when weighing the impact of improper closing argument with the general strength of evidence concerning guilt. "There is no doubt that the evidence against the Defendants was very strong and that there was no tangible evidence supporting their defense. Instead, their defense depended largely on inconsistencies brought by their attorneys during cross-examination of the State's witnesses and inferences suggested by the attorneys in their closing arguments." Liberte, 336 S.C. at 656, 521 S.E.2d at 748. In Liberte, this Court found the improper argument so infected the proceedings that even "very strong" evidence of guilt compared with mere inconsistencies and inferences mentioned during closing could not outweigh the negative impact of a clearly improper argument of the state.

While this Court's opinion mentions the improper vouching of Maurice Smith by the solicitor[2], it again fails to acknowledge the basis or impact of such improper closing argument. "Zealous advocacy crosses the line and becomes improper vouching, however, when the

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[2] 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. Throughout this argument, the solicitor places herself in the role of "truth monitor" by emphasizing her interaction with Smith during his plea and, even more concerning, misleads the jury by implying a "straight up" plea when it was in fact a negotiated plea. App. 670, ll. 4-9; 673, ll. 12-24.

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 contrast between the limited use of the first person and potential vouching found harmless in Busse versus the pervasive improper vouching outlined by this Court in Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025), reh'g denied (Feb. 19, 2025), cert. denied (June 3, 2025). In Washington, this Court held:

> The State stated, "I submit to you [Victim] was wholly credible" followed by assurances that all children of Victim's age are not capable of lying and that children would "fold" under cross-examination if they were lying. The State's assurances were broad, unsubstantiated claims unrelated to anything raised during the trial.

Washington, 445 S.C. at 242, 911 S.E.2d at 540.

As this Court noted in Washington, such impermissible vouching was "prejudicial because there was no physical evidence of the alleged CSC and the only other evidence in the case required an assessment of the relative credibility of the witnesses." Id. at 243, 911 S.E.2d at 541. The evidence in this case falls squarely within the sphere discussed in Washington. Petitioner would note that the nature of the vouching by the solicitor during closing likewise falls within the realm of clear vouching found by this Court in Washington rather than along the border of improper advocacy outlined in Busse.

Even in the face of the volume of improper arguments (as outlined in full by Petitioner's brief), this Court finds overwhelming evidence of guilt based upon:

> 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).

While this Court's evaluation of the weight of the evidence acknowledged credibility concerns regarding two of the eye-witnesses, it focused on the testimony of Levar Walker's observation of the hair style of the shooter. Walker testified he had seen petitioner wear his hair in a similar fashion, but he also readily admitted he could not identify the shooter:

> Q: Last question Mr. Walker the long and short of it is you don't know who the shooter was that particular night?
>
> A: No sir.

App. 159, ll. 3 – 5.

Regarding the alleged connection between petitioner and the caliber of a firearm used in the shooting[3], this Court's opinion fails to acknowledge that during his trial testimony, Mathews denied knowing anything about a gun from the incident other than something that may have been a gun fell from petitioner's waist during the altercation. App. 214, l. 15 – 216, l. 24. The state then proceeded to impeach Mathews by offering prior inconsistent statements regarding the presence of the firearm. App. 315, ll. 11–15.[4] Petitioner's alleged connection to a firearm of the

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[3] Keels was shot with a .45 caliber handgun, but no murder weapon was ever found. App. 734, ll. 2 – 16; 753, ll. 2 – 16

[4]The solicitor compounded the ineffective assistance of counsel in allowing hearsay testimony regarding the impact of a federal probation officer on Matthew's changing story:

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. I mean if the only thing he told Wayne

appropriate caliber prior to the shooting from an unrelated incident in which the witness provided inconsistent versions of events would not overcome the prejudicial impact of the improper closing argument presented by the solicitor due to trial counsel's deficient performance.

Petitioner was certainly in the area of the shooting, as he testified to being at the local hangout spot adjacent to the shooting location during trial. App. 383-384. This Court's opinion thus finds a lack of prejudice when the evidence of guilt *not impacted by ineffective assistance* of counsel centers around being present in the location of the crime and having a similar hairstyle to the shooter.

By contrast, a murder weapon was never located; 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. According to the solicitor, the petitioner's "presence of mind to throw away the evidence" was the reason the case was weak and required the jury to not to let the petitioner "walk away." App. 495, ll. 13 – 14.

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because we have to assume at this point that Wayne McFadden just pulled that back out the sky somewhere, but if he never told Wayne McFadden that he took .45 caliber pistol from 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. 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. 485, l. 6 - 17 (emphasis added). The effectiveness of counsel surrounding the admission of the hearsay statements by the parole officer was asserted in the original petition for certiorari as the third ground, but was not a basis for which this Court granted review:

3. The PCR court erred in finding counsel was effective when he failed to object to prejudicial hearsay testimony from investigator Wayne McFadden about the intention of a federal parole agent to revoke the parole of Detrel Mathews to bolster Mathew's alleged out of court statements to investigator McFadden concerning petitioner's possession of a gun that matched the caliber used in this case.

The evidence of petitioner's guilt centered on circumstantial evidence (his presence in the area of the shooting and a hairstyle similar to the shooter) along with witness identifications that had significant credibility issues (both related and unrelated to allegations of ineffective assistance of counsel). Balanced against the numerous improper arguments of the solicitor during closing argument in a case the solicitor admitted was based upon credibility, is insufficiently strong to remove the taint of counsel's ineffective representation.

Guidance here can be found by our Supreme Court's handling of another case in which allegations of ineffective assistance of counsel impacted evidence of guilt. Our Supreme Court in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) 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. In Smalls, the Supreme Court noted counsel's errors ("failing to cross-examine Green on the dismissal of his carjacking charge and failing to object to evidence Smalls committed a burglary to obtain the shotgun") against the weight of the evidence and found "the errors significantly 'undermine confidence in the outcome of the trial' and leave 'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" Id., 422 S.C. at 195, 810 S.E.2d at 847.

On rehearing, this Court should adopt the same approach. As outlined in Petitioner's Brief and the original Petition for Certiorari, there were numerous instances of ineffective assistance of counsel outside the closing argument. This Court, in a footnote, seemed to reject any impact on these areas of concern by noting "We agree with the State that many of the issues raised in Palmer's petition and brief are not preserved. However, our review of the preserved

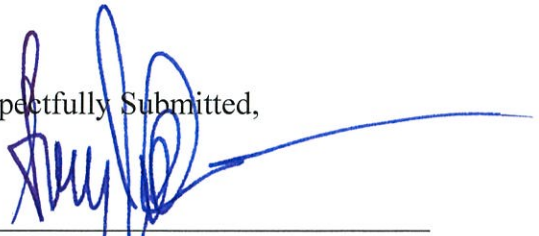
issues convinces us counsel was ineffective." Palmer v. State, No. 2023-000040, fn. 1. (S.C. Ct. App. Mar. 25, 2026). This would ignore the guidance in Smalls that the evidence of guilt from a prejudice analysis should not consider evidence tainted by instances of ineffective assistance of counsel. An example would be the Court's reliance on the connection between petitioner and the .45 caliber handgun that, as alleged in the original Petition for Certiorari, was tainted by ineffective assistance of counsel. Rather than grant review on this ground, this Court's opinion uses that very evidence as part of a finding of lack of prejudice. Here, as in Smalls, this Court should reconsider whether trial counsel's cumulative errors leave a "'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.'" Smalls, 422 S.C. at 195, 810 S.E.2d at 847.

Moreover, this Court should consider the cumulative impact of solicitor's improper argument in light of the lack of strong forensic or physical evidence of guilt. 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). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id. The impact of 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 improper conduct, warrants a finding that petitioner's right to a fair trial was compromised and that trial counsel was ineffective under Strickland in failing to object to the numerous improper comments of the solicitor during closing.

For the reasons set forth herein and as argued more extensively in Petitioner's Brief, this Court should reconsider its finding that despite the ineffective assistance of counsel in failing to know he was allowed to object to the numerous instances of improper argument by the solicitor during closing that there was no reasonable probability the result of the trial would have been different in a case that even the solicitor acknowledged was weak due to the lack of physical evidence of guilt and was dependent on credibility.

Respectfully Submitted,



GARY H. JOHNSON
Appellate Defender
SC Bar #8898

This 9th day of April, 2026.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable Edward W. Miller, Circuit Court Judge

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000040

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Danielle E Dixon, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Marc Anthony Palmer, #354634, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 9th day of April, 2026.

Gary H Johnson
Appellate Defender
SC Bar #8898

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

Marc Anthony Palmer, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000040

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
May 13 2026

cc:
Danielle Dixon, Esquire
Gary Howard Johnson, II, Esquire
Donald J. Zelenka, Esquire
Marc Anthony Palmer, 354634
The Honorable Edward W. Miller