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

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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.

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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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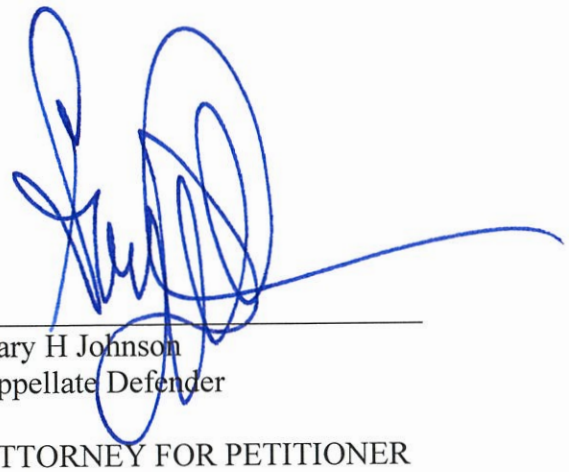
[11] Despite having the police provide Croskey with the key element of her identification of petitioner, despite Croskey admitting the influence of rumors she heard around town that petitioner was the shooter before the identification, trial counsel made this decision not to seek a Neil v. Biggers, 409 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.

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May 15 2025
SC Court of Appeals

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.

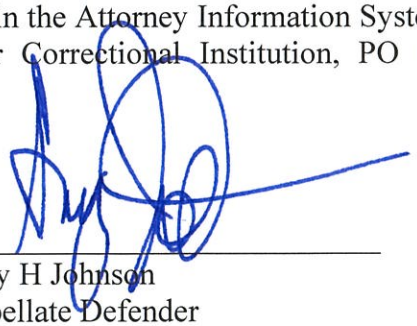
STATE OF SOUTH CAROLINA,

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

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, May 15, 2025 5:16 PM
To: Danielle Dixon
Cc: Vickie Hall; Johnson, Gary
Subject: 2023-000040 - Marc A. Palmer v. State - Brief of Petitioner
Attachments: 2023-000040 - Marc A. Palmer v. State - Brief of Petitioner.pdf

RECEIVED
May 15 2025
SC Court of Appeals

Dear Ms. Dixon,

Attached please find a copy of the Brief of Petitioner in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Gary Johnson
Appellate Defense