

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Unpublished Opinion No. 2026-UP-142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On March 25, 2026, this Court issued an unpublished decision in connection with the above referenced matter finding error in the lower court's ruling that counsel was not ineffective in failing to object during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 conviction¹, 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

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 solicitor², 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

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 shooting³, 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

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

⁴The 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.

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

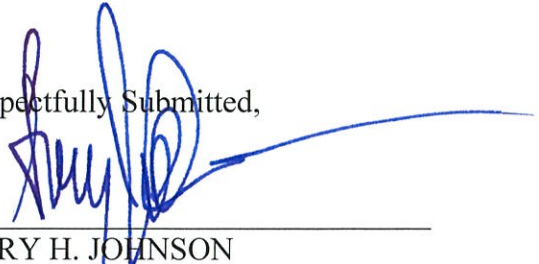
issues convinces us counsel was ineffective.” Palmer v. State, No. 2023-000040, fn. 1. (S.C. Ct. App. Mar. 25, 2026). This would ignore the guidance in Smalls that the evidence of guilt from a prejudice analysis should not consider evidence tainted by instances of ineffective assistance of counsel. An 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.

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Apr 09 2026

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.

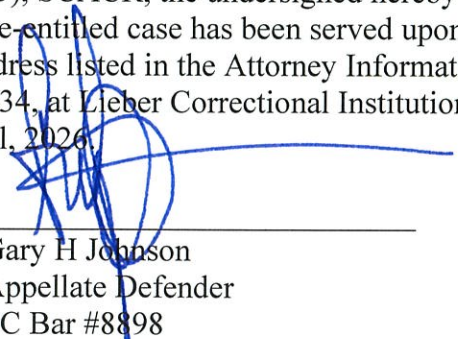
STATE OF SOUTH CAROLINA,

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 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

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Apr 09 2026

Bast, Daniel

SC Court of Appeals

From: Bast, Daniel
Sent: Thursday, April 9, 2026 3:21 PM
To: danielledixon@scag.gov
Cc: Johnson, Gary; blakemeans@scag.gov
Subject: 2023-000040 - Marc Anthony Palmer v. The State
Attachments: 2023-000040 - Marc Anthony Palmer v. The State - Petition for Rehearing.pdf

Good afternoon,

Attached is a copy of the Petition for Rehearing in the above referenced case which will be filed today, April 9, 2026, with the Court of Appeals.

All the best,

Daniel Bast
Administrative Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
(803) 734-1330