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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to
Court of Appeals
Appeal from Williamsburg County
Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2026-001335

MARC ANTHONY PALMER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RETURN TO PETITION
FOR A WRIT OF CERTIORARI**

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II. As an alternate sustaining ground, this Court could find Petitioner did not meet his burden of proving deficiency under <i>Strickland</i> , especially here where a portion of the argument the Court of Appeals relied on was not even raised by Petitioner in his brief, and Petitioner did not prove deficiency as to the remaining portions cited by the Court of Appeals.	
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QUESTIONS PRESENTED

Petitioner's Questions

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

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

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

Respondent's Counterstatement of Questions

I. Did the Court of Appeals properly find the State's comments did so infect the trial with unfairness as to violate due process? Further, should this Court consider allegations of ineffective assistance of counsel that were denied by both the PCR court and the Court of Appeals (in denying certiorari on those questions)?

II. As an alternate sustaining ground, should this Court find Petitioner did not meet his burden of proving deficiency under *Strickland*, especially when a portion of the argument the Court of Appeals relied on was not even raised by Petitioner in his brief, and Petitioner did not prove deficiency as to the remaining portions cited by the Court of Appeals?

III. Are Petitioner's remaining questions are not properly before this Court when (1) the Court of Appeals denied certiorari on the remaining questions and (2) Petitioner did not raise the cumulative error issue to the PCR court—leaving it patently unpreserved?

STATEMENT OF THE CASE

Petitioner is serving a life sentence for murder following the fatal shooting of Therriis Keels.¹ On March 11-14, 2013, Petitioner proceeded to a jury trial before the Honorable William Jeffery Young. Petitioner was convicted as indicted and sentenced to life for murder and a consecutive five-year sentence for possession of a weapon during a violent crime.

Petitioner filed a direct appeal. The Court of Appeals vacated the five-year sentence for the weapon charge pursuant to section 16-23-490(A) of the South Carolina Code but affirmed 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.

Petitioner then filed this application for post-conviction relief (PCR). Following an evidentiary hearing, the Honorable Edward W. Miller issued an order denying relief. Thereafter, Petitioner filed a Petition for a Writ of Certiorari raising five issues. After the matter was transferred to the Court of Appeals, the Court issued and granted certiorari on Question One (related to the solicitor's closing argument) but denied certiorari on the remaining questions. Following briefing, the Court of Appeals issued an unpublished *per curiam* opinion finding that although counsel was deficient for not objecting to portions of the solicitor's closing argument, the comments did not so infect the trial with prejudice as to violate due process.

Statement of Facts

On October 28, 2010, Therriis Keels (Victim) was shot in the head and abdomen. (App. 165). At trial, eyewitness Maurice Smith testified he observed Victim with Joseph Sabb² on the

¹ 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).

² Sabb's nickname was "TT."

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). Smith did not see Petitioner's Dodge Neon that night but heard its distinctive squeal 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. (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 shooting. On the video, Petitioner's distinctive Dodge Neon 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; the two were separated but 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 also 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 and two investigators interviewed Petitioner—who initially claimed he had an alibi. However, police could not 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).

ARGUMENT

I. The Court of Appeals properly found the State’s comments did so infect the trial with unfairness as to violate due process. Further, Petitioner continues to rely on allegations of ineffective assistance of counsel that were denied by both the PCR court and the Court of Appeals (in denying certiorari on those questions); those allegations should not be considered by this Court.

Petitioner contends the Court of Appeals improperly applied precedent in finding a lack of prejudice. First, he avers the Court of Appeals overlooked “numerous” improper comments in its analysis—specifically a comment related to Maurice Smith, which he maintains constituted improper vouching of the “*only* direct witness connecting petitioner with the murder.” (Pet. 6-7). He next contends the Court of Appeals made its prejudice finding “despite a complete lack of physical evidence connecting petitioner to the murder.” (Pet. 8). In doing so, he contends the Court of Appeals rejected precedent that addresses how courts should consider the strength of the State’s evidence when considering the impact of counsel’s errors. He further asserts the solicitor “intentionally went outside the record, misled the jury, and placed the weight of her office and status as a prosecutor on the scales in vouching for Smith.” Contrary to Petitioner’s allegations, however, the State’s closing argument did not improperly vouch for Smith, nor was Smith the only witness who identified Petitioner as the shooter. Further, the Court of Appeals *did* consider the strength of the State’s case in assessing prejudice, and a review of all the evidence (and not just that selected by Petitioner) shows the Court of Appeals properly concluded that the weight of the evidence supported its finding that Petitioner did not prove prejudice. Thus, this case does not present a “special and important reason” for granting certiorari.

a. This Court should not consider the allegations of ineffective assistance of counsel that were denied by both the PCR court and the Court of Appeals.

Throughout his argument, Petitioner criticizes the Court of Appeals’ reliance on evidence he contends would not have been there but for the ineffective assistance of counsel. Specifically,

he asserts the Court of Appeals “relied upon sketchy eye-witness testimony (either infected by ineffective assistance of counsel . . . or based upon physical characteristics rather than direct identification).” (Pet. 9). He likewise continues to assert the solicitor had a “secret deal” with Maurice Smith. However, the PCR court found Petitioner did not prove those allegations, and the Court of Appeals denied certiorari on these questions. (App. 769-73; Supp. App. 22-27, 67). This Court does not entertain Petitions for Writ of Certiorari in PCR matters when the Court of Appeals has denied certiorari. *See Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009) (“[A] decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed “a special reason” justifying the exercise of our discretion under Rule 226.”); *id.* (extending its holding “to cases in which the Court of Appeals has issued an order denying a writ of certiorari in a PCR matter”). Because the Court of Appeals denied certiorari on these remaining questions, the PCR court’s ruling is final: counsel was not ineffective in those regards. Thus, the Court of Appeals—after concluding the other allegations did not warrant granting certiorari—properly considered the State’s evidence in assessing prejudice, and the only allegation properly before this Court is whether counsel was ineffective³ for failing to object to the solicitor’s closing

³ A finding of ineffectiveness requires *both* a finding of deficiency and prejudice; if one of those prongs is missing, then counsel was not ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”). Here, the Court of Appeals found counsel was ineffective (App. 126 & n.1) but went on to find Petitioner did not

argument.

b. The Court of Appeals properly did not consider the portion of the closing argument that Petitioner asserts was improper vouching of Maurice Smith.

Petitioner contends the Court of Appeals overlooked an argument related to Maurice Smith that he maintains constituted improper vouching. Specifically, he takes issue with the following:

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). However, this argument was based on reasonable inferences from the record and did not constitute improper vouching. Thus, the Court of Appeals properly did not consider this portion of the closing argument in its opinion.

Here, the PCR court properly found the foregoing was a reasonable summation based on the evidence presented, and counsel had no basis to object.⁴ *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

suffer prejudice (App. 127). Respondent submits that despite the actual word used, the Court of Appeals' finding of ineffectiveness was actually a finding of deficiency.

⁴ Respondent incorporates herein its argument that Petitioner did not properly preserve an argument related to improper vouching. (Supp. App. 41-43).

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 defense's 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.

Petitioner continues to argue that the solicitor's statement was false based on events that occurred after trial. He likewise continues to assert that the solicitor had a "secret" negotiated deal with Smith. (Pet. 7, 11-13). 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 the Court of Appeals 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 there was no valid basis to object. Thus, this Court should not consider this portion of the closing argument when evaluating prejudice.

c. The Court of Appeals properly found the State's comments did not so infect the trial with unfairness as to violate due process.

The Court of Appeals properly found the State's comments did not so infect the trial with unfairness as to violate due process. *See Humpries v. State*, 351 S.C.362, 373, 570 S.E.2d 160, 166 (2002); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (holding the relevant question when determining whether an improper comment prejudiced a defendant is "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *United States v. Young*, 470 U.S. 1, 11 ("[A] criminal conviction is not to be lightly

overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial."); *id.* ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.").

In *Darden*, the United States Supreme Court considered whether improper comments by the solicitor infected the trial with unfairness as to violate due process. There, the solicitor made multiple improper comments during closing argument, including:

"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." "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." "I wish someone had walked in the back door and blown his head off at that point." "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." "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." "[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."

477 U.S. at 181 n. 12 (internal citations omitted). Notwithstanding the egregiousness of these comments, the Court concluded the comments did not so infect the trial with unfairness as to violate due process:

The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. . . . The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges, reduced the likelihood that

the jury's decision was influenced by argument. Finally, defense counsel made the tactical decision not to present any witness other than petitioner. This decision not only permitted them to give their summation prior to the prosecution's closing argument, but also gave them the opportunity to make a final rebuttal argument. Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner.

Id. at 181–82.

Here, the solicitor's comments did not rise to the level of that condemned by *Darden*. The argument cited by the Court of Appeals encompassed a small portion of the State's more-than-twenty-three-page-closing-argument.⁵ Under *Darden*, the argument here did not so infect the trial with unfairness as to violate due process.

Likewise, the Court of Appeals properly considered the strength of the State's case when determining whether the comments so infected the trial with unfairness as to violate due process. *See Berger v. United States*, 295 U.S. 78, 88-89 (1935) (considering the strength of the State's evidence when determining whether improper comments by solicitor prejudiced defendant); *id.* at 89 ("If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached."); *Young*, 470 U.S. at 19 ("[T]he overwhelming evidence of respondent's intent to defraud Apco and submit false oil certifications

⁵ As set forth below, the Court of Appeals improperly relied on the portions it entitled *Bolstering the Credibility of witnesses* and *Personal Attack against Palmer and calling him a liar* because Petitioner did not even cite to those portions of the argument in his filings with the Court of Appeals and thus did not raise any issue with them. (Supp. App. 7-15). *See State v. Brewton*, 437 S.C. 44, 59, 876 S.E.2d 141, 149 (Ct. App. 2022) *aff'd as modified on other grounds*, 442 S.C. 169, 898 S.E.2d 132 (2024) ("[A]n unappealed ruling, right or wrong, is the law of the case." (alteration in original) (citation omitted)); *id.* ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief." (alteration in original) (quoted source omitted)).

to the Government eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury."); *id.* at 20 ("[T] substantial and virtually uncontradicted evidence of respondent's willful violation provides an additional indication that the prosecutor's remarks, when viewed in context, cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice.").

Here, the Court of Appeals relied on the following evidence:

[T]here 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.

(App. 128). Contrary to Petitioner's assertion that the State's evidence merely placed him at the scene (Pet. 9), the State presented *two* eyewitnesses—Smith and Croskey—who identified Petitioner as the shooter. (App. 114-16, 187-88, 192). Ultimately, the credibility of these witnesses was a question for the jury. Petitioner's contention that Croskey's identification was unreliable because she identified him based on his "walk" (Pet. 7 n.7) ignores Croskey's description of that walk: "He had like a certain walk to him." (App. 187). "Like tip toe kind of it's noticeable if you knew it." (App. 188). She clarified the shooter paced in the same manner that she had seen Petitioner walk. (App. 187-88). Further, although Petitioner continues to raise claims of ineffective assistance of counsel related to those witnesses, those allegations were rejected by both the PCR court and the Court of Appeals and thus should not be considered by this Court. *See Ellison v.*

State, 382 S.C. 189, 676 S.E.2d 671 (2009).

Petitioner’s argument ignores other compelling evidence presented by the State. For example, Petitioner’s very distinct Dodge Neon—which Investigator McFadden described as having a distinct, unusual color (teal) and a missing hubcap—was captured on a nearby gas station’s surveillance video within a minute of the 911 call. (App. 307-08, 316-21). In addition, the State presented evidence of a prior dispute between Petitioner and Victim. (App. 106-07, 211-12). The State also presented evidence that Petitioner had a .45 caliber gun—the same caliber used in this shooting—that he had asked a friend to return to him a few days before the shooting. (App. 108-09, 212-13, 312-15).

In addition to the State’s overwhelming evidence, Petitioner testified at trial and admitted:

- he went to “the shop” where the shooting occurred and saw Victim⁶; (App. 349-51);
- (2) his car was the vehicle in the surveillance footage entered by the State (App. 354-55);
- (3) he and Victim had a verbal confrontation earlier that day (App. 348-49) and had “plenty of incidents” before that day (App. 370-71);
- (4) portions of his initial statement to police were inaccurate (App. 357-59);
- (5) he dropped a gun at a prior confrontation with Dominique McBride (App. 362-63);
- (6) he had a “messed up leg” with a surgical pin, he would “kind of work my injury into a little swag or whatever,” and sometimes he might “be hunched over and you know walk on the tip of my toes or something” (App. 363-64); and
- (7) he knew Croskey through her cousin Toot (App. 364).⁷

Critically, much of Petitioner’s testimony *corroborated* the evidence submitted by the State. Based on the foregoing, the Court of Appeals properly concluded the comments did not so infect the trial with unfairness as to violate due process.

⁶ Petitioner stated he left his home around 10:00 p.m. to go to “the shop,” which was about a ten-minute drive from his home, and stayed there for only 5-10 minutes. (App. 349-51, 355). The 911 call was placed at 10:38 p.m. (App. 321).

⁷ Additionally, he claimed (1) he had corn rows and not a ponytail (App. 360); (2) he owned a .38 caliber gun but not own a .40-caliber gun and had never fired one in his life (App. 362-63); and (3) after he left the shop, he smoked marijuana, tried to sell some drugs, and drove around until his car ran out of gas.

Petitioner’s reliance on *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), is misplaced. Specifically, in *Smalls*, the Court concluded that the Court of Appeals erred in categorically relying on its conclusion that the State presented overwhelming evidence of guilt in concluding the petitioner did not prove prejudice. Unlike *Smalls*, however, the Court of Appeals here did not rely exclusively on a finding related to the strength of the State’s evidence. (Supp. App. 127-28). Rather, the Court of Appeals also properly relied on the jury charge, which reiterated that the jury was the sole factfinder in the case. (Supp. App. 127). *See Darden*, at 181-82 (“The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence.”).

Additionally, the evidence considered by the Court of Appeals was properly-considered evidence. As noted, many of Petitioner’s arguments in this regard are based on his additional allegations of ineffective assistance of counsel—allegations that were rejected by both the PCR court and the Court of Appeals. Based on the foregoing, the Court of Appeals properly concluded the closing argument did not so infect the trial with unfairness as to violate due process.

d. Because the Court of Appeals properly applied precedent, this case does not present a special and important reason for granting certiorari.

Rule 242(b) of the South Carolina Appellate Court rules set forth the following “special and important” reasons for granting certiorari:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

The question presented here—whether the Court of Appeals properly found the solicitor’s comments did not so infect the trial with unfairness as to violate due process—does not warrant

certiorari. Specifically, this case does not present a novel question of law, nor was there a dissent in the Court of Appeals opinion. Although the case *does* involve constitutional rights—due process and the Sixth Amendment right to effective counsel—these areas of law, as raised here, are well-settled, and the Court of Appeal’s finding that Petitioner did not prove prejudice did not conflict with a decision of the United States Supreme Court or misapply State court precedent.

Petitioner contends the Court of Appeals misapplied precedent in considering evidence that was “tainted by a significant error of counsel.” (Pet. 9). As set forth, however, this argument is premised on allegations of ineffective assistance of counsel that the PCR court found Petitioner did not prove, and the Court of Appeals denied certiorari on those additional questions. Thus, the Court of Appeals did not misapply precedent, and this case does not set forth a “special and important reason” to grant certiorari.

II. As an alternate sustaining ground, this Court could find Petitioner did not meet his burden of proving deficiency under *Strickland*.

In its opinion, the Court of Appeals cited to only three portions of the closing, which it referred to as “*Personal attack against Palmer and calling him a liar*”; *Bolstering the credibility of witnesses*”; and “*Golden Rule Argument*.” (App. 123-24). The Court analyzed deficiency as follows:

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. Failure to preserve an issue for appellate review may be deemed deficient performance. In addition, we find the PCR court erred in relying on counsel’s testimony that he believed the solicitor’s statement 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.

(App. 126). The Court of Appeals’ finding of deficiency hinged on (1) counsel’s belief that he

could not object⁸; (2) counsel's failure to object; (3) counsel's "admission that the Golden Rule allegation could be viewed as such"; and (4) counsel admission regarding the "impropriety of pitting witnesses against each other and arguing facts not in the record."⁹

At most, the Court of Appeals found only the three arguments objectionable. However, one of the arguments referenced by the Court of Appeals was not even raised by Petitioner in his filing to the Court of Appeals; thus, the Court of Appeals improperly relied on that argument in finding deficiency. As to the remaining arguments, Petitioner did not prove deficiency.

a. The portion of the argument entitled "Bolstering" was not raised to the Court of Appeals; further, in context, it was supported by evidence and did not constitute improper bolstering.

In its opinion, the Court of Appeals cited the following from the State's closing argument:

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 you

⁸ Respondent concedes counsel misunderstood the rules in this regard. However, the heavy burden of *Strickland* requires Petitioner to (1) identify what portions of the closing argument were objectionable, (2) set forth a valid legal basis for an objection, and (3) show the objectionable portion rendered his trial fundamentally unfair. It is *Petitioner's* burden to prove his ground—not the State's burden to disprove it.

⁹ This finding, however, relies largely on counsel's post-hoc testimony rather than objectively reviewing the comments to determine if they were, in fact, objectionable. *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.").

that he is believable.

(Supp. App. 124). Although this portion of the closing argument was raised at the PCR hearing, Petitioner did not cite it in his Petition for Writ of Certiorari, Reply, or Brief to the Court of Appeals. (Supp. App. 7-15, 58-59, 76-92). Because Petitioner did not raise any issue with this portion of the argument, it was improper for the Court of Appeals to consider it. *See State v. Brewton*, 437 S.C. 44, 59, 876 S.E.2d 141, 149 (Ct. App. 2022) *aff'd as modified on other grounds*, 442 S.C. 169, 898 S.E.2d 132 (2024) (“[A]n unappealed ruling, right or wrong, is the law of the case.” (alteration in original) (citation omitted)); *id.* (“[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief.” (alteration in original) (quoted source omitted)).

Further, the argument as cited by the Court of Appeals is taken out of context. Specifically, the first portion occurred during the solicitor’s statement about Detrel Matthews’ testimony:

Now Detrel Matthews got on the witness stand and says well yeah I saw the fight and I saw something fall form Marc Palmer’s waist but I don’t know what it was I assume it was a gun but I don’t know . . . I said well Mr. Matthews did you tell Investigator McFadden that it was a gun, no I ain’t told him that. Did you tell him it was a .45 caliber pistol, no. Did you tell him you kept it for a couple of days, no. Did you tell him that Palmer kept calling you asking for it back, no. Did you tell him that a few days before the murder you gave the .45 pistol back to him, no I didn’t tell him that I ain’t tell him that. So when we call Investigator McFadden to the stand I asked him about that and he said yes ma’am I had that conversation with Mr. Matthews because that that time he said he wasn’t going to go on record, now because he was on federal parole and it would be a violation of his parole to have a firearm. At this point and time *Investigator McFadden he ain’t worried about not little gun charge he’s worried about trying to solve a murder. So he then goes to his parole officer and says listen ma’am I got a murder down here in Williamsburg County, I got somebody that puts the murder weapon in the defendant’s hand can you please just not violate this guy if he comes forward and he tells me the truth.*

(App. 484, emphasis added). In context the solicitor was recounting Investigator McFadden’s

testimony about his conversation with Mathews’ parole officer—not indicating *she* (the solicitor) had a witness who put the murder weapon in Petitioner’s hand.

Additionally, the PCR court properly found the foregoing was a reasonable summation of the State’s evidence, and counsel had no basis to object. (App. 777-78). Because the foregoing argument was supported by evidence admitted at trial (App. 210;-17; 309-15, specifically 314), it did not constitute improper vouching. *See State v. Busse*, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) (“[A] prosecutor is expected to comment on the credibility of the witnesses when making a closing argument. Far from improper, as previously explained, doing so is one of the fundamental responsibilities of a lawyer. The deputy solicitor was arguing the importance of facts in evidence to the jury’s determination of the victim’s credibility.”); *id.* at 109, 886 S.E.2d at 211 (“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.”).

The next portion of this argument—which, from the Court of Appeals’ opinion looks like a continuation of the first portion—occurs five pages later when the solicitor discussed Smith’s testimony.¹⁰ (App. 489; Supp App. 124). Again, the PCR court properly found this was a reasonable summation based on the evidence presented, and counsel had no basis to object. (App. 777-78). Specifically, because this portion of the closing argument was based on evidence (App. 100), it did not constitute improper vouching. *See id.* Because Petitioner did not raise his portion of the closing argument to the Court of Appeals, and because it did not constitute improper vouching, this Court should not consider it in determining whether to grant certiorari.

¹⁰ Although the solicitor briefly referenced Mathews, in context she was discussing Smith’s testimony—not Mathews’ testimony. (App. 488, ln. 17—491 ln. 3).

b. Respondent did not meet his burden of overcoming the presumption of effectiveness on the remaining argument cited by the Court of Appeals.

As to the remaining portions of the closing argument referenced by the Court of Appeals (App. 123-125), Petitioner did not meet his heavy burden of overcoming the presumption of effectiveness to prove deficiency under *Strickland*. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. (internal quotation marks omitted)).

More specifically, Petitioner did not identify a proper legal basis at the PCR hearing for objecting to these portions of the closing argument.¹¹ *Strickland* clarifies that it is the petitioner’s heavy burden to overcome the presumption of effectiveness—not the State’s burden to disprove ineffectiveness. Here, where Petitioner did not identify a proper legal objection to these portions of the closing argument at the PCR hearing, he did not overcome the *Strickland* presumption of

¹¹ At the PCR hearing, Petitioner loosely questioned trial counsel about a Golden Rule argument; however, this argument does not amount to a Golden Rule argument—and counsel’s hindsight testimony is not the proper standard for measuring deficiency. 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)). Respondent incorporates herein its arguments from its brief to the Court of Appeals. (Supp. App. 103-21, specifically pg. 106-11, 115-16).

effectiveness or prove deficiency.¹²

III. Petitioner’s remaining questions are not properly before this Court because (1) the Court of Appeals denied certiorari on the remaining questions and (2) Petitioner did not raise the cumulative error issue to the PCR court—leaving it patently unpreserved.

Petitioner’s remaining questions are not properly before this Court. As to Question Two, Petitioner raises allegations of ineffective assistance of counsel that were denied by the PCR court and the Court of Appeals. (Pet. 15-18). More specifically, he asserts the Court of Appeals relied on evidence “tainted by ineffective assistance of counsel”—specifically, testimony from Investigator McFadden that he contends constituted prejudicial hearsay. (Pet. 16-19). Although he raised this as Question Three in his Petition for Writ of Certiorari, the Court of Appeals denied certiorari on this question. (Supp. App. 19-21, 67). Because the Court of Appeals had discretion to deny certiorari, this question does not present a “special reason” to justify this Court’s exercise of discretion under Rule 226. *See Ellison v. State*, 382 S.C. 189, 191, 676 S.E.2d 671, 672 (2009) (“[A] decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed “a special reason” justifying the exercise of our discretion under Rule 226.”); *id.* (extending its holding “to cases in which the Court of Appeals has issued an order denying a writ of certiorari in a PCR matter”).

In Question Three, Petitioner raises a cumulative error argument. Although he raised this

¹² Further, the second portion of the argument entitled *Personal Attack against Palmer and calling him a liar* was not raised to—or ruled upon—by the PCR court, nor was it raised by Petitioner in his filings to the Court of Appeals. Thus, the Court of Appeals improperly considered the second portion of this argument. *See Brewton*, 437 S.C. at 59, 876 S.E.2d at 149 (“[A]n unappealed ruling, right or wrong, is the law of the case.” (alteration in original) (citation omitted)); *id.* (“[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief.” (alteration in original) (quoted source omitted)).

argument to the Court of Appeals, it was not raised to the PCR court—leaving it unpreserved. *See Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (reiterating “the general rule that issues which are not properly preserved will not be addressed on appeal”). Likewise, Petitioner again relies on allegations of ineffective assistance of counsel that were denied by both the PCR court and the Court of Appeals. *See Ellison*, 382 S.C. at 191, 676 S.E.2d at 672 (“[A] decision by the Court of Appeals to grant or deny a writ of certiorari in a PCR case is a matter committed to that court's discretion, and a decision to deny certiorari in such a case can never be deemed “a special reason” justifying the exercise of our discretion under Rule 226.”). Thus, this unpreserved issue does not constitute a “special and important reason” for granting certiorari.

CONCLUSION

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

Respectfully Submitted,

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