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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

MARC ANTHONY PALMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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

APPELLATE CASE NO. 2023-000040

REPLY RETURN TO PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ARGUMENTS IN REPLY

I. The State improperly excuses the vouching and misleading argument of the solicitor as a fair comment and reasonable summation by selectively focusing on the lack of prior agreement between Smith and the State.

A. The State's reliance on the lack of any prior agreement by the solicitor ignores the impropriety of the solicitor's improper vouching of Smith.

The State continues to minimize the impropriety of the solicitor's closing argument surrounding the testimony of Maurice Smith. Rather than acknowledge the impropriety of the solicitor personally vouching for Smith by going outside the Record and misleading the jury, the State focuses on the assertion made by petitioner that the solicitor had an undisclosed deal with Smith in exchange for his testimony. Certainly, petitioner asserted such a "secret deal" was in place and never disclosed to trial counsel. App. 650, l. 9 – 653, l. 10. The timing of the downward departure request by the solicitor is circumstantial evidence supporting such prior agreement. App. 693, l. 24 – 694, l. 5. However, as noted by the State, the PCR court found the solicitor's denial of any such "secret" deal credible. App. 771. The existence or non-existence of the prior arrangement (the "secret" deal) has no bearing on the propriety of the solicitor's closing argument concerning Smith's credibility.

Contrary to acceptable argument, the solicitor went outside the Record to place herself and Smith in the courtroom during his guilty plea. "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 that "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, l. 17 – 489, l. 7.

These statements, unrelated to any secret agreement with Smith, were not simply outside the Record of trial but also misleading to the jury. Smith did not plead straight up to his charges, but was in fact allowed to plead to lesser included offenses, a fact that trial counsel admitted to during the PCR evidentiary hearing:

Q And then she goes on and says -- and she's talking about Smith pleading straight up; is that correct? Goes on to the next line. He pled guilty straight up. The man did his wrong. He pled guilty straight up and he's serving his sentence. He is paying his debt to society. I'm going to tell you, you know. You see that line there?

A Yes, sir.

Q All right. But Smith didn't plead straight up, did he?

MS. DIXON: I'm gonna object to facts that are not in evidence. I don't know that we know what type of plea it was.

MR. FALK: Do you have any evidence that he ---

THE COURT: Well, hang on. He -- I 'm not sure what all was in evidence at the trial, but I believe he testified there was no deal; is that right?

MR. FALK: Yes. But he still -- he still did plead straight up. That was a mischaracterization.

THE COURT: Well, explain what you mean by pleading straight up.

BY MR. FALK:

Q Mr. Ballenger, when you hear that somebody is pleading straight up or the solicitor comes to you and says your guy can go in there and plead straight up, what does that mean to you?

A That would mean without recommendation, that he was looking at a term of years and it would be completely up to the court as to what his sentence would be. That would be a straight up plea, without recommendation, without negotiation.

Q And wouldn't it also mean that he's gonna plead to the charge?

A Correct. That would be whatever he -- whatever he's pleading guilty to is without recommendation from the State as to what the appropriate sentence would be so it would be left completely to the discretion of the court.

Q So if he's pleading to a lesser charge, that's not necessarily a straight up plea?

A Not nee-- no. I mean, it would be -- he can plead straight up to a lesser charge, but I mean, yeah, he would be getting the benefit of pleading to a lesser charge so, I mean, he wouldn't be pleading straight up as he was originally charged, no. He could plead straight up to a lesser, a lesser charge with no -- no recommendation on sentence, but there would be a benefit to the defendant to obviously pleading to a lesser charge so we're parsing words which ---

App. 725, l. 15 – 727, l. 17. Solicitor Barr admitted Smith was provided a negotiated plea deal covering numerous charges – not a straight up plea to all charges. App. 692, l. 19 – 693, l. 13.

Moreover, the solicitor's assertion that Smith had nothing to gain by testifying and would be serving his time regardless of his testimony was also not true. The Court of Appeals noted Smith received a downward departure recommendation after testifying, but omitted the source of the recommendation (Solicitor Barr herself) and its timing (within a week or two after trial).

App. 693, l. 24 – 694, l. 5.¹ Barr moved for a sentence reduction for Smith, a reduction she acknowledged he received during the PCR hearing. S.C. Code Ann. §17-25-65 (2010) requires the State to file the motion requesting the reduction:

(A) Upon the state's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided:

(1) substantial assistance in investigating or prosecuting another person

App. 674, l. 12 – 675, l. 7.

The State's focus on the lack of pre-arrangement ignores the impropriety of a solicitor misleading the jury by going outside the Record of trial to improperly vouch for a key witness. Rather than address the impropriety of this improper bolstering, the Court of Appeals simply noted Smith's credibility was an issue and he received a downward departure benefit following his testimony. Contrary to the assertions made by the State, this segment of the improper argument was presented to and ruled upon by the PCR Court (App. 776), incorporated into the Petition for Certiorari as a basis for error (Supp. App. 10 – 13), and was included in the argument granted by the Court of Appeals for review. Petitioner asserted error on the part of the Court of Appeals in failing to address this portion of the State's closing argument in the Petition for Rehearing. Supp. App. 131-132.

¹ The downward departure order itself was entered on May 22, 2013. App. 652, ll. 15 – 24. The week or two estimate from the solicitor likely referred to the motion requesting the downward departure.

B. The cases asserted by the State in finding a lack of prejudice in fact favor the opposite conclusion.

As noted by the Court of Appeals, "[i]n his petition, Palmer raised more than twenty objectionable statements made by the solicitor during her closing arguments. Palmer's PCR counsel raised numerous statements made by the solicitor during the hearing on the petition . . ." State v. Palmer, Unpublished Opinion No. 2026-UP-142 (2026). The solicitor's active vouching of Smith and misleading the jury was a central part of the improper argument analysis. The assertion that it was a "fair summation" and a "reasonable inference" by the State lacks merit.

The vouching for Smith, combined with the "more than twenty" objectionable statements of the solicitor, the most egregious of which were outlined by Petitioner in his Petition for Certiorari to this Court, were highly inappropriate and infected Petitioner's trial with unfairness. The cases cited by the State in denying any prejudice favor a finding of prejudice, not its absence.

Central to the State's argument is Darden v. Wainwright, 477 U.S. 168, 172 (1986). In Darden, the majority condemned the improper closing but found overwhelmingly evidence of guilt prevented a finding that the argument so infected the trial as to deny defendant a fair verdict.² This evidence included eyewitness identification from two victims both of whom were in close proximity to Darden. Darden's car was seen leaving the scene of the crime and involved in a car accident and abandoned by Darden. Darden was driven from the scene of this accident to the home of the car's owner. The murder weapon was identified and found in close proximity to

² Four members of the Court dissented in Darden and would have held the improper argument required reversal. "I cannot conclude that McDaniel's sustained assault on Darden's very humanity did not affect the jury's ability to judge the credibility question on the real evidence before it." Darden v. Wainwright, 477 U.S. 168, 200 (1986)(Blackmun, J. dissenting joined by Brennan, Marshall, and Stevens).

the abandoned car. The Court found much of the improper comments were invited by Darden's counsel who made effective use of his reply to counter their impact. Moreover, the trial court cautioned the jury during closing instruction several times that argument of counsel was not evidence.

By contrast, here the trial court did not caution that argument of counsel was not evidence.³ Trial counsel did not effectively turn the argument of the state against them during his own reply.⁴ To the extent Darden provides any guidance on the merits of finding prejudice in this case, it supports such a finding in contrast to the State's assertion.

C. The State's assertion of overwhelming evidence of guilt relies in large part on evidence tainted by ineffective assistance of counsel in contravention of the guidance this Court has provided in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

The State's focus on the eyewitness testimony of Smith and Croskey as supporting an overwhelming evidence of guilt that would preclude a finding of prejudice of counsel's deficient performance should be tempered when such evidence has been impacted by ineffective assistance of counsel. Here, the State continually cites and relies upon the denial of review of other allegations of ineffective assistance of counsel as a basis for this Court to ignore aspects of the Petition while relying on that same evidence as supporting a lack of prejudice. While

³ The Court of Appeals' reference to the statement by the trial court during its opening comments that the attorney's opening statements were not evidence stands in stark contrast to the warnings used in Darden.

⁴ The State had final word to the jury, and the final words it heard were the improper exhortation not to allow petitioner free since it would disappoint the judge, cause the solicitor to quit her job, and require destruction of the courthouse since it was a waste of money if petitioner was not convicted. App. 495, ll. 11 - 17.

Petitioner acknowledges that several issues presented as errors by the PCR court were denied review by the Court of Appeals, this Court has dictated that evidence tainted by ineffective assistance of counsel should not be relied upon in deciding prejudice. "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." Smalls, 422 S.C. at 194, 810 S.E.2d at 846. As argued in the Petition for Certiorari, this case does not support a finding that the improper arguments of the solicitor did not so infect the trial as to deny petitioner a fair trial.

II. The State's assertion that trial counsel was not deficient is not preserved for this Court's review and places the label of the nature of the improper arguments above their substance.

A. The State failed to seek rehearing and the finding of deficiency of counsel is the law of the case.

The State would have this Court reverse the decision of the Court of Appeals that trial counsel was deficient. However, the State failed to request rehearing on this finding. As such, the decision of the Court of Appeals finding counsel deficient is the law of the case and the State is bound by that determination. See Mazloom v. Mazloom, 392 S.C. 403, 403, 709 S.E.2d 661 (2011)("As to the sufficiency of the evidence to support a breach of fiduciary duty, we find that this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals."); State v. Oxner, 391 S.C. 132, 134, 705 S.E.2d 51, 52

(2011) ("An argument that is not raised to an intermediate appellate court is not preserved for review by this Court.").

Had the State considered the Court of Appeals was in error in finding that counsel was deficient when he believed the Court Rules prevented him from objecting during the solicitor's closing argument, it should have sought rehearing on this finding. The State's failure to correct the alleged error by the Court of Appeals binds it to the finding that trial counsel was deficient.

B. Even if preserved for review, the assertion that trial counsel was not deficient is without merit.

In the present case, the PCR court noted *numerous* areas of concern from the solicitor's closing argument. App. 776-779. The Court of Appeals in its decision finding counsel deficient noted "Palmer raised more than twenty objectionable statements made by the solicitor during her closing arguments. Palmer's PCR counsel raised numerous statements made by the solicitor during the hearing on the petition" State v. Palmer, Unpublished Opinion No. 2026-UP-142 (2026).

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).⁵ 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.

Since the State has urged this Court to find counsel was not deficient in failing to object during the state's closing argument, Petitioner would point to some of the argument that was directly touched on during the PCR hearing and raised to the Court of Appeals to support a finding of deficiency. 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 make a contemporaneous objection on -- if you have an objection to something in the closing argument, you have to make 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

⁵ Having failed to object due the "rules" trial counsel also made no "post-argument" objection to the solicitor's closing arguments.

rule -- his decision not to was made, 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.

“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).

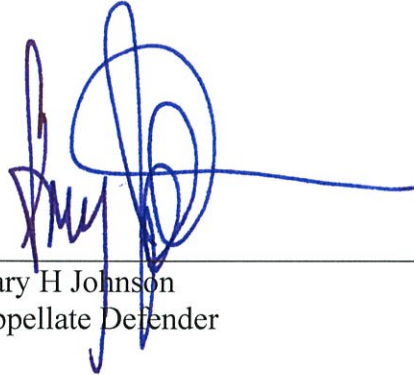
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Petitioner's PCR counsel outlined numerous areas during solicitor Barr's closing that should have raised an objection had trial counsel known he had the ability to object. As outlined in the Petition for Certiorari, these improper arguments infected 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). Moreover, since the improper arguments are extensive and pervasive across the solicitor's closing, as noted in the Petition for Certiorari, the cumulative impact of the improper arguments favors a finding of prejudice. 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 State's assertion that the Court of Appeals erred in finding trial counsel was deficient should be rejected.

CONCLUSION

For the reasons set forth in the Petition for Certiorari, this Court should grant review of the decision of the Court of Appeals and affirm its finding that trial counsel who believes he is not allowed to object during the state's closing argument is deficient and reverse the finding of a lack of prejudice under Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).



Gary H Johnson
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 30th day of July, 2026.