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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

The Honorable Robert J. Bonds, Post-Conviction Relief Judge
The Honorable Perry M. Buckner, IV, Trial Judge

Appellate Case No. 2024-001082

LaParis Flowers, Petitioner,
v.
State of South Carolina, Respondent.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

- I. Did the PCR court err in finding trial counsel was not ineffective for failing to object to the State’s closing argument, in which the solicitor told the jury, “We do not prosecute the innocent, only the guilty,” and argued that the one eyewitness who disavowed his identification at trial did so because of a prison “snitching code” that no witness ever described?
- II. Did the PCR court err in finding trial counsel was not ineffective for failing to object when the solicitor told the jury that its job was to “find the truth” and that “[a] verdict of guilty will speak the truth”?

STATEMENT OF THE CASE

In July 2015, an Allendale County grand jury indicted Petitioner LaParis Flowers for the murder of Russell Smart, the attempted murders of Tyquan Charlton, Jarrell Murray, and Brandon Lewis, and possession of a weapon during the commission of a violent crime. (App. 650–59.)¹ The case went to trial before the Honorable Perry M. Buckner, IV, on January 8, 2018. Joshua Koger, Jr., represented Petitioner. Assistant Solicitors Tameaka Legette and Brian Hollen prosecuted the case. The jury found Petitioner guilty as indicted. (App. 630–34.) The trial court sentenced him to forty-five years for murder, concurrent thirty-year terms for each attempted murder, and a consecutive five-year term on the weapon charge, an aggregate of fifty years. (App. 647.)

Appellate counsel filed a brief under *Anders v. California*, 386 U.S. 738 (1967). The Court of Appeals dismissed the appeal. *State v. Flowers*, Op. No. 2020-UP-207 (S.C. Ct. App. filed July

¹Throughout this brief, “App.” refers to the Appendix filed with the petition for a writ of certiorari, and “Supp. App.” refers to the Supplemental Appendix the State filed with its Return.

1, 2020). The Supreme Court dismissed Petitioner’s petition for a writ of certiorari under *State v. Lyles*, 381 S.C. 442, 673 S.E.2d 811 (2009), and the remittitur issued September 25, 2020.

Petitioner filed an application for post-conviction relief on October 19, 2020, and later amended it. The Honorable Robert J. Bonds held an evidentiary hearing on March 14, 2023. (App. 722–874. The PCR court denied relief in a written Order of Dismissal. (App. 875–901.) Petitioner moved to alter or amend the judgment under Rule 59(e), SCRCP, and the PCR court denied that motion on June 25, 2024. Petitioner timely served and filed his notice of appeal on June 27, 2024, and filed a petition for a writ of certiorari on September 25, 2024. The State filed a Return on January 27, 2025, and Petitioner replied on February 18, 2025.

The Supreme Court transferred the case to this Court under Rule 243(l), SCACR. By order dated September 30, 2026, this Court granted certiorari on Question 1 as it relates to the State’s comments during closing argument, and on Question 2 as it relates to the State’s use of truth-seeking language. The Court denied the remaining questions. This brief follows under Rule 243(j), SCACR.

STANDARD OF REVIEW

One standard governs both issues. This Court defers to a PCR court’s findings of fact when evidence in the record supports them. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018). But “appellate courts review questions of law de novo, with no deference to trial courts.” *Id.* at 181 n.2, 810 S.E.2d at 839 n.2. Whether a solicitor’s argument was legally improper is a question of law. So is whether the PCR court applied the correct legal standard for prejudice. *See id.* at 180–81, 810 S.E.2d at 839.

To prevail on a claim of ineffective assistance, a PCR applicant must show that counsel’s performance was deficient and that the deficiency prejudiced him. *Strickland v. Washington*, 466

U.S. 668, 687 (1984). Prejudice means “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695; *accord Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

STATEMENT OF FACTS

A. A shooting in the dark, and a case built on memory.

Around 3:15 a.m. on December 6, 2014, someone in a white car pulled alongside a green Crown Victoria parked at the Pinewood Apartments in Allendale and fired into it. (App. 288.) The driver, Russell Smart, died. Tyquan Charlton was shot in the jaw. Brandon Lewis was shot in the arm. Jarrell Murray jumped out and ran when the shooting started. (App. 204–05, 208, 214, 288–89, 307–09.)

Police never found a gun. They never matched any bullet or casing to a weapon connected to Petitioner. As the solicitor acknowledged in closing, the searches turned up “[n]o gun,” “[n]o clothes,” and “[n]o bullets.” (App. 575–76.) No witness claimed Petitioner confessed. No DNA connected him to the shooting. The State’s case rested on three things: identifications by the men in the Crown Victoria, a Lobster House surveillance video showing Petitioner getting into a white Oldsmobile earlier that night, and gunshot residue found in that car. (App. 316, 471–92.)

Each of those pillars had cracks the jury saw. The car was unsecured for about forty-eight hours before police had it towed, and SLED knew that at least one other person drove it during that time. Investigators did not know who else had been in it or what anyone had touched. (App. 459–61, 465–66; *see* App. 390–91.) SLED’s trace expert could not say when the residue was

deposited. He agreed it could have been deposited before or after the shooting, at “[a]ny time before the time of collection,” and that anyone with residue on his hands or clothing could have transferred it. (App. 486, 489–92.) SLED did not test the car for DNA, and its agent conceded that such testing possibly could have shown who else drove it. (App. 395.)

The identifications were the heart of the case, and they were contested from start to finish.

Tyquan Charlton identified Petitioner from a photo lineup on December 10, 2014, while hospitalized with a gunshot wound to the jaw. (App. 269–71.) At trial, he agreed he had said he was “drugged” when he made that identification, though he insisted he “was in [his] right mind” and knew who shot him. (App. 273, 275–76.) SLED Agent Matt Brown testified that “drugged” was Charlton’s word for the medication he was receiving in the hospital. (App. 461–62.) Charlton did not dispute that, during the same interview, he told police he did not know how he got into the car or how he got to Pinewood. (App. 272, 276, 461.) He admitted he had been charged with giving false information to police. (App. 273.) He is related to Petitioner by marriage. (App. 268.)

Jarrell Murray testified that he jumped out of the car when the shooting began. (App. 288–89, 294–95.) He did not dispute that he told SLED the shooter drove a Pontiac Grand Prix, not an Oldsmobile. (App. 294.) Agents interviewed him in the parking lot of the Allendale County Magistrate’s Office, and their recorder failed during the first part of the interview, so they had him “rehash” his account on tape. (App. 296–99, 424–26.)

Brandon Lewis testified that he did not remember who shot him, did not remember telling police who shot him, and did not remember selecting anyone from a lineup. (App. 309–11.) The State proved his prior identifications through two officers, without objection. (App. 318–21, 420–27.) Captain Quatique Manor agreed that, when Lewis hesitated, he told him more than once, “I know you are in pain, but you need to make the identification.” (App. 325.)

The officers described Lewis’s demeanor when he identified Petitioner on December 7, 2014, the day after he was shot. Captain Manor testified that Lewis cried, and that he was “nervous because, like I said, I know Brandon, and he doesn’t know them” (meaning the SLED agents). (App. 318, 325.) Agent Brown testified that Lewis “was in pain, he was in discomfort,” “appeared to be scared also,” and did not “know whether to trust us or not to trust us.” (App. 426–27.) More than three years later, Lewis came to trial in custody; he had been serving a federal sentence for possessing a firearm as a felon since 2015. (App. 301–02.) Asked whether he wanted to be there, he answered, “Not really.” (App. 302.) No witness testified that Lewis feared anyone in prison, that any prison “code” existed, or that other inmates would question him about his testimony.

Petitioner has always said he did not do this. The day after the shooting, he went to the Allendale Police Department, waived his rights, and gave a voluntary statement denying any involvement. (Supp. App. 1–3.) He was arrested that evening. (App. 462.) He is the father of a young son. (App. 645.) He has maintained his innocence through trial, appeal, and post-conviction proceedings. (App. 729).

B. The State’s opening statement.

Assistant Solicitor Brian Hollen opened for the State. (App. 166.) He picked up on a remark the trial court had made to the jury about “a search for the truth” and told the jurors what it meant:

[T]he Judge said something . . . about a search for the truth. That’s our job. Our job is to find the truth in this case. That’s what we are going to give you. We are not hiding anything. We are going to tell you what happened, and you are going to know what happened. At the end of this case, the truth is going to come out. The truth is that on the morning of December 6th, Lapolis Flowers killed Russell Smart.

(App. 172.) Trial counsel did not object.

C. The State’s closing argument.

Assistant Solicitor Tameaka Legette began the State’s closing by telling jurors that Petitioner’s “robe of righteousness” (her name for the presumption of innocence) was “already off” because “beyond a reasonable doubt, you already knew.” (App. 555.) Moments later, she told them this:

It is not my intent to prosecute an innocent man. Not so. We do not prosecute the innocent, only the guilty.

(App. 556.) She then promised the jurors “[a] day when you get the truth.” (App. 557.)

Turning to Brandon Lewis, the solicitor faced a problem: the man she presented as an eyewitness had testified that he did not remember who shot him or identifying anyone. She solved it with a story the jury had never heard from the witness stand:

Let’s talk about the inmate, the snitching, the code. It’s a code. It is a code, he is sitting in prison. He has to go back. He has to go back. And because he had to go back there, he can’t sit in here and identify a man and then he would have to go back and tell the boys. He has to go back to the prison. Surely they are going to ask him what he did. He had to know that. Man, I didn’t do anything, man, I didn’t, man, I — that is what the inmate Brandon Lewis came in here and did. That is what he did.

(App. 562.) She returned to the theme later, telling the jury that Lewis “pulls back because of where he lives.” (App. 571.) With Lewis’s testimony explained away, she counted “[t]hirteen times” that Petitioner had been identified, three of them Lewis’s, and told jurors, “You can’t deny it.” (App. 560–67.)²

She closed this way:

Laparis Flowers, ladies and gentlemen, is a wicked and evil man. He is a killer. It’s time to speak the truth. December 6th, 2014 was a time to kill for Laparis Flowers. . . . And now it’s time to speak the

²The solicitor’s count of “13” identifications included three attributed to Lewis. Those prior identifications came in through the officers, but Lewis testified that he did not remember making any of them. (App. 309–11, 563, 567.)

truth. A verdict of guilty will speak the truth. . . . Speak the truth this day. Find Laparis Flowers guilty of murder

(App. 577.) Trial counsel never objected to any of these statements. In his own closing, he attacked the identifications, including Lewis's, and answered the State's "13" with a number of his own: the forty-eight hours the car went unsecured. (App. 580, 583–85.) But he never mentioned the "innocent" remark or the snitch-code argument, and he never told the jury that no evidence supported a prison "code." (App. 578–92.) The trial court gave its standard instructions, including that arguments are not evidence and that the fact of arrest, charge, and indictment "is not evidence" and does not "create any presumption of guilt." (App. 150, 596–600.) It gave no instruction addressing either argument. The jury convicted Petitioner on all counts. (App. 630–34.)

D. The PCR hearing and order.

At the PCR hearing, trial counsel admitted he did not know of any case law making the "innocent man" argument objectionable. He said that because he had the last argument, he "could clean up and cure in my closing statement if in fact, that was objectionable." (App. 810–12.) As to the snitch-code argument, he said, "I'm sure that I clean that up — I clean it up on my closing." (App. 814.) He could not name a single case in which an appellate court had found a prosecutor's argument improper. (App. 815). As to the truth-seeking argument, counsel testified that "a number of solicitors use that," and that he was not aware of *State v. Beaty*. (App. 806–08.) The State acknowledged at the hearing that *Beaty* "did exist at the time of this trial. So there was a directive from our courts at that time to stop using this truth seeking language." (App. 871–72.)

The PCR court found that the "innocent" remark "may have been improper," but concluded that, as "a passing statement at the beginning of a closing argument that spanned twenty-three pages," it "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." (App. 894.) The court analyzed the snitch-code argument only as a claim of

vouching. (App. 893–94.) On the truth-seeking claim, the court found that Petitioner had not shown “any law at the time of Applicant’s trial that prohibited attorneys from arguing truth-seeking language,” and that the remarks were not prejudicial because they were not tied to the reasonable-doubt charge. (App. 896–99.)

ARGUMENT

This was a close case about memory. No gun, no confession, no DNA, no clothing, and no ballistic evidence tied LaParis Flowers to the shooting. The jury had to decide whether to trust the identifications of three men who knew him. One made his identification from a hospital bed, on medication he himself described as being “drugged.” One jumped from the car at the first shot and told SLED the shooter drove a different make of car. The third testified at trial that he did not remember who shot him or ever identifying anyone. Those were the questions the jury had to answer, and the State’s improper arguments went straight at them.

First, she told the jurors that her office had already answered the question for them: “We do not prosecute the innocent, only the guilty.” Then she rescued the one eyewitness who had disavowed his identification at trial by supplying a reason for his recantation, a prison “code,” that no witness described. Finally, the State redefined the jury’s task. The question was no longer whether the State had proven guilt beyond a reasonable doubt; it was “time to speak the truth,” and “[a] verdict of guilty will speak the truth.” Each of these arguments was improper under law settled long before January 2018. Trial counsel objected to none of them. In a case this dependent on the credibility of eyewitnesses, there is a reasonable probability that his silence changed the outcome.

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE SOLICITOR TOLD THE JURY HER OFFICE PROSECUTES ONLY THE GUILTY AND REHABILITATED A RECANTING EYEWITNESS WITH A STORY THAT WAS NEVER IN EVIDENCE.

A. The PCR court applied the wrong test for prejudice.

The PCR court asked only one question about the “innocent” remark: whether, standing alone, it “so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process.” (App. 894 (citing *Darden v. Wainwright*, 477 U.S. 168 (1986)).) That is the standard an appellate court applies when it reviews an improper argument on direct appeal. It is not the standard for a claim of ineffective assistance of counsel. A PCR applicant does not have to prove that the argument, by itself, violated due process. He has to show a reasonable probability that, had counsel objected, “the factfinder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 694–95; *Ard*, 372 S.C. at 331, 642 S.E.2d at 596. *Strickland* emphasizes that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” 466 U.S. at 693.

Our Supreme Court has not allowed the due-process question to swallow the *Strickland* question. In *Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010), the lead opinion granted post-conviction relief from a death sentence because “there is a reasonable probability that trial counsel’s failure to object to the solicitor’s comments affected the jury’s deliberation of Petitioner’s sentence of death,” explaining that “the sheer weight of the evidence in the instant case does not negate the prejudicial impact of the solicitor’s improper comments.” *Id.* at 463–64, (plurality opinion). In *Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998), where the improper argument affected the jury’s consideration of a recommendation of mercy, the Court held that even “the overwhelming evidence of petitioner’s guilt does not eliminate the reasonable probability that the result of the trial would have been different had trial counsel objected to portions of the

solicitor's closing argument." *Id.* at 340, 503 S.E.2d at 167. As the Court later explained, in *Simmons* it "balanced the impact of counsel's error against the strength of the State's case on the point in question, and found Simmons had proved prejudice." *Smalls*, 422 S.C. at 189, 810 S.E.2d at 844.

The PCR court's error had a second dimension. It weighed the remark against the length of the closing argument, not against the strength of the State's case. (App. 894.) Under *Strickland*, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696. *Smalls* directs the PCR court to "consider the specific impact counsel's error had on the outcome of the trial" and "the strength of the State's case in light of all the evidence presented to the jury." 422 S.C. at 188, 810 S.E.2d at 843. And the evidence is "overwhelming" enough to "categorically preclude[] a finding of prejudice" only when it "include[s] something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard . . . cannot possibly be met." 422 S.C. at 191, 810 S.E.2d at 845. The PCR court never conducted that analysis for these arguments. It mentioned the identifications and gunshot residue only in rejecting a different claim. (App. 887.) Here, it counted pages instead. That is an error of law, and this Court reviews the prejudice question de novo. *Id.* at 181 n.2, 810 S.E.2d at 839 n.2.

B. The solicitor's arguments were improper under law settled long before Petitioner's trial.

1. "We do not prosecute the innocent, only the guilty."

For nearly a century, courts have recognized that a prosecutor's personal assurances of guilt carry a weight they do not deserve. A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "[I]mproper

suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” *Id.* The reason is simple: “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.” *United States v. Young*, 470 U.S. 1, 18–19 (1985).

South Carolina has enforced that principle for decades. In *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981), a capital case, the solicitor told the jury that he alone decided whether a person would be tried. The Supreme Court explained that “[w]hen a solicitor’s personal opinion is explicitly injected into the jury’s deliberations as though it were in itself evidence,” the result “may not be free from the influence of any arbitrary factor.” *Id.* at 175, 284 S.E.2d at 359. Five years later, in *State v. Thomas*, 287 S.C. 411, 339 S.E.2d 129 (1986), the solicitor told the jury that a magistrate and a grand jury had already examined the case. The Court reversed: “We have repeatedly condemned closing arguments that lessen the jury’s sense of responsibility by reference to preliminary determinations of the facts.” *Id.* at 412, 339 S.E.2d at 129. Such arguments “inject an arbitrary factor into jury deliberations,” and “arguments of this kind can rarely be harmless.” *Id.* at 412–13, 339 S.E.2d at 129. A solicitor’s argument “must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.” *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981); accord *State v. Northcutt*, 372 S.C. 207, 223, 641 S.E.2d 873, 881 (2007) (condemning a solicitor who “ignored our precedent which rebukes such an imposition of the solicitor’s personal belief”).

Federal courts have long condemned arguments indistinguishable from this one. In *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969), the court held: “The statement ‘we try to prosecute only the guilty’ is not defensible. . . . The remark is, at the least, an effort to lead the jury to believe

that the whole governmental establishment had already determined appellant to be guilty on evidence not before them.” *Id.* at 587. *See also United States v. Garza*, 608 F.2d 659, 665 (5th Cir. 1979) (reversing where the argument “presumed that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant’s guilt before the trial”); *Cargle v. Mullin*, 317 F.3d 1196, 1218 (10th Cir. 2003) (“[I]t is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted.” (quoting *Washington v. Hofbauer*, 228 F.3d 689, 701–02 (6th Cir. 2000))).

Our Supreme Court has since confirmed that this line of authority was settled. In *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019), the solicitor told the jury he would have dismissed the case if he believed someone else committed the crime. The Court called those remarks “absolutely inexcusable” and observed: “Courts have universally condemned comments like this.” *Id.* at 551–52, 837 S.E.2d at 40–4.³ The solicitor, the Court explained, was “improperly claiming for himself the responsibility to decide truth, as though his opinions as to what happened ‘were in itself evidence.’” *Id.* at 560 (quoting *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359).

The solicitor here said the same thing in fewer words. “We do not prosecute the innocent, only the guilty” told the jury that the State had already screened the evidence, decided Petitioner was guilty, and would not be in court otherwise. It is the syllogism *Fortune* condemned: we prosecute only the guilty; we are prosecuting him; therefore he is guilty. Even the PCR court

³Two points about *Fortune* bear noting. First, it was decided in December 2019, after Petitioner’s January 2018 trial. Petitioner does not rely on it to establish what counsel should have known in 2018. He relies on the precedent *Fortune* applied, including *Woomer* (1981) and *Thomas* (1986), which governed at the time of trial; *Fortune* confirms that this line of authority was long settled. Second, *Fortune* granted relief on a due process claim rather than a claim of ineffective assistance. Petitioner cites it for what it says about the impropriety and prejudicial effect of this kind of argument, which applies equally to the *Strickland* analysis.

acknowledged the remark “may have been improper.” (App. 894.) In its Return, the State did not defend the remark on the merits. It argued only that the remark was “passing.” (Return at 10–12.)

2. The “snitching code.”

“The State’s closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.” *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566 (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). A solicitor’s 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.” *Simmons*, 331 S.C. at 338, 503 S.E.2d at 166; *accord Copeland*, 321 S.C. at 324, 468 S.E.2d at 624. In *Vasquez*, the Court found the solicitor’s argument “clearly improper because there was no evidentiary basis to support this characterization.” 388 S.C. at 459, 698 S.E.2d at 567.

The snitch-code argument had no evidentiary basis. No witness testified that a prison “code” existed, that Lewis was subject to one, that other inmates would ask him about his testimony, or that he feared anyone. Lewis testified that he was serving a federal sentence, that he did not really want to be in court, and that he did not remember who shot him or identifying anyone. (App. 301–02, 309–11.) The solicitor supplied every other piece herself: the code, the inmates who would “ask him what he did,” the “boys” to whom he would have to report, and Lewis’s supposed knowledge of what awaited him. (App. 562.)

The State argued below that the argument was a fair inference from testimony that Lewis seemed scared and hesitant when he first spoke to police. (Return at 9–10.) It was not. The fear the officers described came in December 2014, the day after Lewis was shot, while he was in pain and talking with agents he did not know. (App. 318, 325, 426–27.) He did not go to prison until 2015. (App. 302.) Whatever Lewis felt in December 2014, it could not have been fear of a prison

he had not yet entered or of inmates he had not yet met. No witness connected his hesitance to retaliation of any kind. Captain Manor attributed Lewis's nervousness to his unfamiliarity with the SLED agents (App. 325), and Agent Brown attributed his hesitance to pain and to not knowing "whether to trust us" (App. 427). To get from that testimony to a prison "code," inmates who would "ask him what he did," and "boys" to whom he would have to report, the jury needed facts that only the solicitor supplied. That is not a reasonable inference from the record. It is testimony from the prosecutor.⁴

Petitioner raised this claim below. His application alleged that counsel was ineffective for failing to object to the solicitor's argument about Lewis, and at the hearing his counsel argued that the snitch-code argument was "outside the record." (App. 860; *see* App. 893.) The PCR court ruled on the claim, although it analyzed the argument only as vouching. (App. 893–94.)

The argument was not only unsupported. It was calculated to inflame. It invited jurors to draw on whatever they believed about prisons and "snitches," and to treat a witness's sworn denial as proof of the very thing he denied. That is the kind of appeal to passion and outside knowledge that *Linder*, *Copeland*, and *Simmons* forbid.

C. Counsel's failure to object was deficient, and no valid strategy explains it.

Trial counsel offered one reason for his silence: because he had the last argument, he "could clean up and cure in my closing statement if in fact, that was objectionable." (App. 811–12.) That explanation fails for three reasons.

⁴At the PCR hearing, trial counsel speculated that Lewis was reluctant because he "didn't want to go back to prison in Virginia and be considered a snitch." (App. 795). Counsel prefaced that guess with "I suppose," and it came five years after trial. Nothing in the trial record supports it, and a lawyer's after-the-fact speculation cannot supply the evidentiary foundation the solicitor's argument lacked at trial. If anything, counsel's answer shows he accepted the solicitor's theory without asking whether the jury had heard any evidence of it.

First, counsel did not know the remarks were objectionable. He admitted he was not aware of any case law on the “innocent” argument and could not name a single case finding a prosecutor’s argument improper. (App. 810–11, 815.) A decision made in ignorance of the governing law is not a strategic decision. *Cf. Strickland*, 466 U.S. at 690 (deference attaches to “strategic choices made after thorough investigation of law and facts relevant to plausible options”).

Second, counsel did not do what he claimed. His closing argument never mentioned the “innocent” remark, never mentioned the snitch-code argument, and never told jurors that neither had any basis in the evidence. (App. 578–92.) Counsel testified, without his notes and five years after trial, that he was “sure” he had cleaned it up. (App. 814.) The transcript shows he did not. To be sure, counsel attacked the reliability of Lewis’s identifications and answered the State’s “13.” (App. 580, 583–85.) But challenging how police obtained an identification is not the same as telling the jury that the solicitor’s explanation for Lewis’s recantation had no basis in the evidence. Counsel never did that.

Third, a defense lawyer’s rebuttal cannot do what an objection does. Only the trial judge can tell a jury to disregard an improper argument, and only an objection gives the judge that chance. As the Supreme Court observed in *Vasquez*, “given that trial counsel did not object, there was no opportunity for the trial judge to even attempt to cure the error.” 388 S.C. at 463. That is why our Supreme Court has held that “counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). This Court applied that rule recently in reversing the denial of post-conviction relief, holding that “trial counsel still must articulate a valid strategy for his decisions” and finding counsel deficient for failing to object to an improper closing argument. *Washington v. State*, 445 S.C. 233, 242, 911 S.E.2d 536 (Ct. App. 2025).

The “innocent” remark and the snitch-code argument were errors of law, and they were inherently prejudicial because they went to the heart of the only contested question at trial: whether the eyewitnesses were right. No reasonable attorney, aware of *Woomer*, *Linder*, *Copeland*, and *Simmons*, would have sat silent.

D. The solicitor’s arguments prejudiced Petitioner.

This is the heart of the case. The question is not whether the State presented enough evidence to convict. It is whether, had counsel objected and the court cured the error, there is “a probability sufficient to undermine confidence in the outcome” that “the factfinder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 694–95. Five features of this trial show that there is.

1. The evidence was not overwhelming under *Smalls*.

Petitioner does not ask this Court to find that the State’s evidence was weak. He asks the Court to apply *Smalls*, which holds that evidence is “overwhelming” enough to categorically preclude a finding of prejudice only when it “include[s] something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard . . . cannot possibly be met.” 422 S.C. at 191, 810 S.E.2d at 845. This record contains nothing of the kind. There was no confession. There was no DNA. There was no weapon and no ballistic match. There was no clothing. (App. 575–76.)

The physical evidence the State did have was equivocal. The surveillance video showed Petitioner getting into a white Oldsmobile at the Lobster House. (App. 316.) It did not show him at Pinewood, and it did not show who was driving when the shots were fired. Murray told SLED the shooter drove a Pontiac Grand Prix. (App. 294.) The gunshot residue came from a car that was unsecured for about two days, during which at least one other person drove it, and the State’s

expert could not say when the particles were deposited or rule out transfer from someone else. (App. 459–61, 465–66, 486, 489–92.) SLED did not test the car for DNA, though its agent conceded that testing possibly could have shown who else drove it. (App. 395.) In *Fortune*, the State argued that its evidence was overwhelming. The Supreme Court disagreed. Although the evidence was “strong proof for the State,” it was not overwhelming under *Smalls*. *Fortune*, 428 S.C. at 557. The same is true here. And *Smalls* adds a point that matters greatly in this case: “[w]hen 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.” 422 S.C. at 194, 810 S.E.2d at 846. The State’s reliance on Lewis’s prior identifications depended on the snitch-code argument counsel failed to challenge. Without it, the jury had Lewis’s sworn testimony that he did not remember who shot him or identifying anyone.

2. The case turned on credibility, and the improper arguments went straight at credibility.

Everything depended on whether the jury believed the identifications. Each had a weakness the jury could see. Charlton identified Petitioner from a hospital bed while on medication he described as being “drugged,” did not remember telling police he could not recall how he got to the scene, and had been charged with lying to police before. (App. 272–76.) Murray jumped from the car at the first shot and described a different make of car. (App. 288–89, 294.) Lewis testified that he did not remember who shot him or identifying anyone. (App. 309–11.) A juror who doubted any one of these identifications had a principled path to reasonable doubt.

The State’s improper arguments closed those paths. “We do not prosecute the innocent, only the guilty” told jurors that the State, which had access to the full investigation, had already resolved any doubt about the identifications. That is precisely the danger *Young* identified: the jury

may “trust the Government’s judgment rather than its own view of the evidence.” 470 U.S. at 18–19. The snitch-code argument then did something the evidence could not. Lewis’s prior identifications came in through the officers, but Lewis himself sat before the jury and testified that he did not remember who shot him or identifying anyone. The jury had to decide which Lewis to believe: the wounded man in his first days after the shooting, told by police that he “need[ed] to make the identification,” or the man under oath. (App. 325.) The solicitor resolved that conflict for the jury with facts that were never in evidence. Her story turned Lewis’s testimony from a reason to doubt into a reason to convict, and let her fold his three prior statements into a count of “[t]hirteen” identifications that, she told jurors, “[y]ou can’t deny.” (App. 567.) Without that story, the jury would have weighed two contested in-court identifications and a third witness who would not stand behind what police said he told them. With it, the State had a parade of thirteen.

Our courts have recognized that improper argument does its greatest damage when the case turns on credibility. In *Washington*, this Court found prejudice where the case “turned on a credibility determination with little circumstantial evidence and no physical evidence.” 445 S.C. at 244. This case had more physical evidence than *Washington*, but that evidence was equivocal, and the identifications were contested. The solicitor’s arguments put a thumb on the scale at exactly the point where the jury’s judgment mattered most.

3. The arguments came at the moments of greatest impact.

The PCR court called the “innocent” remark “a passing statement at the beginning of a closing argument that spanned twenty-three pages.” (App. 894.) But placement matters as much as length. The solicitor made the remark in the opening moments of her closing, right after telling jurors that Petitioner’s robe of innocence was “already off” because “beyond a reasonable doubt, you already knew.” (App. 555–56.) It framed everything that followed. In *Woomer, Thomas*, and

Fortune, the courts did not ask how many lines the improper statement occupied. They asked what it told the jury. That is why “arguments of this kind can rarely be harmless.” *Thomas*, 287 S.C. at 413, 339 S.E.2d at 129. A single sentence telling jurors that the prosecutor’s office does not charge innocent people can do more harm than pages of overheated rhetoric, because jurors can recognize rhetoric for what it is. A statement that sounds like institutional fact is different.

The snitch-code argument was no passing remark either. The solicitor developed it at length and returned to it later. (App. 562, 571.) Even the State conceded below that the Lewis argument “was more than a mere passing statement.” (Return at 12.)

4. Nothing cured the harm.

Because counsel never objected, the trial court never told the jury to disregard either argument. The State points to the general instructions. (Return at 11–12.) The court did tell jurors that arguments are not evidence and that the fact of arrest, charge, and indictment “is not evidence” and does not “create any presumption of guilt.” (App. 150, 596.) But those instructions answer a different statement. The solicitor did not say that Petitioner’s indictment proved his guilt. She said that her office, the people who had seen the whole investigation, does “not prosecute the innocent.” That is a professional assurance from the State’s representative in the courtroom, and a standard instruction about indictments did not tell jurors to disregard it. No instruction said anything about the snitch-code argument. As this Court explained in *Washington*, “[w]e have difficulty imagining how jury instructions could be curative when the jury was never made aware of the improper” argument. 445 S.C. at 245. Nor did counsel’s closing fill the gap; he never addressed either argument. (App. 578–92.)

5. The State's answers do not withstand scrutiny.

The State relied below on *Darden*, arguing that if the comments in that case did not violate due process, these could not. (Return at 10.) *Darden* is a different case. The Supreme Court emphasized there that the prosecutors' argument "did not manipulate or misstate the evidence," that "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense," and that "[t]he weight of the evidence against petitioner was heavy." *Darden*, 477 U.S. at 181–82. None of that is true here. The snitch-code argument manufactured evidence that did not exist. Nothing invited the solicitor's remarks; she made them before defense counsel said a word in closing. *Cf. Fortune*, 428 S.C. at 556-57 ("There is no argument a defense attorney could make that could justify the improper remarks by the assistant solicitor in this case."). And *Darden* arose on federal habeas review of a due-process claim, not on a *Strickland* claim measured by reasonable probability.

Finally, the solicitor herself told jurors that the presumption of innocence was "already off" and that they "already knew" guilt beyond a reasonable doubt. (App. 555.) Correct instructions delivered after such an argument do not erase its message: the State does not prosecute the innocent, and the eyewitness who disavowed his identification was hiding the truth.

There is a reasonable probability that, absent these arguments, the factfinder would have had a reasonable doubt respecting guilt. That is all *Strickland* requires. The PCR court erred in holding otherwise, and its decision violated Petitioner's rights to the effective assistance of counsel and to due process under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 14 of the South Carolina Constitution.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE SOLICITOR TOLD THE JURY THAT ITS JOB WAS TO “FIND THE TRUTH” AND THAT “A VERDICT OF GUILTY WILL SPEAK THE TRUTH.”

A. Telling jurors their job is to “speak the truth” dilutes the State’s burden of proof.

A criminal jury does not decide what happened. It decides whether the State has proven guilt beyond a reasonable doubt. Those are different questions. A jury may believe the defendant probably committed the crime and still be obligated to acquit. Language that tells jurors their task is to find “the truth” blurs that line. It invites them to decide which version of events is more likely true, which is a preponderance standard.

Our Supreme Court has said so for more than twenty-five years. In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), the Court explained that instructions telling the jury to “seek the truth” are disfavored because they “[run] the risk of unconstitutionally shifting the burden of proof to a defendant.” *Id.* at 26–27, 538 S.E.2d at 251 (quoting *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). The Court quoted the Fifth Circuit’s explanation: “As an abstract concept, ‘seeking the truth’ suggests determining whose version of events is more likely true, the government’s or the defendant’s, and thereby intimates a preponderance of evidence standard.” *Id.* at 28, 538 S.E.2d at 252 (quoting *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994)). In *State v. Daniels*, addressing a charge that told jurors to return a verdict “just” and “fair” to all parties, the Court explained why such language matters: it “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.” 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012).

In *State v. Beaty*, the Court made the point unmistakable. It held that “a trial judge should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict.” 423 S.C. 26,

34, 813 S.E.2d 502, 506 (2018). “These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice.” *Id.* The Court directed trial judges “to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant’s guilt beyond a reasonable doubt.” *Id.*⁵

B. The solicitor’s truth-seeking argument was improper, and competent counsel would have objected.

The State did more than repeat a general remark about trials as a search for the truth. In opening, Assistant Solicitor Hollen seized on that remark (“That’s our job. Our job is to find the truth in this case”) and told the jury what the truth was: “The truth is that . . . Laparis Flowers killed Russell Smart.” (App. 172.) Assistant Solicitor Legette ended the State’s closing by equating truth with a guilty verdict: “A verdict of guilty will speak the truth. . . . Speak the truth this day. Find Laparis Flowers guilty.” (App. 577.) Earlier, she had promised jurors they would “have no choice” and would leave with “no doubt.” (App. 566, 572.)

The PCR court held that counsel was not deficient because Petitioner had not identified “any law at the time of Applicant’s trial that prohibited attorneys from arguing truth-seeking language.” (App. 896–97.) The State defends that ruling on the ground that *Beatty* addressed judges, not prosecutors. (Return at 15–16.) That reading is too narrow, for three reasons.

⁵The original opinion in *Beatty*, Op. No. 27693, was filed December 29, 2016, more than a year before Petitioner’s January 2018 trial. The Supreme Court granted rehearing and substituted the published opinion on April 25, 2018. The admonition against truth-seeking language appeared in both opinions in substantively the same form. *See State v. Ostrowski*, Op. No. 5872, slip op. at n.26 (S.C. Ct. App. filed Nov. 24, 2021) At the PCR hearing, Petitioner’s counsel placed the 2016 opinion before the court. (App. 852–53).

First, the vice *Beaty* identified does not depend on who speaks the words. The danger is to the jury’s understanding of its task: that jurors will “render the verdict the jury believes best serves its perception of justice” rather than apply the burden of proof. 423 S.C. at 34, 813 S.E.2d at 506. That danger exists whether the words come from the bench or from counsel table. If anything, it is sharper when a prosecutor uses the words to urge conviction. A judge who mentions the search for truth speaks neutrally. A solicitor who says “[a] verdict of guilty will speak the truth” tells jurors that truth and guilt are the same thing.

Second, *Beaty* did not create a new rule about judges that prosecutors were free to ignore. It applied a principle that already governed everyone in the courtroom: no one may dilute the State’s burden of proof. A solicitor who misdescribes the reasonable-doubt standard makes “an erroneous statement of law” that is “clearly improper.” *State v. Portee*, 278 S.C. 260, 261, 294 S.E.2d 421, 422 (1982) (finding the error cured by the instructions in that case). This Court has reversed a conviction where the solicitor’s argument “effectively invited the jury to disregard the trial court’s instructions on reasonable doubt,” holding such an argument “improper and well beyond the bounds of zealous advocacy.” *State v. Liberte*, 336 S.C. 648, 655–57, 521 S.E.2d 744, ___ (Ct. App. 1999) Courts elsewhere have applied the same reasoning to prosecutors who urge jurors to “speak the truth.” The Washington Supreme Court explained: “The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’ Rather, a jury’s job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *State v. Emery*, 174 Wash. 2d 741, 760, 278 P.3d 653 (2012) (holding that “the prosecutor’s truth statements are improper,” although finding no prejudice on that record).

Third, this is not a case in which counsel failed to foresee a change in the law. In *Teamer v. State*, 416 S.C. 171, 786 S.E.2d 109 (2016), the Supreme Court held that counsel was not

deficient for failing to object to a “reach the truth” jury charge given before *Daniels* was decided, because “no case law existed rendering the instruction improper per se” at the time. *Id.* at 183, 786 S.E.2d at 115. Petitioner’s trial came years after *Daniels* and more than a year after *Beaty*’s admonition was published. *Aleksey* and *Needs* had warned about “seek the truth” language for nearly two decades, and *Portee* had held for more than thirty years that a solicitor may not misstate the reasonable-doubt standard. The State itself told the PCR court that “there was a directive from our courts at that time to stop using this truth seeking language.” (App. 871–72.) The State now says it meant only that the original *Beaty* opinion existed before trial. (Return at 16 n.1.) That is the point. The PCR court likewise recognized that the Supreme Court issued its *Beaty* opinion before Petitioner’s trial. (App. 897 n.12) Petitioner does not ask this Court to announce a new rule. *Cf. Pantovich v. State*, 427 S.C. 555, 562–63, 832 S.E.2d 596, 600 (2019). He asks the Court to apply a settled principle to the solicitor who violated it.

Counsel offered no strategic reason for his silence. He testified that “a number of solicitors use that,” and he admitted he was unaware of *Beaty*. (App. 806–08.)⁶ Familiarity with an improper practice is not a strategy, and ignorance of controlling precedent is not a reasonable professional judgment. Counsel was deficient.

⁶Trial counsel used similar language himself in his opening statement and closing argument. (App. 174, 591–92.) The Court of Appeals did not grant certiorari on any claim based on counsel’s own remarks, and Petitioner does not argue that claim here. Counsel’s remarks matter for a different reason: they confirm that his silence in the face of the State’s argument was not a tactic. Counsel testified he did not know *Beaty* existed. (App. 807.) A lawyer who does not know a rule cannot make a strategic choice about whether to invoke it.

C. The truth-seeking argument prejudiced Petitioner.

The PCR court found no prejudice because, under *Aleksey* and *Beaty*, truth-seeking language is harmless when it is “not given in conjunction with the charge on the State’s burden of proof.” (App. 898–99.) That reasoning misreads both cases.

In *Aleksey* and *Beaty*, the challenged language came from the trial judge, in a neutral context, and the judge followed it with full and correct instructions on reasonable doubt. The Supreme Court found that jurors were unlikely to apply a judge’s isolated remark in a manner inconsistent with the burden of proof because the judge’s own charge made the burden clear. *Aleksey*, 343 S.C. at 28–29, 538 S.E.2d at 252–53; *Beaty*, 423 S.C. at 32–34, 813 S.E.2d at 505–06.

This case is different in kind. The language came from advocates, and its purpose was to persuade. The State did not describe trials generally as a search for truth. It told jurors what the truth was, told them their verdict should “speak the truth,” and told them that “[a] verdict of guilty will speak the truth.” (App. 172, 577.) Those were the State’s final words to the jury. The solicitor’s passing reference to reasonable doubt in the same breath did not change the message; she told jurors that a guilty verdict was itself the truth. (App. 577.) No objection drew the court’s attention to the argument, and the court never told jurors that their task was not to find the truth but to hold the State to its burden. The general reasonable-doubt charge did not answer the State’s specific message. (App. 597–98.) As this Court recognized in *Liberte*, when a solicitor’s argument undercuts the reasonable-doubt standard itself, “we fail to see how another instruction mentioning reasonable doubt could have cured the error.” 336 S.C. at 657. The *Liberte* court reversed even though “the evidence against the Defendants was very strong.” *Id.* at 656.

The argument also worked hand in hand with the errors discussed in Issue I. The State told jurors its office does not prosecute the innocent. It told them the eyewitness who disavowed his

identification was hiding the truth because of a prison code. And it told them a guilty verdict would “speak the truth.” Together, these arguments invited the jury to replace the question the law asked (has the State proven guilt beyond a reasonable doubt?) with a different one: what is the truth, as the State has told it to you? In a case that depended on contested identifications and equivocal physical evidence, there is a reasonable probability that this substitution affected the verdict.⁷

Counsel’s failure to object deprived Petitioner of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 14 of the South Carolina Constitution. The PCR court erred in denying relief.

CONCLUSION

LaParis Flowers is serving fifty years in prison on the strength of eyewitness identifications that were contested at every turn: one made from a hospital bed, one by a man who jumped from the car at the first shot, and one the witness himself would not stand behind at trial. The jury that convicted him heard the State say its office prosecutes only the guilty, heard the solicitor explain away a witness’s sworn testimony with a story no witness told, and heard the State tell them a guilty verdict would “speak the truth.” His lawyer said nothing. Petitioner respectfully asks this Court to reverse the PCR court’s order of dismissal and remand for a new trial.

Respectfully submitted,

s/ Elizabeth A. Franklin-Best
Elizabeth A. Franklin-Best

⁷Petitioner also argued the combined effect of these errors to the PCR court. (App. 862). Our Supreme Court has said that “[w]hether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.” *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, ___ (2002). This Court need not resolve that question. Under *Strickland*, prejudice is measured against “the totality of the evidence before the judge or jury,” 466 U.S. at 695, and the State’s improper arguments formed part of that whole. Petitioner asks the Court to assess each error on its own, and also to recognize how they reinforced one another.

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Columbia, South Carolina
October 29, 2026

CERTIFICATE OF SERVICE

I certify that on October 29, 2026, I served a copy of this Brief of Petitioner on counsel for Respondent, Assistant Attorney General Danielle Dixon and Senior Assistant Deputy Attorney General D. Russell Barlow, II, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211, by electronic mail to their primary e-mail addresses on file with the Attorney Information System. A copy of the sent e-mail is attached. *See* Rule 262(b), SCACR; Order (S.C. Apr. 24, 2024).

s/ Elizabeth A. Franklin-Best
Elizabeth A. Franklin-Best

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