

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas

The Honorable William Jeffrey Young, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2013-001419  
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Roger Dale Burke, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

\_\_\_\_\_  
**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**  
\_\_\_\_\_

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MAY 29 2014

**S.C. Supreme Court**

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## QUESTION PRESENTED

1. Is there probative evidence to support the PCR judge's finding that Petitioner failed to prove counsel was ineffective for calling Addy as a defense witnesses?
2. Did the PCR judge correctly find that that Petitioner failed to prove counsel was ineffective for failing to object to common vernacular associated with killing in a murder trial that allegedly were prejudicial?
3. Did the PCR judge correctly find Petitioner failed to prove counsel was ineffective for failing to object to the solicitor's comments that allegedly constituted vouching?
4. Is there probative evidence to support the PCR judge's finding that Petitioner's failed to prove counsel was ineffective for failing to investigate an unproven and speculative insanity defense?
5. Did the PCR judge correctly find Petitioner failed to prove counsel was ineffective for failing object to the jury instruction on implied malice based upon the jurisprudence at the time of trial?
6. Did the PCR judge correctly find Petitioner failed to prove counsel was ineffective for failing to object to the solicitor cross-examining that allegedly wasn't in evidence?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Lexington County Grand Jury indicted Petitioner at the September 2002 term of General Sessions for murder (02-GS-32-3278), possession of a firearm or knife during the commission of a violent crime (02-GS-32-3279), attempting to commit arson (02-GS-32-3280), and burglary, 1<sup>st</sup> degree (02-GS-32-3281). (App.pp.791-808). William N. Nettles, Esq., represented Petitioner.

Petitioner went to trial on August 23, 2004, and was subsequently found guilty on all charges. He was sentenced by the Honorable Marc H. Westbrook to life for murder, five years for the possession of a firearm, twenty years for attempted arson and thirty years for burglary. All sentences were set to run concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Burke, Op. No. 2007-UP-042 (S.C. Ct. App. filed January 24, 2007). Petitioner filed a Petition for Rehearing, which was denied by order of the South Carolina Court of Appeals on March 22, 2007.

Petitioner filed his application for post-conviction relief (PCR) on May 18, 2007. Respondent made its return on August 27, 2007. An evidentiary hearing into the matter was convened on August 14, 2012, at the Lexington County Courthouse. Petitioner was present at the hearing and was represented by David W. Melnyk, Esquire. Respondent was represented by Kaelon E. May, Esquire, of the South Carolina Attorney General's

Office. On June 6, 2013, the Honorable W. Jeffrey Young issued an order of dismissal, denying Petitioner's application for post-conviction relief.

A timely notice of appeal from the order of dismissal was filed and perfected.

This Return Petition for Writ of Certiorari now follows.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

### I.

Certiorari is not warranted where the ample evidence supports the PCR court's finding that Petitioner failed to meet his burden to prove counsel was ineffective for calling a witness that offered some harmful testimony when the testimony at issue was known, the solicitor had the intent to present the matter at trial despite counsel's decision, the and the witness provided beneficial testimony to counsel's defense theory.

#### Applicable Law

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

Petitioner asserts that the PCR Court erred in finding that trial counsel was not ineffective in calling Addy as a defense witness. Petitioner's complaint stems from Witness Addy's admission testimony that Petitioner had spoken one time of killing his wife and disposing of her body in a chemical tank. App. 326 ll. 3-25. He also admitted that Petitioner had further told him that he planned to put his children in that tank of acid. App. 329, l. 22 – 330, l. 1. Petitioner argues that Addy's testimony constituted direct, contradictory evidence to the defense, and that knowing of such evidence and allowing him to testify anyway was unreasonable of Counsel and an invalid trial strategy, citing Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002); and McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). Respondent contends that ample evidence supports the PCR

judge's finding that Petitioner did not meet his burden to prove counsel's performance was ineffective here where the particular facts of this case shows that counsel made an reasonable decision to Addy.

In Ingle, a witness actually refuted the facts of the defendant's defense, undermining the very basis of the defense's theory. There, the defendant claimed that he had not had sex with his girlfriend's underage daughter. Id., at 470, 560 S.E.2d at 402-403. Instead, the semen found by authorities had been produced by sex with his girlfriend the morning of the alleged offense. Id. Defense counsel called the girlfriend as a witness to corroborate the defendant's story without having interviewed her previously. Id. On direct examination, contrary to defense counsel's expectations, the girlfriend testified that she did not have sex with the defendant on the morning of the offense. Id., at 471, 560 S.E.2d at 403.

McKnight is also easily distinguishable. There, the issue was not whether the witness provided direct, contradictory evidence to the defendant's theory of the case, but whether defense counsel should have presented readily available evidence in rebuttal to the State's expert and theory. Id., at 46, 661 S.E.2d, at 360. McKnight involved two trials. Id., at 39, 661 S.E.2d, at 356-57. During the first, the defense called two experts, one of whom directly rebutted the State's expert testimony regarding the cause of the victim's death; the second expert's testimony was consistent with the State's theory. Id., at 40-45, 661 S.E.2d, at 357-60. During the second trial, that expert was unavailable, and the second expert was the only expert to testify for the defense. Id. Defense counsel's failure to prepare stemmed from calling one expert witness whose testimony was known

to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available. Id., at 45-46, 661 S.E.2d 360.

Here, there were no expert witnesses, competing theories on the cause of death, or any real factual disputes other than those going toward malice. Prior to trial, Counsel's investigator interviewed Addy and the solicitor told counsel of intent to elicit the testimony at issue on cross-examination. App. 765, ll. 13-20. Based on his defense theory, thorough investigation of the case, and formulated an informed opinion that Addy's testimony would be more beneficial than harmful. App. 766, ll. 12-16. Addy withstood the solicitor's questioning and stood firm on his testimony that he believed the "vast of acid" comment was a literal threat from Petitioner. Addy testified that he did not believe he would rationally harm his family. Other defense witnesses echoed similar sentiments.

The PCR Court found that Addy testified to Petitioner's emotional instability prior to the murder, that Petitioner had lost weight and had made irrational statements regarding executing a murder. App. 788. Moreover, Counsel testified that he "just didn't think anybody would ever believe that [Petitioner] would put his kids in acid," and that showed "just how distraught he was." App. 766, ll. 1-4. Counsel's testimony shows that his trial strategy was to use Addy to show that Petitioner was "stressed and possibly not in a normal state of mind," and to show that "what propelled him" to murder "was not malice but grief." App. 766, ll. 18-24." The PCR Court found that the benefits derived to Petitioner's case from Addy's testimony overshadowed the alleged detriment. App. 788.

Furthermore, the Petitioner failed to show prejudice here. First, any error was harmless in light of the fact that solicitor could have used Addy's statement for impeachment purposes when he cross-examined and the opportunity to present Addy as a witness during the State's reply case. The statement and/or testimony then would certainly have constituted admissible extrinsic impeachment evidence. State v. Fossick, 333 S.C. 66, 69, 508 S.E.2d 32, 33 (1998). Second, an abundance of probative evidence supports the PCR judge's finding that overwhelming evidence of guilty supported the convictions. Probative Evidence supports the PCR judge's finding that Petitioner failed to meet his burden of proof on this meritless issue.

## II.

Certiorari is not warranted where the PCR court correctly found counsel correctly reasoned that comments made by the solicitor in argument that utilized common vernacular associated to the to the act of killing in a murder trial did not warrant an objection where it was undisputed Petitioner killed his estranged wife.

Petitioner's Counsel was ineffective in failing to object to the Solicitor's use of the language "judge, jury, and executioner" in reference to Petitioner is without merit. The relevant question is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Bennett, 369 S.C. 219, 232, 632 S.E.2d 281, 288 (2006) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). Counsel testified at the PCR hearing that he "didn't think it was effective," and that it sounded "a bit cliché." App. 767, ll. 25 -768, ll. 1. Further, he said he "didn't see a reason to object to it." App. 768, l. 3. The PCR Court found that the

Solicitor's executioner statement was merely descriptive of the offense charged—murder—and was supported by testimony of Petitioner's son who witnessed Petitioner kill the victim.

Respondent submits the PCR judge correctly found that the comments were objectionable. Undeniably, Respondent was on charged with murder. The comments were not unreasonable in light of the seriousness of the charge. Petitioner's claim here also fails Strickland's prejudice prong. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Petitioner cites State v. Medrano, 27 A.3d 52, 65 (Conn. App. Ct. 2011), where a Connecticut court concluded that the prosecutor's characterization of the defendant as the victim's "judge, jury, and executioner" was improper. However, it went on to find that these improprieties did not deprive the defendant of due process or a right to a fair trial. Id. Those facts are analogous to this case. Here, as in Medrano, there were only a handful of allegedly improper statements, none of which are extreme in and of themselves, amidst over five hundred pages of trial transcript. In addition, similar to Medrano, the PCR Court here found that "[o]verwhelming evidence of guilt" supported Petitioner's conviction. App. 789. Therefore, the record supports the PCR judge's finding on the matter.

### III.

Certiorari is not warranted where Petitioner has failed to show Solicitor's comments amounted to improper vouching as a matter of law

Petitioner asserts that Counsel provided ineffective assistance of counsel in failing to object to the Solicitor's remarks during closing argument, arguing that they constituted improper vouching for the credibility of the State's witness, and branded Petitioner as a liar and untruthful. Respondent submits the PCR judge correctly found this allegation to be without merit.

Improper vouching occurs (a) when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or (b) where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. Gilchrist v. State, 350 S.C. 221, 285, 565 S.E.2d 281 (2002) (citing State v. Shuller, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 535 U.S. 988 (2001)).

The comments here did not constitute vouching. The Solicitor does not make any personal assurances regarding the credibility of the State's witness. Compare Gilchrist, 350 S.C. at 225-27, 565 S.E.2d at 283-85 (Solicitor inappropriately assured the jury of a government witness's credibility when, during opening argument, he emphatically stated: "from the bottom of my heart," the witness was "now clean," i.e., worthy of belief). Petitioner made the knowingly, intelligent, and voluntary decision to testify on his own behalf. See State v. Taylor, 404 S.C. 506, 511, 745 S.E.2d 124, 126 (Ct. App. 2013) ("An appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion."). Certainly a prosecutor can

cross-examine a witness, then comment on reasonable inferences from that witnesses testimony in his closing argument.

Neither did the solicitor's comments constitute improper implicit vouching. Compare Vaughn v. State, 362 S.C. 163, 168, 607 S.E.2d 72, 74 (2004) (Improper vouching occurred when, during closing argument, Solicitor told jury that he did not call other specific witnesses because their *testimony would have been the same as another state witness*). Therefore, the PCR judge found Petitioner failed to meet his burden on this issue. Therefore, the record supports the PCR judge's finding on the matter.

#### IV.

Certiorari is not warranted where the probative evidence supports the PCR court's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to investigate an insanity defense where the merits of the allegation rests entirely on Petitioner's speculative testimony compared to counsel's compelling strategy and trial performance.

Petitioner argues that the PCR Court erred in finding that Counsel was not ineffective in failing to pursue an insanity defense. However, the absence of evidence here suggests otherwise. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976). Respondent submits the allegation is entirely speculative. Regardless, ample evidence of probative value supports the PCR judge's finding that counsel's performance here was a product of valid and intelligent trial strategy.

First, Counsel actually had *no duty* to pursue an investigation of Petitioner's mental health. See Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992) (defense attorney's failure to seek a psychiatric evaluation was not outside the range of reasonable professional assistance where counsel reasonably relied on his own perceptions). The PCR Court found that trial counsel's testimony was compelling on this matter. App. p. 787. By pursuing this strategy, trial counsel precluded the Solicitor from utilizing experts in rebuttal to his presentation of Petitioner's case. Counsel presented a defense case that only showed Petitioner was unhinged and emotionally unstable as a result of the victim's conduct. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Therefore, the PCR judge correctly ruled Petitioner entirely failed to meet his burden here.

#### V.

Certiorari is not warranted address whether State v. Belcher applies retroactively in light State of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Petitioner's argument that the PCR Court erred in finding that trial counsel was not ineffective for failing to object to the implied malice jury charge is without merit. Petitioner cites to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Respondent agrees this Court's opinion governs this issue.. Because the PCR judge recognized and followed this Court's dispositive instructions on Belcher's retroactive application, further comment is not necessary.

#### VI.

**Certiorari is not warranted where there is probative evidence to support the PCR Court's ruling that the Solicitor's question to Petitioner on cross-examination was supported by and easily inferable from the evidence presented at trial.**

Petitioner posits that PCR Court erred in finding that counsel was not ineffective for failing to object to the Solicitor's cross-examination of Petitioner regarding facts not supported by the evidence. Specifically, Petitioner points to the when the Solicitor asked Petitioner if he washed his hands in the sink after the killing to portray Petitioner as a calm and cold-blooded killer. App. p. 519, l. 3-4. Petitioner argues that there was no evidence of Petitioner washing his hands in the sink, that trial should have objected to this line of questioning, and that as a result Petitioner is entitled to a new trial.

The substance of this claim is directly refuted by the PCR Court's finding of fact regarding this allegation. The PCR Court found that the question was proper and inferable from evidence presented at trial. App. p. 789. On cross-examination, Petitioner identified an exhibit on the matter at issue that was submitted into evidence. App. 518, ll. 20-22. Furthermore, Petitioner opened the door to the matter when he earlier testified he returned to the murder scene to effectuate a cover-up and complete the arson. Thus, Petitioner's contention is entirely without merit.

**CONCLUSION**

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By:   
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ATTORNEYS FOR RESPONDENT

May 29<sup>th</sup>, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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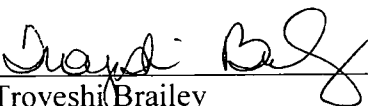
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Carmen V. Ganjehsani**  
**Office of Appellate Defense**  
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This 28<sup>th</sup> day of May, 2014

  
\_\_\_\_\_  
Troyeshi Brailey  
LEGAL ASSISTANT for the Respondent