ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Calhoun County

Maite Murphy, Circuit Court Judge

MICHAEL A. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001537

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's misleading, prejudicial demonstration during closing arguments, which mischaracterized Petitioner's testimony, since the demonstration bore no resemblance to the reality of the actual shooting?

II.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's closing arguments during which he impermissibly appealed to the passions of the jurors by arguing, *inter alia*, that if they found Petitioner not guilty, he would find his hidden gun and would kill again; thus so infecting the trial with unfairness as to make the resulting conviction a denial of due process?

STATEMENT

Indictment

On June 14, 2004, Petitioner Michael Smith was indicted by the Calhoun County Grand Jury for: Murder and possession of a firearm during the commission of a crime of violence. App. 482-485.

Trial and Direct Appeal

On August 30, 2005, Petitioner proceeded to trial before the Honorable Deadra Jefferson and a jury. App. 1. Petitioner was represented by Charles Johnson, and the State was represented by Solicitor David Pasco and Assistant Solicitor Carol Frick. *Id.* The jury convicted Petitioner on both charges. App. 368, ll. 11-20. Judge Jefferson sentenced Petitioner to forty-five years for murder and five years for possession of a firearm during the commission of a crime of violence. App. 392, ll. 1-7. The sentences were ordered to be served concurrently. *Id.*

Petitioner filed a timely notice of appeal. Robert M. Dudek perfected Petitioner's appeal by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 399-409. The Court of Appeals dismissed the appeal in an unpublished opinion filed on September 3, 2009. *State v. Smith*, 2009-UP-415 (S.C.Ct. filed Sept. 3, 2009); App. 410-411.

PCR and Evidentiary Hearing

On April 19, 2010 Petitioner filed an application for post-conviction relief (PCR) alleging counsel was ineffective assistance of counsel. App. 413-419. The State filed a return dated July 27, 2010. The matter proceeded to an evidentiary hearing on June 6, 2011 before the Honorable Diane Goodstein. App. 425-457. Nicole Singletary represented Petitioner, and the State was represented by Assistant Attorney General Mary S. Williams. App. 425.

Order of Dismissal

Judge Goodstein denied Petitioner relief by an order filed on September 14, 2011. App. 458-464. The PCR court held that counsel made a reasonable strategic decision in not objecting to Solicitor's statements and actions in closing argument. App. 460. Specifically, the PCR court noted that counsel had participated in the jury charge conference which resulted in the judge telling the jury that statements made by the attorneys during closing argument were not to be considered evidence, this included any character-related statements put forth by the State. App. 461.

A timely notice of appeal was not filed. App. 480.

Second PCR and Consent Order for *Austin* Review

Petitioner filed a second PCR application on September 14, 2012. App. 465-471. The State filed a Return and Motion to dismiss all claims except *Austin* review on November 27, 2012. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); App. 472-477. A hearing was scheduled for May 29, 2014. App 478. Tara Shurling represented Petitioner, and the State was represented by Assistant Attorney General Megan E. Harrigan. *Id.* Prior to the hearing being held, the parties entered into a Consent Order for *Austin* Review. App. 478-480. The Honorable Maite Murphy granted Petitioner a belated PCR appeal. *Id.*

This petition for writ of certiorari follows.

ARGUMENT

I

Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's misleading, prejudicial demonstration during closing arguments, which mischaracterized Petitioner's testimony, since the demonstration bore no resemblance to the reality of the actual shooting.

Relevant Facts

On Thursday, March 9, 2000, William Marion was traveling home on Nates Store Road, when he stopped to speak with three individuals: Lewis Rivers, Frank Roberts Brown, and Petitioner. App. 122, ll. 23 – App. 125, ll. 6. While stopped, Marion was shot and killed by someone standing on the passenger side of the vehicle. App. 218, ll. 7-21. After the shooting, Marion's vehicle continued down the road a few hundred feet and came to rest in a field. App. 82, ll. 5-10. Sometime after the shooting, a passing motorist noticed Marion's vehicle in the field and contacted first responders. App. 82, ll. 12-24.

During the investigation, law enforcement made a public request for information. App. 108, ll. 13-23. John Hayes, who had been in the area on the day of Marion's murder, came forward and identified Brown and Rivers as having been in the vicinity of the murder before it occurred. App. 102, ll. 22 – App. 107, ll. 16. Hayes also told law enforcement that Brown and Rivers had been at the crime scene after the shooting. *Id.* Hayes also stated that the two had changed clothes and that Petitioner was with them before the shooting, but not after. *Id.* Based on Hayes' information, law enforcement spoke with the three on March 11, 2000. App. 132, ll. 19 – App. 133, ll. 11. The police detained Frank Brown, who had previously been convicted of burglary, due to a probation violation for leaving the state, after he admitted that all three had gone to Savannah over the weekend. *Id.*

While Brown was in jail he contacted law enforcement and implicated Rivers and Petitioner as the gunmen in Marion's murder. App. 134, ll. 7-23. Specifically, Brown alleged Petitioner shot Marion. App. 136, ll. 12-19. Following Brown's arrest, Petitioner, who was sixteen at the time of Marion's murder, fled to New York and was a fugitive until he was arrested in January 2003. App. 294, ll. 7 – App, 295, ll. 20; App. 245, ll. 7-16.

Testimony Presented at Trial

During trial, the State's only witnesses who could testify, even circumstantially, on the sequence of events that occurred once Marion stopped his car, were: Frank Brown, a forensic pathologist; and Agents David Black and Phillip Coonfield of SLED's latent print and crime scene department. App. 394-395. Rivers did not testify. The forensic pathologist testified on the results of Marion's autopsy and to his opinion that Marion was shot with a nine millimeter. App. 218, ll. 4 – App. 223, ll. 12; App. 223, ll. 21-23. No gun or bullets were ever recovered from the scene, the only ballistic evidence was a nine-millimeter casing found down the road from Marion's vehicle. App. 199, ll. 9-25. The forensic pathologist conceded on cross-examination that a high velocity .380 and .359 could have caused a similar wound pattern and that he could only be certain that Marion was killed by a gun. *Id.* at ll. 24-24; App. 224, ll. 1-21.

Agents Black and Coonfield were responsible for fingerprinting Marion's vehicle. App. 175, ll. 6-9. Both agents testified that of the fifteen identifiable prints recovered only a single, partial palm print of Petitioner's was found. App. 195, ll. 16-25. It was located above the front passenger side door; its position indicated that Petitioner was facing the driver at some point during the stop. App. 208, ll. 2-5; App. 239, ll. 4-22. Rivers' prints were only found on the driver's side door. App. 205, ll. 1-6. By contrast, Brown had five identifiable prints on the

passenger side, all of which were consistent with someone facing the driver. App. 195, ll. 4-15.[1] Brown initially told the police that they would not find his prints on the vehicle. *Id.* Coonfield and Black both conceded that that the fingerprint evidence could not determine which of the three individuals shot Marion; only that the individuals had touched Marion's car in certain places at some point in time. App. 210, ll. 7-11; App. 239, ll. 7-11.

The State also called Darren Brown, Frank Brown's younger brother who was fourteen at the time of the murder. App. 227, ll. 2-21. Darren testified that on the afternoon of the murder he walked into his brother's room where he saw the three attempting to hide a gun. App. 228, ll. 3-14. Darren recalled that Rivers was wearing some of Darren's clothes. App. 229, ll. 15-24. Darren threatened to tell his mom about the incident and argued with his brother about the gun. App. 228, ll. 9-16. Once Frank Brown was arrested, Darren went to the police with his story. App. 232, ll. 16-23. Darren testified that Petitioner was handling the gun at the time he entered the room. App. 228, ll. 17-20.

Once the State rested, counsel called Petitioner to the stand. App. 267, ll. 5 – App. 298, ll. 23. Petitioner testified that he, Rivers, and Brown were looking for a ride to meet up with girlfriends and had been attempting to flag down a car for a while before Marion stopped. App. 287, ll. 5-14. Petitioner denied knowing in advance that Rivers and Frank Brown intended to rob or murder Marion. App 288, ll. 10-23. Petitioner stated that Brown, using Petitioner's body as a screen, reached around him and shot Marion when he attempted to pull away. App. 288, ll. 13-14; App. 290, ll. 2-14. Petitioner testified that he fled to New York out of fear and on the advice

[1] In his initial statement to police, Brown only admitted to touching the trunk area; his prints were found there, but were also found on the driver's side of the car. App. 205, ll. 1-5. Brown admitted that he had at some point been on the passenger side and had been facing the driver. App. 262, ll. 11 – App. 263, ll. 4. Further, Brown admitted he initially refused to cooperate with the investigation and refused to give his fingerprints. App. 255, ll. 3-13.

of his parents, who raised him in a culture of fear and non-cooperation with law enforcement. App. 278, ll. 18 – App. 279, ll. 1. Petitioner denied owning a nine millimeter handgun. App. 296, ll. 11-23. After Petitioner stepped down, the State called Hercules Huggins, an individual from Camron, South Carolina, as a rebuttal witness. App. 300, ll. 4-22.

Huggins claimed to have seen Petitioner with a nine millimeter handgun some weeks before Marion's murder. App. 301, ll. 16-20. Petitioner had denied knowing Huggins. App. 296, ll. 20-23. Huggins testified that his experience in Vietnam thirty-three years prior to the time of Marion's murder, allowed him to identify the gun:

> Counsel: [H]ow do you know it was a nine millimeter?
>
> Huggins: [T]hat was the gun he was firing.
>
> Counsel: I understand that's what you're saying. I'm saying how do you personally have personal knowledge that it was a nine millimeter?
>
> Huggins: I have been around military-wise, right, been around weapons.

App. 302, ll. 16-25. Huggins testified that he had not handled weapon and had allegedly observed Petitioner with it from a distance. App. 303, ll. 3-8. Huggins believed that nine millimeter shell casings were recovered after this alleged incident, but did not remember personally seeing the shell casings. App. 302, ll. 12-15; App. 303, ll. 3-8.

Solicitor's Closing Argument

The solicitor started his closing argument by describing Marion as, "the type of person that would help anyone. He would pullover by the side of the road if he saw someone that he thought needed help. He cared about human life, and it cost him his human life. It cost him his life." App. 337, ll. 19-23. The solicitor then described the Petitioner, "Now the truth is that the [Petitioner] is a cold-blooded murderer. A cold-blooded murder." App. 345, ll. 4-7. The solicitor

then went on to call the Petitioner a liar while mischaracterizing Petitioner's testimony on his reasons for fleeing the state after the murder. App. 341, ll. 11-19.

The solicitor also inveighed that the Petitioner had hidden the alleged murder weapon, "We don't reward defendants for hiding evidence. We don't reward defendants for running to New York and taking the gun to Georgia or wherever he hid it." App. 340, ll. 9-11; App. 341, ll. 11-19. The state presented no evidence that Petitioner had hidden the murder weapon, all three of the people charged with Marion's murder had access to the alleged pistol, as well as, Darren Brown and other members of the Brown family. None of the State's witnesses, including Frank Brown, testified that Petitioner had disposed of the gun.

In an effort to further discredit Petitioner's testimony, during closing argument, the solicitor had Sherriff Summers assist him in demonstrating how Petitioner's version of the shooting was "absolutely impossible". App. 343, ll. 3-24. This demonstration did not provide any context on the location and orientation of Marion's vehicle and individuals at the time of the shooting. *Id* – App. 344, ll. 4. The solicitor admitted Sherriff Summers was significantly larger than Petitioner and the solicitor was significantly smaller than Frank Brown. *Id.*

With respect to Darren Brown, the solicitor argued that he should be believed because he implicated his brother in the crime. App. 347, ll. 4-9. The solicitor concluded, "Let me tell you, that takes courage. That's courage. That's not an easy thing to do." *Id.* The solicitor then vouched for Frank Roger Brown's credibility by alluding to a written statement Frank Brown made that was never entered into evidence. *Id.* at ll. 19 – App. 348, ll. 5. The solicitor assured the jury that Frank Brown was telling truth:

> [T]here is absolutely no deal for his testimony. None, zero. He doesn't deserve any deal. He already gave his statement to the police back in March. He doesn't deserve any deal. He's part of this killing, too. But you know what he really -- how was Frank Roger Brown originally charged in this case, the only way -- listen now, the

> only way that he is prejudiced in this case is to ease guilt. That's-- because if it wasn't for his statement he wouldn't have even have been charged. *And if he's [Petitioner] not guilty, then Frank Roger Brown is not guilty. That's the only way he's prejudiced. You don't get 'any more credible than that.*

Id. (emphasis added). This characterization contradicted Frank Brown's testimony; he expressed no remorse, only hope of receiving credit by cooperating with the prosecution and identifying Petitioner as the shooter. App. 144, ll. 8-17; App. 146, ll. 10-12.

PCR and Evidentiary Hearing

At the evidentiary hearing, Petitioner testified, "It's certain things he [counsel] let the prosecutor say, as far as discrediting my character during closing arguments, that I felt [counsel] should of objected, that he never objected to." App. 435, ll. 7-10. When called to testify, counsel recalled that the State had a weak case, "there was no direct evidence that specifically said Michael shot anyone. The only evidence they has [*sic*] was some fingerprints." App. 450, ll. 17-20. There was no gun, no witnesses beyond Brown, and Petitioner did not have a significant criminal record for impeachment. App. 448, ll. 10-20. Counsel testified that he encouraged Petitioner to testify because only the Petitioner could counter Frank Brown's testimony. *Id.* Counsel concluded that Petitioner's credibility and testimony was critical to the defense:

> That -- it was -- it was important that a jury had believed him to be telling the truth in order to believe that he didn't shoot, because no one was there. And Michael told the truth. He did what I asked him to do. I'm -- I'm sorry about the outcome because, I mean, I didn't go in there with the intent to lose. But I -- as I told Michael, I'd do the best I could.

App. 451, ll. 9-15.

Order of Dismissal

The PCR judge, in denying Petitioner's application, concluded that Petitioner's allegations of counsel's ineffectiveness for failing to object to solicitor's comments closing arguments did not

rise to a level requiring reversal. App. 462. Additionally, the PCR judge determined, without further elaboration, that counsel presented, "a logical and strong trial strategy." *Id.*

Discussion

Counsel's failure to object to solicitor's deceptive demonstration of Petitioner's testimony during closing arguments constitutes ineffective assistance of counsel as the demonstration was a prejudicial distortion of Petitioner's testimony; thus, so infecting the Petitioner's trial with unfairness as to make the resulting conviction a denial of due process. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in *Powell v. Alabama*, 287 U.S. 45 (1932). To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in *Strickland*, 466 U.S. 668. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that

"counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692.

Deficient Performance

Solicitor's demonstration during closing arguments mischaracterized Petitioner's testimony on the sequence of events leading to Marion's murder. App. 26 ll. 5 – App. 298, ll. 23. As such, counsel's failure to object to the demonstration constituted deficient performance. *Cherry,* 300 S.C. at 117, 386 S.E.2d at 625.

In making closing arguments, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, closing arguments must stay within the record and reasonable inferences drawn therefrom. *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). Closing arguments can include demonstrative acts. *State v. Finklea*, 338 S.C. 379, 385, 697 S.E.2d 543, 547 (2010). Such demonstrations are subject to the same analysis as any other potentially improper conduct during closing argument and the demonstration must be viewed in the context of the entire record. *Id.*

In *State v. Northcutt*, this Court addressed when a demonstrative act by a solicitor may be improper and merit reversal. 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007). There the defendant was convicted at trial of homicide by child abuse. *Id.* During closing arguments in the sentencing phase, the solicitor staged a mock funeral procession complete with a baby carriage wrapped in a black shawl. *Id.* On appeal, this Court determined, that the procession, among other errors, was an improper demonstration and required reversal of defendant's death sentence. *Id.* at 223, 641 S.E.2d at 882. *Northcutt* holds that the permissibility of a demonstration in closing arguments is judged in the context of the provocativeness of the demonstration compared with the strength

and the kind of evidence presented at trial.

This Court revisited the issue of improper demonstrations in closing argument in *Finklea*. 338 S.C. at 385, 697 S.E.2d at 547. In *Finklea*, the same solicitor from *Northcutt*, "held a lighted match-shaped, metal fire-starter before the jury as he described [the defendant] lighting [the victim] on fire," during closing argument. *Id.* Defense counsel's objected once the solicitor ignited the device and began to explain the pain the victim must have gone through prior to death. *Id.* at 387, 697 S.E.2d at 547. The trial judge overruled the objection holding, "The use of these things ***for demonstrative purposes*** is allowed." *Id.* (emphasis added). This Court affirmed the trial judge, holding that in light of, "the other evidence before the jury regarding the physical torture of [the victim], we find the Solicitor's use of the incendiary device was not unduly prejudicial." *Id.* at 387, 697 S.E.2d at 547-548. During the trial **the State had entered into evidence surveillance footage of the victim running while engulfed in flames, the victim's charred uniform, and extensive autopsy photographs**. *Id.*(*emphasis added*)

Unlike in *Finklea*, where the jury viewed surveillance footage of the victim's immolation, jurors in Petitioner's case had few visuals; just photographs from the crime scene and the autopsy. App.396-397. There were no visual aids, no diagrams, or crime scene reconstructionist to help jurors form an accurate conclusion of which version events was more likely. The jurors had to decide whether to believe the Browns' testimony or the Petitioner's; with only inconclusive fingerprint evidence establishing that both Frank Brown and Petitioner were at some point on the passenger side of Marion's vehicle. In the context of the evidence put forward in this case, the demonstration by the solicitor and Sherriff was unduly prejudicial, and should have drawn an objection from counsel.

The demonstration in Petitioner's case is distinguishable from the demonstrations in

Finklea and Northcutt in two key respects. First, the demonstration affirmed in *Finklea* was well within the evidence produced at trial. Second, the *Finklea* and *Northcutt* demonstrations did not attempt to reconstruct the murder or purport to definitively prove the impossibility certain evidence; they were merely symbolic of the State's evidence. *Northcutt* at 223, 641 S.E.2d at 882; *Finklea, 338 S.C. at 385, 697 S.E.2d at* 547; *see also Randall*, 356 S.C. at 642, 591 S.E.2d at 610. In contrast the demonstration in the Petitioner's case claimed to be an accurate portrayal of Petitioner's oral testimony which allegedly proved Petitioner was lying. App. 343, ll. 1-9.

Most problematically, there was no effort by the solicitor to ensure that his demonstration was an accurate reflection of the testimony. Crime scene reconstructionists must be approved by the trial court as experts prior to testifying precisely because it requires special knowledge and training to ensure the crime scene reconstruction accurately reflects how a crime was committed. *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer not qualified to as an expert in accident reconstruction gave improper opinion testimony on a central issue in the case, thus mandating reversal); *State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009) (trial court performs a gate keeping function to ensure all proposed expert testimony, scientific and non-scientific, meets a reliability threshold). The court performs this gate keeping function, in part, because jurors tend to attribute great weight to such reenactments and to expert testimony generally. *Id.*; *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010). In Petitioner's case there was no expert testimony to put the individuals' locations and Marion's vehicle into perspective; nor was there any indication that the Sherriff and solicitor compared in size, height, and reach to the Petitioner and Brown. App. 343, ll. 3-19. Instead the demonstration merely showed that, by his own account, a diminutive solicitor was, unable to reach around a Sheriff with a larger build than Petitioner. *Id.*

The solicitor's demonstration was misleading and prejudicial. Counsel should have objected. Accordingly, the PCR court erred in finding that counsel's failure to object did not constitute deficient performance falling below prevailing professional norms for a criminal defense attorney. *See Strickland*, 466 U.S. at 687-88.

Prejudice

As to prejudice, counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692. The circumstantial nature of the State's case and its reliance on the self-serving testimony of a single witness makes counsel's failure to object to the solicitor's demonstration all the more prejudicial to Petitioner. *Edmond v. State*, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000) (improper comments by solicitor were not harmless as evidence of defendant's guilt was circumstantial and not overwhelming).

The demonstration inaccurately portrayed Petitioner's testimony and unfairly damaged his credibility. As it was conducted by the solicitor and the Sheriff, who testified on the investigation, the demonstration was imbued with the imprimatur of their expertise and the weight of the State's authority. *See Ellis*, 345 S.C. at 178, 547 S.E.2d at 491 (reversing a conviction in part because the prosecution relied on police officer's authority and earlier testimony to bolster credibility of his improper opinion testimony; and emphasized these points during closing argument).

The prejudicial impact of this deceptive demonstration was compounded by the solicitor stressing no fewer than five times that the demonstration definitively proved Petitioner was lying. App. 341, ll. 5-8; App. 342, ll. 17-18; App. 343, ll. 1-9; 20-24; *See State v. King,* 334 S.C. 504, 514 S.E.2d 578 (1999) (defendant prejudiced where solicitor stressed improperly admitted

evidence in closing argument). Given that the demonstration occurred during the State's final closing arguments, the defense was not afforded the opportunity to question, to present evidence, or to in any other way attack the misperceptions caused by the demonstration. The only way counsel could have protected Petitioner was by objecting and asking for a curative instruction or mistrial.

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 458 - 464; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

II.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's closing arguments during which he impermissibly appealed to the passions of the jurors by arguing, *inter alia*, that if they found Petitioner not guilty, he would find his hidden gun and would kill again; thus so infecting the trial with unfairness as to make the resulting conviction a denial of due process.

Discussion

Deficient Performance

As discussed above, during closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). This includes arguing the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State v. Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990). However, a solicitor's arguments must be confined to the evidence presented at trial and the reasonable inferences that may be draw from the evidence. *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Further, in keeping with their obligation to seek justice, and not simply a conviction, a solicitor's closing argument must be carefully tailored to avoid appealing to the personal bias of jurors, or to arouse a juror's passion or prejudice. *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

It is inappropriate for the State to vouch for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. *See State v. Shuler,* 344 S.C. 604, 545 S.E.2d 805 (2001), *cert. denied,* 534 U.S. 977, 122 S.Ct. 404 (2001) ("[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where

a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony[.]") (citations omitted). Further, it is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. *State v. Kelly,* 343 S.C. 350, 369, 540 S.E.2d 851, 861 (2001), *rev'd on other grounds,* 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002).

At the evidentiary hearing, the Petitioner specifically identified the following section of the solicitor's closing argument as improper:

> Forty-one year old Billy Marion didn't stand a chance that afternoon because that man [Petitioner] and his two friends could care less about human life. How is there any doubt, much less reasonable doubt, that he's guilty. How is there any doubt, much less a reasonable doubt that that man gunned down Billy Marion and then he ran like a coward. ***And if I'm wrong, find him not guilty. Find him not guilty. He knows where his gun is. [Counsel] keeps talking about his gun. Find him not guilty. Let him go back to it.***"

App. 338, ll. 9-24 (*emphasis added*). The solicitor then implored the jurors: "***We don't reward defendants for hiding evidence. We don't reward defendants for hiding evidence***. We don't reward defendants for running to New York and taking the gun to Georgia or ***wherever he hid it.***" App. 340, ll. 9-11 (*emphasis added*).

These comments impermissibly shifted the burden of proof on to Petitioner and blatantly invited jurors to draw a negative inference from the Petitioner's failure to explain what happened to a weapon, Petitioner said he never owned. App. 338, ll. 22-24; App. 296, ll. 16-19; *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003) (closing arguments implying jurors have a personal responsibility to punish defendant is improper). At a minimum, Petitioner would have been entitled to a contemporaneous curative instruction from the trial judge clarifying that the defense does not have to put forth evidence. The solicitor also used inflammatory language proclaiming Petitioner was a "cold-blooded murder" in an appeal to the jury's prejudice. App. 341, ll. 11-19.

In addition, solicitor improperly vouched for the credibility the State's two key witnesses, Frank and Darren Brown. First, the solicitor misled jurors about the circumstances surrounding Frank Brown's statement to law enforcement;" because if it wasn't for his statement he wouldn't have even have been charged. And if he's [Petitioner] not guilty, then Frank Roger Brown is not guilty. That's the only way he's prejudiced [*sic*]. You don't get any more credible than that." App. 347, ll. 19 – App. 348, ll. 5. In actuality, the evidence presented at trial showed Brown was already incarcerated and suspected of the murder when he made his statement. App. 132, ll.19-App. 134, ll. 23. Nor was Brown's statement was the only evidence law enforcement had of his involvement; the police already had statements from his brother, Darren, and John Haynes linking him to the murder. App. 347, ll. 19 – App. 348, ll.

Second, the solicitor personally guaranteed the credibility of Darren Brown by telling the jury that implicating his own brother in the murder was courageous; "Let me tell you, that takes courage. That's courage. That's not an easy thing to do." App. 347, ll. 4-8. Under the circumstances of the case, Darren's statement helps Frank Brown downplay his role in the murder by implying that the gun belonged to Petitioner. App.233, ll. 1923. The solicitor enhanced the Brown brothers' reliability by mischaracterizing the circumstances under which they made their statements and referring to evidence never entered in the record. *Id. Mathews,* 350 S.C. at 275, 565 S.E.2d at 767 (improper for solicitor to tell jury witnesses' testimony was personally corroborated by the solicitor before trial).

The solicitor intentionally interjected prejudicial comments into Petitioner's trial. The solicitor also improperly vouched for the credibility of key state witnesses using personal assurances, mischaracterizations of evidence, and allusions to statements not in evidence. Accordingly, the PCR court erred because counsel's performance was not reasonable "under

prevailing professional norms." *See Strickland*, 466 U.S. at 687-88; *See also Von Dohlen v. State*, 360 S.C. 598, 613, 602, S.E.2d 738, 746 (2004) (counsel ineffective for failing to object to solicitor's closing argument asking jury to depart from impartiality).

Prejudice

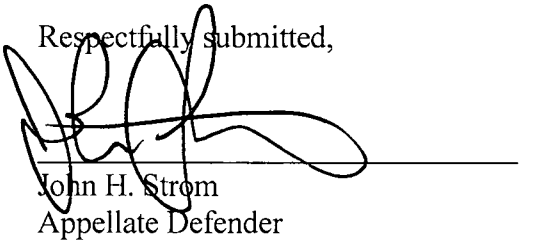
As to prejudice, counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692. Petitioner was unable to mitigate the prejudice of the solicitor's improper comments as counsel failed to object or request a curative instruction. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997) (finding a solicitor's improper comments may be cured by the judge's instructions to the jury). These improper comments, taken together, had a significant impact on the trial that improperly strengthened the state's circumstantial case. The sheer number of objectionable comments made by the solicitor which were either; unsupported by the evidence, improperly bolstered State's witnesses, shifted the burden of proof to Petitioner, or appealed to the prejudices of jurors, call into question whether the trustworthiness of the verdict.

Thus, the PCR court erred because the solicitor's improper comments during closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vaughn*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004); App. 579. Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 566 – 581; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

For the reasons herein stated, Petitioner Michael Smith's petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Calhoun County
Maite Murphy, Circuit Court Judge

MICHAEL A. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001537

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 29th day of December, 2014.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2014.

Rhonda Renee Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.